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September 5, 2018

Waylene Hiles, Director  
Joint Committee on Administrative Rules  
State Capitol, Room B8  
Jefferson City, MO 65101

Dear Ms. Hiles:

Please accept this submission as the Missouri Hospital Association's ("MHA") brief in connection with its request for a hearing before the Joint Committee on Administrative Rules ("Committee") on the Order of Rulemaking for 13 CSR 70-15.160 Prospective Outpatient Hospital Services Reimbursement Methodology.

MHA respectfully requests the Committee recommend that the General Assembly nullify the rule on the grounds that it fails to comply with the Missouri Administrative Procedures Act in several respects. Specifically:

- The fiscal note is inaccurate, in violation of Sections 536.200 and 536.205, RSMo;
- The rule impermissibly incorporates by reference outside sources, in violation of Section 536.031.4, RSMo;
- The rule fails to properly assess the impact on small businesses, in violation of Section 536.300, RSMo;
- The rule conflicts with House Bill 2011, enacted by the second regular session of the 99<sup>th</sup> General Assembly, in violation of Section 536.014, RSMo;
- The rule fails to adequately assess the impact on the Federal Reimbursement Allowance program, rendering it arbitrary and capricious in violation of Section 536.014, RSMo;
- The rule unduly burdens small, rural, safety-net and financially stressed hospitals, as well as vulnerable citizens needing access to care, rendering it arbitrary and capricious in violation of Section 536.014, RSMo.

### **The Department Failed to Adequately Assess the Economic Impact of the Rule**

#### **A. The Fiscal Note Fails to Separately Assess the Cost to Public and Private Entities**

Assessing the fiscal impact of a new or revised regulation is integral to the act of rulemaking. Sections 536.200 and 536.205, RSMo require that an agency separately assess the financial impact of every rule to public and private entities. For public entities, the agency must provide

“a detailed estimate of the cost of compliance.” Section 536.200.1, RSMo. For private entities, the Department must estimate the number of entities affected, along with the aggregate cost of compliance. According to one Missouri court, “These requirements are not trivial.” *Missouri Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 391 (Mo. App. W.D. 1994). Rather, they are intended to ensure that the agency adequately assess the costs and benefits of rulemaking, in part to assure that the General Assembly is informed of the economic impact in light of its role to establish a state budget appropriately managing state revenues and expenditures given its overall strategy for economic development in Missouri.

To begin, the Department failed to satisfy the basic requirements of Sections 536.200 and 536.205, RSMo. First, the Department made no attempt to distinguish between public and private entities, as required by the respective statutes. The class of affected political subdivisions identified in the public entity fiscal note includes “Hospitals enrolled in MO HealthNet,” yet the \$66.5 million fiscal impact only considers the *savings* to the state and federal government. It does not assess the *cost* of compliance to the state’s county hospitals and hospital districts. Section 536.205.1, RSMo expressly requires an agency assess the cost to any political subdivision of the state.

Similarly, the private entity fiscal note identifies the types of businesses likely to be affected as “Hospitals enrolled in MO HealthNet,” including 142 in-state facilities and 42+ out-of-state hospitals. The private entity fiscal impact is also estimated at \$66.5 million. While there are approximately 142 hospitals in the State of Missouri, the Department made no effort to distinguish the relative fiscal impact among public and private facilities. The General Assembly required that agencies separately assess how a proposed regulation affects public versus private entities because the implications of reduced revenues to public and private entities differ. For example, a reduction in revenues to a private entity may result in a lower tax obligation to the state, thereby affecting overall state revenues.

Unless the Department contends that the rule has no fiscal impact on county hospitals or hospital districts, the fiscal note is inaccurate. The deficiencies in the fiscal note make it impossible to determine if the entire fiscal impact of the rule is \$66.5 million or \$66.5 million to private entities *plus* an unknown sum representing the cost of compliance to public entities. Fiscal notes that fail to comply with the statutory rulemaking requirements render a rule “void and of no force and effect.” *Missouri Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d at 392.

## **B. The Fiscal Note Does Not Account for Reductions in Managed Care Payments**

The fiscal note is based on the dollar value of the proposed cuts to fee-for-service reimbursement. It does not assess the collateral impact on managed care payments, which comprise a large volume of Medicaid reimbursements to hospitals. Fee-for-service rates set the starting point for negotiating contracted managed care rates. Therefore, any reduction in fee-for-

service rates will impact, and commensurately reduce, what managed care plans will pay to hospitals. The Department made no attempt to evaluate the financial impact on managed care rates; thus, the fiscal note is inaccurate.

For example, the Department recently amended its managed care contracts to require that managed care organizations pay non-participating providers (i.e., hospitals with which a particular managed care plan does not contract) 90 percent of fee-for-service rates. As the fee-for-service rate drops, any hospital treating a patient enrolled in a managed care plan with which it does not contract will now receive 90 percent of the lower amount. This is an actual and calculable impact on hospital reimbursement, which the Department made no attempt to assess.

In ignoring the impact of fee-for-service reductions on managed care rates, the fiscal note vastly underestimates the total cost to Missouri hospitals, in violation of Sections 536.200 and 536.205, RSMo.

### **C. The Fiscal Note Does Not Consider Any Impact on the Federal Reimbursement Allowance**

Section 11.730 of House Bill (HB) 2011 of 2018 requires the Department to determine the impact of any changes to the fee-for-service or managed care payment methodologies on the Federal Reimbursement Allowance (FRA) provider tax. While the Department publicly has stated it would consider reductions in hospital reimbursements when setting the FRA tax for state fiscal year 2019, such action does not adequately address the total cost of the rule and renders the fiscal note inaccurate. Further, failing to assess how the reimbursement changes will affect the FRA is arbitrary and capricious.

MHA maintains a voluntary pooling arrangement that enhances the FRA program by ensuring stability in hospital reimbursement and mitigation of the impact of changes in payment methodologies. While the Department is not involved in the operation of the pool, it has a vested interest in ensuring the FRA program continues to provide a viable funding stream for the state Medicaid program. Therefore, it must adequately take into account the effect of changes in payment methodologies on the pool. Absent such consideration, the fiscal note does not adequately capture the impact to affected hospitals.

Changes in the reimbursement methodology have far-reaching implications for the pooling arrangement. The total cost to a particular hospital participating in the pool may not be limited to the dollar amount in reduced Medicaid reimbursement. In other words, the financial impact of these proposed reductions are not proportional to the actual cost to each facility. Because of the pooling arrangement, some facilities may experience an increased fiscal impact that provides a disincentive to participate in the pool. If any facility elects to cease participating in the pool, there is a financial effect on the remaining pool participants. These ripple effects could

undermine the stability of the entire FRA program and the pooling arrangement, which were established for the opposite reason – to ensure a stable funding source for the state’s Medicaid reimbursements to hospitals.

Further, the failure to consider the impact to the FRA program is arbitrary and capricious. A rule is arbitrary and capricious when it represents “willful and unreasoning action, without consideration of and in disregard of the facts and circumstances . . . .” *Psychiatric Healthcare Corp. v. Dep’t of Soc. Servs., Div. of Med. Servs.*, 100 S.W.3d 891, 900 (Mo. App. W.D. 2003) (citing *Jones v. City of Jennings*, 595 S.W.2d 1, 3 (Mo. App. 1979)). The success of the pooling arrangement is key to the FRA program, which, in turn, was established to maintain financial stability among hospitals in the state. The Department’s refusal to consider the collateral impact on the continued viability of the FRA program is contrary to HB 2011 and imposes substantial inequity among affected hospitals, rendering it arbitrary and capricious.

A fiscal note that fails to adequately assess all implications to a regulatory change does not comply with Sections 536.200 and 536.205, RSMo. The fiscal note attached to the Department’s Order of Rulemaking merely applies the dollar value of the reimbursement reductions to the number of projected procedures. This calculation fails to take into account additional, but very real, impacts of the rule.

The Administrative Procedure Act imposes more stringent requirements on rulemaking activity than the Department has undertaken here. Sections 536.200 and 536.205, RSMo require an agency to conduct a detailed analysis of the aggregate cost of compliance – the “entire number, sum, mass, or quantity of something; total amount; complete whole.” *Missouri Hosp. Ass’n v. Air Conservation Comm’n*, 874 S.W.2d at 389-390 (citing *Black’s Law Dictionary* 60 (5th ed. 1979)). Because the fiscal note does not separately assess the costs to public and private entities and does not evaluate the impact on managed care rates or the Federal Reimbursement Allowance, MHA requests that the Committee recommend the General Assembly declare the rule invalid on the grounds that it does not comply with the fiscal note requirements of chapter 536 and is arbitrary and capricious, in violation of Section 536.014, RSMo.

### **The Order of Rulemaking Impermissibly Incorporates by Reference Outside Sources**

Section 536.031, RSMo authorizes an agency to incorporate by reference outside sources if certain requirements are met. If an agency is to include reference to outside sources, it must “fully identify the material by publisher, address, and date in order to specify how a copy of the material may be obtained, and shall state that the referenced rule, regulation, standard, or guideline does not include any later amendments or additions . . . .” The Order of Rulemaking violates this statutory requirement.

Section (1)(C)2.B of the rule provides that the Medicaid fee schedule amounts will be based on a percentage of the “Medicare Physician fee schedule rate using Missouri Locality 01.” The rule fails to state the date of the operative fee schedule and does not assert that the rule will not include any later amendments or additions. As written, the Medicaid reimbursement rate will necessarily fluctuate each time the Medicare Physician fee schedule changes, which occurs at least annually. Section 536.031.4, RSMo assures that regulatory standards are fixed and certain. The statute is intended to prevent the open-ended result that occurs here – changes in a primary reimbursement source without proper notice by the agency and the ability of the affected industry to comment with respect to same. Because the rule contains reference to outside sources in violation of Section 536.031, RSMo, MHA asks the Committee to recommend that the General Assembly nullify the rule.

### **The Order of Rulemaking Fails to Properly Assess the Impact on Small Businesses**

The Department failed to comply with the requirements of chapter 536, RSMo with respect to assessing the impact on small businesses. The Small Business Impact Statement attached to the Department’s Order of Rulemaking acknowledges a cost to hospitals exceeding \$66.5 million annually. When an agency has determined that a proposed rule affects small businesses, it is to submit a statement to the Small Business Regulatory Fairness Board describing, in part, the methods considered to reduce the impact on small businesses and how the agency involved small businesses in the development of the rules. Section 536.300, RSMo.

The Department’s Small Business Impact Statement wholly fails to describe *any* methods considered to reduce the impact on small business. Instead, it contains a rote description of what the rule does:

This amendment describes how all outpatient surgical procedures, outpatient drugs, the technical component of outpatient radiology procedures and the telehealth originating site fee will be reimbursed. Additionally, this amendment describes how adjustments will be made when calculating the outpatient percentage rates for hospitals along with an exception process for outpatient surgical procedures. This proposed amendment also removes outdated language and date references.

Section 536.300 was enacted by the General Assembly to protect small businesses and ensure that agencies adequately and fairly assess the impact of cumbersome regulations on entities that foster and drive economic development in their local communities. The statute expressly directs the Department to consider alternatives that reduce a rule’s impact on small businesses. The Small Business Impact Statement accompanying the rule does not satisfy this mandate, and the Committee should recommend that the rule be invalidated until the Department conducts an adequate assessment.

The Small Business Impact Statement is similarly deficient in describing how the agency involved small businesses in the development of the rules. The Department's sole activity in involving small businesses was to share the proposed rule with MHA. It did not engage directly with any small business to evaluate the impact of the rule. While MHA did communicate its opposition to various components of the rule to the Department on behalf of all member hospitals, the Department failed to meet its statutory obligation to make this assessment. For these reasons, MHA requests that the Committee vote to disapprove the rule.

### **The Order of Rulemaking Exceeds the General Assembly's Budgetary Directives**

A rule may be declared invalid when it is in conflict with state law or is so arbitrary and capricious that it unduly burdens those affected. Section 536.014, RSMo. The nature of the reimbursement reductions imposed in the Order of Rulemaking satisfy both criteria.

The General Assembly establishes the state budget through its legislative enactments. The process of enacting the state budget involves input from both legislative chambers and affected stakeholders, who can provide information to their elected representatives on the implications of budgetary decisions. The General Assembly considers a variety of information in establishing annual appropriations, including fiscal notes supplied by state agencies and public testimony from interested parties. The process is intended to ensure that budget decisions are a product of transparency and full and fair debate.

During the 2018 legislative session, the House of Representatives introduced House Bill (HB) 2011, which proposed that hospital Medicaid services be reduced by \$138 million. MHA, among other affected parties, petitioned members of the General Assembly on the drastic impact of the proposed cuts. Following public input and negotiations between both chambers of the General Assembly, the conference committee recommended, and the legislature adopted, a final version of HB 2011 that reduced MO HealthNet appropriations for fee-for-service hospital services by \$28.7 million in total funds. As enacted, the bill expressed the intent of the General Assembly as to the appropriate level of hospital reimbursements under the Medicaid program.

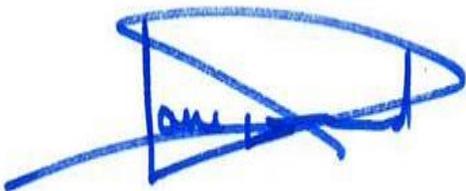
This rule further decreases the amount in fee-for-service hospital expenditures by a purported \$66.5 million annually, in conflict with the legislative enactment found in HB 2011, which is prohibited by Section 536.014, RSMo. Moreover, it represents an arbitrary and capricious act that unduly burdens financially stressed hospitals, especially those in rural areas. The Department's action failed to consider the totality of facts and circumstances underlying the health care system in Missouri, rendering it arbitrary and capricious as defined by law. *Psychiatric Healthcare Corp. v. Dep't of Soc. Servs., Div. of Med. Servs.*, 100 S.W.3d 891, 900 (Mo. App. W.D. 2003) (citing *Jones v. City of Jennings*, 595 S.W.2d 1, 3 (Mo. App. 1979)).

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Access to health care services is a concern for many Missourians, but especially those who are economically disadvantaged or who live in areas where the local hospital is one of few viable sources of care. The General Assembly recognized the delicate balance of interests between state savings and ensuring adequate health care services are available to all citizens of the state. The Department has essentially ignored this legislative determination in the interest of reducing expenditures, regardless of the impact on those who provide and utilize health care services.

Essentially, the Department claims unilateral and unfettered authority to reduce or eliminate spending on some or all of its programs, essentially rewriting the General Assembly's plan for allocating resources through its budget enactments. State law establishes a process for addressing agency overspending through supplemental budget requests and a process for reducing spending through withholdings when revenues are insufficient to support the General Assembly's appropriations. Instead, the proposed rule circumvents the budgetary process and imposes severe spending cuts without consideration of the facts and circumstances before the General Assembly when it enacted HB 2011. Therefore, MHA urges the Committee to disapprove the rule.

Sincerely,

A handwritten signature in blue ink, appearing to be "Jane Drummond", written over a rectangular stamp or box.

Jane Drummond  
General Counsel and Vice President of Legal Affairs