

**WISCONSIN DEPARTMENT OF HEALTH SERVICES
PROPOSED ORDER TO ADOPT PERMANENT RULES**

The Wisconsin Department of Health Services (“the department”) proposes an order to: **amend** DHS 107.24 (4) (c) 1.; **repeal** DHS 107.24 (4) (c) 3.; **renumber and amend** DHS 107.24 (4) (c) 2.; and **create** DHS 107.24 (4) (c) 2. a. to c., relating to complex rehabilitation technology prescribed to Medical Assistance recipients in nursing homes.

RULE SUMMARY

Statute interpreted

Section 49.45 (9r) (e), Stats.

Statutory authority

Sections 49.45 (9r) (e), and (10), and 227.11 (2), Stats.

Explanation of agency authority

Section 49.45 (10), Stats., authorizes the department to “promulgate such rules as are consistent with its duties in administering medical assistance.” 49.45 (9r) (e), Stats., directs the department to “reimburse a provider for a complex rehabilitation technology with prior authorization when prescribed by a physician, medically necessary, and used by a recipient of Medical Assistance who is a resident of a nursing home.” The department therefore has express rulemaking authority consistent with s. 227.11 (2), Stats., to amend s. DHS 107.24 for consistency with s. 49.45 (9r) (e), Stats., which was created by 2021 Wis. Act 88 (“Act 88”).

Related statute or rule

The following statutes and rules directly relate to or address complex rehabilitation technology.

42 USC § 1395m

42 USC § 1395w-3(a)

42 USC § 1395x(n)

42 USC § 1396b(i)(27)

42 CFR § 440.70

42 CFR § 414.234

42 CFR § 441.375

DHS 101.03 (28g) and (28m)

DHS 105.54

DHS 107.24

Plain language analysis

Section 49.45 (9r) (e), Stats., which was created by Act 88, directs the department to reimburse a provider for a complex rehabilitation technology with prior authorization when prescribed by a physician, medically necessary, and used by a recipient of Medical Assistance who is a resident of a nursing home. As it is currently written, s. DHS 107.24(4) (c) provides that durable medical equipment (DME), including complex rehabilitation technology, is not covered for recipients who are nursing home residents except for any of the following:

-DME which is personalized in nature or custom-made for a recipient and is to be used by the recipient on an individual basis for hygienic or other reasons, such as orthoses, prostheses including hearing aids or other assistive listening devices, orthopedic or corrective shoes, special adaptive positioning wheelchairs and electric wheelchairs.

-A special adaptive positioning wheelchair or electric wheelchair that is justified by the diagnosis and prognosis and the occupational or vocational activities of the resident recipient.

-A wheelchair prescribed by a physician if the wheelchair will contribute towards the rehabilitation of the resident recipient through maximizing his or her potential for independence, and if the recipient has a long-term or permanent disability and the wheelchair requested constitutes basic and necessary health care for the recipient consistent with a plan of health care, or the recipient is about to transfer from a nursing home to an alternate and more independent setting.

The intent of the proposed rules is to establish rules consistent with s. 49.45 (9r) (e), Stats., by requiring the department to reimburse a provider for a complex rehabilitation technology with prior authorization when prescribed by a physician, medically necessary, and used by a recipient of Medical Assistance who is a resident of a nursing home.

Summary of, and comparison with, existing or proposed federal regulations

42 CFR 440.70(b)(3) requires that states provide medical equipment, including durable medical equipment of which complex rehabilitation technology is a subset, suitable for use in the home as home health services and that this equipment be reviewed by a physician annually.

42 CFR 483.24 (a) (1), which requires that nursing homes give residents the “appropriate treatment and services to maintain or improve his or her ability to carry out the activities of daily living,” including hygiene, mobility, toileting, dining, and communicating.

42 CFR 414.234(b) contains a master list of durable medical equipment (of which complex rehabilitation technology is a subset) requiring a face-to-face encounter with a provider, written authorization or prescription, and prior authorization in order to be a covered Medicare service

42 CFR 414.229 includes requirements to ensure that durable medical equipment suppliers who rent CRT follow specific requirements.

Comparison with rules in adjacent states

Illinois:

As of June 23, 2022, the state has rules related to complex rehabilitation technology under 305 Ill. Stat. 5 and 89 Ill. Admin. Code s. 140.476. The Medicaid agency is directed to [not make] payment for durable medical equipment or supplies required by an individual in a long-term care facility that are commonly used in patient care and considered as a part of the per diem reimbursement paid by the Department.

Iowa:

As of June 23, 2022, the state has rules related to prior authorization requirements for complex rehabilitation technology under IAC ch. 294A, 441 IAC ss. 78.1 (1) (b) (294A). [Under] the Medicaid agency medical supplies are payable when ordered by a legally qualified practitioner for a specific rather than incidental use, subject to the conditions specified in rule 441—78.10(249A). When a member is receiving care in a nursing facility or residential care facility, payment will be approved only for the following supplies when prescribed by a legally qualified practitioner: (1) Colostomy and ileostomy appliances. (2) Colostomy and ileostomy care dressings, liquid adhesive and adhesive tape. (3) Disposable irrigation trays or sets. (4) Disposable catheterization trays or sets. (5) Indwelling Foley catheter. (6) Disposable saline enemas. (7) Diabetic supplies including needles and syringes, blood glucose test strips, and diabetic urine test supplies.

Michigan:

As of February 22, 2021, the state has rules related to prior authorization requirements for complex rehabilitation technology under Act 280 of 1939 s. 400.111j. The Medicaid agency may require prior authorization for medical equipment with a 15 work day review period. The agency has determined that prior authorization is required for complex rehabilitation technology when it costs more than \$500. Additional legislation specific to complex rehabilitation technology is pending. *See*

[http://www.legislature.mi.gov/\(S\(frku1nkfpr41gffeyrprsvug\)\)/mileg.aspx?page=GetObject&objectname=2021-SB-0500](http://www.legislature.mi.gov/(S(frku1nkfpr41gffeyrprsvug))/mileg.aspx?page=GetObject&objectname=2021-SB-0500).

Minnesota:

As of June 23, 2022, the state has rules related to prior authorization requirements for complex rehabilitation technology under Minn. Stats. s. 256B.0625 subd. 25. and Minn. Admin. Code 9505.0310. State Medicaid policy: “A provider who furnishes durable medical equipment for a recipient who is a resident of a hospital or long-term care facility may submit a separate claim for medical assistance payment if the equipment has been modified for the recipient or the item is necessary for the continuous care and exclusive use of the recipient to meet the recipient's unusual medical need according to the written order of a physician.”

Summary of factual data and analytical methodologies

The department relied on requirements set forth in s. 49.45 (9r) (e), Stats.

Analysis and supporting documents used to determine effect on small business

The department published a solicitation in the Administrative Register from September 6, 2022 to September 20, 2022, in which it requested comments on the economic impact of the proposed rule.

Effect on small business

Based on the economic impact public commenting period and the analysis provided in fiscal estimate and economic impact analysis, the proposed rule is anticipated to have little to no economic impact on small businesses.

Agency contact person

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Statement on quality of agency data

The data used by the Department to prepare these proposed rules and analysis comply with s. 227.14 (2m), Stats.

Place where comments are to be submitted and deadline for submission

Comments may be submitted to the agency contact person that is listed above until the deadline given in the upcoming notice of public hearing. The notice of public hearing and deadline for submitting comments will be published in the Wisconsin Administrative Register and to the department's website, at <https://www.dhs.wisconsin.gov/rules/permanent.htm>. Comments may also be submitted through the Wisconsin Administrative Rules Website, at: <https://docs.legis.wisconsin.gov/code/chr/active>.

RULE TEXT

SECTION 1. DHS 107.24 (4) (c) 1. is amended to read:

DHS 107.24 (4) (c) 1. Oxygen. Prescriptions for oxygen shall provide the required amount of oxygen flow in liters;

SECTION 2. DHS 107.24 (4) (c) 2. is renumbered DHS 107.24 (4) (c) 2. (intro.) and amended to read:

DHS 107.24 (4) (c) 2. Durable medical equipment which is personalized in nature or custom-made for a recipient and is to be used by the recipient on an individual basis for hygienic or other reasons. These items are orthoses, prostheses including hearing aids or other assistive listening devices, orthopedic or corrective shoes, ~~special adaptive positioning wheelchairs and electric wheelchairs~~ and complex rehabilitation technology. For coverage and reimbursement ~~of a special adaptive positioning wheelchair~~

~~or electric wheelchair shall be justified by the diagnosis and prognosis and the occupational or vocational activities of the resident recipient; and, complex rehabilitation technology shall be prescribed by a physician, require prior authorization to establish medically necessity, and meet all complex rehabilitation standards under sub. (3) (i). In order to be covered for a recipient who is a nursing home resident, the complex rehabilitation technology shall do at least one of the following:~~

SECTION 3. DHS 107.24 (4) (c) 2. a. to c. are created to read:

- DHS 107.24 (4) (c) 2. a. Contribute to the recipient's independent completion of activities of daily living.
- b. Support the recipient's occupational, vocational, or psychosocial activities.
- c. Provide the recipient the independent ability to move about the facility, or to attain or retain self-care.

SECTION 4. DHS 107.24 (4) (c) 3. is repealed.

SECTION 5. EFFECTIVE DATE. This rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2) (intro.), Stats.

Wisconsin Department of Health Services

Kirsten Johnson, Secretary-designee