

MEMORANDUM

TO: Rules Review Subcommittee of the Senate Health & Welfare Committee and the House Health & Welfare Committee

FROM: Research & Legislation Staff - Paige Alan Parker

DATE: October 27, 2009

SUBJECT: Department of Health and Welfare - IDAPA 16.03.09 - Medicaid Basic Plan Benefits (Docket No. 16-0309-0804) (Proposed and Temporary)

This Proposed and Temporary Rule docket, amending the Department of Health and Welfare's Medicaid Basic Plan Benefits (IDAPA 16.03.09), was approved by the 2009 Legislature as a Temporary Rule. This docket is now being presented to the 2010 Legislature as a Pending Rule. Please review the attached Memorandum dated November 3, 2008, for an analysis of this rulemaking.

Attachment: November 3, 2008 Memo of Analysis

MEMORANDUM

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SUBJECT: Department of Health and Welfare - IDAPA 16.03.09 - Medicaid Basic Plan Benefits (Docket No. 16-0309-0804) (Proposed and Temporary).

By this Proposed and Temporary Rule docket, the Department of Health and Welfare amends IDAPA 16.03.09 (Docket No. 16-0309-0804)(hereinafter “temporary and proposed rule”). The Governor’s justification for the temporary rule is to meet deadlines in federal regulation. [No federal regulation has been cited by the Department.] The temporary rule became effective on October 1, 2008.

The Department states that the temporary and proposed rule complies with 42 USC section 1396b(I) which, according to the Department, requires all handwritten and computer generated printed prescriptions for fee-for-service Medicaid patients to be fully tamper-resistant as of October 1, 2008. The Department states that at least one industry recognized feature from each of three categories of tamper resistance is required for all handwritten and computer generated printed prescriptions.

According to the Department, the temporary and proposed rule is authorized pursuant to sections 56-202(b), 56-203(g), 56-203(I) and 56-250 through 56-257, Idaho Code, and the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery and Iraq Accountability Appropriations Act of 2007, section 70029(b), P.L. 110-28 [should be section 7002(b)] and P.L. 110-90.

Section 56-202(b), Idaho Code, provides the Department with general and broad rule making authority. Sections 56-203(g) and (I), Idaho Code, provides the Department with the power to define persons entitled to medical assistance in such terms as will meet requirements for federal participation in medical assistance payments and to determine the amount, duration and scope of care and services to be purchased as medical assistance on behalf of needy eligible individuals. Sections 56-250 through 56-257, Idaho Code, are part of the Idaho Medicaid Simplification Act, adopted by the Legislature in 2006. Pursuant to section 56-253(8), Idaho

Code, the Department's Director is given the authority to promulgate rules consistent with the Act.

No copy of the cited federal law has been provided to the Legislative Services Office as required by section 67-5223(1), Idaho Code. Cited P.L. 110-90 could not be found. Section 7002(b) of P.L. 110-28 states:

(b) Requirement for Use of Tamper-Resistant Prescription Pads Under the Medicaid Program.--

(1) In general.--Section 1903(I) of the Social Security Act (42 U.S.C. 1396b(I)) is amended--

(A) by striking "or" at the end of paragraph (21);

(B) by striking the period at the end of paragraph (22) and inserting "; or"; and

© by inserting after paragraph (22) the following new paragraph:

“(23) with respect to amounts expended for medical assistance for covered outpatient drugs (as defined in section 1927(k)(2)) for which the prescription was executed in written (and non-electronic) form unless the prescription was executed on a tamper-resistant pad.”

(2) Effective date.--The amendments made by paragraph (1) shall apply to prescriptions executed after September 30, 2007.

The citation to public laws should be discouraged since they public laws are not accessible or readable. Far better would be to cite to the United States Code where the public laws are codified. Thus, 42 USC section 1396b(i)(23) states:

(i) Payment for organ transplants; item or service furnished by excluded individual, entity, or physician; other restrictions
Payment under the preceding provisions of this section shall not be made - . . .

(23) with respect to amounts expended for medical assistance for covered outpatient drugs (as defined in section 1927(k)(2)) for which the prescription was executed in written (and non-electronic) form unless the prescription was executed on a tamper-resistant pad.

According to the Department, no fee or charge is imposed by the temporary and proposed rule and there is no anticipated impact to the general fund in excess of \$10,000. According to the Department, negotiated rulemaking was not conducted because the changes are necessary to comply with federal regulation. The Department states that a public hearing will be scheduled if requested in writing by 25 persons, a political subdivision or an agency not later than November 19, 2008. All written comments must be delivered to the Department on or before November 26, 2008.

ANALYSIS

The temporary and proposed rule creates new section 661.02, “Tamper-Resistant Prescription Requirements,” which requires any written, non-electronic prescription for a Medicaid participant be written on a tamper-resistant prescription form. Three features are outlined in the temporary and proposed rule: prevent unauthorized copying, prevent erasure or modification, and prevent the use of counterfeit prescription forms. The temporary and proposed rule appears to require the paper on which the prescription is written to have one or more of each of these industry-recognized features. However, the failure of the Department to place “and” between the second and third listed feature creates an ambiguity. Sections 661.02.a through c.

The temporary and proposed rule exempts electronically, verbally and faxed prescriptions communicated by the prescriber to the pharmacy. Also exempted are drugs provided in an inpatient hospital or nursing facility where the patient and family do not have direct access to the paper prescription. Section 661.03.

SUMMARY

The Department’s temporary and proposed rule appears to be authorized under sections 56-202(b), 56-203(g), and 56-257, Idaho Code.

cc: Tamara Prisock, Department of Health and Welfare - Administrative Procedures Section; and
Jeanne Siroky.

IDAPA 16 - DEPARTMENT OF HEALTH AND WELFARE

16.03.09 - MEDICAID BASIC PLAN BENEFITS

DOCKET NO. 16-0309-0804

NOTICE OF RULEMAKING - TEMPORARY AND PROPOSED RULE

EFFECTIVE DATE: The effective date of the temporary rule is October 1, 2008.

AUTHORITY: In compliance with Sections 67-5221(1) and 67-5226, Idaho Code, notice is hereby given that this agency has adopted a temporary rule, and proposed rulemaking procedures have been initiated. The action is authorized pursuant to Sections 56-202(b), 56-203(g), 56-203(i), 56-250 through 56-257, Idaho Code; and the "U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007," Section 70029(b), P.L. 110-28 and P.L. 110-90.

PUBLIC HEARING SCHEDULE: Public hearing(s) concerning this rulemaking will be scheduled if requested in writing by twenty-five (25) persons, a political subdivision, or an agency, not later than November 19, 2008.

The hearing site(s) will be accessible to persons with disabilities. Requests for accommodation must be made not later than five (5) days prior to the hearing, to the agency address below.

DESCRIPTIVE SUMMARY: The following is the required finding and concise statement of its supporting reasons for adopting a temporary rule and a nontechnical explanation of the substance and purpose of the proposed rulemaking:

As of October 1, 2008, all handwritten and computer generated printed prescriptions for fee-for-service Medicaid patients must be fully tamper resistant in compliance with federal implementation of an amendment to 42 USC 1396b(i).

Rules are being amended to require at least one industry recognized feature from each of the three categories of tamper resistance (characteristics that prevent unauthorized copying, erasure or modification of information, or the use of counterfeit prescription forms) for all handwritten and computer generated printed prescription for fee for service Medicaid patients. Prescriptions for Medicaid patients that are telephoned, faxed, or ePrescribed are exempt from these tamper resistance requirements.

TEMPORARY RULE JUSTIFICATION: Pursuant to Section 67-5220, Idaho Code, the Governor has found that temporary adoption of the rule is appropriate for the following reasons: This rulemaking is necessary to meet deadlines in federal regulation.

FEE SUMMARY: Pursuant to Section 67-5226(2), the Governor has found that the fee or charge being imposed or increased is justified and necessary to avoid immediate danger and the fee is described herein: N/A

FISCAL IMPACT: The following is a specific description, if applicable, of any fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year.

This rulemaking will have no anticipated fiscal impact to the state general fund.

NEGOTIATED RULEMAKING: Pursuant to IDAPA 67-5220, negotiated rulemaking was not conducted because this rule is being written to comply with federal regulations.

ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS: For assistance on technical questions concerning the temporary and proposed rule, contact Jeanne Siroky at (208) 364-1897.

Anyone may submit written comments regarding the proposed rulemaking. All written comments must be directed to the undersigned and must be delivered on or before November 26, 2008.

DATED this 2nd day of October, 2008.

Tamara Prisock
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THE FOLLOWING IS THE TEXT OF DOCKET NO. 16-0309-0804

661. PRESCRIPTION DRUGS - PARTICIPANT ELIGIBILITY.

01. Obtaining a Prescription Drug. To obtain a prescription drug, a Medicaid participant or authorized agent must present the participant's Medicaid identification card to a participating pharmacy together with a prescription from a licensed prescriber. (3-30-07)

02. Tamper-Resistant Prescription Requirements. Any written, non-electronic prescription for a Medicaid participant must be written on a tamper-resistant prescription form. The paper on which the prescription is written must have: (10-1-08)T

a. One (1) or more industry-recognized features designed to prevent unauthorized copying of a completed or blank prescription form; (10-1-08)T

b. One (1) or more industry-recognized features designed to prevent the erasure or modification of information written on the prescription by the prescriber; (10-1-08)T

c. One (1) or more industry-recognized features designed to prevent the use of counterfeit prescription forms. (10-1-08)T

03. Tamper-Resistant Prescription Requirements Not Applicable. The tamper-resistant prescription requirements do not apply when the prescription is communicated by the prescriber to the pharmacy electronically, verbally, by fax, or when drugs are provided in an inpatient hospital or a nursing facility where the patient and family do not have direct access to the paper prescription. (10-1-08)T

024. Drug Coverage for Dual Eligibles. For Medicaid participants who are also eligible for Medicare known as ("dual eligibles"), the Department will pay for Medicaid-covered drugs that are not covered by Medicare Part D. Dual eligibles will be subject to the same limits and processes used for any other Medicaid participants. (~~3-30-07~~)(10-1-08)T