

Report From Agency

DEPARTMENT OF HEALTH SERVICES
Office of Legal Counsel
F-02113 (08/2017)

STATE OF WISCONSIN
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RULEMAKING REPORT TO LEGISLATURE

CLEARINGHOUSE RULE 20-063

Ch. DHS 107

Basis and Purpose of Proposed Rule

This rule project is based on *Flack v. Wis. Dep't of Health Servs.*, 395 F. Supp. 3d 1001 (W.D. Wis. 2019), in which the United States District Court for the Western District of Wisconsin concluded ss. DHS 107.03 (23) and (24) and 107.10 (4) (p)—which exclude Medicaid coverage for “[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics” and “transsexual surgery”—violated the federal Medicaid Act and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Based on those conclusions, the court permanently enjoined the department from enforcing the exclusions in ss. DHS 107.03 (23) and (24) and DHS 107.10 (4) (p).

Based on the decision in *Flack*, the department proposes to repeal ss. DHS 107.03 (23) and (24) and DHS 107.10 (4) (p). There are no reasonable alternatives to the proposed repeal, and these exclusions must be repealed in order to align department administrative code with the district court’s permanent injunction, and to ensure consistency between department policy and its rule so that the public is aware that Medicaid coverage is available for these services.

Department Response to Legislative Council Rules Clearinghouse Recommendations

The department accepts the recommendations made by the Legislative Council Rules Clearinghouse and has modified the proposed rule where suggested.

Final Regulatory Flexibility Analysis

The issues raised by each small business during the public hearing(s).

The proposed rules will not have an economic impact on small businesses.

Any changes in the rule as a result of an alternative suggested by a small business and the reasons for rejecting any of those alternatives.

No alternatives were suggested by a small business. The proposed rules will not have an economic impact on small businesses.

The nature of any reports and estimated cost of their preparation by small businesses that must comply with the rule.

The proposed rules will not have an economic impact on small businesses.

The nature and estimated costs of other measures and investments that will be required by small businesses in complying with the rule.

The proposed rules will not have an economic impact on small businesses.

The reason for including or not including in the proposed rule any of the following methods for reducing the rule’s impact on small businesses, including additional cost, if any, to the department for administering or enforcing a rule which includes methods for reducing the rule’s impact on small businesses and the impact on public health, safety and welfare, if any, caused by including methods in rules

The proposed rules will not have an economic impact on small businesses.

Changes to the Analysis or Fiscal Estimate/Economic Impact Analysis

Analysis

No changes were made to the rule’s analysis.

Fiscal Estimate/Economic Impact Analysis

No changes were made to the fiscal estimate/economic impact analysis.

Public Hearing Summary

The department began accepting public comments on the proposed rule via the Wisconsin Legislature Administrative Rules website, and through the department's Administrative Rules Website on February 1, 2021. A public hearing was held on February 12, 2021, in a virtual conference call. Public comments on the proposed rule were accepted until end of business on February 12, 2021.

List of the persons who appeared or registered for or against the Proposed Rule at the Public Hearing.

Registrant	Position Taken (Support or Opposed)
No person appeared or registered for or against the proposed rule at the public hearing.	

Summary of Items Submitted with this Report to the Legislature

Below is a checklist of the items that are attached to or included in this report to the legislature under s. 227.19 (3), Stats.

Documents/Information	Included in Report	Attached	Not Applicable
Final proposed rule -- Rule Summary and Rule Text		x	
Department response to Rules Clearinghouse recommendations	x		
Final Regulatory Flexibility Analysis	x		
Changes to the Analysis or Fiscal Estimate/Economic Impact Analysis			x
Public Hearing Summary	x		
List of Public Hearing Attendees and Commenters	x		
Summary of Public Comments and Department Responses	x		
Fiscal Estimate/Economic Impact Analysis		x	
Revised Fiscal Estimate/Economic Impact Analysis			x
Small Business Regulatory Review Board (SBRRB) statement, suggested changes, or other material, and reports made under s. 227.14 (2g), Stats. and Department's response			x
Department of Administration (DOA) report under s. 227.115 (2), Stats., on rules affecting housing			x
DOA report under s. 227.137 (6), Stats., on rules with economic impact of \$20 MM or more			x
Public Safety Commission (PSC) energy impact report under s. 227.117 (2), Stats. and the Department's response, including a description of changes made to the rule			x