

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

N.D. Admin. Code Chapter)	
75-02-02 and 75-02-02.1,	)	<u>REPORT OF THE</u>
Medical Services and Eligibility)	<u>DEPT. OF HUMAN SERVICES</u>
For Medicaid)	March 14, 2016
(Pages 229-256))	

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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 75-02-02 and 75-02-02.1 are related to an appropriations measure passed by the Legislative Assembly in 2015 House Bill No. 1012.
2. The proposed amendments ensure comprehensive consistency with the federal language included in the American Recovery and Reinvestment Act in regards to Native-American cost-sharing exemptions; to which the Department has been adhering to. The proposed amendments also clarify the rules related to an exemption from cost sharing that relates to provisions in the Deficit Reduction Act.
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 7, 2015. The record was held open until 5:00 p.m. on December 17, 2015, to allow written comments to be submitted. No one attended or provided comments at the public hearing. One written comment was received within the comment period. 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 \$2,302.64.
6. The proposed rules amend chapters 75-02-02 and 75-02-02.1. The following specific changes are made:
 - Section 75-02-02-03.2. Section 75-02-02-03.2 is amended to create a definition for "psychological service".
 - Section 75-02-02-08. Section 75-02-02-08 is amended to clarify who can refer clients for speech, hearing, and language disorder services to be consistent with federal Medicaid

regulations; to ensure consistency with the Medicaid state plan with regard to coverage for home health and private duty nursing services; and to specify the pharmacy reimbursement methodology for generic drugs by ensuring both the brand name and generic pricing information are included in the rules.

Section 75-02-02-09.1. Section 75-02-02-09.1 is amended to clarify the cost-sharing exemption applying to all medical institutions; to ensure the reference to cost sharing exemptions for Native Americans is consistent with federal Medicaid regulations; to include that cost sharing exemption language applies to individuals eligible for Medicaid under the breast and cervical cancer treatment program, and to inmates, otherwise eligible for Medicaid and receiving qualifying inpatient services; to make a correction to emergency services that are exempt from cost-sharing; and to clarify the application of the copayment for an office visit.

Section 75-02-02-09.3. Section 75-02-02-09.3 is amended to correct an error in the rule.

Section 75-02-02-09.4. Section 75-02-02-09.4 is amended to include evaluation limits and clarify language.

Section 75-02-02-09.5. Section 75-02-02-09.5 is amended to add "psychiatric residential treatment facility" to be consistent with federal Medicaid regulations.

Section 75-02-02-11. Section 75-02-02-11 is amended to add "physician assistant" as a provider type that can be chosen or assigned as a Coordinated Service provider; to account for a provider's acceptance of the recipient's selection as a coordinated services provider; and to address what will

occur if a selection is received after a recipient has been placed on medically necessary medical and pharmacy services.

Section 75-02-02-12. Section 75-02-02-12 is amended to add other practitioners of the healing arts within their scope of practice to those directing emergency services.

Section 75-02-02-13.1. Section 75-02-02-13.1 is amended to clarify who can be reimbursed for services; that enrollment in the Medicaid program is required if a provider wants to receive reimbursement; and that attendant services need authorization and proof of medical necessity.

Section 75-02-02-13.2. Section 75-02-02-13.2 is amended to move the words "medical center" prior to the word "city" to ensure it is consistent with the definition in this subsection.

Section 75-02-02-29. Section 75-02-02-29 is amended to clarify the eligibility groups subject to selection of a primary care provider; to add physician assistants to the list of providers that can serve as primary care providers; to remove "osteopathy" as a specialty for a primary care provider; to exempt individuals eligible under Medicaid expansion and who are medically frail, from selecting a primary care provider; and to extend the redetermination period from six to twelve months.

Section 75-02-02.1-24. Section 75-02-02.1-24 is amended to update the monthly maintenance needs allowance to the legislatively authorized increase.

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 anticipated fiscal impact resulting from the implementation of the proposed amendments is \$539,838, of which \$269,919 is general fund.
 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
Legal Advisory Unit
North Dakota Department of Human Services
March 14, 2016



Legal Advisory Unit

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Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

**SUMMARY OF COMMENTS RECEIVED
REGARDING PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE CHAPTERS 75-02-02 AND 75-02-02.1
MEDICAL SERVICES AND ELIGIBILITY FOR MEDICAID**

The North Dakota Department of Human Services (the Department) held a public hearing on December 7, 2015, in Bismarck, ND, concerning the proposed amendment to N.D. Administrative Code chapters 75-02-02 and 75-02-02.1, Medical Services and Eligibility for Medicaid.

Written comments on these proposed amendments could be offered through 5:00 p.m. on December 17, 2015.

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

1. Erik Elkins - 600 E Boulevard Ave Dept 325 Bismarck ND 58505

SUMMARY OF COMMENTS

Comment: The definition of psychological services and other proposed rules should be amended to reflect Medicaid guidelines and state plan.

Response: The Department has made changes to 75-02-02-03.2(11), 75-02-02-09.1(2)(c), and 75-02-02-09.4(5) to reflect Medicaid guidelines and state plan.

Prepared by:

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

In Consultation with: Erik Elkins, Medical Services

January 15, 2016

Cc: Erik Elkins, Medical Services

MEMO

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Erik Elkins, Assistant Director, Medical Services Division

RE: Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-02-02 Medical Services and 75-02-02.2 Eligibility for Medicaid

DATE: September 4, 2015

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 Article 75-02-02 and 75-02-02.1. The amendments, other than 75-02-02.1-24 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 chapter 75-02-02 and 75-02-021. 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 North Dakota Medicaid program
- Physician assistants who will be able an eligible provider type to be selected as a primary care provider.
- Community Spouses who receive a monthly maintenance needs allowance.

Probable Impact

The proposed amendments may impact the regulated community as follows:

- Provide clarification to limits and cost-sharing within the Medicaid program
- Allow physician assistants to serve as a primary care provider
- Increase the monthly maintenance needs allowance for community spouses of individuals who are residing in a nursing home.

Probable Cost of Implementation

- There are no expected costs of implementation.

Consideration of Alternative Methods

There are no alternative methods that would ensure consist understanding and application of rules governing the administration of the Medicaid program. Also, the 2015 Legislative Assembly authorized an increase to the monthly maintenance needs allowance; therefore, 75-02-02.1-24 must be updated.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Erik Elkins, Assistant Director, Medical Services

DATE: September 4, 2015

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code chapter 75-02-02 and Chapter 75-02-02.1

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 proposed amendments to N.D. Admin. Code chapter 75-02-02 and 75-02-02.1. 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 North Dakota Medicaid program. 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. 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. 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. 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: Julie Leer, Director, Legal Advisory Unit

FROM: Erik Elkins, Assistant Director, Medical Services Division

DATE: September 4, 2015

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code Chapter 75-02-02 and Chapter 75-02-02.1

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 75-02-02 and Chapter 75-02-02.1.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the proposed amended rules are providers enrolled with the North Dakota Medicaid program.

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 cost 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: Enrolled Medicaid recipients will be able to have an expanded group of providers to select as a primary care provider, as physician assistants will be added as an option. Also, individuals who are medically frail and eligible for the Medicaid expansion will not have to select a primary care provider, which will afford them greater flexibility in accessing necessary services. Finally, community spouses of Medicaid-eligible individuals residing in a nursing home will benefit with an increase to the monthly maintenance needs allowance.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: the state is expected to receive an increase in federal medicaid match payments for fifty percent of the increase in the monthly maintenance needs allowance.

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 estimated fiscal impact for implementing the changes 75-02-02 is minimal.

The estimated fiscal impact for the implementing the proposed changes in 75-02-02.1 (specifically 75-02-02.1-24 minimum monthly maintenance needs allowance) is \$539,838 (total funds) and \$269,919 (general fund) for the period of January 1, 2016 through June 30, 2017. Funding for this change was appropriated by the 2015 Legislative Assembly.



Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

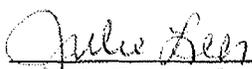
TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code chapters
75-02-02 and 75-02-02.1.

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 4th day of September, 2015.

by: 
N.D. Dept. of Human Services

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

N.D. Admin. Code Chapters	)	<u>REPORT OF THE</u>
75-03-07, 70-03-07.1, 75-03-08,	)	<u>DEPT. OF HUMAN SERVICES</u>
75-03-09, 75-03-10, 75-03-11, and)	March 14, 2016
75-03-11.1, Licensing of)	
Early Childhood Services)	
(Pages 257-335))	
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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 75-03-07, 75-03-07.1, 75-03-08, 75-03-09, 75-03-10, 75-03-11, and 75-03-11.1 are necessary to comply with 2015 House Bill No. 1247.
2. These rules are related to changes in a federal statute or regulation, specifically P.L 113-186, relating to the Child Care and Development Block Grant Act of 2014.
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 8, 2015. The record was held open until 5:00 p.m. on December 18, 2015, to allow written comments to be submitted. No one attended or provided comments at the public hearing. Seven written comments were received within the comment period. 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 \$2,444.24.
6. The proposed rules amend chapters 75-03-07, 75-03-07.1, 75-03-08, 75-03-09, 75-03-10, 75-03-11, and 75-03-11.1. The following specific changes are made:

Section 75-03-07-04. Section 75-03-07-04 is amended to reflect a statutory change regarding training requirements for providers who provide care to infants and to provide additional language to include a services-required determination from another state.

Section 75-03-07.1-00.1. Section 75-03-07.1-00.1 is amended

to provide consistency across chapter 75-03-07.1 regarding the use of provider and emergency designee.

Section 75-03-07.1-02. Section 75-03-07.1-02 is amended to remove redundant language, provide consistency across chapter 75-03-07.1 regarding the use of provider and emergency designee, to reflect a statutory change regarding training requirements for providers and emergency designees who provide care to infants, frequency of training courses, clarify who decides and to whom a child shall be released from care to, and to address aquatic activities.

Section 75-03-07.1-05. Section 75-03-07.1-05 is amended to provide consistency across chapter 75-03-07.1 regarding the use of provider.

Sections 75-03-07.1-06. Sections 75-03-07.1-06 is amended to provide consistency across chapter 75-03-07.1 regarding the use of provider and emergency designee, to add "arson" as a direct bearing offense, provide a requirement that a fingerprint based criminal history record check is required upon hire and every five years after initial approval, to provide a background check results review process, and to provide additional language to include a services-required determination from another state.

Section 75-03-07.1-08. Section 75-03-07.1-08 is amended to include both frequent visual checks and a monitor in the room with sleeping infants unless the provider or emergency designee is in the room with the sleeping infant.

Section 75-03-07.1-09. Section 75-03-07.1-09 is amended to provide consistency across chapter 75-03-07.1 regarding

the use of provider and emergency designee.

Section 75-03-07.1-10. Section 75-03-07.1-10 is amended to add 75-03-07.1-08 and to provide consistency across chapter 75-03-07.1 regarding the use of emergency designee.

Section 75-03-07.1-12. Section 75-03-07.1-12 is amended to allow for the issuance of a restricted license.

Section 75-03-08-12. Section 75-03-08-12 is amended to add the exception of substitute staff and emergency designees from basic child care courses and to reflect a statutory change regarding training requirements for staff members who provide care to infants.

Section 75-03-08-14. Section 75-03-08-14 is amended to remove redundant language, to add a requirement for an initial and annual fire inspection, and to obtain written statements of compliance to provide consistency across all licensed child care providers.

Section 75-03-09-14. Section 75-03-09-14 is amended to remove redundant language.

Section 75-03-09-17. Section 75-03-09-17 is amended to require an initial and annual fire inspection.

Section 75-03-10-09. Section 75-03-10-09 is amended for clarification purposes and to add language to clarify who decides and to whom a child shall be released from care to.

Section 75-03-11-13. Section 75-03-11-13 is amended to require all staff members to complete a Department approved basic child care course within the first three months of employment with the exception of substitute staff and

emergency designees.

Section 75-03-11.1-22. Section 75-03-11.1-22 is amended to add a requirement that records shall be kept at the school age program premises and satellite sites where the child is enrolled in.

Sections 75-03-07-06, 75-03-08-27, 75-03-09-27, 75-03-10-27, 75-03-11-27, and 75-03-11.1-27. Sections 75-03-07-06, 75-03-08-27, 75-03-09-27, 75-03-10-27, 75-03-11-27, and 75-03-11.1-27 are amended to add "arson" as a direct bearing offense, a requirement that a fingerprint based criminal history record check is required upon hire and every five years after initial approval, and a background check results review process.

Sections 75-03-07.1-00.1, 75-03-08-03, 75-03-09-03, 75-03-10-03, 75-03-11-03, and 75-03-11.1-03. Sections 75-03-07.1-00.1, 75-03-08-03, 75-03-09-03, 75-03-10-03, 75-03-11-03, and 75-03-11.1-03 are amended to add a definition of aquatic activity.

Sections 75-03-08-08.1 and 75-03-09-08. Sections 75-03-08-08.1 and 75-03-09-08 are amended to remove the exemption of substitute staff and emergency designee to complete CPR and First Aid and add language to clarify who decides and to whom a child shall be released from care to.

Sections 75-03-08-10, 75-03-09-10, 75-03-09-12, 75-03-10-10, 75-03-10-11.1, and 75-03-10-12. Sections 75-03-08-10, 75-03-09-10, 75-03-09-12, 75-03-10-10, 75-03-10-11.1, and 75-03-10-12 are amended to reflect a statutory change regarding training requirements for directors, providers, supervisors, and staff members who provide care to infants and

frequency of training courses.

Sections 75-03-08-21.1, 75-03-09-18, 75-03-10-18, 75-03-11-18, and 75-03-11.1-18. Sections 75-03-08-21.1, 75-03-09-18, 75-03-10-18, 75-03-11-18, and 75-03-11.1-18 are amended to address aquatic activities.

Sections 75-03-08-24, 75-03-09-24, and 75-03-10-24.

Sections 75-03-08-24, 75-03-09-24, and 75-03-10-24 are amended to include both frequent visual checks and a monitor in the room with sleeping infants unless a staff member is in the room with the sleeping infant.

Sections 75-03-08-28, 75-03-09-28, 75-03-10-28, 75-03-11-28, and 75-03-11.1-28. Sections 75-03-08-28, 75-03-09-28, 75-03-10-28, 75-03-11-28, and 75-03-11.1-28 are amended to provide additional language to include a services-required determination from another state.

Sections 75-03-11-08 and 75-03-11.1-08. Sections 75-03-11-08 and 75-03-11.1-08 are amended to clarify who decides and to whom a child shall be released from care to.

Sections 75-03-11-13 and 75-03-11.1-08.4. Sections 75-03-11-13 and 75-03-11.1-08.4 are amended to address frequency of training courses and to require a basic child care course.

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 \$201,994.50. The entire fiscal impact is due to the proposed rules in response to Federal Reauthorization of the Child Care and Development Block Grant Act of 2014 that was signed into law (Pub.L. 113-186) by President Obama on November 19, 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:

Jonathan Alm
Legal Advisory Unit
North Dakota Department of Human Services
March 10, 2016



Legal Advisory Unit

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Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

**SUMMARY OF COMMENTS RECEIVED
REGARDING PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE CHAPTERS 75-03-07, 70-03-07.1, 75-03-08, 75-03-09, 75-03-10,
75-03-11 AND 75-03-11.1
EARLY CHILDHOOD SERVICES**

The North Dakota Department of Human Services (the Department) held a public hearing on December 8, 2015, in Bismarck, ND, concerning the proposed amendments to N.D. Administrative Code chapters 75-03-07, 75-03-07.1, 75-03-08, 75-03-09, 75-03-10, 75-03-11 and 75-03-11.1, Early Childhood Services.

Written comments on these proposed amendments could be offered through 5:00 p.m. on December 18, 2015.

No one attended or provided comments at the public hearing. Seven written comments were received within the comment period. The commentors were:

1. Michelle Dressler Johnson, Exploring Minds Development Center, 120 Calgary Ave, Bismarck ND 58503
2. Alicia Hegland-Thorpe, 6360 28th Ave SE, Lincoln ND
3. Angie LeKander, 1533 N 8th St., Fargo ND 58102
4. Sen. Erin Oban, District 35, 1319 Apache Street, Bismarck ND 58501-2632
5. Earleen Friez, PO Box 1101, Hettinger ND 58639
6. Joy Kaul, 2028 3rd St N, Bismarck ND 58501
7. Kathy Lampman, RN CCHC, 1616 Capital Way, Bismarck ND 58501

SUMMARY OF COMMENTS

Comment: "As an early childhood and elementary educator, along with being a mother of 3 young boys, I myself know and understand the importance swimming lessons and water play. Swimming is not only a life saving skill, but provides much more than meets the eye. In a world where activity levels in children are rapidly dropping off, swimming provides a physical outlet for our students to "burn some energy off", and gives the kids an extracurricular activity to look forward to. Along with the fact that being in the water is so therapeutic for children (and adults) of all ages and abilities and is a place where so many children can feel success without feeling competition." "Having approximately 60 school age and preschool parents sign a waiver every day because their child "might" be able to swim is not feasible. I strongly feel that parents having to sign a waiver each day their child swims (especially when I am dealing with 60 swimmers 2 to 4 xs a week) is going to take me and my staff away from what is the most important part of our day....THE KIDS WE ARE WORKING WITH. There simply has to be a more efficient solution than having parents sign a form every single day their child swims. What will happen the days that a grandparent drops off?...an aunt or uncle?...or a friend because of a sleepover? Are these adults ok to sign this form? To me that is far to gray

of an area, and these scenarios will absolutely happen on nearly a daily basis, especially in the summer.”

“If there is a strong need to having something in writing about swimming, I could see having us add a box or check mark place about swimming on our annual contracts or on the paperwork that annually gets filled out from social services so there is a unified form that gets filled out once a year. However, when a child gets signed up for swimming lessons, parents have to put all of that in writing and pay the extra fees with that company. The need for any of this is difficult for me to understand. I feel like pretty soon I will have to have parents put in writing each day I open my water/sensory table in order to let their child participate.

As far as water play "swimming" goes with our little ones (25 of them) on the playground during the summer time, again this is not always something we can plan ahead for. We ask our parents to bring water play clothes for the entire summer to keep in their child's cubby. When the weather seems nice and warm that day we fill the pools early so they can warm up a bit and we can enjoy some time out side even when it is warm out. For me to have each parent sign a form for their young child each time we "might" be able to swim in the little pools at school that day seems a bit ridiculous and a waste of their and my time.

We feel that swimming is such an important part of children's development and definitely want to continue to provide this service to our families. Thank you so much in advance for your time with this matter!”

Response: The Department will make no change at this time. The Department has not proposed a rule requiring providers to have parents sign a waiver each day their child swims. The Department has not suggested a mandate for a specific policy, only that providers have a policy to address aquatic activities and written parental permission for the child to participate, which includes the disclosure of the child's swimming ability. The proposed rule does not limit the use or type of aquatic activities and the language requiring parental permission is consistent with other sections of the early childhood services rules that require parental permission.

Comment: “On July 30, 2015 my son drowned at the Hillside Aquatic Center in Bismarck, ND under the care of his daycare, The Enrichment Garden. He was pulled from the bottom of the pool by a lifeguard after he had been under for a full two minutes. Believe it or not, my son survived! He is doing well and has recovered. He is still very afraid of water, but that is understandable. What is NOT understandable is why it happened in the first place.

There is a long list of “things NOT to do while allowing a pre-schooler to swim ‘unattended’ by a daycare supervisor” that I could write here. However, these facts speak for themselves.

1. I was not informed that TEG (the Enrichment Garden) was taking my child to a public pool.

2. Workers at TEG were told by the Pool, that these kids (ages 3-4) were NOT allowed to wear life vests at the pool. (Bis Parks and Rec argue this point)
3. TEG workers did not immediately have my contact information. I was notified 8 - 10 minutes after my son was revived by a lifeguard, after they called the director and asked for my number.
4. My son was unattended. There were 15 kids and 4 supervisors. Yet not a one was watching my son jump in the pool and crawl out several times over 3 minutes in an area too deep for him. Keep in mind, he's NOT wearing a life vest. Nor did they see my son swim to the deeper end of the pool and struggle for 2 minutes before going under. That's when a lifeguard pulled him out.
5. TEG was not paying attention to my son, clearly, as when he was pulled from the pool as was resuscitated, not a single worker came over to "claim" him as one of theirs for over two minutes.

What I am getting at is that clearly, rules need to protect children, not the daycare." "My first thought in changing rules, or laws, was to ban all daycare centers from taking children to pools altogether. I realize that's not a rule that would pass. But rather, I'm urging for tighter restrictions instead. For example:

- I feel that if parents want their child to enjoy aquatic activities, they must have taken their child to swim lessons. If a parents can't be as proactive for that to happen, then parents simply don't let their kids swim under daycare supervision.
- I also feel that daycares need to have parental notification records on them at all times, especially away from their center and at aquatic activities. A list of parents' phone numbers need to be easily accessed for emergency reasons.
- I also feel that life vest restrictions needs to be made, a child should have access to a life vest at all times, either their own, or one the school provides them, or even one the pool provides.
- I feel parents should be able to choose whether or not they want their child to swim with a daycare rather than a daycare making this an activity for the day. Other activities need to be offered if child doesn't go swimming.
- I also feel pools should offer life vests 'free of charge' for kids under certain height and weight requirements, and especially to daycares.
- I also feel daycare should restrict how many kids they bring at a time. This will reduce their distraction level as they won't have as many kids at a time.
- Daycares should sign in each child, this can be used as research in the future. This is not happening now and would be a lot more helpful at a time like this.

What happened to my child wasn't an 'accident' waiting to happen, but a tragedy ready to rip a family apart. It nearly did to mine. I had to leave my job when I took my son out of their care. I didn't trust daycares at that point. Honestly, I still don't, especially those that offer aquatic activities.

There were so many things wrong, that lead up to this, on so many levels, including the current rules that allowed the daycare get away with this behavior - without discipline. I'm so thankful he survived, but others have not been so fortunate."

Response: The Department appreciates this comment. The Department will make no change at this time. The proposed rule requires the provider to have a policy to address aquatic activities that the program participates in. The Department has not suggested a mandate for a specific policy, only that providers have a policy to address aquatic activities and written parental permission for the child to participate, which includes the disclosure of the child's swimming ability. The proposed rule does not require a child to participate in aquatic activities nor does it require a provider to participate in water activities. The Department has no authority to require pools to provide life vests. The Department will consider tighter restrictions for future revisions in collaboration with the Early Childhood Advisory Board.

Comment: "The swimming regulation is not a problem as well. Common sense, a signed form by the parents will take care of this."

Response: The Department appreciates this comment.

Comment: "This letter is being sent regarding the proposed amendments to ND Administrative Code Chapters 75-03-07, 75-03-07.1, 75-03-08, 75-03-09, 75-03-10, 75-03-11, and 75-03-11.1, most specifically Section 75-03-07.1-02 about aquatic activities". "I have been in contact with a local mother whose son had a near-drowning this past summer." "There is no question in my mind that all involved want the very best outcome. I understand the need to have a balance between having little to no protections in place for these children and their families and overreaching regulations on childcare providers, but after reviewing the proposed changes to this section, I feel there are further steps that should be taken through this process to provide even greater protections for everyone involved than what is currently being proposed. I would implore this committee to take additional time to review this mother's comments, seek input from both those families most affected and the providers who will be adhering to any proposed changes, and adopt stronger policies that will protect children, parents, and providers from any future tragedies that could be prevented."

Response: The Department appreciates this comment. The Department will make no change at this time. The Department will consider stronger policies for future revisions in collaboration with the Early Childhood Advisory Board.

Comment: "Rules regarding Aquatic Activity – I agree with these."

Response: The Department appreciates this comment.

Comment: 75-03-07.1-02(3)(g)(1), 75-03-08-21.1(16)(a), 75-03-09-18(22)(a), 75-03-10-18(24)(a), 75-03-11-18(16)(a). "Caring for our Children suggest staff to child ratios Infant 1:1, Toddler 1:1, Preschool 4:1, School Age 6:1. Delete appropriate to the ages and swimming ability....To many children have had their lives risked by the lack of supervision while swimming during child care hours. Life jackets should be required to wear for all non-swimmers. Hot tubs are another risk to children and should be banned during child care hours."

Response: The Department appreciates this comment. The proposed rule requires the provider to have a policy to address staff to child ratios appropriate to the ages and swimming ability of the children participating in aquatic activities. The Department will consider tighter restrictions for future revisions in collaboration with the Early Childhood Advisory Board.

Comment: "As far as the completion of the new required training. I have no problem with this other than the fact that it is only available online. It should be offered in a class format as well, since it is mandated."

Response: The Department will make no change at this time. The Sudden Infant Death Syndrome training requirement is required by state law, 2015 House Bill No. 1247. Due to the geographically dispersed population we have in North Dakota the most efficient and effective method to get the required training out to providers is to make it available online. This ensures providers have unlimited access to the training and that the course content is the same.

Comment: 75-03-09-12(6)(f). "I totally agree with this. In our community some providers rely heavily upon training given here by NDSU Extension which tends to be on guidance. Training should be well rounded."

Response: The Department appreciates this comment.

Comment: 75-03-09-12(7). "I opposed "Addison's Law" passed by the 2015 ND Legislature because requiring this training annually for anyone caring for infants is ridiculous. However since it passed the legislature it needs to be included in the rules."

Response: The Department will make no change at this time.

Comment: Fingerprint based background checks – needed to reflect federal law requirements.

Response: The Department appreciates this comment.

Comment: 75-03-09-27. "Adding arson on page 31 – agree".

Response: The Department appreciates this comment.

Comment: 75-03-09-28. "agree with these various changes".

Response: The Department appreciates this comment.

Comment: "[T]he finger printing is a bit over the top." "Do you honestly have that much abuse with the system as is? Why does not the current BCA take care of this?"

Response: The Department understands the concern of needing a finger based criminal history check initially and every five years after initial approval. This proposed rule is in response to Federal Reauthorization of the Child Care and Development Block Grant Act of 2014 that was signed into law (Pub.L. 113-186) by President Obama on November 19, 2014. In order to be in compliance with federal law the Department needs to modify its current background check requirements and administrative rules.

Comment: "[T]he proposed mandate of backup and subs to have CPR and First Aid will be an issue".

Response: The Department understands the concern of needing substitutes and emergency designee's first Aid and CPR certified. This proposed rule is in response to the Federal Reauthorization of the Child Care and Development Block Grant Act of 2014 that was signed into law (Pub.L. 113-186) by President Obama on November 19, 2014. In order to be in compliance with federal law the Department needs to modify its current first aid and CPR requirements.

Comment: 75-03-09-08(1)(o). "I am totally opposed to exempting substitute staff from the requirement of being CPR certified. Adding the requirement for substitute staff to be CPR certified will place a tremendous and in many cases an impossible burden upon facilities with staff. Staffing in child care facilities is already very difficult. Requiring this of early childhood facility substitute staff is unrealistic and unnecessary. School teacher, be they full time or subs, are not required by state to be either CPR or First Aid certified."

Response: The Department understands the concern of needing substitutes and emergency designee's first Aid and CPR certified. This proposed rule is in response to the Federal Reauthorization of the Child Care and Development Block Grant Act of 2014 that was signed into law (Pub.L. 113-186) by President Obama on November 19, 2014. In order to be in compliance with federal law the Department needs to modify its current first aid and CPR requirements.

Comment: 75-03-09-08(1)(q). "In this day and age this is important even though already included on the child enrollment forms."

Response: The Department appreciates this comment.

Comment: 75-03-09-14(2)(d). "I agree with this proposed change. Ideally they should have a bed to sleep in during night time hours, but reality is that often is not possible. Siblings who sleep together at home should be able to sleep together at a facility as well."

Response: The Department appreciates this comment.

Comment: 75-03-09-14(2)(d). "This may allow a child to be placed on the floor all night long."

Response: The Department appreciates this comment. The proposed rule removes paragraph d as subsection 2 of section 75-03-09-24 also addresses night care.

Comment: 75-03-08-14(15) and 75-03-09-17(1). "I understand the reasoning behind this proposed change since desire is for uniformity of rules across chapters. I am certain especially for those with a family license it will result in some providers quitting or dropping down to caring for 5 or fewer children. I would be more comfortable with leaving wording as is for family rules or at least not to make it annual."

Response: The Department appreciates the comments regarding fire inspections. This proposed change was supported by the Early Childhood Advisory Board, the State Fire Marshal, and the Early Childhood Services Administrator. The Department will consider the comment for future revisions.

Comment: Many comments on the changes to infant care, sleeping. "I totally disagree with changing the wording from "or" to "and" concerning monitor". "Monitor isn't defined. Is it audio, video or medical type?" "Be it audio or video no provider is able to monitor it consistently as you are either caring for other children or doing other work while children are

napping such as filling out food program paperwork, washing dishes etc.” “If this requirement is adapted you will definitely see a decline in the number of providers/facilities who are willing to provide infant care. It would just be another reason for not doing so.” “Delete regularly and add every 10 to 15 minutes. Delete monitor in the room. Best practice is to physically check on the child every 10 to 15 minutes.”

Response: The Department believes in the importance of checking on infants regularly, which could include every 10 to 15 minutes. It is important for providers to visually check on infants to make sure their heads are not covered, their color is pink, and they are breathing. The proposed rule would allow for any type of monitor. This proposed change was supported by the Early Childhood Advisory Board and the Early Childhood Services Administrator.

Comment: “Around the mid-eighties, when Sherwin Nelson was Fire Inspector in Bismarck, existing Child Care Providers were grandfathered in with an exemption to the window height inside our bedrooms by putting a fixed object under the window.” “With the proposed changes to the Day Care Rules and Regulations, many providers in Bismarck, may be unable to meet the inspection requirements if their home was built prior to 1970 and there have been no window updates. With the current shortage of child care within the state of North Dakota, a change in the regulations seems unwarranted. There are many reasons why I feel the proposed changes should be dropped.

- 1) There is no federal requirements for fire inspection.
- 2) The legislature has spent many hours studying the day care situation, including hiring an outside group, in an attempt to alleviate the problem without finding a solution. Why would a change be made to the regulations which will make matters worse?
- 3) Unlicensed home day cares are opening throughout the state. These unlicensed day cares are easy to start up since they function without the Rules and Regulations imposed on licensed day care providers. One reason these day care providers may forego the licensing procedure would be the difficulty in meeting the requirements such as those demanded by fire inspection regulations.
- 4) Infant care is virtually impossible to obtain in the Bismarck area. I have received calls from prospective parents who are within the first trimester. Many parents are willing to pay the monthly day care fee to hold a position in order to ensure there will be child care available when baby arrives. This results in lower income parents being unable to compete for infant spots. People are breaking down and crying as they beg providers to take their child. Parents are also forced to split their children up, so they can obtain care.

Licensors review homes prior to licensing them, and they do drop in visits. A major infraction in the fire violation would be noticeable. “

Response: The Department appreciates this comment. The Department works to ensure that it has rules and regulations to ensure minimum health and safety standards are being

N.D. Admin. Code Chapters 75-03-07, 75-03-07.1, 75-03-08, 75-03-09, 75-03-10, 75-03-11
and 75-03-11.1
Summary of Comments
January 15, 2016

met while allowing programs the flexibility to develop their own policies and procedures to meet these requirements. The Department understands the concern for homes built before 1970. The rule is to address the need for initial and annual fire inspections for family and group providers regardless of the number of children they serve or the structure of the home. The Department has reached out to the fire marshal for the city of Bismarck and was informed that providers will be allowed to continue to use an 18" wide step that is mounted to the wall under a window that is not in compliance with the window height requirement of 44". The Department will make no change at this time.

Comment: 75-03-07-04(2)(d), 75-03-07.1-02(3)(a)(14) and (15), 75-03-08-10(4), 75-03-08-12(4). It would be helpful to include the ages 0-12 months so providers know the definition of an infant.

Response: The Department will make no change at this time as the definition of an infant is already defined in Early Childhood Services rules as "a child who is less than twelve months of age."

Comment: 75-03-07.1-09(1). "Add the HCP [health care plan] should be updated at least yearly".

Response: The Department will make no change at this time. The Department will consider the comment for future revisions.

Comment: 75-03-08-08.1(4)(b) and (e), 75-03-10-09, 75-03-10-09(21), 75-03-11-08(18). Add to the appropriate rule chapters "which requires immediate medical", "Fire or other natural disasters that occur in or on...", and "breast milk feed to the wrong infant".

Response: The Department will make no change at this time. The Department will consider the comment for future revisions.

Comment: 75-03-11.1-08.4(3)(c). "Change problems to needs".

Response: The Department appreciates this comment. The Department will consider the comment for future revisions as the change would also need to occur in 75-03-10-12(2)(c).

Comment: 75-03-11.1-18(10). Change "eadily" to "easily".

Response: The Department appreciates this comment. The current rule is "[b]ooks and other toys that are not readily cleanable must be sanitized as much as possible without

N.D. Admin. Code Chapters 75-03-07, 75-03-07.1, 75-03-08, 75-03-09, 75-03-10, 75-03-11 and 75-03-11.1
Summary of Comments
January 15, 2016

damaging the integrity or educational value of the item.” Department will make no change at this time as the rule uses “readily” and not “easily” and “readily” is commonly defined as “quickly and easily”.

Comment: 75-03-11.1-22(2)(d). Add “and transportation”.

Response: The Department will make no change at this time. The need for parental permission for transportation is covered in section 75-03-11.1-15.

Prepared by:

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

In Consultation with: Rebecca Eberhardt, Early Childhood Services

January 15, 2016

cc: Rebecca Eberhardt, Early Childhood Services

MEMO

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Becky Eberhardt, Early Childhood Services Administrator, Children and Family Services

RE: Regulatory Analysis of Proposed North Dakota Administrative Code chapters 75-04-07, 75-03-07.1, 75-03-08, 75-03-09, 75-03-10, 75-03-11, 75-03-11.1.

DATE: October 23, 2015

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to proposed amendments to North Dakota Administrative Code chapters 75-03-07.1, 75-03-08, 75-03-09, 75-03-10, 75-03-11, 75-03-11.1. These amendments are not anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

Purpose

Most of the proposed amendments are required as a response to the reauthorization of the Child Care and Development Block Grant Act of 2014 (CCDBG) and a change to N.D.C.C. chapter 50-11.1 during the 2015 Legislative. A review of the proposals was completed by, and guidance was provided by, the Early Childhood Advisory Board.

Classes of Persons Who Will be Affected

In-home providers, self-declared child care providers, and operators of family, group, center, preschool, and school age early childhood service programs will be affected.

Probable Impact

Providing updates and clarification will positively impact In-home providers, self-declared child care providers, and operators of family, group, center, preschool, and school age early childhood service programs. Updates to fire inspections will assist in consistence across family, group, center and preschool rules and at a more local level to ensure a safe environment for children in early childhood services. The inclusion of monitors in rooms where infants are sleeping will assist in supervision and monitoring. Adding new rules to address aquatic activities will assist providers in delivering safe, consistent, and quality service to children and families. In addition, the federal government requires states to

implement PL 113-186, The CCDBG Act of 2014, this law requires states to update early childhood services licensing rules. These proposals do not represent a significant impact to providers.

Probable Cost of Implementation

There are minimal expected costs to In-home providers, self-declared child care providers, and operators of family, group, center, preschool, and school age early childhood service programs. Programs that provide care to infants may have to purchase a monitor if they do not have one. Family and group providers may have to pay an annual fire inspection fee. The increase in fingerprint based background checks will not cost the providers as DHS will be covering this added cost.

The projected costs for DHS associated with the proposed amendments will be the regular rulemaking costs of publishing and mailing notices and printing of new rule books. DHS is also covering the associated cost of background checks requirements that are laid out in CCDBG Act 2014. The cost to the department for a background check is \$12.75; BCI covers \$30/each. Fingerprint background checks have increase three times from the 2011-2013 biennium to the 2013-2015 biennium and are projected to continue to increase as the number of people needing to have a fingerprint background check completed increases.

Consideration of Alternative Methods

The division suggests no alternative methods, because the department is required to update rules at this time, based on federal law and statutory changes.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Becky Eberhardt, Early Childhood Services Administrator, Children and Family Services Division

DATE: October 23, 2015

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code chapters 75-03-07, 75-03-07.1, 75-03-08, 75-03-09, 75-03-10, 75-03-11, 75-03-11.1

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 proposed amendments to N.D. Admin. Code chapters 75-03-07, 75-03-07.1, 75-03-08, 75-03-09, 75-03-10, 75-03-11, 75-03-11.1. Federal law does mandate some of the proposed rules, and state law does mandate some of the proposed changes.

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 minimum standard of compliance have been established to ensure safe care for children enrolled in early childhood services programs. Less stringent standards have not been considered as the majority of the changes are in response to the reauthorization of the Child Care and Development Block Grant Act of 2014 and chapter 50-11.1 during the 2015 Legislative Session.

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 requirements. 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

Yes, simplification of compliance reporting methods has been considered. The annual requirements that providers need to submit have been determined to be necessary for assuring safe care for the children enrolled in early childhood services programs.

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. There may be operational standards such as policy updates that would need to be addressed due to the rule updates.

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

There are no exemptions contained in the proposed rules.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Becky Eberhardt, Early Childhood Services Administrator, Children and Family Services

DATE: October 21, 2015

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendment to N.D. Admin. Code chapters 75-03-07, 75-03-07.1, 75-03-08, 75-03-09, 75-03-10, 75-03-11, 75-03-11.1.

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 a proposed amendment to N.D. Admin. Code chapters 75-03-07, 75-03-07.1, 75-03-08, 75-03-09, 75-03-10, 75-03-11, 75-03-11.1. Some of the proposed rules are mandated by federal law and others are not. 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 in-home providers, self-declared providers, licensed family, group, center, preschool, and school-age program operators.

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

2. Costs For Compliance

Administrative and other costs required of these entities for compliance with the proposed amendments are expected.

The cost to the department for a background check is \$12.75; BCI covers \$30/each. Fingerprint background checks have increase three times from the 2011-2013 biennium to the 2013-2015 biennium and are projected to continue to increase as the number of people needing to have a fingerprint background check completed increases.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rules could be \$15-\$300. This cost would be to include the purchase of a monitor to be in the room with sleeping infants. There is the possible cost of a fire inspection done annually for family and group licensed providers. Not all fire inspections are charged to the provider it depends on the city or county. The State fire marshal has stated that the State does not charge to complete fire inspections.

4. Probable Effect on State Revenue

The probable effect on state revenue is expected because of the increase in the background checks that are being completed and the departments commitment to cover the cost.

5. Alternative Methods

Most of the proposed revisions are required in response to the reauthorization of the Child Care and Development Block Grant Act of 2014 and a change made to N.D.C.C. chapter 50-11.1 during the 2015 Legislative Session. The division suggests no alternative methods at this time.

FISCAL IMPACT OF ADMINISTRATIVE RULE

EARLY CHILDHOOD SERVICES

Passage will significantly expand the number of fingerprint background checks required for early childhood providers. All early childhood staff will be required to be fingerprinted. Prior to the new administrative rule, only staff that have lived outside of North Dakota in the last 10 years were required to be fingerprinted. It is anticipated this will result in an additional 6,110 background checks that will need to be completed during the 2015-2017 biennium. One additional full time staff is needed to complete the background checks in a timely matter.

6,110 background checks (\$12.75/check):	\$ 77,902.50
one full-time staff	\$ 124,092.00
Total Fiscal Impact:	<u>\$ 201,994.50</u>



Jack Dairymple, Governor
Maggie D. Anderson, Executive Director

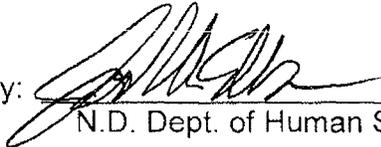
TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code chapters 75-03-07, 75-03-07.1, 75-03-08, 75-03-09, 75-03-10, 75-03-11 and 75-03-11.1.

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 23rd day of October, 2015.

by: 
N.D. Dept. of Human Services

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

N.D. Admin. Code Chapter	)	<u>REPORT OF THE</u>
75-03-14, 75-03-16, and 75-03-36,	)	<u>DEPT. OF HUMAN SERVICES</u>
Family Foster Home for Children,	)	March 14, 2016
Licensing of Group Homes and)	
Residential Child Care Facilities,)	
and Licensing of Child-Placing)	
Agencies)	
(Pages 336-350 and 399-402))	

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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 75-03-14, 75-03-16, and 75-03-36 are not related to statutory changes made by the Legislative Assembly.
2. These rules are related to changes in a federal statute or regulation, specifically P.L. 113-183, Preventing Sex Trafficking and Strengthening Families Act.
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 9, 2015. The record was held open until 5:00 p.m. on December 21, 2015, to allow written comments to be submitted. Four individuals attended the public hearing and one comment was provided. Three written comments were received within the comment period. 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 \$2,461.10.
6. The proposed rules amend chapters 75-03-14, 75-03-16 and 75-03-36. The following specific changes are made:

Section 75-3-14-01. Section 75-03-14-01 is amended to add the definition of reasonable and prudent parent standard in response to P.L. 113-183, Preventing Sex Trafficking and Strengthening Families Act.

Section 75-03-14-03. Section 75-03-14-03 is amended to allow for additional flexibility of where water samples can be

tested.

Section 75-03-14-04. Section 75-03-14-04 is amended to add the federal requirements of P.L. 113-183, Preventing Sex Trafficking and Strengthening Families Act, regarding foster parents and potential foster parents demonstrating a working knowledge of the reasonable and prudent parent standard and to require all foster parents to engage in the reasonable and prudent parent standard.

Section 75-03-14-04.1. Section 75-03-14-04.1 is amended to clarify language, to create consistency across chapters 75-03-14, 75-03-16, 75-03-17, and 75-03-36 regarding criminal background checks, and to allow the Department to discontinue processing a request for criminal background check for any individual who provides false or misleading information.

Section 75-03-14-08. Section 75-03-14-08 is amended to create consistency regarding excusing fingerprinting requirements across chapters 75-03-14, 75-03-16, 75-03-17, and 75-03-36.

Section 75-03-16-01. Section 75-03-16-01 is amended to clarify the definition of facility and to add a definition of reasonable and prudent parent standard in response to P.L. 113-183, Preventing Sex Trafficking and Strengthening Families Act.

Section 75-03-16-05. Section 75-03-16-05 is amended to remove behavior management and crisis management from the list of trainings documented in an employee's file and to correct the use of a conjunction and punctuation.

Section 75-03-16-06. Section 75-03-16-06 is amended to ensure that facilities will have at least one employee who is responsible to meet the P.L. 113-183, Preventing Sex Trafficking and Strengthening Families Act, requirements of reasonable and prudent parent standard.

Section 75-03-16-10.1. Section 75-03-16-10.1 is created to require a residential child care facility to provide for a licensed nurse to accommodate the medical needs of children in placement onsite and to establish policy.

Section 75-03-16-12.1. Section 75-03-16-12.1 is amended to clarify language, to create consistency across chapters 75-03-14, 75-03-16, 75-03-17, and 75-03-36 regarding criminal background checks, to allow the Department to discontinue processing a request for criminal background check for any individual who provides false or misleading information, to address policy requirements for criminal histories on current employees and nonemployees, and to create consistency regarding excusing fingerprinting requirements across chapters 75-03-14, 75-03-16, 75-03-17, and 75-03-36.

Section 75-03-16-13. Section 75-03-16-13 is amended to lower the staff-to-child ratios, to add a requirement for a residential child care facility to provide onsite nursing services, and to require a facility to notify the Department if minimum employee-to-child ratios are not met.

Section 75-03-16-14. Section 75-03-16-14 is amended to clarify language, to create consistency in terms used throughout chapter 75-03-16, to require classroom trainings for four of the identified trainings, and to require training

documentation and retention to maintain safety and wellbeing for children in placement.

Section 75-03-16-15. Section 75-03-16-15 is amended to clarify language, to add a corrective action notification requirement, and to require policy development regarding child abuse and neglect situations.

Section 75-03-16-16. Section 75-03-16-16 is amended to clarify language, to clarify the admission and discharge procedures, and to add a requirement for the facility to develop an intake screening process.

Section 75-03-16-31. Section 75-03-16-31 is amended to clarify the need for facilities to develop and implement a facility improvement plan.

Section 75-03-16-32. Section 75-03-16-32 is created to specify the normalcy activity policy documentation requirements.

Section 75-03-36-01. Section 75-03-36-01 is amended to add the definitions of authorized agent and Department.

Section 75-03-36-12. Section 75-03-36-12 is amended to remove the duplicate language regarding the excuse of fingerprints if unusable prints occur.

Section 75-03-36-13. Section 75-03-36-13 is amended to clarify language, to create consistency across chapters 75-03-14, 75-03-16, 75-03-17, and 75-03-36 regarding criminal background checks and to when an offense is known, and to address criminal background check policy requirements.

Section 75-03-36-14. Section 75-03-36-14 is amended to clarify that volunteers are required to have criminal

background checks and to remove unnecessary language.
Section 75-03-36-26. Section 75-03-36-26 is amended to allow agencies to make a legal risk adoption placement into a home beyond thirty days.

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. These rules are not expected to have a fiscal impact on state revenues and expenditures, including on any funds controlled by the Department.
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
Legal Advisory Unit
North Dakota Department of Human Services
March 10, 2016



Legal Advisory Unit

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Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

SUMMARY OF COMMENTS RECEIVED REGARDING PROPOSED AMENDMENTS TO N.D. ADMIN. CODE CHAPTERS 75-03-14, 75-03-16 AND 75-03-36 FAMILY FOSTER HOME FOR CHILDREN, LICENSING OF GROUP HOMES AND RESIDENTIAL CHILD CARE FACILITIES AND LICENSING OF CHILD-PLACING AGENCIES

The North Dakota Department of Human Services (the Department) held a public hearing on December 9, 2015, in Bismarck, ND, concerning the proposed amendment to N.D. Administrative Code chapters 75-03-14, 75-03-16 and 75-03-36, Family Foster Home for Children, Licensing of Group Homes and Residential Child Care Facilities and Licensing of Child-Placing Agencies.

Written comments on these proposed amendments could be offered through 5:00 p.m. on December 21, 2015.

Four individuals attended the public hearing and one comment was provided. Three written comments were received within the comment period. The commentors were:

1. Paul & Carla Bjornson, 610 10th St NW, Devils Lake ND 58301-1747
2. Julie Mehlhoff, Hope Home, 7301 Keepsake Ln, Bismarck ND 58504
3. Kelsey Bless, 600 E Boulevard Ave Dept 325 Bismarck ND 58505
4. Jim Vetter, Dakota Boys & Girls Ranch, 1227 N 35th St, Bismarck ND 58501

SUMMARY OF COMMENTS

Comment: 75-03-14-01(3) adds the "Reasonable and prudent parent standard". We proposed that clarification be provided allowing children in foster care to spend the night at a responsible adult's home, at the discretion of the foster family and licensing agency. We believe that "encouraging the emotional and developmental growth of the child participating in extracurricular, enrichment, cultural and social activities" should allow for this to occur. It would definitely encourage emotional and developmental growth to allow children in care the opportunity to expand healthy relationships with their peers. If this is allowed, we would of course provide adequate notice and contact information to the supervising agency.

Response: The Department appreciates this comment. No change is necessary as the reasonable and prudent parent standard would allow such opportunity for normalcy. The expectations from the custodian for foster parent engagement in the reasonable and prudent parent standard should be discussed during child placement.

Comment: "Another thing to work on in future changes would be to make obtaining respite care easier for foster parents. We would appreciate more flexibility in coordinating that on

our own.” “We would appreciate being able to choose where the children go when we request respite care. The children, when exposed to differing parenting styles for a weekend, can come back to us with very negative behaviors. These behaviors can be so disruptive that it makes it not worthwhile to give ourselves the break. We work hard to help the children get past their negative behaviors on a daily basis. Once we find a respite care provider that minimizes disruption to a child’s progress, we would appreciate being able to use them at our discretion, rather than taking a chance on who the supervising agency chooses.”

Response: The Department appreciates this comment. No change is necessary. If a foster family is in need of substitute care it is appropriate to work with the child’s custodian to inform them of your wishes and see if there is an opportunity to make such arrangements with a licensed or approved provider. Therapeutic foster families have a different standard as they have a pool of licensed providers within the PATH agency. It would be important to develop relationships with the agency to determine when it might be appropriate to “choose” your own licensed provider to care for the child in your absence.

Comment: 75-03-16-01(4). The definition of facility should be amended to reflect that a group home consists of 4 to 12 children.

Response: The Department has made this change.

Comment: If changes are made to 75-03-16-12.1(4) that the same changes are made to 75-03-14-04.1(4) in an effort to be consistent regarding the discontinue processing a request for a criminal background check.

Response: The Department appreciates this comment. No change is necessary.

Comment: If changes are made to 75-03-16-12.1(7) that the same changes are made to 75-03-36-13(8) in an effort to be consistent and replace “facility” with “agency” in 75-03-36-13(8).

Response: No change is necessary to 75-03-16-12.1(7). Department has made the change replacing “facility” with “child-placing agency” in 75-03-36-13(8).

Comment: 75-03-16-01(4). “[I]s there any difference in the rules that relate to a facility versus group home?”

Response: No change is necessary. The term “facility” is inclusive of both residential child care facilities and group homes; both levels are required to be in full compliance with chapter 75-03-16. Proposed rule 75-03-16-10.1 would require a residential child care facility (thirteen

or more beds) to have a nurse onsite, that standard would not be required for a group home licensed for four, but no more than twelve beds.

Comment: Would it still be a reimbursable expense if a group home has a nurse?

Response: No change is necessary. Yes, nursing services are reimbursable under 75-03-15, ratesetting for providers of services to foster children – group homes and residential child care facilities.

Comment: 75-03-16-12.1(4). “[W]ould it be considered false or misleading if [an employee] left it blank? Is that different than if they wrote something in there that was inaccurate because we have some people that don’t write anything in there then that gets kicked back and they write the right information but we also have people that write the wrong information and that gets kicked back so does leaving it blank considered to be misleading in the fact that would that get it stopped.”

Response: No change is necessary. The proposed rule would allow the Department to discontinue processing a request for a criminal background if additional information, not noted on the application, is identified. If paperwork is not complete when submitted, the forms are immediately returned to the employer or the licensing agency.

Comment: 75-03-16-12.1(7). “[I]s there an intent or what happens if they are arrested and with waiting trial does that fall into the rules for this one?” “We’re talking about is if I have someone that’s just arrested and they’ve never been tried into court and they get fired or we let them go they come back at us and say well I was found innocent of this so I was wrongfully discharged and it becomes quit messy so um so is it our decision or is it the department’s decision whether they can or can’t work for us.” If an individual is arrested, does the Department or the facility make the employment decision?

Response: The Department appreciates this comment. No change is necessary as the proposed rule does not apply to an individual awaiting trial. The proposed rule does not prohibit a facility from establishing a policy addressing additional situations or making the employment decision. The Department would not make the employment decision.

Comment: 75-03-16-15(5). “[M]y request basically be if we could look at some language in there where it says the facility shall notify the department licensing administrator in writing of the corrective action the facility has taken, is there for me it would sound, no it’s public opinion the facility shall provide a written response to the department licensing administrator um I get, the word notify confuses us sometimes as to what you want, so if you it would say is notify a phone call but it also says written in there again but in my public opinion I would think

N.D. Admin. Code Chapters 75-03-14, 75-03-16 & 75-03-36
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if we had like the facility shall provide a written response to the department licensing administrator of the correct action so on and so forth it just I think if you state up front that it's written response is what you want it would be more helpful of the providers than just to say notify."

Response: No change is necessary as the proposed rule requires the notification to be in writing.

Comment: 75-03-16-32(1). "Is the intent of number 1 that these duties be in everyone's jobs descriptions or the designated person to be our normalcy coordinator?"

Response: No change is necessary as the duties only need to be part of the job description of the employee(s) who is designated to carry out the duties of the reasonable and prudent parent standard.

Comment: 75-03-16-32(1). "[I]s there a way earlier in the language it says we have to identify a person that's the normalcy coordinator. Is there a way that this number one could clarify that, it is that person, that employee?"

Response: No change is necessary as 75-03-16-32(1) addresses the requirement of a written policy detailing the job description related to the carrying out the duties of the reasonable and prudent parent standard. 75-03-16-06(4) requires a facility to actually designate at least one employee who is authorized to apply the reasonable and prudent parent standard and training requirements.

Prepared by:

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

In Consultation with: Kelsey Bless, Children & Family Services

January 15, 2016

cc: Kelsey Bless, Children & Family Services

MEMO

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Kelsey Bless, Permanency Administrator, Children and Family Services.

RE: Regulatory Analysis of Proposed North Dakota Administrative Code chapter (N.D.A.C.) 75-03-14, N.D.A.C 75-03-16 and N.D.A.C 75-03-36.

DATE: July 31, 2015

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 75-09.1. These amendments are not anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

Purpose

The purpose of N.D.A.C 75-03-14 is to provide standards of compliance for Licensing Foster Homes across the state of North Dakota. The proposed amendments are to provide updates and clarification to the rule since the last update (January 2014) and offer consistency across three Children & Family Service program areas for criminal conviction of potential foster parents, adoptive parents, and employees of agencies or facility working with foster youth.

The purpose of N.D.A.C. 75-03-16 is to provide standards for Licensing Group Homes and Residential Child Care Facilities across the state of North Dakota. The proposed amendments are to provide updates and clarification to the rule since the last update (July 2014) and offer consistency across three Children & Family Service program areas for criminal conviction of potential foster parents, adoptive parents, and employees of agencies or facility working with foster youth.

The purpose of N.D.A.C. 75-03-36 is to provide standards of compliance for Licensing of Child Placing Agencies across the state of North Dakota. The proposed amendments are to provide updates and clarification to the rule since the last update (January 2012) and offer consistency across three Children & Family Service program areas for criminal conviction of potential foster parents, adoptive parents, and employees of agencies or facility working with foster youth.

Classes of Persons Who Will be Affected

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

1. Foster Families
2. Adoptive Families
3. Group Homes and Residential Child Care Facilities (RCCF)
4. Licensed Child Placing Agencies (LCPA)

It is intended that licensing agents working to license county foster and adoptive homes, RCCF, and LCPA providers will receive the clarification needed to provide quality and consistent service across the state. In addition, consistent regulation and standard in order to be a licensed provider or employee for the licensed agency.

Facilities will be benefitted by the further clarification; it is not intended that facilities be negatively affected by the proposed amendments. However, facilities will need to revise policy and may have to adjust their way of training employees, how they document and update their employee, nonemployee, and child files, and their staff – to – child ratio to meet a new standard for children in placement.

Probable Impact

Providing updates and clarification will positively impact Family Foster Homes for Children across the state. Necessary updates to water testing will assist providers in meeting the standard timely and at a more local level to ensure a safe environment for children in placement. In addition, the federal government requires states to implement PL 113-183 “Preventing Sex Trafficking and Strengthening Families Act”, this law requires states to train and incorporate the reasonable and prudent parent standard where providers would offer normalcy to children in placement. The federal definition and standards have been added to family home licensing.

Providing updates and clarification will positively impact RCCF’s across the state. Hiring employees will be consistent with their peers and will support the dual licensure efforts of some of the RCCF’s who are also PRTF licensed by NDDHS. The intent is that the PRTF rule will also be updated to accommodate the consistency for employability in these facility settings. Necessary updates and clarification to rule will assist providers in delivering safe, consistent, and quality service to children and families. In addition, the federal government requires states to implement PL 113-183 “Preventing Sex Trafficking and Strengthening Families Act”, this law requires states to train and allow foster care providers to engage in reasonable and prudent parent standards while requiring one employee to be appointed to the training and maintain of “normalcy” within the group home/facility setting. The federal definition and standards have been added to family home licensing.

Providing updates and clarification will positively impact LCPA’s across the state. Necessary updates and clarification to rule will assist providers in delivering safe, consistent, and quality service to children and families.

Probable Cost of Implementation

There are minimal expected costs to group home and residential child care facilities as majority of the RCCF's are already meeting the staff-to-child ratio of 1 to 6 children. There are occasions when a RCCF has 1 staff on with 8 children today; however that meets the minimum standard of NDAC 75-03-16 as it reads today, the RCCF understand that is not best practice and does not always a safe alternative for the children in placement. Lowering the staff-to-child ratio may cost facilities more money to maintain enough staff on each shift, but will not be significant to what Rate Setting NDAC 75-03-15 and reimbursement is to the RCCF providers today.

The projected costs for DHS associated with the proposed amendments would be newspaper advertisements (\$2500) to inform the community of the N.D.A.C 75-03-14, N.D.A.C 75-03-16, and N.D.A.C 75-03-36 amendment process as well as a mailing to inform foster parents, adoptive parents, County Social Services, Division of Juvenile Services, Tribal Social Services, eleven RCCF's, and five LCPA's of the process (\$500).

Consideration of Alternative Methods

The Department cannot consider no amendment to N.D.A.C 75-03-14 and N.D.A.C 75-03-16 rules as there are federal requirements that must be met in our state standards for licensing.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Kelsey Bless, Permanency Administrator, Children and Family Services.

DATE: July 31, 2015

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D.A.C. 75-03-14, N.D.A.C 75-03-16 and N.D.A.C 75-03-36.

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.A.C. 75-03-14, N.D.A.C 75-03-16 and N.D.A.C 75-03-36.

The proposed rule do include changes mandated by federal law; both N.D.A.C 75-03-14 and N.D.A.C 75-03-16 has language incorporated to meet the requirements of PL 113-183 "Preventing Sex Trafficking and Strengthening Families Act" as it pertains to reasonable and prudent parent standards and offering "normalcy" to children in placement.

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 minimum standard of compliance has been established to ensure appropriate licensing of family foster homes, group homes and residential child care facilities (RCCF's), and licensed child placing agencies (LCPA's). Less stringent standards have been considered and established in writing initial rule in 1987 and amended in 1999 as a variance. The Department advocates to keep this option for facilities as older facility buildings and diverse programming allows for the Department to grant a variance. Currently, there are three facilities that use the variance option and Children and Family Services does support this accommodation (ex: buildings and grounds for bathroom or bedroom floor plans in older facility structures).

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

N/A

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

N/A

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

The minimum standard of compliance has been established to ensure appropriate licensing of family foster homes, group homes and residential child care facilities (RCCF's), and licensed child placing agencies (LCPA's) who all partner with Children and Family Services and the Department. North Dakota requires that all family foster or adoptive homes and RCCF's are visited annually for an onsite review to ensure the environment is meeting minimum standards to care for children in placement.

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

It is expected that all providers will meet the minimum standard of compliance set forth in N.D.A.C. 75-03-14, N.D.A.C 75-03-16 and N.D.A.C 75-03-36 to ensure safety of any child cared for or placed by a custodial agency or private provider. Children and Family Services would recommend that the option of variance continues as it does assist older facility buildings in meeting the needs of children. Current variances are building and grounds accommodations of bathroom establishments and the bedroom structure (PLC). These granted variances do not offer concern to Children and Family Services for the safety and wellbeing of the children when residing in the facility. The facilities have created appropriate accommodations and adjustments to meet the needs of residents.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Kelsey Bless, Permanency Administrator, Children and Family Services

DATE: July 31, 2015

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D.A.C. 75-03-14, N.D.A.C 75-03-16 and N.D.A.C 75-03-36.

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.A.C 75-03-14, N.D.A.C 75-03-16 and N.D.A.C 75-03-36 rules. The proposed rule adjustments do include changes mandated by federal law; both N.D.A.C 75-03-14 and N.D.A.C 75-03-16 has language incorporated to meet the requirements of PL 113-183 "Preventing Sex Trafficking and Strengthening Families Act" as it pertains to reasonable and prudent parent standards and offering "normalcy" to children in placement. The proposed rules should not have an adverse economic impact on small entities.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the amended rules are:

- *Foster Families*
- *Adoptive Families*
- *Group Homes and Residential Child Care Facilities (RCCF)*
- *Licensed Child Placing Agencies (LCPA)*

The following small entities may also be subject to the rule:

- *Psychiatric Residential Treatment Facilities (PRTF) as there is a need to engage in consistency for criminal conviction of employees for a RCCF and PRTF. At this time, NDDHS is paying for two background checks for one employee who may be cross trained to work at a PRTF and a RCCF lead by the same agency. For example; Dakota Boys & Girls Ranch.*

2. Costs For Compliance

The administrative and other costs required for compliance with the proposed rule are expected to be: *Little cost increase to group homes or residential child care facilities for adjusting their schedules of direct care staff working with children in placement. The staff-to-child ratio will change to 1:6 rather than 1:8, most RCCF's are already staffing 2 staff at all times to maintain safety for staff and children in placement as well as accommodate transportation needs for children in placement to attend meetings, therapy, school, etc.*

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule: *N/A*

The probable benefit to private persons and consumers who are affected by the proposed rule: *A benefit of the changes to rules are N.D.A.C. 75-03-14 and N.D.A.C 75-03-16 will provide clear expectation to meet regulations specific to reasonable and prudent parent standards and allowing providers the ability to offer normalcy activities to children in placement.*

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: *Increase, at this time NDDHS is paying for two CBCU criminal background checks for RCCF and PRTF employees. There are two agencies in ND who are dual licensed by NDDHS as a PRTF and RCCF. These facilities are held to different criminal conviction standards, so both levels need to be fingerprint based background checked.*

Costs for printing and dissemination of amended rules will be provided by the foster care administrative budget.

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. Those alternatives included: *Federal regulations require the implementation of the reasonable and prudent parent standard language. However, continuing to license existing foster parents, RCCF employees, and LCPA employees could occur with the existing rule based on criminal conviction sections all reading differently; this is not seamless for the Criminal Background Check Unit, it is not consistent for Providers, and offers an issue of dual fingerprinting for the dual licensed RCCF and PRTF's in ND. The alternatives were not selected because updates and clarification to rules are necessary.*



Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code chapters 75-03-14, 75-03-16
and 75-03-36.

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 31st day of July, 2015.

by: 
N.D. Dept. of Human Services

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

N.D. Admin. Code Chapter	)	<u>REPORT OF THE</u>
75-03-17, Psychiatric Residential)	<u>DEPT. OF HUMAN SERVICES</u>
Treatment Facilities for Children)	March 14, 2016
(Pages 351-379))	
)	

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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 75-03-17 are necessary to comply with 2015 Senate Bills Nos. 2046 and 2047.
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 14, 2015. The record was held open until 5:00 p.m. on December 24, 2015, to allow written comments to be submitted. Ten individuals attended the public hearing and two comments were provided. Three written comments were received within the comment period. 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 \$2,321.84.
6. The proposed rules amend chapter 75-03-17. The following specific changes are made:
Section 75-03-17-01. Section 75-03-17-01 is amended to add the definition of "employee" and "nonemployee" to be consistent with chapter 75-03-16; to modify the definition of "person with a mental illness" to include people first language; to modify the definition of "clinical supervision," "diagnostic assessment," "individual person-centered treatment plan," "serious occurrence" and "special treatment procedures"; to remove the definition of "qualified mental health professional" in response to Senate Bill No. 2047; and to remove the definition of "mental health professional," "out-based activity" and

“solo activity.”

Section 75-03-17-02. Section 75-03-17-02 is amended to remove “qualified mental health professionals” and “mental health professional” in response to Senate Bill No. 2047 and added “or contracting with” in response to a comment to ensure all professionals working with children are licensed.

Section 75-03-17-03. Section 75-03-17-03 is amended to further establish the role of the Department in licensing; to ensure the quality of services; accessibility of policies and procedures; and to create consistency with chapter 75-03-16 in regards to outcomes and data collection.

Section 75-03-17-04. Section 75-03-17-04 is amended to clarify the admission process and to provide a non-discrimination statement consistent with chapter 75-03-16.

Section 75-03-17-05. Section 75-03-17-05 is amended to reduce the time period to provide a progress report; to clarify the requirements of information included in an individual person-centered treatment plan; to clarify who must develop an individual person-centered treatment plan; to remove language in response to Senate Bill No. 2047; to remove outdated language regarding diagnostic and statistical manual of mental disorders; and to add screening for brain injury and fetal alcohol spectrum disorder.

Section 75-03-17-06. Section 75-03-17-06 is amended to ensure compliance with title 42, Code of Federal Regulations, part 483 by adding a requirement that the facility inform the identified individuals on its policies regarding restraint and seclusion procedures; to update outdated language regarding the use of “staff”; to allow for an identified professional to order the use of

physical restraint or seclusion and to ensure that a physician will review and sign the physical restraint or seclusion order; to clarify and require the facility to perform certain procedures after the use of seclusion or physical restraint to ensure compliance with title 42, Code of Federal Regulations, part 483, sections 366 and 370; and to amend reporting requirements to add inappropriate sexual contact.

Section 75-03-17-07. Section 75-03-17-07 is amended to update outdated language regarding the use of "staff".

Section 75-03-17-10. Section 75-03-17-10 is amended to update outdated language regarding the use of "staff", "volunteers", and "interns"; to add a requirement for training on institutional child abuse and neglect; to add a requirement for certification to document competencies to ensure compliance with title 42, Code of Federal Regulations, part 483, section 376; and to add the use of positive behavior supports to the child person-centered treatment plan.

Section 75-03-17-12. Section 75-03-17-12 is amended to clarify a facility's responsibilities and procedures regarding discharge and to ensure compliance with discharge planning standards located in title 42, Code of Federal Regulations, part 441, section 155.

Section 75-03-17-14. Section 75-03-17-14 is amended to update outdated language regarding the use of "staff", "volunteers", and "interns".

Section 75-03-17-15. Section 75-03-17-15 is amended to update outdated language regarding the use of "staff".

Section 75-03-17-16. Section 75-03-17-16 is amended to update outdated language regarding the use of "staff"; to require certain

policies to apply to nonemployees; to remove the criminal background check process information; to establish employee and nonemployee individual file documentation requirements; and to create greater consistency with chapter 75-03-16.

Section 75-03-17-16.1. Section 75-03-17-16.1 is amended to update outdated language regarding the use of "staff", "interns", "volunteers", and "student placement workers".

Section 75-03-17-16.2. Section 75-03-17-16.2 is created to reinsert the criminal background check process information that was removed from section 75-03-17-16; amended to ensure consistency with chapter 75-03-16; to establish that an individual is not sufficiently rehabilitated until any term or probation, parole, or other form of community corrections has elapsed; to allow the Department to discontinue processing a request for criminal background check for any individual who provides false or misleading information; to establish the criteria as to when an offense is known; to require a facility to have policy regarding criminal histories; and to establish the ability for the Department to excuse a person from providing fingerprints.

Section 75-03-17-17. Section 75-03-17-17 is amended to update outdated language regarding the use of "staff" and "volunteers".

Section 75-03-17-18. Section 75-03-17-18 is amended to update outdated language regarding the use of "staff".

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. These rules are not expected to have a fiscal impact on state revenues and expenditures, including on any funds controlled by the Department.
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:

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March 10, 2016



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Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

SUMMARY OF COMMENTS RECEIVED REGARDING PROPOSED AMENDMENTS TO N.D. ADMIN. CODE CHAPTER 75-03-17 PSYCHIATRIC RESIDENTIAL TREATMENT FACILITIES FOR CHILDREN

The North Dakota Department of Human Services (the Department) held a public hearing on December 14, 2015, in Bismarck, ND, concerning the proposed amendment to N.D. Administrative Code chapter 75-03-17, Psychiatric Residential Treatment Facilities for Children.

Written comments on these proposed amendments could be offered through 5:00 p.m. on December 24, 2015.

Ten individuals attended the public hearing and two comments were provided. Three written comments were received within the comment period. The commentors were:

1. James Jacobson - DHS, 600 E Boulevard, Bismarck ND 58505
2. Denise Harvey, Program Dir. ND Protection and Advocacy Project, 400 East Broadway Suite 409, Bismarck ND 58501
3. Elizabeth Faust, MD, Blue Cross Blue Shield North Dakota, 4510 13th Ave S, Fargo ND 58121
4. Jim Vetter, Dakota Boys & Girls Ranch, 1227 N 35th St, Bismarck ND 58501
5. Courtney Koebele, North Dakota Medical Association, 1622 E Interstate Ave, Bismarck, ND 58503

SUMMARY OF COMMENTS

Comment: 75-03-17-01(3). “Clinical Supervision” means the oversight responsibility for individual treatment plans and individual service delivery provided by appropriately trained and licensed professionals employed by or under contract with the facility.

Response: The Department has revised this provision to state, “Clinical supervision” means the oversight responsibility for individual treatment plans and individual service delivery.”

Comment: 75-03-17-01(11). The definition of “Mental health professional” should be eliminated and all other sections of the proposed rule should be amended accordingly.

Response: The Department agrees with this comment and has revised 75-03-17-01, 75-03-17-02, 75-03-17-05, and 75-03-17-06 accordingly. Due to the elimination of “mental health professional”, the Department has added “or contracting with” in section 75-03-17-02 to ensure all professionals working with children are licensed. The Department has added

specific disciplines to 75-03-17-05 and 75-03-17-06 that would ensure compliance with State law.

Comment: 75-03-17-01(13) and (19). The definitions of “Out-based activity” and “Solo activity” should be eliminated. The regulated community identified agreement with this proposed change. This change would also require changes in all other affected sections of the proposed rules.

Response: The Department agrees with this comment and has removed the proposed definition of “Out-based activity” and “Solo activity” from the proposed rules and has amended all other affected sections of the proposed rules.

Comment: 75-03-17-04. Should the proposed language be modified or eliminated since the Department is responsible for licensure of the facility for all children served, regardless of source of payment?

Response: The Department has determined that the proposed “Certificate of need” section is not required in the proposed rules. During the course of review, the Department noticed that “or abuse” was not removed from 75-03-17-04(2)(a)(b) making it inconsistent with other proposed changes. The Department has revised this section accordingly and has reinserted existing language.

Comment: 75-03-17-05(3)(a). The elimination of the definition of “mental health professional” will require a change in the statement identifying responsibility for clinical supervision.

Response: The Department agrees with this comment and has revised 75-03-17-05 accordingly. The Department has added specific disciplines to 75-03-17-05 that would ensure compliance with State law.

Comment: Section 75-03-17-05(3)(b)(1)(b) should be changed to read “A licensed clinical social worker or licensed independent clinical psychiatric social worker...”

Response: Due to the elimination of the proposed rule regarding “Certificate of need”, subsection 3 of section 75-03-17-05 will be amended to identify the specific disciplines, licensed professionals, that would be appropriate to provide clinical supervision for the development and implementation of the individual person centered treatment plan. This change also supports the proposed amendments stay more consistent with the current rule and no longer supports the proposed amendments in subdivision 75-03-17-05(3)(b)(1)(a) and (b). Removing the proposed amendments to 75-03-17-05(3)(b)(1)(b) eliminates commentor’s concern.

Comment: 75-03-17-06(3) and (4) will both require amending due to the reference to “mental health professional” and authority to authorize restraint or seclusion.

Response: Due to the elimination of “mental health professional” definition, the Department agrees with this comment and has amended the rules according. Amendments were made to ensure only qualified individuals can order restraints and seclusion and specific licensed disciplines were added. During the course of review, the Department noticed that the word “physical restraints” was inserted instead of the word “seclusion” in 75-03-17-06(4). The Department has replaced “physical restraints” with “seclusion”.

Comment: 75-03-17-04(4)(j) should be amended to read; “A child under special treatment procedures is provided the ~~same~~ similar diet that other children in the facility are receiving. This change is requested as there could be pre-existing diet considerations that have to still be implemented and would result in the fact that the child could not be provided the “same” diet as other children.

Response: The Department agrees and has made this change.

Comment: 75-03-17-04(9) should be amended to read: “Reporting requirements for serious occurrences that include a death, serious injury, or attempted suicide, exposure to inappropriate sexual contact, restraint, or seclusion.”

Response: The correct citation in the proposed rule is 75-03-17-06(9). The Department agrees and has revised this provision to state, “Reporting requirement for serious occurrences that include a death, serious injury, suicide attempt, inappropriate sexual contact, restraint, or seclusion.”

Comment: Section 75-03-17-04(9)(a)(3) should be amended to read; “The report must contain the information documented in 75-03-17-04(6)(a,b,c, and d) on any serious occurrence involving seclusion or restraint or any other serious occurrence involving a death, serious injury, attempted suicide or inappropriate sexual contact if seclusion or restraint preceded the occurrence. ~~on the use of any specialized treatment procedures for the child involved preceding the serious occurrence~~

Response: The correct citation in the proposed rule is 75-03-17-06(9)(a)(3). The Department agrees and has revised this provision to state, “The report must contain information identified in subsection 6 of this section on any serious occurrence involving seclusion or restraint or any other serious occurrence involving a death, serious injury, suicide attempt, or inappropriate sexual contact if seclusion or restraint preceded the occurrence.”

Comment: **75-03-17-01.** Definition of "Individual person-centered treatment plan" should be amended to state "means a written plan of intervention, treatment, and services that is developed under the clinical supervision of a mental health professional on the basis of a diagnostic assessment, and includes a youth-guided, family- driven plan."

Response: The Department agrees and has revised this provision to state, "Individual person-centered treatment plan" means a youth-guided and family-driven written plan of intervention, treatment, and services that is developed under clinical supervision on the basis of a diagnostic assessment.

Comment: 75-03-17-03(1)(b) should be amended as follows:

- b. Ensure that all policies and procedures required by this chapter are in writing and on file at the facility and are accessible to all staff employees, and residents; and families.

Response: The Department agrees and has revised this provision to state, "Ensure that all policies and procedures required by this chapter are in writing and on file at the facility and are accessible to all employees, family members, and residents;

Comment: **75-03-17-05(1)(g)(6)** should be amended as follows:

- (6) A brain injury screening and fetal alcohol disease disorder screening.

Response: The Department supports the addition of a screening for fetal alcohol spectrum disorders to be identified in a separate subdivision, not included with the brain injury screening. The Department has amended the proposed rule to state,

- "(7) A family and child substance use history to include substance use during pregnancy; and
- (8) A fetal alcohol spectrum disorder screening; and"

Comment: Section 75-03-17-04 should be amended as follows:

- 6. No child may be denied admission to a facility on the basis of race, color, creed, religion or national origin or disability-

(Note: this could be added to prevent concerns about discrimination and/or disability related discrimination, considering requirements of the Rehabilitation Act of 1973, the Americans with

Disabilities Act, and the state Human Rights Act. All prohibit discrimination based on disability. Perhaps the facilities admission policy could be place to address this.)

Response: The Department appreciates this recommendation and understands that it is not acceptable to discriminate on the basis of a disability. The Department would not support adding the term disability as the intent of a psychiatric residential treatment facility is to provide treatment for specific disabilities and the co-occurrence of other disabilities may eliminate the ability of an individual to benefit from or “respond to active psychotherapeutic intervention” which is also a requirement for admission based on current rule.

Comment: 75-03-17-06. The rule should be amended to require the reporting to be shorter, such as within 12 hours. The rule should be amended to reflect that all prone restraints are prohibited. The rule should be amended to eliminate the use of seclusion. What state laws are being referred to in 75-03-17-06(9)(d) as N.D.C.C. § 25-01.3-04 does not provide for exceptions regarding reporting?

Response: The Department appreciates the comments and issues identified in this comment. First the department will respond to the comment on time period for reporting. Only specific professionals will be allowed, in the absence of the physician, to order restraint or seclusion. The proposed additional changes in this section will identify those professionals who will have the authority, in the absence of the physician, to order restraint. The defined professionals are also the professionals qualified to provide clinical supervision of the development and implementation of individualized person-centered treatment plans and must also be trained on the use of safe emergency interventions. With these conditions as requirements the Department believes that a 48 hour time limit is acceptable.

In response to the comment that all prone restraints are prohibited and seclusion is not allowed, the department is supportive of a system that is moving towards elimination of all restraint and seclusion. Additional proposed rule changes will enforce the reporting and timely review of all use of restraint and seclusion. This process will provide the necessary data to proceed in a more effective direction to minimize and eliminate restraint and seclusion. At this time to, by rule, eliminate either option may ultimately result in a risk to health and safety of both clients and staff.

The Department will consider the comment regarding what state laws are being referred to in 75-03-17-06(9)(d) for future revisions.

Comment: 75-03-17-10(2). All employees must satisfactorily complete training on institutional child abuse and neglect on an annual basis to include the definitions of abuse and neglect, how and where to report this, and training on reporting of the following areas: serious events including attempted suicide; physical maltreatment; cuts, scratches, punctures; broken bones and skull fractures; burns; human bite marks; internal injuries; general abuse; subject to seclusion or restraint and harmful restraint/control; definition of and

prohibition against and dangers related to the use of prone restraint and education on positional asphyxiation; sexual abuse; neglect of the child in institutional care; inadequate or improper supervision; danger to the life, health, mental, or social adjustments; psychological maltreatment; and death of a child in an institution.

Training should also be provided on penalty for failure to report, immunity from liability, and prohibition of employer retaliation for reporting, per the North Dakota Century Code. (Note: this training could be provided by Protection & Advocacy)

Response: The Department would support and has recommended changes in the proposed amendments that would include training on institutional child abuse and neglect, reporting requirements and prohibition of employer retaliation for reporting. The Department believes that other specific issues identified are more appropriately components of a training curriculum not administrative rule.

Comment: 75-03-17-10(3)(e) should be amended as follows:

- e. The facility shall develop and implement a youth-guided, family-driven plan of discipline as part of the child's person-centered treatment planning, to include therapeutic interventions, that promote an effective means of discipline, include disability related accommodations, and an emphasis the use of positive behavioral supports. Daily documentation must reflect whether the interventions are effective and if they need revising.

Response: The Department agrees and has revised this provision to state, "The facility shall develop and implement a youth-guided, family-driven plan of discipline as part of the child's person-centered treatment planning, emphasizing the use of positive behavior supports and therapeutic interventions, that promote an effective means of discipline. Daily documentation must reflect whether the interventions are effective and if they need revising."

Comment: 75-03-17-10(2). All employees must satisfactorily completed training on institutional child abuse and neglect on an annual basis to include the definitions of abuse and neglect, how and where to report this, and training on reporting of the following areas: serious events including attempted suicide; physical maltreatment; cuts, scratches, punctures; broken bones and skull fractures; burns; human bite marks; internal injuries; general abuse; subject to seclusion or restraint and harmful restraint/control; sexual abuse; neglect of the child in institutional care; inadequate or improper supervision; danger to the life, health, mental, or social adjustments; psychological maltreatment; and death of a child in an institution. Training should also be provided on penalty for failure to report, immunity from liability, and prohibition of employer retaliation for reporting, per the North Dakota Century Code.

Response: The Department would support and has recommended changes in the proposed amendments that would include training on institutional child abuse and neglect, reporting requirements and prohibition of employer retaliation for reporting. The Department believes that other specific issues identified are more appropriately components of a training curriculum not administrative rule.

Comment: Chapter 75-03-17-01, Section 1 Definitions, #3: "Clinical supervision" means the oversight responsibility for individual treatment plans and individual service delivery provided by qualified mental health professionals. Section 1 Definitions, #11. This section outlines the proposed definition for "mental health professionals" who would be allowed to provide "clinical supervision" for individual treatment plans in a children's PRTF setting. It includes psychologists, social workers, advanced practice psychiatric registered nurses, registered nurses with 2 years psychiatric experience, licensed addiction counselors, and LMFTs. Of note, it does not include physicians or psychiatrists.

Response: The Department is recommending the removal of the definition of "mental health professional" and inserting, in relevant and effected sections of proposed code, the specific disciplines that would ensure compliance with State law and ensure that those professional disciplines with proper training and licensure were inserted in the rules in place of "mental health professional".

Comment: 75-03-17-05(3): Our concerns regarding the draft changes of these three sections are as follows: The definition of "mental health professional" who would be allowed to provide "clinical supervision" for individual treatment plans for children in a PRTF setting has been expanded to include RN's with 2 years of psychiatric experience, licensed addiction counselors and licensed marriage and family therapists. The definition has been contracted to eliminate physicians and psychiatrists. Our concern is that this appears to broaden the scope of several categories of practitioners to include oversight responsibility for individual treatment plans and individual service delivery for children by professionals who do not have the training or experience to effectively provide those services for mentally ill children. Specifically, we do not believe that RN's, licensed addiction counselors or licensed marriage and family therapists have the training, scope of practice or experience background to afford them the necessary skills to safely provide "Clinical supervision means the oversight responsibility for individual treatment plans and individual service delivery provided by mental health professionals". In addition, we are concerned that physicians and psychiatrists have been eliminated from the category of practitioners to be allowed oversight responsibility for individual treatment plans and individual service delivery for children with mental illness. They clearly fall within the spectrum of professionals who have specialty training that would allow safe and effective oversight for children with mental illness.

Response: The Department is recommending the removal of the definition of "mental health professional" and inserting, in relevant and effected sections of proposed code, the specific disciplines that would ensure compliance with State law and ensure that those professional

disciplines with proper training and licensure were inserted in the rules in place of “mental health professional”.

Comment: The term “qualified mental health professional” has been struck from the definition section, 75-03-17-01, of the draft and replaced with “mental health professional”, and the listing of allowed professionals follows as outlined in the rule. In 75-03-17-05, the “development of the individual person-centered treatment plan” is described as being developed by a team that includes a psychiatrist or a PhD psychologist and a psychiatric social worker, or RN, or occupational therapist, or master level psychologist. This is very confusing, as several of these professionals do not fall in the proposed definition of “mental health professional”. This team is responsible for crafting a treatment plan, but are not included in those individuals who should have oversight in carrying out the treatment plan.

Response: Due to the elimination of the “Certificate of need” in 75-03-17-04, specifically subsection 3 of 75-03-17-05 will be amended to identify the specific disciplines, licensed professionals, that would be appropriate to provide clinical supervision for the development and implementation of the individual person centered treatment plan. This change also supports the proposed amendments to stay more consistent with the current rule and no longer supports the amendments in subdivision 75-03-17-05(3)(b)(1)(a) and (b).

Comment: In addition, in 75-03-17-05, Section 5, #3, (2), the diagnosis of a child by a “mental health professional” within the prior 30 days can be accepted as the determination of diagnosis, with “only updating required”. Based on your definitions, that allows an RN with two years psychiatric experience, a licensed addiction counselor or a licensed marriage and family therapist all to diagnose a child with psychiatric illness according to the most current edition of the Diagnostic and Statistical Manual of Mental Disorders.

Response: The Department is recommending the removal of the definition of “mental health professional” and inserting, in relevant and effected sections of proposed rule, the specific disciplines that would ensure compliance with State law and ensure that those professional disciplines with proper training and licensure were inserted in the rules in place of “mental health professional”. Proposed changes to the proposed rules would also eliminate the language that is currently interpreted as allowing diagnosis by professionals not licensed in their scope of practice to diagnose.

Comment: We are extremely concerned with the apparent proposal that RNs, LACs and LMFTs will be placed in roles of diagnosis of children and oversight of treatment and care delivery for mentally ill children without the necessary training, credentials or scope of practice. This does not appear in the best interest of the vulnerable youth of North Dakota who need these services.

Response: The Department is recommending the removal of the definition of “mental health professional” and inserting, in relevant and effected sections of proposed rule, the specific disciplines that would ensure compliance with State law and ensure that those professional

disciplines with proper training and licensure were inserted in the rules in place of “mental health professional. Proposed changes to the proposed rules would also eliminate the language that is currently interpreted as allowing diagnosis by professionals not licensed in their scope of practice to diagnose.

Comment: Finally, it is our understanding that DHS has been charged with the following as an outcome of S.B. 2049: “During the 2015-16 interim, DHS in consultation with DOH and other stakeholders shall study references to mental health professionals to determine whether changes in law may help to more fully utilize there (sic) professionals within their scope of practices. DHS shall report recommended changes in alignment with the most current professional standard or with the most current diagnostic and statistical manual.” We are confused about the expectation that the Department develop standard definitions for “mental health professional” to be used broadly and in a consistent fashion, but yet you have simultaneously developed a specific local definition of “mental health professional” that is not standardized within this particular chapter. Is it not the purpose and scope of the charge that came out of S.B. 2049 to define common nomenclature and standards to be used broadly?

In addition, the definition of “mental health professional” in Chapter 75-03-17 excludes physicians and psychiatrists, includes RNs, puts LACs and LMFTs in clinical roles for which they are not trained, and appears to be contradicted in later sections of the document.

Response: The Department concurs with the concerns expressed in this and the previous comments. Previous responses have addressed the issues identified in this specific comment.

Comment: I represent physicians and my concern was on number, let's see on page 2 under the definition of mental health professional. We list lots of lists and we add in marriage and family therapists which I have no objection too, but then on number 13 on page 4, we take out qualified mental health professional which we're supposed to pursuant to statute, but that's the only place where a licensed physician is defied. There's no other definition that I could see of physician or psychiatrist. And then, like for example on page 1 number 3, clinical supervision means the oversight responsibility for treatment plans provided by mental health professionals. Well physicians aren't in mental health professionals and they used to be in qualified, but we took out qualified. And maybe I'm stating the obvious because you know we all know what a physician and psychiatrist is, but I just wanted to point that out that it seems like they're not present in the definitions and maybe that's okay but I didn't know, I just noticed that.

Response: The Department concurs with the concerns expressed in this and the previous comments. Previous responses have addressed the issues identified in this specific comment.

Comment: On page 2 under mental health professional means, on B we have a social worker with a master degree in social work from an accredited program and my thought would be that we should have a licensed social worker so it would be more in line with licensed addiction counselor and licensed marriage and family we do have occurrences where we have social workers from other states that aren't licensed in our state so it that would just read licensed social worker on that one.

Response: The Department has revised 75-03-17-01, 75-03-17-02, 75-03-17-05, and 75-03-17-06 and eliminated the definition of mental health professional.

Comment: And then on the top of page 3 which is under f where we talk about the LPC or the licensed professional counselor, as I see it in our agency for our LPC's when they're working to get their LPCC they actually work under the supervision of a LPCC, to get there, the LPC's do. So I don't see them working under the supervision of a psychiatrist or a psychologist, it just doesn't, not that psychologist are too busy or something right. But if we could get that in line with what the licensing standards are for the LPC, LPCC's and the LAPC's and all the initials that we have. That part I think we could take out there.

Response: The Department has revised 75-03-17-01, 75-03-17-02, 75-03-17-05, and 75-03-17-06 and eliminated the definition of mental health professional.

Comment: And then just below that number 13, there is the information on the out based programs and there is also the information we put in under 19 on solo activities. I just, from a providers standpoint I don't foresee us ever using those rules, we don't do out based programs in the sense of what we see in an out based program we haven't found that worked in or have any real merit so I don't know if it's worth everyone's trouble to put out based programs in there or if another provider wants to come in and do something like that I don't know how you'd license it. My public input would be that we don't put out based program or solo activity in the PRTF, I just think at that level of care that's not something we would do, from my humble opinion.

Response: The Department agrees with this comment and has removed the proposed definition of "Out-based activity" and "Solo activity" from the proposed rules and has amended all other affected sections of the proposed rules.

Comment: And then on page 6, towards the bottom on number 5 where we talk about quality improvement, the applicant and facility shall submit quality improvement program and evaluations for the program to the department my understanding is that's our CBS data, and if there is any way to put in there that the department I believe would access that data through the CBS website and through that information so we're not actually submitting you a form or submitting you a document, you have that information so if there's a way to write it in there so that submit would mean we put it in CBS data then you the department would read if

from that so we don't have to worry about all the HIPPA information and those types of things. If there's a way that we can have it written in there that submit means it's in CBS data and we put it in there on a timely basis and then the department would actually read it from there so we not sending extra information back and forth since you all have access to it.

Response: The Department did not specify CBS data as it may only be one potential source in identifying quality improvement plans.

Comment: Page 12 of your information, just a question on number 5 at the very bottom, we have in there a behavioral rating scale completed by the custodian, facility and child, when applicable. My only question would be when would it, why we have, when applicable in there. I don't know of any situations in there when we don't do that. We don't have when applicable on the rest of them, the brain injury screening the substance abuse and those and I'm not sure what the intent was of when applicable I think these are very useful we do it on all of our residents and all 48 of our beds when they come in, so I'm not sure what, why we leave that open to someone not doing it, my input would be that we take when applicable out of their cause I think all kids should have that done.

Response: The Department agrees and is proposing the elimination of "when applicable."

Comment: And then on page 14, under b we have the a psychiatric social worker written in there, and I talked before we don't have in our definition's what a psychiatric social worker is and I'm not sure if we have any social workers that defied as that in our agency I don't know if that definition would be to clarify I ask or take that out, or put it in the definition if there is a definition for that. A requirement of a psychiatric social worker, we don't have that expertise at our, well we have that expertise but we don't that title I would say.

Response: The Department has removed that section of the proposed rule.

Comment: And then on page 17, on letter j about food for special treatment. It may seem like a small thing, but for those in the facilities a child under special treatment procedures is provided the same diet that other children in the facility are receiving. I would ask for a possible change of the word same to similar, we've had kids and their parents challenge us on the fact that if we had soup for lunch, that we should be giving that, it says the same and that the child is required to have the same, which means I need to give him chicken noodle or soup when they are in this exclusion room which is a very dangerous thing to do. So if we could just, I know it's picky but it's helpful for our lawyers we have on the floor working and looking at every rule so.

Response: The Department agrees and has changed "the same" to "similar".

Comment: And then on page 18 number, the new number 9 there. Reporting requirements for serious occurrence that include a death, serious injury and suicide attempt. I believe we would have to then add in restraint and seclusion into that wording to, to match what we're intending as far as reporting, seclusion restraint as a serious occurrence.

Response: The Department agrees and has proposed adding the following to the identified section "inappropriate sexual contact, restraint, or seclusion".

Comment: And then on top of page 19, just I think we need to do, since this isn't new but it will have to be cleaned up when we added restraint and seclusion to the serious occurrence. Clean the language up in here especially on number 3 of page 19. Where the report must contain information on the use of any specialized treatment procedures of the child involved in proceeding the serious occurrence. It's only logical then that if restraint and seclusion, which are specialized treatment procedures are a serious occurrence that we wouldn't do that just kind of clean up this top page here as to some of the changes we have in there so it's not confusing for us and then one of the other things we had talked about with the long list of, long list of people that we report to is that we need to put together a reporting mechanism for that, so that we're sending information because we have the Department, Medical Services, we have the Behavioral Health Division, and we have the regional supervisor, and then we would have our accrediting body and all that that information sent as it asks for a report sent in. Which I have no, no objection to that but I think for the staff we talked about that. We need to make a reporting process that is safe and secure and simple enough so that, because it's got to be in within 24 hours so if this incident happened on Friday night that I have staff that are trained in the right way to get that submitted to the Department and to all these entities in a in a timely mater just with our information you know, our reports on a behavior incident like this can be anywhere from 10-12 pages long, or shorter so we could work together to see what it is you want in that report and I think in talking with the other providers for PRTF, theirs the three others we'd like to see something where Ruth Meyers isn't sending one thing in, we're sending one thing in and Luther Hall is another thing and Manchester another. So that we'd work as providers with the Department to get together a reporting system which would be consistent and simpler for all of us to use and also secure if we're going to send it over email to work on a secure system.

Response: The Department appreciates this comment and will provide technical assistance to providers on the reporting process to ensure all entities receive required reports.

Comment: Then on page 31, number 7 and what we talked about on that one or we have talked is a in the, the facility shall ensure employments have a background, criminal background check and the abuse and neglect check, one of the things that's in there is prior to offers of employment and I don't know if it's just a difference in our employment lawyer versus other employment lawyers, but we are, we offer employment to a person before we do their background checks cause basically they aren't going to stand around waiting with no offer of employment for the 2-3 weeks that it takes to do a background check. I would ask or

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DBGR would ask that the part where it says prior to offers of employment would be stricken and it would just be prior to placement or direct contact or with the children. I completely agree with, if you don't have a background check you don't have access to any children or records or anything like that, but we do offer them employment and then they know they got a job as soon as their background check comes in. Plus we run them through some of our online training which is away from the kids, so that's what we would ask on 31. Those are my comments if anyone has any questions on anything I said or clarification, okay with that thank you for the opportunity to speak.

Response: The Department has revised 75-03-17-16.2(7) to state, "The facility shall ensure that a prospective employee and nonemployee shall consent to and have completed background checks in criminal conviction records and child abuse or neglect records prior to direct care or contact with children residing in the facility." The proposed change will allow an offer of employment to be made and accepted to keep applicants engaged without putting children at risk.

Prepared by:

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

In Consultation with: Stacie Dailey, Behavioral Health Division

January 15, 2016

cc: Pam Sagness, Behavioral Health Division

MEMO

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Stacie Dailey, Lead Behavioral Health Administrator

RE: Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-03-17 Psychiatric Residential Treatment Facilities for Children

DATE: August 3, 2015

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 and amendments to North Dakota Administrative Code Article 75-03-17. These amendments are not anticipated to have a fiscal impact on the regulated community in excess of \$50,000.

Purpose

The purpose of N.D.A.C. 75-03-17 is to provide standards for the operation of psychiatric residential treatment facilities for children. The rules ensure that services are provided in compliance with State Law, Federal Law, and Federal Regulations. The rules also establish the N.D. Department of Human Services role and responsibility relative to licensing and monitoring the operation of any facility that is applying for or licensed to provide psychiatric residential treatment facilities for children.

Classes of Persons Who Will be Affected

1. Children admitted to, receiving services in, and being discharged from licensed psychiatric residential treatment facilities.
2. Licensed psychiatric residential treatment facilities in North Dakota

Probable Impact

Amendments to N.D.A.C. 75-03-17 will create changes in the Rules that correspond to changes in State Law as a result of legislation passed in the 2015 legislative session.

The amendments will also establish consistency with proposed changes to N.D.A.C. 75-03-16 in regard to the standards for criminal background checks and determining offenses that would eliminate a person's ability to act as an employee or nonemployee in both psychiatric residential treatment facilities and residential child care facilities. Since both psychiatric residential treatment

facilities and residential child care facilities are licensed by the Department of Human Services and serve a very vulnerable population clarity and consistency within and between licensing standards is critical.

Since there are currently organizations that are licensed to provide services in both psychiatric residential treatment facilities for children and residential child care facilities the consistency between rules will help eliminate confusion and improve the ability comply with the standards.

Probable Cost of Implementation

There are minimal expected costs to psychiatric residential treatment facilities for children. Criminal background checks are already required and it is not anticipated that the changes would create any increased fiscal burden.

There may be minimal costs to licensed facilities relative to training as one of the proposed changes, that ensures compliance with Federal Law, requires a semi-annual demonstration of competency. It is anticipated that this requirement can most likely be met with existing "in-house" staff.

Licensed facilities may realize a positive fiscal impact with changes that establish an additional discipline, Licensed Marriage and Family Therapists, as filling the required role of mental health professional.

Projected costs to the Department of Human Services is approximately \$2500.00 to complete the required notification and rules promulgation process.

Consideration of Alternative Methods

Due to the changes in State Law resulting in outdated language in N.D.A.C. 75-03-17 there are no alternative methods.

M E M O R A N D U M

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Stacie Dailey, Lead Behavioral Health Administrator

DATE: August 3, 2015

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code chapter 75-03-17

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 75-03-17. 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 are the six community based psychiatric residential treatment facilities for children in North Dakota. The proposed amendments will not have a substantive impact on their duties or responsibilities. They are changes proposed to be current with changes in State Law and to clarify existing sections of the current administrative code further ensuring compliance with Federal Regulations.

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

Due to the fact that there is little or no fiscal impact on the identified small entities and changes in State Law require corresponding updates in Administrative Code there were no less stringent schedules or deadlines to consider.

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 the community based psychiatric

residential treatment centers for children. Therefore there was no need to consider less stringent schedules or deadlines.

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

Community based psychiatric residential treatment facilities for children are currently responsible to comply with all Federal Regulations established by the Centers for Medicare and Medicaid and the proposed changes will not alter those standards. The proposed changes may allow for flexibility for the psychiatric residential treatment facilities for children in meeting some standards.

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

There are no exemptions. All community based psychiatric residential treatment facilities must meet the standards and requirement established by State and Federal Law.

M E M O R A N D U M

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Stacie Dailey Lead Behavioral Health Administrator

DATE: August 3, 2015

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code chapter 75-03-17.

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 75-03-17. The proposed rule amendments are required to ensure compliance with State Law, specifically 25-03.2, Residential Treatment Centers for Children, and Federal Law and Regulations, specifically 42 CFR Chapter IV Subchapter C Part 441 Subpart D. It is unlikely that the proposed rules will have an adverse effect on small entities as they are clarifying existing standards and establishing consistency with other rules that may simplify compliance for indicated small entities.

1. Small Entities Subject to the Proposed Rules

The small entities that are subject to the proposed amended rules are community base psychiatric residential treatment facilities for children. Additionally there could be minor effect on group homes licensed as residential child care facilities.

2. Costs For Compliance

There is no likely costs to community based psychiatric residential treatment facilities for children other than possible minor costs for training, most of which can be conducted using in-house resources and at a low frequency.

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: There are potential benefits to the proposed changes as they may have a positive impact on the quality of services by establishing greater clarity to

the Administrative Rules to address compliance with standards developed in applicable Federal regulations.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: No effects on state revenue expected because of the proposed rules.

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 no probable effect on State Revenue, exploring alternative methods was not necessary.



Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code chapter 75-03-17.

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 3rd day of August, 2015.

by: 
N.D. Dept. of Human Services

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

N.D. Admin. Code Chapter	)	<u>REPORT OF THE</u>
75-03-23, Provision of Home and	)	<u>DEPT. OF HUMAN SERVICES</u>
Community-Based Services Under	)	March 14, 2016
the Service Payments for Elderly)	
and Disabled Program and the)	
Medicaid Waiver for the Aged and)	
Disabled Program)	
(Pages 380-391))	
)	

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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 75-03-23 are necessary to comply with 2015 Senate Bill Nos. 2050 and 2081.
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 15, 2015. The record was held open until 5:00 p.m. on December 28, 2015, to allow written comments to be submitted. No one attended or provided comments at the public hearing. No written comments were received within the comment period. 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 \$2,470.80.
6. The proposed rules amend chapter 75-03-23. The following specific changes are made:

Section 75-03-23-02. Section 75-03-23-02 is amended to provide eligibility for home and community-based services for an applicant based on estimated monthly benefits or for an individual who is receiving a service not available under Medicaid or the Medicaid waiver, as required under 2015 Senate Bill No. 2050.

Sections 75-03-23-05 and 75-03-23-06, and subsections 5 and 7 of section 75-03-23-07. Sections 75-03-23-05 and 75-03-23-06, and subsections 5 and 7 of section 75-03-23-07 are amended to change references to “adult family foster care” to “adult foster care” as required under 2015 Senate Bill No. 2081.

Section 75-03-23-07. Section 75-03-23-07 is amended to remove certain offenses from the list of criminal offenses that prevent an applicant from being a qualified service provider, to address when an applicant who was the subject of a child abuse and neglect assessment that resulted in a services required decision may or may not become a qualified service provider, and allows the department to require an applicant to undergo an evaluation to ensure the applicant is capable of being a qualified service provider.

Section 75-03-23-08. Section 75-03-23-08 is amended to allow a qualified service provider’s status as a qualified service provider to be terminated or an application to become a qualified service provider to be denied if the qualified service provider or the applicant is not capable of providing care, if the qualified service provider or the applicant has been the subject of a child abuse and neglect assessment that resulted in a services required decision, if the qualified service provider has not billed for any services within twelve months, or if the applicant previously was terminated for inactivity and either does not have a private pay client or has not provided

a valid reason for the inactivity.

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 \$40,200 in general fund dollars as set forth in the 2015 Senate Bill No. 2050 Fiscal Note Requested by Legislative Council dated March 25, 2015.
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
Legal Advisory Unit
North Dakota Department of Human Services
March 10, 2016



Legal Advisory Unit

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Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

**SUMMARY OF COMMENTS RECEIVED
REGARDING PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE CHAPTER 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**

The North Dakota Department of Human Services held a public hearing on December 15, 2015, in Bismarck, ND, concerning the proposed amendments to N.D. Administrative Code Chapter 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.

Written comments on these proposed amendments could be offered through 5:00 p.m. on December 28, 2015.

No one attended or provided comments at the public hearing. No written comments were received within the comment period.

SUMMARY OF COMMENTS

No comments were received.

There will be no change to the proposed amendments as no comments were received.

Prepared by:

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

December 31, 2015

cc: Nancy Nikolas Maier, Medical Services

MEMO

TO: Julie Leer, Legal Advisory Unit

FROM: Nancy Nikolas Maier, Program Administrator, Medical Services

RE: Regulatory Analysis of Proposed New Chapter North Dakota Administrative Code 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 and Disabled Program

DATE: August 13, 2015

The purpose of this regulatory analysis is to fulfill the requirements of N.D.C.C. § 28-32-08. This analysis pertains to proposed creation of new North Dakota Administrative Code Article 75-03-23. These 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 creation of new N.D. Admin. Code chapter 75-03-23. 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:

Individuals that receive services and individuals and agencies that provides services under Service Payments for the Elderly and Disabled program and the Medicaid Waivers for the Aged and Disabled program.

Probable Impact

The proposed creation of this chapter may impact the regulated community as follows:

- Provide Service Payments to the Elderly and Disabled (SPED) eligibility for an applicant based on estimated monthly benefits as required under 2015 Senate Bill No 2050.
- Change references to adult family foster care to adult foster care as required under Senate Bill No 2081.
- Allow individuals with certain offenses to enroll as Qualified Service Providers if they have been sufficiently rehabilitated.

- Clarify when an applicant who has been the subject of a services required child abuse and neglect assessment can or cannot enroll as a Qualified Service Provider.
- More clearly define the reasons for termination or denial of Qualified Service Provider Status.

Probable Cost of Implementation

- Expected cost of providing changes in eligibility for SPED as required under 2015 Senate Bill No 2050.

Program	Total	General	Federal	County
SPED	33,600	40,200	(7200)	600

Consideration of Alternative Methods

A consideration of alternate methods was not considered as the creation of this chapter is necessary to comply with 2015 Senate Bill No. 2050 & 2081.

MEMORANDUM

TO: Julie Leer, Legal Advisory Unit

FROM: Nancy Nikolas Maier, Program Administrator, Medical Services

DATE: August 13, 2015

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

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. 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 Service Payments for the Elderly and Disabled (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 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 regiment for these small entities. Therefore, an exemption of small entities from all or part of the requirements in the proposed rule was not considered.

MEMORANDUM

TO: Julie Leer, Legal Advisory Unit

FROM: Nancy Nikolas Maier, Program Administrator, Medical Services

DATE: August 13, 2015

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed creation of new N.D. Admin. Code chapter 75-03-23.

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 75-03-23. The proposed rules are mandated by 2015 Senate Bill 2050 & 2081. 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: Additional administrative costs may be incurred by County Social Service Boards or small business and organizations enrolled as Qualified Service Providers if the physical, cognitive or emotional health of one of their direct care staff appears to be questionable and they are asked to provide evidence of a formal evaluation to determine if the individual is capable of providing the required care.

3. Costs and Benefits

The probable cost to private persons and consumers who are affected by the proposed rule: There may be a cost if the physical, cognitive or emotional health of an individual applicant or provider appears to be questionable and they are asked to provide evidence of a formal evaluation to determine if they are capable of providing the required care.

The probable benefit to private persons and consumers who are affected by the proposed rule: Additional individuals may be eligible for the Service Payment to the Elderly and Disabled program because of the change to the eligibility requirements required under 2015 Senate Bill No. 2050. Providers who may have been previously terminated or denied enrollment as a Qualified Service Provider may now be eligible to provide care, thus increasing the pool of available providers. Other changes to the provider enrollment standards will help assure that providers are fit to provide the care, and removing inactive providers from the list of available Qualified Service Providers will make it easier for consumers to find providers who are interested in working with new clients.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: No effects on state revenue expected because of the proposed rules.

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 only experience a cost if the physical, cognitive, social, or emotional health of one of their direct care staff is questioned and they are asked to provide a formal evaluation as evidence that the individual is capable of providing the necessary care. For that reason, the Department determined that exploring alternative methods was not necessary.

FISCAL NOTE
Requested by Legislative Council
03/25/2015

Amendment to: SB 2050

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				\$(6,600)		\$(7,200)
Expenditures			\$40,200	\$(6,600)	\$40,800	\$(7,200)
Appropriations			\$40,200	\$(6,600)	\$40,800	\$(7,200)

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
Counties		\$600	\$0
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

SB2050 would preclude the department from requiring specific individuals to apply for Medicaid before receiving services from SPED, and as amended, would also not allow a claim to be filed against an estate to recover payments made on behalf of Medicaid expansion enrollees.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 1 precludes the Department from requiring an individual to apply for Medicaid before being eligible for services under the SPED program if they meet the exemption of this section. The Department estimates there are potentially 10 individuals that would meet the requirements and utilize the exemptions. If these individuals were allowed to receive personal care services through the SPED program, it is estimated that General fund expenditures would increase by \$40,200 and Other funds would decrease by \$(6,600), of which \$(7,200) is a decrease in Federal funds and \$600 is an increase in County funds for the 15-17 biennium.

The above fiscal impact was calculated assuming the State will take responsibility for the County's share of SPED effective January 1, 2016. If the Counties continue to be responsible for 5% of the SPED program the County share would increase to \$2,400 for the 15-17 biennium.

Section 2: The department may not file a claim against an estate to recover payments made on behalf of a recipient who was eligible for Medicaid under section 50-24.1-37 [Medicaid Expansion] and who received coverage through a private carrier. The department is unable to determine the fiscal impact of this section.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

The loss of revenue is the result of precluding the department from requiring individuals to apply for Medicaid before receiving services through the SPED Program. It is estimated that the department will receive (\$7,200) less Federal funds and \$600 more County funds for a net decrease of (\$6,600) in the 15-17 biennium and (\$7,200) less Federal funds in the 17-19 biennium.

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Section 1 would allow individuals to receive services from SPED without first having to apply for Medicaid, which provides for a federal match, thus increasing medical assistance grant General Fund expenditures by \$40,200 and decreasing other funds by (\$6,600) of which (\$7,200) would be a Federal fund decrease combined with a \$600 County fund increase for the 15-17 biennium. A \$40,800 General Fund increase and a (\$7,200) decrease in Federal Funds for the 17-19 biennium are expected.

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

Section 1 would allow individuals to receive services from SPED without first having to apply for Medicaid, which provides for a federal match, thus increasing medical assistance grant General Fund appropriation by \$40,200 and decreasing other funds appropriation by (\$6,600) of which (\$7,200) would be a Federal fund decrease combined with a \$600 County fund increase for the 15-17 biennium. A \$40,800 General Fund appropriation increase and a (\$7,200) decrease in Federal Funds appropriation for the 17-19 biennium are expected.

Name: Debra McDermott

Agency: Department of Human Services

Telephone: 701 328-3695

Date Prepared: 03/27/2015



Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

TAKINGS ASSESSMENT

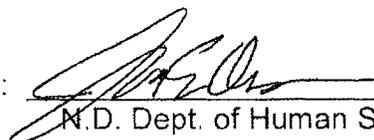
concerning proposed amendment to N.D. Admin. Code chapter 75-03-23.

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 13th day of August, 2015.

by:



N.D. Dept. of Human Services

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

N.D. Admin. Code Chapter	)	<u>REPORT OF THE</u>
75-03-25, Ombudsman Program)	<u>DEPT. OF HUMAN SERVICES</u>
(Pages 392-398))	March 14, 2016
)	
)	

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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 75-03-25 are necessary to comply with 2015 Senate Bill No. 2065.
2. These rules are related to changes in a federal statute or regulation, specifically title 45 Code of Federal Regulations, part 1327, subpart A relating to state long-term care ombudsman program.
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 8, 2015. The record was held open until 5:00 p.m. on December 18, 2015, to allow written comments to be submitted. No one attended or provided comments at the public hearing. No written comments were received within the comment period. 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 \$2,300.89.
6. The proposed rules amend chapter 75-03-25. The following specific changes are made:
 - Section 75-03-25-01. Section 75-03-25-01 is amended to change "community ombudsman" to "volunteer ombudsman"; to update the definitions of "complaint" and "immediate family"; and to remove definitions of "designated representative" and "second degree of kinship".
 - Section 75-03-25-02. Section 75-03-25-02 is repealed as the State Long Term Care Ombudsman position is no longer an appointed position.

Section 75-03-25-03. Section 75-03-25-03 is amended to match the changes in defined terms in Section 75-03-25-01; to correct a spelling error; and to update the language.

Section 75-03-25-04. Section 75-03-25-04 is repealed because local ombudsmen are no longer appointed positions.

Section 75-03-25-05. Section 75-03-25-05 is amended to match the changes in defined terms in Section 75-03-25-01 and to update the language.

Section 75-03-25-06. Section 75-03-25-06 is amended to match the changes in defined terms in Section 75-03-25-01 and to update the language to ensure consistency with federal regulations.

Section 75-03-25-07. Section 75-03-25-07 is amended to match the changes in defined terms in Section 75-03-25-01 and to address changes made in 2015 Senate Bill No. 2065.

Section 75-03-25-08. Section 75-03-25-08 is amended to match the changes in defined terms in Section 75-03-25-01.

Section 75-03-25-09. Section 75-03-25-09 is amended to match the changes in defined terms in Section 75-03-25-01 and to address changes made in 2015 Senate Bill No. 2065.

Section 75-03-25-10. Section 75-03-25-10 is amended to match the changes in defined terms in Section 75-03-25-01 and to update the language to ensure consistency with federal regulations.

Section 75-03-25-11. Section 75-03-25-11 is amended to clarify language and to update the language to ensure consistency with federal regulations.

Section 75-03-25-14. Section 75-03-25-14 is amended to

address changes made in 2015 Senate Bill No. 2065.

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. These rules are not expected to have a fiscal impact on state revenues and expenditures, including on any funds controlled by the Department.
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
Legal Advisory Unit
North Dakota Department of Human Services
March 10, 2016



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Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

**SUMMARY OF COMMENTS RECEIVED
REGARDING PROPOSED AMENDMENTS TO
N.D. ADMIN. CODE 75-03-25
OMBUDSMAN PROGRAM**

The North Dakota Department of Human Services held a public hearing on December 8, 2015, in Bismarck, ND, concerning the proposed amendments to N.D. Administrative Code 75-03-25, Ombudsman Program.

Written comments on these proposed amendments could be offered through 5:00 p.m. on December 18, 2015.

No one attended or provided comments at the public hearing. No written comments were received within the comment period.

SUMMARY OF COMMENTS

No comments were received.

There will be no change to the proposed rule as no comments were received.

Prepared by:

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

December 31, 2015

Cc: Karla Backman, Aging Services

MEMO

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Karla Backman, State Long Term Care Ombudsman

RE: Regulatory Analysis of Proposed North Dakota Administrative Code chapter 75-03-25, Ombudsman Program

DATE: June 12, 2015

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 75-09.1. These 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. Admin. Code chapter 75-03-25. Federal law does mandate some of the proposed rules.

Classes of Persons Who Will be Affected

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

Residents of long term care facilities in ND and their resident representatives.
State Long Term Care Ombudsman
Local Long Term Care ombudsmen
Volunteer Long Term Care ombudsmen

Probable Impact

The proposed amendments may impact the regulated community as follows:

- Official change from appointment of ombudsmen to employment though has always been the practice.
- Change to the SLTCO certifying local and volunteer ombudsmen;
- Changes in access to records – social records are added and added that SLTCO can give approval if resident has no resident representative or if that representative is not seen to be working in resident's best interest.
- Additional areas added to conflict of interest for ombudsmen which may prohibit them having that position.

Probable Cost of Implementation

- No anticipated costs for implementing changes in the Long Term Care Ombudsman Program.

Consideration of Alternative Methods

The administrative code needs to be updated to be in alignment with the amendments made to NDCC and also the regulations mandated through CFR 45 parts 1321 and 1327. The minimum changes are being made.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Karla Backman, Long Term Care Ombudsman

DATE: June 12, 2015

SUBJECT: Small Entity Regulatory Analysis Regarding Proposed Amendments to N.D. Admin. Code chapter 75-03-25.

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 75-03-25. Federal law does mandate some of 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 small entities affected by these proposed amendments are long term care facilities. The change to them not having to post a copy of NDCC 50-10.1 is less stringent. Otherwise the changes do not involve compliance or reporting requirements.

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 long term care facilities. For this reason, the establishment of less stringent schedules or deadlines for compliance or reporting requirements for these small entities did not need to be 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 long term care facilities. 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 long term care facilities are responsible to meet performance standards as well as operational standards imposed by federal and state law. The proposed amendments do not impose any design standards or impose any additional operational standards or operational standards for the facilities. 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 some of the proposed amendments will impact ombudsmen and thus small entities are exempted from those requirements. The proposed rules that impact the long term care facilities apply to each category of facility and there are no exemptions to those rules.

MEMORANDUM

TO: Julie Leer, Director, Legal Advisory Unit

FROM: Karla Backman, State Long Term Care Ombudsman

DATE: June 12, 2015

SUBJECT: Small Entity Economic Impact Statement Regarding Proposed Amendments to N.D. Admin. Code chapter 75-03-25.

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 75-02-01.2. Some of the proposed rule changes are to be consistent with the changes in NDCC 50-10.1 (Senate Bill 2065), NDCC 50-10.2, and some are mandated by federal law 45 CFR, Parts 1327 and 1327. The proposed rules should not 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 long term care facilities.

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 be no 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: Restrictions on long term care residents' access to the ombudsman services will be removed. There will also be more assurance of the ombudsman's focus on resident rights due to the conflict of interest screening being strengthened.

4. Probable Effect on State Revenue

The probable effect of the proposed rule on state revenues is expected to be: No effects on state revenue expected.

5. Alternative Methods

Small entities will not experience administrative costs or other costs and there are no probable effects on State Revenue so exploring alternative methods was not necessary.



Jack Dalrymple, Governor
Maggie D. Anderson, Executive Director

TAKINGS ASSESSMENT

concerning proposed amendment to N.D. Admin. Code chapter 75-03-25.

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 12th day of June, 2015.

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