

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

N.D. Admin. Code Chapter)	
75-02-07.1, Ratesetting for)	<u>REPORT OF THE</u>
Basic Care Facilities)	<u>DEPT. OF HUMAN SERVICES</u>
(Pages 227-239))	June 11, 2014

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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 chapter 75-02-07.1 are not related to statutory changes made by the Legislative Assembly.
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 of 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 April 2, 2014. The record was held open until 5:00 p.m. on April 14, 2014, to allow written comments to be submitted. One set of written comments was received. The "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 \$2,052.82.
6. The proposed rules amend chapter 75-02-07.1. The following specific changes were made:

Section 75-02-07.1-01. Section 75-02-07.1-01 is amended to update language in the definition of "depreciation guidelines," to correct a typographical error in the definition of "property costs," and to amend the definition of "specialized facility for individuals with mental disease" to reflect that they do not provide diagnoses.

Section 75-02-07.1-22. Section 75-02-07.1-22 is amended to remove language that resulted in rate inequities and to set the direct care and indirect care limit rates beginning July 1, 2014, pending further

revision of this section on rate limitations. (This section was further amended in response to comments received.)

Section 75-02-07.1-23. Section 75-02-07.1-23 is amended to allow notification of facilities by electronic mail on adjustments made based on a desk review.

Section 75-02-07.1-26. Section 75-02-07.1-26 is amended to remove obsolete language and to address one-time adjustments for cost increases.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The proposed 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 expected fiscal impact of these rules is minimal to none.
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:

Julie Leer
Legal Advisory Unit
North Dakota Department of Human Services
June 11, 2014



Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

**SUMMARY OF COMMENTS RECEIVED
REGARDING PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE CHAPTER 75-02-07.1
RATESETTING FOR BASIC CARE FACILITIES**

The North Dakota Department of Human Services (the Department) held a public hearing on April 2, 2014, in Bismarck, ND, concerning the proposed amendment to N.D. Administrative Code chapter 75-02-07.1, Ratesetting for Basic Care Facilities.

Written comments on these proposed amendments could be offered through 5:00 p.m. on April 14, 2014.

One individual attended the public hearing. One written comment was received within the comment period. The commentor was:

1. Shelly Peterson, 1900 North 11th Street Bismarck, ND 58501

SUMMARY OF COMMENTS

Comment: Shelly Peterson with the ND Long Term Care Association. I did send these to the Department in writing but I thought I would show up at the hearing to see if there were any additional comments and explain a little bit why we are commenting. First, we are very supportive of the rule changes and deeply appreciate them when you look at the limits and what has been occurring with them. We would like to make one recommendation.

The proposed rules increase the 2013 limits by the legislatively approved inflation factor but do not consider that the yet to be determined calculation of the limits may, in fact, exceed the stated amounts. The proposed rules while assuring that the limits will increase by 3%, which has not always been the case in the past, do not allow a contingency should the calculation of the 80th percentile bed be greater than a 3% increase from a previous year. The historical basic care limit increases from year to year have not followed any pattern and have ranged from -8.5% to +4.2% over the past 4 years.

I brought the limits. When you look at them, just for the direct care limit, in 2010 we were at \$38.61, in 2011 it increased to \$40.62, in 2012 it increased again to \$44.07 and it drastically decreased in 2013 to \$42.23. By increasing at 3% it would go up to \$43.50, which is still not as high as the 2012 limit. That's why we are proposing, we don't know what the 80th percentile bed will do simply because of the reconfiguration of beds, and selling of beds and closure of some facilities.

The fixed limit increase as stated in the proposed rules will be detrimental to basic care facilities should the 80th percentile limit calculation for the Direct and Indirect cost category be higher for the 2014 rate year.

We recommend the proposed rules be amended to reinstate the calculation of the 80th percentile bed and provide for the limit to be set at the greater of the 80th percentile limit or \$43.50 for direct and \$39.98 for indirect. So it's still keeping it at a safe guard position.

In addition, as the department has contracted with an independent consultant to review the limit process for basic care, the proposed rules should ensure the continuation of the limit calculation with a minimum annual increase should implementation of a change in the limit methodology be delayed or not implemented for the 2015 rate year.

And as I think of the legislative session and everything that's going on and the July 1st, it might be difficult to implement anything so that's why we thought if you could have language in there just extending it should you not have the time to make the change from the 2015 session.

Thank you again for considering the rules. Today we represent all of the basic care facilities except McClusky. Should you have any questions regarding our comments, please don't hesitate to contact me.

Again we really do appreciate the proposed rule and just would suggest a tweaking of it to either have it be the greater of either the 3% increase or the 80th percentile bed. Thank you again for the consideration of these comments.

Response: To address the concerns raised, the Department will change the proposed amendments to subsections 4 and 5 of section 75-02-07.1-22 and will add subsection 6 to read as follows:

4. The July 1, 2014 direct care limit rate may not be less than forty-three dollars and fifty cents.
5. The July 1, 2014 indirect care limit rate may not be less than thirty-nine dollars and ninety-eight cents.
6. The department may use an adjustment factor to calculate the July 1, 2015 direct care and indirect care limits.

N.D. Admin. Code Chapters 75-02-07.1
Summary of Comments
April 22, 2014

Prepared by:

Julie Leer, Director
Legal Advisory Unit
N.D. Dept. of Human Services

In Consultation with: LeeAnn Thiel, Medical Services

April 22, 2014

Cc: LeeAnn Thiel, Medical Services



Medical Services
(701) 328-2321
Toll Free 1-800-755-2604
Fax (701) 328-1544
ND Relay TTY 1-800-366-6888
Provider Relations (701) 328-4030

Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

MEMO

TO: Julie Leer, Director, Legal Advisory Unit

FROM: LeeAnn Thiel, Administrator, Medicaid Payment and Reimbursement Services, Medical Services

RE: Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-02-07.1

DATE: December 9, 2013

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to the proposed amendments to North Dakota Administrative Code Article 75-02-07.1. These amendments are not anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

Purpose

The amendments to NDAC 75-02-07.1 are to change the way the direct care and indirect care limits are calculated and general cleanup of other sections.

Classes of Persons Who Will be Affected

Basic care facility operators and basic care facility residents will be affected by the proposed rule changes since some of the changes affect components of the ratesetting process for basic care facilities.

Probable Impact

The estimated impact of the changes to North Dakota Medical Services cannot be determined because there is no way to estimate what the direct care and indirect care limits would be based on the current process.

Probable Cost of Implementation

The amendments become part of existing rules on ratesetting and there are no additional costs associated with implementing the rule changes. It is estimated there will be no effect on state revenues.

Consideration of Alternative Methods

The Department did not consider whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules.



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Maggie D. Anderson, Executive Director

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: LeeAnn Thiel, Administrator, Medicaid Payment and Reimbursement Services, Medical Services

DATE: December 9, 2013

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code chapter 75-02-07.1

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 the proposed amendments to N.D. Admin. Code chapter 75-02-07.1. The proposed rules are not mandated by federal law.

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 the proposed amendments are licensed basic care facilities that are either non-profit organizations or have gross revenues of less than \$2.5 million annually and who participate in the Medicaid program. The proposed amendments affect components of the ratesetting processes for basic care facilities that are applied to costs reported by the entities. Because all costs must be considered when establishing limits used in the rate setting process, facilities, including facilities that are considered to be small entities, must file a uniform annual cost report. The proposed amendments do not alter the uniform cost reporting requirements necessary to establish the rates for all basic care facilities in the state that choose to participate in Medicaid and therefore establishment of less stringent compliance or reporting requirements for these small entities was not considered.

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

The proposed amendments will not alter any required schedules or deadlines for the uniform cost reporting requirements and therefore 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 any uniform cost reporting requirements, therefore, consolidation or simplification of 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 affect any design or operational standards in existence for these small entities, therefore, establishment of new performance standards were not considered.

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

The requirements of the proposed amendments are applicable to all basic care facilities that choose to participate in Medicaid and have a rate established for payment of services. Entities choosing not to participate in Medicaid would not be impacted by the proposed amendments.

Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: LeeAnn Thiel, Administrator, Medicaid Payment and Reimbursement Services, Medical Services 

DATE: December 9, 2013

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code chapter 75-02-07.1

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 75-02-07.1. The proposed rules are not mandated by federal law. The proposed rules are not anticipated to have an adverse economic impact on small entities.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the proposed amended rules are licensed basic care facilities that are either non-profit organizations or have gross revenues of less than \$2.5 million annually and who participate in the Medicaid program.

There are no other small entities subject to the proposed amendments.

2. Costs For Compliance

Administrative and other costs required of basic care facilities for compliance with the proposed amendments are expected to be zero. The proposed amendments affect only the rate calculation used to establish the rates payable by individuals in basic care facilities and do not affect compliance requirements.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rules cannot be determined. The proposed amendments affect the rates established for basic care facilities participating in Medicaid and the Basic Care Assistance program. The rate established may only be paid if the rate

charged to private pay residents is equal to or exceeds the rate established. The basic care facility may determine the rate charged to private pay individuals which may be changed by the proposed amendments.

Since the proposed amendments do not apply to private persons and consumers there is no estimated probable benefit.

4. Probable Effect on State Revenue

The probable effect of the proposed rules on state revenues is expected to be none as the proposed amendments affect state expenditures.

5. Alternative Methods

The Department did not consider whether there are any less intrusive or less costly alternative methods of achieving the purpose of the proposed rules.



Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code chapter 75-02-07.1.

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 9th day of December, 2013.

by: Julie Lee
N.D. Dept. of Human Services