

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

**N.D. Admin. Code Chapters)
75-03-38, Autism Spectrum)
Disorder Voucher Program,)
75-03-39, Autism Services)
Waiver, and 75-04-06,)
Eligibility for Intellectual)
Disabilities-Developmental)
Disabilities Case Management)
Services)
(Pages 293-297))**

**REPORT OF THE
DEPT. OF HUMAN SERVICES**

June 11, 2014

.....

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

1. The proposed creation of N.D. Admin. Code chapters 75-03-38 and 75-03-39, and the proposed amendments to N.D. Admin. Code chapter 75-04-06 are related to statutory changes made by the Legislative Assembly in 2013 House Bill No. 1038. The Department requested an extension to delay implementation of these rules until July 1, 2014.
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. Two sets of written comments were 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 \$2,302.98.
6. The proposed rules create chapters 75-03-38 and 75-03-39 and amend chapter 75-04-06. The following specific changes were made:

Chapter 75-03-38. Chapter 75-03-38 is created to establish the definitions; the eligibility requirements; the application process, including review, approval, and denial of an application; and the appeals process for the autism spectrum disorder voucher pilot project. (Section 75-03-38-01 was further amended in response to a comment received.)

Chapter 75-03-39. Chapter 75-03-39 is created to define

eligibility for services under the autism spectrum disorder birth through seven medicaid waiver.

Section 75-04-06-06. Section 75-04-06-06 is repealed to remove eligibility for autism waiver services from the developmental disabilities program, in conjunction with the creation of chapter 75-03-39.

7. No written requests for regulatory analysis have been filed by the Governor or by any agency. The proposed amendments are 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 resulting from the implementation of proposed chapter 75-03-38 on the Autism Spectrum Disorder Voucher Program is \$539,186 in general fund dollars as stated in the appropriation clause to 2013 House Bill No. 1038. There is no anticipated fiscal impact resulting from the creation of chapter 75-03-39, the Autism Services Waiver chapter, or the amendment to chapter 75-04-06.
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 CREATION OF
N.D. ADMIN. CODE CHAPTERS 75-03-38 AND 75-03-39
AUTISM SPECTRUM DISORDER VOUCHER PROGRAM AND AUTISM SERVICES
WAIVER AND TO AMEND N.D. ADMIN. CODE CHAPTER 75-04-06 ELIGIBILITY FOR
INTELLECTUAL DISABILITIES-DEVELOPMENTAL DISABILITIES CASE MANAGEMENT
SERVICES**

The North Dakota Department of Human Services (the Department) held a public hearing on April 2, 2014, in Bismarck, ND, concerning the proposed creation of N.D. Administrative Code chapters 75-03-38 and 75-03-39, Autism Spectrum Disorder Voucher Program and Autism Services Waiver and the proposed amendment to N.D. Administrative Code chapter 75-04-06, Eligibility for Intellectual Disabilities Developmental Disabilities Case Management Services.

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

Four individuals attended the public hearing. Two written comments were received within the comment period. The commentators were:

1. Suzanne Hanson, 801 Page Drive Fargo ND 58103
2. Paula Storm, 4901 Meadow Cree Dr South Fargo ND 58104
3. Brenda Majerus, 801 Page Dr Fargo ND 58103
4. Teresa Larsen, 400 East Broadway Suite 409 Bismarck ND 58501
5. Judie Lee, 3240 15th St S Suite B Fargo ND 58104

SUMMARY OF COMMENTS

Comment: As you're working on the autism spectrum waiver, there needs to be a broad focus to include all of the others that find themselves under this umbrella. My daughter who is 30 has recently been diagnosed with Asperger's, which is classified on the autism spectrum. Since she has graduated from high school, we have been trying to help her achieve goals of an education, employment, housing, and feeling good about herself, but we are going in circles and not achieving most of the goals in 11 years of trying. We have had a lot of failures. During the school years, support for children and parents are the individual education plan or IEP. There are team meetings and school staff and the structure that comes from the IEP and the school setting. Once you graduate from high school, what happens next? As a parent, you are on your own to figure it out. We have tried advanced schooling, but it didn't work. Tried different jobs and there was always a glitch. With her last job, not enough onsite job coaching to continue working at the position because of the lack of state funds to give her the staff necessary to stay employed and not enough state funds to help her find new employment and settle into a new job with ongoing job coaching either. And I'd also like to make note that we are a border state in Fargo. We are competing with Minnesota coming in with their job coaching and their teams to work at jobs in Fargo that our

children with disabilities are trying also to work with, and oftentimes they have different laws, different rules, different amount of job coaching available, and there is some places of employment that prefer having the Minnesota team there rather than North Dakota. However, that is not in my notes because I just thought of that. So as of now, she needs help to find a different job, job training and job coaching that continues once she has a job due to the quirky nature of the Asperger brain. Where do we go to get help?

Next, appropriate community-style housing like we provide for the 55 and older folks in assisted-living communities with their own apartments and supports. Where do we go to get help for that? She also needs a one-stop department that opens all the doors to give her the ongoing resources to accomplish having a job, housing, and a balanced life. Where do we go? Every age and stage of development of someone on the autism spectrum brings a unique set of needs, and all must be given attention as you design programs for the future. I would like to suggest a task force to look at the needs of the folks throughout their adult lives on the autism spectrum that have Asperger's, high functioning autism, and whoever else or the others that are going to fall under the umbrella who need help after high school, placing emphasis on post-high school education; job training; job coaching supports that fit their individual needs to stay employed; life skill training; and appropriate long-term housing option. Also, the mental health supports they need to manage the serious emotional setbacks that occur when they are unable to communicate needs with others, especially in the work settings. Finally, the help to develop the emotional skills needed to stay focused and balanced to lead a productive life.

Thank you for your consideration and listening to my testimony. Thank you.

Response: 2013 House Bill No. 1038 provides for the voucher program to cover children from the ages of 3 through 17. There is no authority for providing services past the age of 17. No change is made in response to this comment.

Comment: I just have a quick question. You know, for this voucher that's ages 3 to 17, but looking at the language, if you took out "child" under the qualifiers, it's still pretty similar for an adult. Is there – I mean, is their reason funding that it's only 3 through 17, or could it just be ages 3 and up? I just -- there's maybe not enough visibility with people who are adults, like they're getting recent diagnosis at 30 years old.

Response: 2013 House Bill No. 1038 provides for the voucher program to cover children from the ages of 3 through 17. There is no authority for providing services past the age of 17. No change is made in response to this comment.

Comment: I just wanted to add, kind of in a piggyback on what Suzanne just said and what Paula said. Her daughter was actually in the mental health system for many, many years, and then was referred for DD services, and then just found eligible for DD services probably about two months ago. So I was thinking, wow, her daughter now finally has what I refer to as the DD, as the golden ticket, because of the service -- services that are provided to folks

with DD. But just looking at that and -- and yes, now the focus is still on the 1- to 17-year-olds, but we do, going forward as a state, I think really need to focus on those over 21 and then what services are going to be available with all these children now that are being diagnosed. As they're moving into adulthood, we need to do more to take care of them.

And that's a huge transition that nobody is addressing either. And that's the confusing age where you are coming out of the system where your child has been on an IEP. And so you're coming out of that security blanket of the school, the education plan, and then you're flung into the world to try to figure out how to help this person with this quirky brain who seems to know a lot in one thing but it doesn't transfer to another situation very easily, and then you think you've got everything going down the right path, and one little thing changes and then you're back to square one. And it is the -- it is kind of a very odd situation to be in as a parent, especially when you've got other very bright children who are out changing the world, and then you have the one who's so quirky and nobody in the family can figure out why they can't get their pieces together. Well, because the puzzle in the brain is not going to fit, the pieces just won't fit. And it's very frustrating. And also the other issue is, as children, they're diagnosed -- like to get her services at school, it was considered a learning disability or dyslexic or the inability to do math. So we're always working really hard to get services, tutors, special schools, special classes, less amounts of work, having them do their reports orally rather than written, and all sorts of accommodations. And then you graduate from high school, and where do you go in this state? What is there? That is there is nothing. And you are floundering. And so you piecemeal stuff together. And then you get close to being in assisted living yourself and you're going, "Oh, my God, who's going to take care of this person," because the siblings don't live in North Dakota, they probably never will. And they're looking at you, like, "Mom, get this figured out because I don't think we're capable of it." So however you all can -- or whoever else you want me to talk to, I'll be very glad.

Response: 2013 House Bill No. 1038 provides for this program to cover children from the ages of 3 through 17. There is no authority for providing services past the age of 17. No change is made in response to this comment.

Comment: I would just like to add, too, in the probably 14- to 17-year group, that you really, really need to look at real work experiences, not in classroom or the job at the school where the student is filling the pop machine and that's considered work. I think you need to set really good work examples on community-based employment for those folks. Job shadows. See, even the environmental change, you know, how does light affect the person. And then when you're looking for a job after age 17 or 21, however long they decide to stay in school, you're going to have a real good clue on what kind of working environments really work for this person. Because just "I vacuum -- my job was vacuuming the school or cleaning the gym," they're not getting out of that environment and transitioning into other environments. And I don't know if the schools even allow that anymore because of -- I mean, I don't see students cleaning anymore in schools. It has to be piggybacking, too, with VR and the VR service. Somebody is going to have to pay for the support services. Is it going to be the school or is it going to be VR?

Response: Up until the day that the individual leaves the public school system, be it at 17, 21, or anywhere in between, the responsibility will be on the shoulders of the public education system. The educational system is encouraged to involve the vocational rehabilitation system and together, the two entities work collaboratively. Upon leaving the education system, vocational habitation works with individuals to achieve competitive employment. There is a possibility that the ASD waiver funds could be used by families to pay for prevocational training to prepare the individual for entrance into the vocational rehabilitation program. No change is made in response to this comment.

Comment: I think job training in these for young people is not enough, and especially for the autistic, Asperger's, other, because they need to have experiences, but they also need to make it a learning experience simultaneously, not where they're made to feel bad because they're not doing it right.

Response: This would fall under the scope of the public education system and division of vocational rehabilitation based upon age of individual, as these are services provided currently under their umbrella of care. No change is made in response to this comment.

Comment: Thank you for the opportunity to provide input on the proposed rules as delineated in the subject line.

With regard to N.D.A.C. § 75-03-38, we ask that you please consider the following:

How will "cost effective" be determined as to whether the item or support meets the child's needs?

Response: An applicant will be expected to explain why the applicant believes the item or support requested is "Cost effective". It is anticipated that the applicant will identify how the applicant intends to maximize the voucher dollars awarded. It will be the applicant's responsibility to research items and find the best value or quality based upon the needs of the child; an applicant may work with a child's treatment team to assist in determining cost effective options. No change is made in response to this comment.

Comment: How will it be determined as to whether the "child's needs cannot be met by a generic service or support"? Will a burden be put on the family to meet some standard for this?

Response: Evaluating whether a child's needs cannot be met by a generic service or support is based on CMS waiver criteria and is intended to prevent misuse of voucher funds. It is anticipated that this would simply be a question asked of an applicant to ensure that the applicant had attempted other options (e.g. attempting to find a regular childcare setting before using voucher funds for specialized respite care). No change is made in response to this comment.

Comment: Can an appeal be made for a voucher that is issued for a different amount of support or service than requested by the applicant or only the denial or termination?

Response: Vouchers are usable for any amount up to the individual's annual limit; the applicant would set the need amount. Denial or termination would only occur if the services requested were outside the parameters of the statute or rule, or if there was a danger or risk of harm in the use of an item requested. If an award were made for an amount less than the amount requested by the applicant, that would be appealable as a denial. No change is made in response to this comment.

Comment: No comments of substance regarding N.D.A.C. § 75-03-39.

Response: No change is made in response to this comment.

Comment: I am submitting this comment on behalf of the Interagency Program for Assistive Technology (IPAT), a non-profit organization designed by the Governor as the implementing entity for the Statewide Assistive Technology Program for North Dakota. IPAT brings over 20 years of experience in assistive technology assessments, eligibility determination, equipment purchase, equipment delivery, equipment set-up, data collection, consumer outreach, education, and training to this public comment letter.

IPAT's concern is specific to the definition of assistive technology that falls in Section 1 Chapter 75-03-38 of the proposed N.D. Admin. Code chapters 75-03-38 & 75-03-39, Autism Spectrum Disorder Voucher Program and Autism Services Waiver, which states:

"75-03-38-01. Definitions.

1. "Assistive technology" means technology used by an individual with a disability to perform functions that might otherwise be difficult or impossible for that individual to perform."

We ask that the definition of Assistive Technology (AT) used within the proposed document be consistent with the definition of AT within the current ND Autism Spectrum Waiver, effective November 1, 2010, as well as, the federal definition of AT as defined within the Assistive Technology Act of 2004. The proposed definition does not completely define AT devices and omits the definition of AT services. This change clarifies and provides consistency throughout the programs offered by the Department of Human Services.

IPAT appreciates the opportunity to offer comment, and as your state assistive technology program, we remain available to provide AT technical assistance.

Response: The Department will replace the definition of "assistive technology" in the draft rules with the following definitions found in the Assistive Technology Act of 2004:

1. "Assistive technology device" means any item, piece of equipment, or product system, whether acquired commercially, modified, or customized, that is used

to increase, maintain, or improve functional capabilities of individuals with disabilities.

2. "Assistive technology service" means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device.

Prepared by:

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

In Consultation with: Trisha Page, Autism Services Unit and JoAnne Hoesel, Mental Health
Substance Abuse Services

April 28, 2014

Cc: Trisha Page, Autism Services Unit

MEMO

TO: Julie Leer, Director, Legal Advisory Unit
FROM: Trisha Page, Autism Services Coordinator
RE: Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-03-38, Autism Spectrum Disorder Voucher Program
DATE: November 20, 2013 (Updated May 15, 2014)

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to proposed to North Dakota Administrative Code Article 75-03-38. These amendments are 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. Admin. Code chapter 75-03-38. Federal law does not mandate the proposed rules.

Classes of Persons Who Will be Affected

Persons on the autism spectrum ages three through seventeen years that do not qualify for the Medicaid waiver or the department's autism spectrum disorder waiver and meet the financial eligibility requirements of the voucher.

Probable Impact

The proposed amendments may impact the regulated community as follows:

- More individuals on the autism spectrum receiving financial support
- Eligible individuals can receive up to \$12,500 per year for assistive technology; video modeling videos or equipment; language-generating devices; training and educational material for parents; parenting education; sensory equipment; tutors; safety equipment; travel tools; self-care equipment; timers; visual representation systems; respite care; specialized daycare; language comprehension equipment; and registration and related expenses for workshops and training to improve independent living skills, employment opportunities, and other executive or social skills.

Probable Cost of Implementation

Costs to implement are \$539,186 which is general fund and was included in the 2013-2015 appropriation.

Consideration of Alternative Methods

If families do not meet the criteria for the Autism Voucher program due to financial status, they are free to apply for either the Autism Waiver or the Developmental Disabilities waiver for support.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Trisha Page, Autism Coordinator, Department of Human Services

DATE: November 20, 2013

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

The purpose of this small entity regulatory analysis is to fulfill the requirements of N.D.C.C. § 23-01-41 and 50-06-32.1. This regulatory analysis pertains to proposed [new/amendments to] N.D. Admin. Code chapter 75-03-38. 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

There are no small entities affected by these proposed. For these reasons, 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 in any material way any required schedules or deadlines for compliance or reporting. For this reason, the establishment of less stringent schedules or deadlines for compliance or reporting requirements for 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. For this reason, the establishment of less stringent schedules or deadlines for 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 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 requirements of the proposed amendments are imposed on families receiving Autism Voucher benefits. For this reason, the proposed rules exempt Small Entities.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Trisha Page, Autism Coordinator, Department of Human Services

DATE: November 20, 2013

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

The purpose of this small entity economic impact statement is to fulfill the requirements of N.D.C.C. § 23-01-41 and 50-06-32.1. This impact statement pertains to proposed amendments to N.D. Admin. Code chapter 75-03-28. The proposed rules are not mandated by federal law but by House Bill number 1038. The proposed rules could have an adverse economic impact on small entities.

1. Small Entities Subject to the Proposed Rules

There are currently no small entities that are subject to the proposed amended rules.

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 will not be probable cost to private persons or consumers for the proposed rules.

The probable benefit to private persons and consumers who are affected by the proposed rule: The anticipated benefits to private persons or consumers by the proposed rules are adding supports for individuals on the autism spectrum, ages 3-17, to gain valuable skills and training in order to better adapt and thrive in their homes and communities.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be up to \$539,186 for the second half of the 2013-2014 biennium or \$12,500 per year, per individual participant, as determined by legislation in HB 1038.

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. Because small entities will not experience administrative costs or other costs, exploring alternative methods was not necessary.



Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

TAKINGS ASSESSMENT

concerning proposed creation of N.D. Admin. Code chapters 75-03-38 and 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 20th day of November, 2013.

by Julie Leen
N.D. Dept. of Human Services