

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

**N.D. Admin. Code Chapters )  
75-03-23, Provision of Home )  
and Community-Based Services )  
Under the Service Payments for )  
Elderly and Disabled Program )  
and the Medicaid Waiver )  
for the Aged and Disabled )  
Program, and 75-03-24, )  
Expanded Service )  
Payments for Elderly and )  
Disabled (Pages 103-127) )**

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

**September 15, 2014**

.....

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

1. The proposed amendments to N.D. Admin. Code chapters 75-03-23 and 75-03-24 are not related to statutory changes made by the Legislative Assembly, but they are the result of an appropriation provided in the Department's appropriation bill, 2013 House Bill No. 1012. At the June 11, 2014 meeting of this committee, the Department requested and received an extension until October 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 rulemaking. 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 July 2, 2014. The record was held open until 5:00 p.m. on July 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 \$2,324.32.
6. The proposed rules amend chapters 75-03-23 and 75-03-24. The following specific changes were made:
  - Section 75-03-23-01. Section 75-03-23-01 is amended to remove a duplicate definition and to revise

the definition of "functional assessment".

Section 75-03-23-02. Section 75-03-23-02 is amended to clarify eligibility for services for an applicant under eighteen years of age.

Section 75-03-23-05. Section 75-03-23-05 is amended to allow for the provision of extended personal care services under the SPED program, to clarify what is included in extended personal care services under the SPED program, to allow for the provision of home-delivered meals to certain clients under the SPED program, to clarify what is included in homemaker services under the SPED program, to explain the homemaker services funding cap, and to clarify who may provide respite care services under the SPED program to a client who resides in an adult family foster care home.

Section 75-03-23-06. Section 75-03-23-06 is amended to update language consistent with other changes being made, to clarify what is included in homemaker services under the medicaid waiver program, to explain the homemaker services funding cap, to allow for the provision of supervision to clients with cognitive or physical impairment under the medicaid waiver program, and to clarify who may provide respite care services under the medicaid waiver program to a client who resides in an adult family foster care home.

Section 75-03-23-07. Section 75-03-23-07 is amended to clarify application requirements for qualified service provider applicants, to add direct-bearing offenses pursuant to federal requirements, and to clarify impact of a criminal case against an applicant on the application status.

Section 75-03-23-08. Section 75-03-23-08 is amended to add the federal requirements in reference to disqualification of a qualified service provider, and conditions under which a qualified service provider's application may be denied.

Section 75-03-23-15. Section 75-03-23-15 is created to specify application requirements and require an applicant to prove the applicant's eligibility. This section was also amended based on the comment received to clarify the role of an "individual properly seeking services on behalf of another individual."

Section 75-03-23-16. Section 75-03-23-16 is created to identify limitations on an individual to request qualified service provider status after the individual's status has previously been terminated or denied.

Section 75-03-23-17. Section 75-03-23-17 is created to identify the need and use of a functional assessment.

Section 75-03-24-07. Section 75-03-24-07 is amended to create consistency with other changes and to allow for the provision of home-delivered meals to certain clients under the expanded SPED program.

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 estimated fiscal impact resulting from the implementation of the proposed amendments was anticipated in the Department's budget. The estimated fiscal impact is \$676,255, of which \$431,329 is general fund. Prior to the implementation, the Centers for Medicare and Medicaid Services (CMS) must also approve the changes contained in the proposed language for subsection 14 of section 75-03-23-06. Last week, CMS advised the Department that the rate proposed for services to be provided pursuant to the proposed language for subsection 14 of section 75-03-23-06 needs to be reviewed to ensure compliance with provisions of the Social Security Act and the Fair Labor Standards Act. Department staff are in the process of analyzing the rate, and it may be necessary to increase the proposed rate. Based on the results of the analysis and the time needed by CMS for final review and approval, it is possible that the services to be provided pursuant to the changes proposed to subsection 14 of section 75-03-23-06 may not be implemented on October 1, 2014.
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  
September 15, 2014



Jack Dalrymple, Governor  
Maggie D. Anderson, Executive Director

**SUMMARY OF COMMENTS RECEIVED  
REGARDING PROPOSED AMENDMENTS TO  
N.D. ADMIN. CODE CHAPTERS 75-03-23 AND 75-03-24  
PROVISION OF HOME AND COMMUNITY-BASED SERVICES UNDER THE SERVICE  
PAYMENTS FOR ELDERLY AND DISABLED PROGRAM AND THE MEDICAID WAIVER  
FOR THE AGED AND DISABLED PROGRAM AND EXPANDED SERVICE PAYMENTS  
FOR ELDERLY AND DISABLED**

The North Dakota Department of Human Services (the Department) held a public hearing on July 2, 2014, in Bismarck, ND, concerning the proposed amendment to N.D. Administrative Code chapters 75-03-23 and 75-03-24.

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

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

1. Bonny M. Fetch - Office of Administrative Hearings 2911 N 14<sup>th</sup> St Suite 303 Bismarck ND 58503

**SUMMARY OF COMMENTS**

**Comment:** The Office of Administrative Hearings has reviewed proposed amendments to N.D. Admin. Code Chapters 75-03-23 and 75-03-24 and offers the following comments. In the newly created rule in N.D. Admin. Code § 75-03-23-15, "applicant" is not defined. In subsection (2) it seems to imply that an applicant is either "an individual seeking services" or "an individual properly seeking services on behalf of another individual". It is important to state clearly who the applicant is, especially in light of subsection (4) which requires the applicant to provide information sufficient to establish eligibility.

The way subsection (2) reads now, we would interpret it to mean that either "an individual seeking services" or "an individual properly seeking services on behalf of another individual" would be considered an application and be able to satisfy the requirement in subsection (4) and subsection (7). If that is the intent of the proposed rule, we would suggest rewording subsection (2) as follows:

An application is a request made to the department or its designee by an applicant, who is either an individual seeking services under this chapter, or by by an individual properly seeking services on behalf of the applicant. "An individual properly seeking services" means an individual of sufficient maturity and understanding to act responsibly on behalf of the individual for whom services are sought.

If it is not intended that "an individual properly seeking services on behalf of another individual" be considered an applicant, then we suggest a separate subsection defining applicant be added.

There should be no doubt left as to who the applicant is as any confusion at all may lead to unnecessary complications and possible litigation. Making the definition crystal clear at the outset will eliminate those potential problems. We hope these comments are helpful. If you have any questions, please contact me.

**Response:**

The intent of this section is to say that an applicant or someone properly acting on behalf of the applicant can request services on behalf of the individual in need. It is not the intent of these rules that "an individual properly seeking services on behalf of another individual" be considered an applicant after the initial request for services is made.

To clarify the department has changed Section 75-03-23-15 to read as follows:

**75-03-23-15. Application – Applicant required to provide proof of eligibility.**

1. An individual wishing to apply for benefits under this chapter must have the opportunity to do so, without delay.
2. An application is a request made to the department or its designee by an individual seeking services under this chapter, or by an individual properly seeking services on behalf of another individual. "An individual properly seeking services" means an individual of sufficient maturity and understanding to act responsibly on behalf of the individual for whom services are sought.
3. An application must include a functional assessment.
4. The individual seeking services under this chapter, or an individual properly seeking services on behalf of that individual shall sign the application.
5. The department or its designee shall provide information concerning eligibility requirements, available services, and the rights and responsibilities of individuals seeking services under this chapter and of recipients to all who require it.
6. The date of application is the date the department or the department's designee receives the properly signed application.
7. The individual seeking services under this chapter shall provide information sufficient to establish eligibility for benefits, including a social security number and proof of age, identity, residence, blindness, disability, functional limitation, financial eligibility, and other information required under this chapter.

N.D. Admin. Code Chapters 75-03-23 & 75-03-24  
Summary of Comments  
July 22, 2014

Prepared by:

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

In Consultation with: Nancy Nikolas-Maier, Medical Services

July 22, 2014

Cc: Nancy Nikolas-Maier, Medical Services

Jack Dalrymple, Governor  
Maggie D. Anderson, Executive Director

## MEMO

**TO:** Julie Leer, Director, Legal Advisory Unit

**FROM:** Nancy Nikolas Maier, Program Administrator *NM*

**RE:** Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-03-23, Provision of Home and Community Based Services Under the Service Payments for the Elderly and Disabled Program and the Medicaid Waiver for the Aged & Disabled & 75-03-24, Expanded Service Payments to the Elderly and Disabled

**DATE:** June 30, 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 changes to North Dakota Administrative Code chapter 75-03-23 & 75-03-24. The amendments to Chapter 75-03-23 are anticipated to have a fiscal impact on the regulated community in excess of \$50,000. The amendments to Chapter 75-03-24 are not.

### 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 75-03-23 & 75-03-24. 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:

Recipients that receive services under the Service Payments to the Elderly and Disabled (SPED), Home and Community Based Services Medicaid waiver and Expanded-Service Payments to the Elderly & Disabled (Ex-SPED) program and their providers.

### Probable Impact

The proposed amendments may impact the regulated community as follows:

- Possible increase in SPED, HCBS waiver and Ex-SPED due to more consumers applying to use added services.
- Possible increase in enrollment of providers willing to provide home delivered meals, extended personal care or supervision to eligible recipients.
- Possible decrease in homemaker services for those recipients who reside in the same home and will have their homemaker services capped.
- Possible decrease in homemaker services for people who reside with family and will no longer be eligible to receive these services because they can be provided by an informal support.

Probable Cost of Implementation

- Expected cost of providing additional services in SPED & Ex-SPED:

Program	Total	General	Federal	County
SPED	47,410	45,036		2,374
Ex-SPED	21,551	21,551		
	68,961	66,587		2,374

- Expected cost of providing additional service in HCBS waiver:

Program	Total	General	Federal
HCBS Waiver	471,520	235,760	235,760

Consideration of Alternative Methods

A review of final rules, state laws, and Home and Community Based Services policy, was undertaken to determine the best approach to required changes. The review included a discussion of current policy, possible alternatives, and recommendations to the Department. The amendments provide the least fiscal impact and the least impact to recipients, and providers.

Alternate methods were not considered because the legislature directed us to add additional services. In order to assure the most appropriate use of services the Department needed to clarify and establish limits on the amount of homemaker services available to individuals who reside with other recipients and for those who live with family and to clarify the requirements for enrolling and re-enrolling as a Qualified Service Provider.

Jack Dalrymple, Governor  
Maggie D. Anderson, Executive Director

## MEMORANDUM

**TO:** Julie Leer, Director, Legal Advisory Unit

**FROM:** Nancy Nikolas Maier, Program Administrator, Medical Services *NMM*

**DATE:** June 30, 2014

**SUBJECT:** Small Entity Regulatory Analysis Regarding Proposed Creation of N.D. Admin. Code chapter 75-03-23 & 75-03-24.

---

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 new N.D. Admin. Code chapter 75-03-23 & 75-03-24. 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

Small entities affected by the proposed rule include small political subdivisions consisting of County Social Service Boards of counties with populations of less than five thousand, small businesses and small organizations enrolled as Qualified Service Providers.

Like all other County Social Service Boards in North Dakota, County Social Service Boards of counties with populations with less than five thousand are responsible for locally administering the Service Payments to the Elderly and Disabled, Home and Community Based Services Waiver, and Expanded Service Payments for the Elderly and Disabled (EX-SPED) program. The County Social Service Boards must assist the North Dakota Department of Human Services to meet any compliance and reporting requirements imposed by state law. In addition, all Qualified Service Providers are required to comply with the service standards set forth in N.D.A.C. 75-03-23-07. 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 rules will not alter in any material way any required schedules or deadlines for compliance or reporting requirement of County Social Service Boards or Qualified Service 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 rules will not alter in any material way any required compliance or reporting requirements of County Social Service Boards or Qualified Service Providers. 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 rules do not impose any design standards or impose any additional operational standards or operational standards for County Social Service Boards or Qualified Service 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 requirements of the proposed rules are imposed on County Social Service Boards and small entities enrolled as Qualified Service Providers. The proposed rule will not alter in any material way any required compliance or reporting requirement for these small entities. Therefore, an exemption of small entities from all or part of the requirements in the proposed rule was not considered.

Jack Dalrymple, Governor  
Maggie D. Anderson, Executive Director

## MEMORANDUM

**TO:** Julie Leer, Director, Legal Advisory Unit

**FROM:** Nancy Nikolas Maier, Program Administrator, Medical Services *NMM*

**DATE:** June 30, 2014

**SUBJECT:** Small Entity Economic Impact Statement Regarding Proposed creation of new N.D. Admin. Code chapter 75-03-24.

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 creation of N.D. Admin. Code chapter 75-03-23 & 75-03-24. Modification to 75-03-23-05, 75-03-23-06 & 75-03-24-08 of the proposed rules are mandated by 2013 House Bill 1012. The proposed rules should not have an adverse economic impact on small entities.

### 1. Small Entities Subject to the Proposed Rules

Small entities affected by these proposed rules include small political subdivisions consisting of the County Social Service Boards of counties with populations with less than five thousand, small businesses and small organizations enrolled as Qualified Service Providers.

### 2. Costs For Compliance

The administrative and other costs required for compliance with the proposed rule are expected to be: No additional administrative costs will be incurred by County Social Service Boards or small business and organizations enrolled as Qualified Service Providers because of 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 costs to private persons or consumers for the proposed rules.

The probable benefit to private persons and consumers who are affected by the proposed rule: Service Payments to the Elderly and Disabled recipients will be

able to access personal care with supervision, and Expanded Service Payments to the Elderly & Disabled and Service Payments to the Elderly and Disabled recipients will benefit from the proposed rule changes as they will be able to access home delivered meals. Eligible Home & Community based Services Medicaid waiver recipients will be able to access personal care with supervision.

#### 4. Probable Effect on State Revenue

- Expected cost of providing additional services in SPED & Ex-SPED:

<b>Program</b>	<b>Total</b>	<b>General</b>	<b>Federal</b>	<b>County</b>
SPED	47,410	45,036		2,374
Ex-SPED	21,551	21,551		
	68,961	66,587		2,374

- Expected cost of providing additional service in HCBS waiver:

<b>Program</b>	<b>Total</b>	<b>General</b>	<b>Federal</b>
HCBS Waiver	471,520	235,760	235,760

#### 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 and the probable effect on State Revenue was authorized by the Legislature, exploring alternative methods was not necessary.

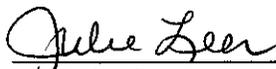
### TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code chapters 75-03-23 & 75-03-24.

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 17th day of February, 2014.

by:   
N.D. Dept. of Human Services