

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 37.34.702, 37.40.1017,) PROPOSED AMENDMENT
37.40.1407, and 37.90.406 pertaining)
to HCBS Setting Regulations)

TO: All Concerned Persons

1. On January 12, 2024, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/87238776671?pwd=YTIabjlnZk5OS0ZsR2pOZCtFQVZZdz09>, meeting ID: 872 3877 6671, and password: 808278; or

(b) Dial by telephone: +1 646 558 8656, meeting ID: 872 3877 6671, and password: 808278. Find your local number: <https://mt-gov.zoom.us/u/kegv6sYkkd>.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on December 29, 2023, to advise us of the nature of the accommodation that you need. Please contact Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

37.34.702 ADULT SERVICES: PERFORMANCE REQUIREMENTS

(1) through (3)(c) remain the same.

(d) provide supervision, support, care, education, and training according to the needs of the individual and as specified by the ~~IP team~~ personal support plan (PSP);

(e) implement any assigned activities of the ~~IP~~ PSP;

(f) remains the same.

(g) participate in the PSP ~~IP team~~ process, recommending objectives, as applicable, to the PSP ~~IP team~~ for the individual; and

(h) coordinate transportation to assist the individual in meeting the individual's needs;

~~(i) adhere to the service component definitions when specified in the contract; and~~

~~(j) provide additional or specialized services or requirements when specified in the contract.~~

(4) A contractor providing adult services must ensure that any contractor-owned or contractor-controlled setting:

(a) is integrated in and facilitates full access of the individual to the greater community;

(b) ensures the individual receives services in the community to the same degree of access as individuals not receiving Medicaid Home and Community-Based Services;

(c) is selected by the individual from among setting options, including non-disability specific settings and an option for a private unit in a residential setting;

(d) ensures the individual's rights of privacy, dignity, and respect, and freedom from coercion and restraint;

(e) supports health and safety based upon the individual's needs, decisions, or desires;

(f) optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to daily activities, physical environment, and with whom to interact;

(g) provides an opportunity to seek employment and work in competitive integrated settings; and

(h) facilitates individual choice of services and supports, and who provides them.

(4) through (6) remain the same but are renumbered (5) through (7).

(8) The department adopts and incorporates by reference 42 CFR 441.301(c)(4), as amended January 16, 2014. A copy of this regulation may be obtained at <https://www.ecfr.gov/> or by contacting the Department of Public Health and Human Services, Behavioral Health and Developmental Disabilities Division, Developmental Disabilities Program, 111 N. Sanders, P.O. Box 4210, Helena, MT 59604-4210.

AUTH: 53-20-204, MCA

IMP: 53-20-205, MCA

37.40.1017 AGENCY-BASED COMMUNITY FIRST CHOICE SERVICES: PROVIDER REQUIREMENTS (1) remains the same.

(2) CFCS personal care attendant providers will maintain staff resources, including a nurse supervisor and person-centered plan facilitator, to perform the necessary CFCS duties as referenced in ARM 37.40.1005. The nurse supervisor and plan facilitator may be the same person.

(3) and (4) remain the same.

(5) The CFCS ~~provider agency~~ personal care attendant providers must provide documentation to verify the nurse supervisor and plan facilitator credentials, certification, and training.

(6) remains the same.

(7) A provider of services must ensure that the services adhere to the requirements of 42 CFR 441.710(a)(1) and (a)(2), which permits reimbursement with

Medicaid monies only for services within settings that meet certain qualities set forth under the regulation. These qualities include that the setting:

(a) is integrated in and facilitates full access of the individual to the greater community;

(b) ensures the individual receives services in the community to the same degree of access as individuals not receiving Medicaid Home and Community-Based Services;

(c) is selected by the individual from among setting options, including non-disability specific settings and an option to choose a private unit in a residential setting;

(d) ensures the individual's rights of privacy, dignity, and respect, and freedom from coercion and restraint;

(e) optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to daily activities, physical environment, and with whom to interact.;

(f) provides an opportunity to seek employment and work in competitive integrated settings; and

(g) facilitates individual choice of services and supports, and who provides them.

(8) The department adopts and incorporates by reference 42 CFR 441.710(a)(1) and (a)(2), as amended January 16, 2014. A copy of this regulation may be obtained at <https://www.ecfr.gov/> or by contacting the Department of Public Health and Human Services, Senior & Long-Term Care Division, 1100 N. Last Chance Gulch, P.O. Box 4210, Helena, MT 59604-4210.

AUTH: 53-2-201, MCA

IMP: 53-2-201, 53-6-113, MCA

37.40.1407 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: GENERAL REQUIREMENTS (1) and (2) remain the same.

(3) A provider of services must ensure that the services adhere to the requirements of 42 CFR 441.301(c)(4), which permits reimbursement with Medicaid monies only for services within settings that meet certain qualities set forth under the regulation. These qualities include that the setting:

(a) is integrated in and facilitates full access of the individual to the greater community;

(b) ensures the individual receives services in the community to the same degree of access as individuals not receiving Medicaid Home and Community-Based Services;

(c) is selected by the individual from among setting options, including non-disability specific settings and an option for a private unit in a residential setting;

(d) ensures the individual's rights of privacy, dignity, and respect, and freedom from coercion and restraint;

(e) supports health and safety based upon the individual's needs, decisions, or desires;

(f) optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including, but not limited to daily activities, physical environment, and with whom to interact;

(g) provides an opportunity to seek employment and work in competitive integrated settings; and

(h) facilitates individual choice of services and supports, and who provides them.

~~(3)~~(4) A provider of services must meet the requirements necessary for the receipt of reimbursement with Medicaid monies.

(4) through (6) remain the same but are renumbered (5) through (7).

(8) The department adopts and incorporates by reference 42 CFR 441.301(c)(4), as amended January 16, 2014. A copy of this regulation may be obtained at <https://www.ecfr.gov/> or by contacting the Department of Public Health and Human Services, Senior & Long-Term Care Division, 1100 N. Last Chance Gulch, P.O. Box 4210, Helena, MT 59604-4210.

AUTH: 53-2-201, 53-6-101, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-402, MCA

37.90.406 HOME AND COMMUNITY-BASED SERVICES FOR ADULTS WITH SEVERE AND DISABLING MENTAL ILLNESS: PROVIDER REQUIREMENTS (1) remains the same.

(2) A provider of services must ensure that the services adhere to the requirements of 42 CFR 441.301(c)(4), which permits reimbursement with Medicaid monies only for services within settings that meet certain qualities set forth under the regulation. These qualities include that the setting:

(a) is integrated in and facilitates full access of the individual to the greater community;

(b) ensures the individual receives services in the community to the same degree of access as individuals not receiving Medicaid Home and Community-Based Services;

(c) is selected by the individual from among setting options, including non-disability specific settings and an option for a private unit in a residential setting;

(d) ensures the individual's rights of privacy, dignity, and respect, and freedom from coercion and restraint;

(e) supports health and safety based upon the individual's needs, decisions, or desires;

(f) optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including, but not limited to daily activities, physical environment, and with whom to interact;

(g) provides an opportunity to seek employment and work in competitive integrated settings; and

(h) facilitates individual choice of services and supports, and who provides them.

~~(2)~~(3) The department may authorize a SDMI HCBS contracted case management entity to issue pass-through payment for reimbursement of services rendered by a non-Medicaid provider for the following services:

(a) through (f) remain the same.

(3) and (4) remain the same but are renumbered (4) and (5).

(6) The department adopts and incorporates by reference 42 CFR 441.301(c)(4), as amended January 16, 2014. A copy of this regulation may be obtained at <https://www.ecfr.gov/> or by contacting the Department of Public Health and Human Services, Behavioral Health and Developmental Disabilities Division, 100 N. Park, Ste. 300, P.O. Box 202905, Helena, MT 59620-2905.

AUTH: 53-2-201, 53-6-402, MCA

IMP: 53-6-402, MCA

4. STATEMENT OF REASONABLE NECESSITY

Montana Medicaid provides Home and Community Based Services (HCBS) through three Section 1915c Home and Community Based Waivers and one Section 1915i State Plan. HCBSs are long-term services and supports provided in home and community-based settings that may assist in diverting and/or transitioning eligible individuals from institutional settings into their homes and community or maintaining such individuals in their homes and communities.

CMS issued guidance to states on July 14, 2020, indicating that the transition period for ensuring compliance with the HCBS Final Rule has been extended one year to March 17, 2023, in response to the COVID-19 pandemic. The guidance can be found here: <https://www.medicaid.gov/Federal-Policy-Guidance/Downloads/smd20003.pdf>. The Department of Public Health and Human Services (department) has been communicating collectively and individually with Montana Medicaid HCBS providers to support their transition to full compliance with the federal regulation. Additional information about the department's transition plan to comply with the federal settings rule may be found at <https://dphhs.mt.gov/hcbs>.

Effective March 17, 2023, only HCBS services provided in accordance with the HCBS Final Rule, which is promulgated at 42 CFR 441.301 and 42 CFR 441.710, are eligible for federal reimbursement under the Medicaid program. The proposed changes to ARM 37.34.702, 37.40.1017, 37.40.1407, and 37.90.406 are necessary to require HCSB providers to comply with the federal HCBS Final Rule, which is intended to ensure, among other things, individuals receiving services through an HCSB waiver have access to the greater community, including opportunities to seek employment and work in competitive settings, to engage in community life, to control personal resources, and to receive services in the community, to the same degree of access as individuals not receiving HCBS.

Fiscal Impact

There is no anticipated fiscal impact associated with this rulemaking.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be

submitted to: Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-3026; or e-mail hhsadminrules@mt.gov, and must be received no later than 5:00 p.m., January 19, 2024.

6. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in paragraph 5.

8. An electronic copy of this notice is available on the department's web site at <https://dphhs.mt.gov/LegalResources/administrativerules>, or through the Secretary of State's web site at <http://sosmt.gov/ARM/register>.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will significantly and directly impact small businesses, by requiring provider of home and community-based services to comply with federal regulation.

11. Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

12. The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

/s/ Brenda K. Elias
Brenda K. Elias
Rule Reviewer

/s/ Charles T. Brereton
Charles T. Brereton, Director
Department of Public Health and Human
Services

Certified to the Secretary of State December 12, 2023.