

**BEFORE THE
ADMINISTRATIVE RULES COMMITTEE
OF THE
NORTH DAKOTA LEGISLATIVE COUNCIL**

N.D. Admin. Code Chapters)	<u>REPORT OF THE</u>
75-03-38 and 75-03-39,)	<u>DEPT. OF HUMAN SERVICES</u>
Autism Spectrum Disorder)	March 13, 2018
Voucher Program and Autism)	
Services Waiver)	
(Pages 491-495))	

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For its report, the North Dakota Department of Human Services (Department) states:

1. The proposed amendments to N.D. Admin. Code chapters 75-03-38 and 75-03-39 are being amended as a result of 2017 House Bill No. 1012.
2. These rules are not related to changes in a federal statute or regulation.
3. The Department uses direct and electronic mail as the preferred ways of notifying interested persons of proposed rulemaking. The Department uses a basic mailing list for each rulemaking project that includes the county social service board directors, the regional human service centers, Legal Services offices in North Dakota, all persons who have asked to be on the basic list, and internal circulation within the Department. Additionally, the Department constructs relevant mailing lists for specific rulemaking. The Department also places public announcements in all county newspapers advising generally of the content of the rulemaking, of over 50 locations throughout the state where the proposed

rulemaking documents may be reviewed, and stating the location, date, and time of the public hearing.

The Department conducts public hearings on all substantive rule-making. Oral comments are recorded. Oral comments, as well as any written comments that have been received, are summarized and presented to the Department's executive director, together with any response to the comments that may seem appropriate and a re-drafted rule incorporating any changes occasioned by the comments.

4. A public hearing on the proposed rules was held in Bismarck on December 6, 2017. The record was held open until 5:00 p.m. on December 18, 2017, to allow written comments to be submitted. No one attending the public hearing provided comments. One written comment was received within the comment period. A "Summary of Comments" is attached to this report.
5. The cost of giving public notice, holding a hearing, and the cost (not including staff time) of developing and adopting the rules was \$2,261.24.
6. The proposed rules amend chapters 75-03-38 and 75-03-39. The following specific changes were made:
Section 75-03-38-01 is amended to include a definition of "division" and "provider", to clarify the definition of "assistive technology device", "assistive technology service" and "qualified professional", and to delete the definition of "unit" to be more consistent with other division rules and improve clarity.
Section 75-03-38-02 is amended to update and clarify eligibility criteria and to ensure consistency of meaning and defined terms.

Section 75-03-38-03 is amended to update and clarify application requirements and processes and to ensure consistency of meaning and defined terms.

Section 75-03-38-04 is amended to update and clarify voucher services requirements for the division, applicants, and participants, to ensure consistency of meaning and defined terms, to remove unnecessary references, to establish when a voucher can be denied or terminated, and to add restrictions for use of voucher funds.

Section 75-03-38-05 is amended to update and clarify denials, terminations, and appeals processes.

Section 75-03-39-01 is amended to update the definition of "unit" to "division" to be more consistent with other division rules and improve clarity and add a definition of "qualified professional".

Section 75-03-39-02 is amended to change the age from seven to eleven to match waiver amendments and to update and clarify language and requirements for eligibility for services under the Medicaid autism spectrum disorder waiver.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The rule amendments are not expected to have an impact on the regulated community in excess of \$50,000. A regulatory analysis was prepared and is attached to this report.
8. A small entity regulatory analysis and small entity economic impact statement were prepared and are attached to this report.
9. The anticipated fiscal impact resulting from the implementation of the proposed amendments is nominal.
10. A constitutional takings assessment was prepared and is attached to this report.

11. These rules were not adopted as emergency (interim final) rules.

Prepared by:

Jonathan Alm
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March 9, 2018



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Doug Burgum, Governor
Christopher Jones, Executive Director

SUMMARY OF COMMENTS RECEIVED REGARDING PROPOSED AMENDMENTS TO N.D. ADMIN. CODE CHAPTERS 75-03-38 AND 75-03-39 AUTISM SPECTRUM DISORDER VOUCHER PROGRAM AND AUTISM SERVICES WAIVER

The North Dakota Department of Human Services (the Department) held a public hearing on December 6, 2017, in Bismarck, ND, concerning the proposed amendment to N.D. Administrative Code chapters 75-03-38 and 75-03-39, Autism Spectrum Disorder Voucher Program and Autism Services Waiver.

Written comments on these proposed amendments could be offered through 5:00 p.m. on December 18, 2017.

No one attending the public hearing provided comments. One written comment was received within the comment period. The commentor was:

1. Maggie Anderson, Director of Medical Services, DHS, 600 E Blvd Ave Dept. 325, Bismarck ND 58505-0250

SUMMARY OF COMMENTS

Comment: After submitting the proposed changes to NDAC Chapter 75-03-38, and as the Medical Services Division (Division) reviewed the proposed changes to NDAC Chapter 75-01-03, we identified clarifications needed.

Specifically, the Division is proposing two changes:

First, to add item "1j." to 75-03-38-02:

- j. The child is currently a North Dakota resident for at least six months.

This change would also necessitate removing the word "and" from 1h and adding the word "and" at the end of 1i.

Second, to add 6. and 7. to 75-03-38-05:

6. A parent, custodian, or legal guardian may appeal the denial of an item or service that was requested when the child was a resident of North Dakota, even if the child is no longer a resident of North Dakota at the time of the denial.

7. A parent, custodian, or legal guardian may not appeal a termination resulting from the child no longer being a resident of North Dakota.

Response:

The Department agrees with the comment and has made changes to sections 75-03-38-02 and 75-03-38-05 as follows:

75-03-38-02. Eligibility – Financial – Functional.

1. A parent, custodian, or legal guardian may apply to the ~~unit~~division to participate in the voucher program ~~for needs identified for aif~~ all the following conditions are met:
 - a. ~~The child with~~has an autism spectrum disorder diagnosis, ~~whose;~~
 - b. ~~The child's~~ age is from three years through seventeen years, ~~and whose family;~~
 - c. ~~The household~~ has an income below two hundred percent of the federal poverty level ~~for the child's family size;~~
 - d. ~~The child may~~is not be currently served under any of the department's developmental disability-medicaid waiver or the department's autism spectrum disorder birth through seven medicaid waiver, and the need for voucher support must be established through the completion of the voucher program application provided by the ~~unit~~waivers;
2. ~~A child aged three years through seventeen years may be eligible if all of the following conditions are met:~~
 - a-~~e.~~e. The child has been recommended for voucher support by a qualified professional;
 - b-~~f.~~f. The child's support need cannot be obtained through insurance or through other service systems, including educational and behavioral health systems;
 - e-~~g.~~g. The item or support requested is cost-effective in meeting the child's needs; ~~and~~
 - d-~~h.~~h. The child's needs cannot be met by a generic service or support;
 - i. The child lives with the child's parent, custodian, or legal guardian; and
 - j. The child is currently a North Dakota resident for at least six months.

75-03-38-05. Denials -Terminations - Appeals.

1. The division shall issue a written notice to a parent, custodian, or legal guardian when a voucher application has been denied, an item or service has been denied, or if the voucher is terminated for inactivity.
2. The division shall include the reason for the denial or termination and shall inform the parent, custodian, or legal guardian of the right to appeal the denial or termination.
3. A voucher application, an item or service, or voucher may be denied or terminated under the terms and conditions of this chapter or North Dakota Century Code section 50-06-32.1.
4. A parent, custodian, or legal guardian may appeal a denial or termination of a voucher under this chapter. An appeal under this section must be made in writing ~~on a form developed and provided by the department~~ within thirty days

of the date of the notice issued under this section ~~75-03-38-04~~. The parent, custodian, or legal guardian shall submit the written request for an appeal and hearing under North Dakota Century Code chapter 28-32 and chapter 75-01-03 to the appeals supervisor for the department of human services.

5. A parent, custodian, or legal guardian may not appeal a termination resulting from exhausting the funding awarded under the voucher or if approving the voucher would exceed the limits of legislative appropriations.
6. A parent, custodian, or legal guardian may appeal the denial of an item or service that was requested when the child was a resident of North Dakota, even if the child is no longer a resident of North Dakota at the time of the denial.
7. A parent, custodian, or legal guardian may not appeal a termination resulting from the child no longer being a resident of North Dakota.

Prepared by:

Jonathan Alm, Director
Legal Advisory Unit
N.D. Dept. of Human Services

In Consultation with: Katherine Barchenger, Medical Services

January 4, 2018

cc: Katherine Barchenger, Medical Services
Maggie Anderson, Medical Services

MEMO

TO: Jon Alm, Director, Legal Advisory Unit

FROM: Katherine Barchenger, State Autism Coordinator

RE: Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-03-38 and chapter 75-03-39

DATE: September 6, 2017

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to proposed North Dakota Administrative Code chapters 75-03-38 and 75-03-39. The amendments are not anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

Purpose

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed amendments to N.D. Administrative Code chapters 75-03-38 and 75-03-39. Federal law does not mandate the proposed rules.

Classes of Persons Who Will be Affected

The classes of person who will most likely be affected by these rules are:

- Providers enrolled to provide services to individuals eligible for the autism voucher and the Medicaid autism spectrum disorder waiver.
- Clients / households receiving services through the autism voucher or Medicaid autism spectrum disorder waiver.

Probable Impact

The proposed amendments may impact the regulated community as follows:

- Households currently receiving voucher –have to review rule updates for clarifications in process / authority.

Probable Cost of Implementation

- There are no expected costs of implementation.

Consideration of Alternative Methods

- There are no alternative methods that would ensure understanding and application of rules governing the administration of the autism voucher and the Medicaid autism spectrum disorder waiver.

MEMORANDUM

TO: Jon Alm, Director, Legal Advisory Unit

FROM: Katherine Barchenger, State Autism Coordinator

DATE: September 6, 2017

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code Chapter 75-03-38 and Chapter 75-03-39

The purpose of this small entity regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This regulatory analysis pertains to proposed amendments to N.D. Admin. Code chapter 75-03-38 and chapter 75-03-39. Federal law does not mandate the proposed rules.

Consistent with public health, safety, and welfare, the Department has considered using regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. For this analysis, the Department has considered the following methods for reducing the rules' impact on small entities:

1. Establishment of Less Stringent Compliance or Reporting Requirements

The only small entities affected by these proposed amendments are small providers enrolled to provide services within the Medicaid autism spectrum waiver and autism voucher. There are no stringent compliance or reporting requirements within the proposed rule changes.

2. Establishment of Less Stringent Schedules or Deadlines for Compliance or Reporting Requirements for Small Entities

The proposed amendments will not alter in any material way any required schedules or deadlines for compliance or reporting requirement of small enrolled Medicaid providers and autism voucher providers. For this reason, the establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered.

3. Consolidation or Simplification of Compliance or Reporting Requirements for Small Entities

The proposed amendments will not alter in any material way any required compliance or reporting requirements of Medicaid providers and autism voucher

providers. For this reason, the establishment of simplified compliance or reporting requirements for these small entities was not considered.

4. Establishment of Performance Standards for Small Entities to Replace Design or Operational Standards Required in the Proposed Rules

The proposed amendments do not impose any design standards or impose any additional operational standards or operational standards for enrolled Medicaid providers and autism voucher providers. For this reason, the establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities was not considered.

5. Exemption of Small Entities From All or Any Part of the Requirements Contained in the Proposed Rules

The proposed rules do not exempt small entities from the requirements.

MEMORANDUM

TO: Jon Alm, Director, Legal Advisory Unit

FROM: Katherine Barchenger, State Autism Coordinator

DATE: September 6, 2017

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code Chapter 75-03-38 and Chapter 75-03-39

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 28-32-08.1. This impact statement pertains to proposed amendments to N.D. Admin. Code chapter 75-03-38 and chapter 75-03-39.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the proposed amended rules are providers enrolled to provide services for autism voucher and autism waiver.

2. Costs For Compliance

The administrative and other costs required for compliance with the proposed rule are expected to be: No administrative or other costs are required by the small entities for compliance with the proposed rules.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule: There are no probable costs to private persons or consumers expected for the proposed rules.

The probable benefit to private persons and consumers who are affected by the proposed rule: better clarification of program process and coverage.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: with the increase in the age limit for the Medicaid waiver state revenue is expected to increase consistent with the states federal medical assistance percentage.

5. Alternative Methods

The Department considered whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules. Small entities will not experience administrative costs or other costs; therefore, alternative methods were not necessary.

FISCAL IMPACT

The anticipated fiscal impact resulting from the implementation of the proposed amendments is nominal.



Doug Burgum, Governor
Christopher Jones, Executive Director

TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code chapters 75-03-38 & 75-03-39.

This document constitutes the written assessment of the constitutional takings implications of this proposed rulemaking as required by N.D.C.C. § 28-32-09.

1. This proposed rulemaking does not appear to cause a taking of private real property by government action which requires compensation to the owner of that property by the Fifth or Fourteenth Amendment to the Constitution of the United States or N.D. Const. art. I, § 16. This proposed rulemaking does not appear to reduce the value of any real property by more than fifty percent and is thus not a "regulatory taking" as that term is used in N.D.C.C. § 28-32-09. The likelihood that the proposed rules may result in a taking or regulatory taking is nil.
2. The purpose of this proposed rule is clearly and specifically identified in the public notice of proposed rulemaking which is by reference incorporated in this assessment.
3. The reasons this proposed rule is necessary to substantially advance that purpose are described in the regulatory analysis which is by reference incorporated in this assessment.
4. The potential cost to the government if a court determines that this proposed rulemaking constitutes a taking or regulatory taking cannot be reliably estimated to be greater than \$0. The agency is unable to identify any application of the proposed rulemaking that could conceivably constitute a taking or a regulatory taking. Until an adversely impacted landowner identifies the land allegedly impacted, no basis exists for an estimate of potential compensation costs greater than \$0.
5. There is no fund identified in the agency's current appropriation as a source of payment for any compensation that may be ordered.
6. I certify that the benefits of the proposed rulemaking exceed the estimated compensation costs.

Dated this 6th day of September, 2017.

by: _____

A handwritten signature in black ink, appearing to be "C. Jones", is written over a horizontal line. Below the line, the text "N.D. Dept. of Human Services" is printed.

N.D. Dept. of Human Services