MONTANA

DISCLAIMER: The views, statistical analysis, findings, and opinions expressed herein are not necessarily those of the Office of Minority Health, the Office of Public Health and Science nor the Department of Health and Human Services. The National Health Law Program, Inc. (NHeLP), under contract #282-00-0026, reviewed and analyzed existing state policies related to collecting racial and ethnic data by managed care organizations and health insurers. The information in this draft report contains the findings of NHeLP and not that of the Office of Minority Health, the OPHS, nor the U. S. Department of Health and Human Services. The study was conducted between October 2000 and May 2001. The policies and/or data per state may have changed since that time. The findings that have been updated in this draft report are the U.S. Census data (updated so that all data is from the 2000 Census) and the Center for Medicare & Medicaid Services (CMS)/HHS Medicaid data (updated from the June 30, 2000 to the December 31, 2002 reports).

MONTANA

A. General and Health Demographics

Total Population	902,195	
Percent Black Population	0.3	
Percent American Indian and Alaskan Native Population	6.0	
Percent Asian Population	0.5	
Percent Native Hawaiian and Other Pacific Islander Population	0.0	
Percent Hispanic Population (of any race)	2.0	
Percent White Population	89.5	
Other (some other race and two or more races)	1.6	
Language Use - 2000 census data		
Percent Limited English Proficiency (LEP) Population	0.46	(1.49)
Health Care Delivery Profile		
Percent of Total Non-elderly Population Privately Insured (1997-99)	67.9	
Percent of Total Population Enrolled in HMOs	6.97	
Medicaid Enrollment (as of December 31, 2002)	76,482	(8.48%)
Medicaid Managed Care Enrollment	52,237	(68.30%)
Percent of Total Non-elderly Population Uninsured (1997-99)	21.8	

B. Collection and Reporting of Racial and Ethnic Data by Health Insurers and Managed Care Organizations

1. Statutes, Regulations, Policies, and Other Written Materials

Montana uses the term “health insurer”or “health carrier” to encompass any entity that provides health care services, and includes a disability insurer, managed care organization

(MCO),[1] health maintenance organization (HMO),[2] health service corporation (HSC) or any other entity providing a health benefit plan.[3] This state summary will use the term "health insurer" to refer to these entities, unless there is a distinction made within the statutes or regulations regarding the issue being discussed.

The Commissioner of Insurance (Commissioner) regulates health insurers in the state[4] and must approve all filings.[5] Montana has no statutes or regulations that prohibit or require the collection or reporting of racial, ethnic, or primary language data.

However, all MCOs, including HMOs,[6] must file with the Department of Insurance an access plan describing "the health carrier's efforts to address the needs of covered persons with limited English proficiency (LEP) and literacy,[7] with diverse cultural and ethnic backgrounds, and with physical and mental disabilities."[8] This requirement strongly suggests the need for at least collection of race, ethnicity, and primary language data.

2. Discrimination

HMOs cannot "unfairly discriminate" against any enrollee or applicant on the basis of race, color, creed, national origin, ancestry, or several other protected classifications.[9]

Pursuant to Montana's unfair trade provisions, health insurers cannot permit any unreasonable discrimination between individuals of the same class and of essentially the same hazard in the rate charged, the benefits provided, or any terms and conditions of the policy.[10] But the statute does not contain a direct prohibition against discriminating because of race, color,

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[1] An MCO is a health carrier that provides health care services with systems or techniques to control or influence the quality, accessibility, utilization, or costs of services to its enrollees. Mont. Code Ann. § 33-37-101(8).

[2] An HMO provides basic health services to enrollees on a prepaid basis. Mont. Code Ann. § 33-31-102.

[3] Mont. Code Ann. §§ 33-36-103(13), 33-37-101 and 33-1-207 (health insurers are included in the definition of "disability insurance").

[4] Mont. Code Ann. §§ 33-1-311, 33-1-102(1) and 33-1-1102. MCOs, including HMOs, are under the concurrent jurisdiction with the Department of Public Health and Human Services (DPHHS). Mont. Code Ann. §§ 33-1-102 (4) & (6) and 33-36-103(5).

[5] Mont. Code Ann. §§ 33-1-501, 33-30-301 (HSC) and 33-31-201 (HMOs).

[6] Mont. Code Ann. § 33-31-111(5)(d).

[7] Montana requires the insurer to certify that non-English language policies meet the same minimum literacy standard as do policies printed in English, or to be otherwise authorized by the Commissioner. Mont. Code Ann. §§ 33-15-324(3) & 33-15-325(1)(a), and 33-15-327.

[8] Mont. Code Ann. § 33-36-201(6)(d).

[9] Mont. Admin. R. 6.6.2507.

[10] Mont. Code Ann. §§ 33-18-206(2) and 33-30-306(1)(HSC).

or national origin.[11]

Montana's Human Rights Act has two provisions which appear to apply to health insurers.[12] The first addresses discrimination in financial transactions and includes insurance companies within the definition of financial institutions.[13] It prohibits any discrimination based on race, creed, color or national origin and certain other classifications, in any term, condition or privilege relating to the receipt of the financial assistance, unless based on reasonable grounds.[14]

The other provision covers public accommodations. It prohibits any owner, agent or employee of a public accommodation, which specifically includes a hospital or any other business,[15] from refusing, withholding or denying a person any of its services because of race, creed, color, or national origin, except when the distinction is based on reasonable grounds.[16] This part of the statute also makes it unlawful for any financial institution to aid or abet such a discriminatory practice.[17]

Finally, the statute makes it illegal for the state or any of it political subdivisions, which includes the Commissioner, to refuse, withhold, or deny any local, state, or federal funds or services because of a person's race, color, creed or national origin, unless based on reasonable grounds.[18]

3. Confidentiality

Montana has a comprehensive statutory scheme establishing standards for the collection,

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[11] By comparison, there is a statute for property, casualty, and surety insurance which prohibits unfair discrimination in the rates, premium, benefits, or any other term or condition between insureds because of race, color, creed, or national origin. Mont. Code Ann. § 33-18-210.

[12] These statutes and their implementing regulations appear to include health insurers within their ambit. However, another statute, dealing directly with the issuance or operation of any type of insurance policy or plan, only prohibits discrimination based on sex or marital status, with no mention of race or ethnicity. Mont. Code Ann. § 49-2-309; *see also* Mont. Admin. Code 24.9.1303(1)(same, regarding rates or premiums for health insurance policies). It is unclear whether Montana's courts would view this failure to mention race or ethnicity when dealing specifically with discrimination in health insurance as an indication that the Legislature did not intend to prohibit such discrimination in that field.

[13] Mont. Code Ann. § 49-2-101(13).

[14] Mont. Code Ann. § 49-2-306(1).

[15] Mont. Code Ann. § 49-2-101(20).

[16] Mont. Code Ann. § 49-2-304(1).

[17] Mont. Code Ann. § 49-2-302. The administrative rule interpreting this section explains that unlawful discrimination includes imposing or applying qualification standards that screen out persons who are members of a protected class, unless it can be shown to be necessary. Mont. Admin. R. 24.9.609. Interestingly, a given example of prohibited retaliatory or adverse action is the denial of insurance. Mont. Admin. R. 24.9.603.

[18] Mont. Code Ann. § 49-2-308.

use, and disclosure of information gathered from insurers.[19] Despite the public records requirements which would otherwise subject the Commissioner's records and filings to public scrutiny,[20] this act describes the limited circumstances in which personal, privileged and medical information can be collected and released.[21] There are many provisions, including detailing definitions of medical record, personal and privileged information,[22] as well as specific requirements restricting the use of information gathered for insurance transactions.[23]

With regard to MCOs, including HMOs, any data or information pertaining to the diagnosis, treatment, or health of an enrollee or applicant must be held in confidence.[24] Disclosure by an MCO is only permitted: (1) if allowed by the Privacy Act; (2) if required in administrative proceedings; (3) in an appeal; or (4) as otherwise required by law or court order.[25]

C. Collection and Reporting of Racial and Ethnic Data by Other Health Care Entities

1. Department of Public Health and Human Services (DPHHS)

a. Statutes, Regulations, Policies and Other Written Materials

DPHHS is the state agency that administers the state's Medicaid program and SCHIP.[26] In Montana, Medicaid is operated through a managed care and capitated health care system.[27]

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[19] Insurance Information and Privacy Act (Insurance Privacy Act); Mont. Code Ann. §§ 33-19-101 & 33-10-102.

[20] Mont. Code Ann. § 33-1-312.

[21] With regard to personal information obtained by the Commissioner through an examination report of an insurer, it is protected by an individual privacy interest. Mont. Code Ann. §33-1-409(6). If a utilization review requires disclosure of a patient's personal information, the identity of that person must be concealed. Mont. Code Ann. § 33-32-210.

[22] Mont. Code Ann. § 33-19-104(18),(20) & (23).

[23] *See e.g.*: (1) Mont. Code Ann. § 33-19-202 (notice to the applicant of insurance information practices, such as the types of personal information collected and the source); (2) Mont. Code Ann. §33-19-204 (the content, use, and disclosure of authorization forms, which provides that the insurer cannot disclose personal information before obtaining a signed authorization form from the applicant); and (3) Mont. Code Ann. §§ 33-19-301-306 (disclosure provisions and limitations of personal and medical information, including access to personal information).

[24] Mont. Code Ann. § 33-36-305. Any information considered by a quality assurance program is also confidential.

[25] *Id.* HMOs cannot disclose such information except: (1) to the extent necessary to carry out the purposes of the HMO provisions; (2) upon the express consent of the subject; (3) pursuant to a court order; or (4) if there is litigation involving the subject and the HMO where the information is relevant. Mont. Code Ann. § 33-31-113.

[26] Mont. Code Ann. §§ 53-6-101(1) & 53-4-1003.

[27] Mont. Code Ann. §§ 53-6-116, and generally, 53-6-701 *et seq*.

There are no state statutes or regulations that prohibit or require the collection or reporting of racial, ethnic or primary language data regarding Medicaid or SCHIP applicants or recipients. However, as with other MCOs, providers in the Medicaid managed care network must have an access plan that addresses the needs of LEP and/or illiterate enrollees and those with diverse cultural and ethnic backgrounds, in order to insure that these characteristics do not pose barriers to their services. Providers must submit an updated access plan if there is a significant change in the demographic characteristics of the enrolled population that renders the provider network non-compliant.[28] At a minimum, the access plan is expected to include: (a) interpreter services to allow effective communication regarding treatment, medical history and health education; (b) appropriate and sufficient personnel, physical resources and equipment to meet the basic health care needs of these enrollees; and (c) education to providers and other employees about the needs of these covered persons.[29] The Montana Medicaid Managed Care Contract ("Montana Contract") provides that "enrollee handbooks shall be made available in languages other than English, *if in the [DPHHS's] determination*, a significant number of enrollees are conversant only in those other languages."[30] (Emphasis added.)

Montana's SCHIP application asks for the applicant's "Ethnic Group or Tribal Affiliation".[31] The instructions indicate that the information is optional and will not be used to determine eligibility for health care or public assistance.[32]

Vital statistics and other information for public health records are also collected by DPHHS[33] and include: (1) race and ancestry of the parents on birth certificates;[34] (2) race of both parents for delayed birth certificates;[35] (3) race of adoptive parents on certificates;[36] (4) race and ancestry of the decedent on death certificates;[37] (5) race and ancestry of parents for fetal death certificates;[38] (6) race of each party for marriage applications;[39] (7) race of each party in a

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[28] Mont. Admin. R. 37.108.206 & 207.

[29] Mont. Admin. R. 37.108.236.

[30] Montana Contract, Attachment 1. The Contract does not define the phrase "significant number".

[31] "Application for Children's Health Insurance Program Plan," (SCHIP Application) at: http://www.dphhs.state.mt.us/hpsd/index.htm. The ethnicity codes include: AI-American Indian/Alaskan Eskimo/Native (with space for the specific tribe); AS-Asian or Pacific Islander; BL-Black, not of Hispanic Origin; HI-Hispanic; WH-White, not of Hispanic Origin.

[32] *Id.*

[33] Mont. Code Ann. § 50-15-102.

[34] Mont. Admin. R. 37.8.301(3)(a).

[35] Mont. Admin. R. 37.8.303 (4)(b).

[36] Mont. Admin. R 37.8.310(1)(b).

[37] Mont. Admin. R. 37.8.801(1)(a).

[38] Mont. Admin. R. 37.8.802(1)(f).

[39] Mont. Admin. R. 37.8.601.

dissolution of marriage;[40] (8) race of patients on the tumor registry;[41] and (9) patient race for all hospitals and other health care facilities.[42]

b. Discrimination

No applicant or recipient of Medicaid can be discriminated against, or denied or delayed care or services on the basis of race, color, or national origin, either by DPHHS itself,[43] or by any provider.[44] Accordingly, the Montana Contract requires contracting MCOs to comply with the Civil Rights Act of 1964.[45] The SCHIP Application also provides that the application will be considered without regard to race, color, national origin, and several other protected characteristics.[46]

In addition, DPHHS is bound by the same general discrimination provisions, discussed above, that apply to the Commissioner of Insurance.[47]

c. Confidentiality

Any Medicaid information regarding an applicant or recipient is confidential and must be used only for purposes related to the administration of the Medicaid program.[48] A provider may not divulge such information to any person other than DPHHS or other authorized representatives without the written consent of the applicant or recipient.[49] Medicaid HMOs must comply with the disclosure requirements of both the Health Information Act and the Insurance Privacy Act.[50] The SCHIP application also states that the information given is confidential, that it will be released only if needed to administer the program, and will be forwarded to other agencies or organizations only if the applicant gives her/his permission on the form.[51]

Montana's Government Health Care Information Act (Health Information Act)[52] governs

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[40] Mont. Admin. R. 378.602.

[41] Mont. Admin. R. 37.8.1802(6) & 37.81808(5).

[42] Mont. Admin. R. 37.8.1601(1).

[43] Mont. Code Ann. § 53-6-105.

[44] Mont. Admin. R. 37.85.402(6) & 37.85.401.

[45] Montana Contract, p. 11.

[46] SCHIP Application at 4.

[47] Mont. Code Ann. §§ 49-2-304(1) & 308.

[48] Mont. Admin. R. 37.85.414(2).

[49] *Id*.

[50] Mont. Admin. R. 37.86.5026.

[51] SCHIP Application at 4. The form also informs the applicant where complaints can be filed.

[52] Mont. Code Ann. §§ 50-16-601 *et seq*. There is an analogous statute, the Uniform Health Care Information Act, which regulates the gathering, use, and disclosure of health record information by health care providers. Mont. Code Ann. §§ 50-16-501 *et seq*.

the release of health care information[53] in the possession of DPHHS. It limits disclosure to the following: (1) for statistical purposes, if there are no individual identifiers; (2) upon written consent of the subject; (3) to medical personnel in an emergency; (4) as allowed for public health purposes; and (5) for certain circumstances involving minors.[54]

It is also state policy to protect the integrity of vital records and reports, and to ensure their proper use.[55] Unless otherwise authorized by law, DPHHS will restrict access to prevent the identification of individuals and will allow disclosure only: upon application from the registrant or his/her authorized representative;[56] to authorized government agencies; or for statistical or research purposes.[57]

D. Observations

Montana has no statutes or regulations that prohibit or require the collection or reporting of racial, ethnic, or primary language data.

Like many western rural states, Montana's population is not especially diverse, with American Indians/Alaskan Natives being the largest minority group. However, Montana has recognized the importance of ensuring culturally and linguistically appropriate access for its private managed care enrollees and has mandated, either statutorily or through regulation, that plans address the special needs of racial, ethnic and LEP populations. Because DPHHS is the agency that regulates the adequacy of all managed care networks, it has both the opportunity and the ability to provide uniformity to the collection of race, ethnicity, and primary language data.

The Montana Human Rights Act provides that any pre-employment inquiry made in connection with prospective employment which elicits information regarding race, color, creed, or national origin raises the suspicion of an intent to discriminate.[58] However, another statute[59] requires all employers, labor organizations, employment agencies, and government agencies to keep adequate records to show the number of Whites (non-Hispanic), Blacks (non-Hispanic), Hispanics, Asians or Pacific Islanders, American Indians or Alaskan Natives in each job category in order to help "administer the civil rights laws and regulations."[60] This dichotomy of approach, prohibiting advance knowledge of race and ethnicity in an effort to avoid discrimination but requiring it after the hiring decision has been made to insure proportionate inclusion, could be readily adapted by DPHHS to serve in the health care industry as well.

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[53] Health care information means any information that identifies or can be readily associated with the identity of an individual. Mont. Code Ann. § 50-16-602(2)(a).

[54] Mont. Code Ann. §50-16-603.

[55] Mont. Code Ann. §50-15-122.

[56] Mont. Code Ann. §50-15-121.

[57] Mont. Admin. R. 37.8.126.

[58] Mont. Admin. R. 24.9.1406.

[59] Mont. Code Ann. §49-2-102.

[60] Mont. Admin. R. 24.9.805.