

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

The Wisconsin department of health services (“the department”) proposes an order to **repeal** DHS 105.28 (2) (a) to (c), 107.06 (5) (c), 107.07 (4) (b), 107.07 (4) (k) 1., 107.16 (1) (e) 3. b.; **renumber and amend** DHS 105.28 (2) (intro.), and 107.16 (1) (e) 3. a.; **amend** DHS 105.24 (1) (b) 1., 105.25 (2) (a), 105.27 (2), 106.02 (9) (b) (intro.) and 1. to 7., 107.01 (2) (d), 107.03 (1), 107.06 (1), 107.07 (4) (c), 107.11 (1) (c), 107.13 (2) (a) 5., (2) (b) 4. e., (3) (a) 5. and 6., (3) (b) 4. d., (3m) (d) 6., (4) (a) 8., and (d) 7., and 107.16 (1) (a); **create** DHS 101.03 (66m), (174m), 105.27 (2) (Note 1), 105.28 (2) (Note 2). 105.48 (2m), 106.02 (9) (b) 9., 107.02 (5), 107.06 (4) (cm), 107.13 (2) (a) 4. h., and 107.24 (4) (j).

RULE SUMMARY

Statute interpreted

Not applicable.

Statutory authority

The department is authorized to promulgate the proposed rules based upon the following statutory sections:

Section 227.11 (2), Stats.

Rule-making authority is expressly conferred on an agency as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency’s rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

2. A statutory provision describing the agency’s general powers or duties does not confer rule-making authority on the agency or augment the agency’s rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

(b) Each agency may prescribe forms and procedures in connection with any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but this paragraph does not authorize the imposition of a substantive requirement in connection with a form or procedure.

(c) Each agency authorized to exercise discretion in deciding individual cases may formalize the general policies evolving from its decisions by promulgating the policies as rules which the agency shall follow until they are amended or repealed. A rule promulgated in accordance with this paragraph is valid only to the extent that the agency has discretion to base an individual decision on the policy expressed in the rule.

(d) An agency may promulgate rules implementing or interpreting a statute that it will enforce or administer after publication of the statute but prior to the statute’s effective date. A rule promulgated under this paragraph may not take effect prior to the effective date of the statute that it implements or interprets.

(e) An agency may not inform a member of the public in writing that a rule is or will be in effect unless the rule has been filed under s. 227.20 or unless the member of the public requests that information.

Section 49.45 (61) (d), Stats.

The department shall promulgate rules specifying any services under par. (c) 4. that are reimbursable under Medical Assistance. The department may promulgate rules excluding services under par. (c) 1. to 3. from reimbursement under Medical Assistance. The department may promulgate rules specifying any telehealth service under par. (b) or (c) 1. or 2. that is provided solely by audio-only telephone, facsimile machine, or electronic mail as reimbursable under Medical Assistance.

Explanation of agency authority

The department's authority to promulgate the proposed rules is expressly provided in ss. 227.11 (2) and 49.45 (61) (d), Stats.

Related statute or rule

The following statutes or rules directly relate to reimbursement of many Medical Assistance services when delivered by means of telehealth and communications technology services:

Section 1173(d)-(f) of the Social Security Act

Section 1176 of the Social Security Act

Section 1177 of the Social Security Act

Section 1180 of the Social Security Act

Section 1905 of the Social Security Act

45 CFR s. 164.105(1)(2)(ii)

45 CFR s. 164.302, et seq.

Section 49.45 (61), Stats.

Section 49.46 (2) (b) 21. through 23., Stats.

Plain language analysis

In 2019 Wis. Act 56 ("Act 56"), the Wisconsin Legislature directed reimbursement of many Medical Assistance services when delivered by means of telehealth and communications technology services. It directs the department to reimburse Medical Assistance certified providers for services provided through asynchronous telehealth, interactive telehealth, and remote patient monitoring services, including for federally recognized Medicare telehealth services, remote physiological monitoring, remote evaluation of prerecorded patient information, brief communication technology-based services, and care management services delivered via telehealth. Act 56 also does the following: (1) It directs the department to identify by rule any other reimbursable Medical Assistance telehealth services; and (2) It permits the department to identify by rule certain non-reimbursable Medical Assistance services.

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

Federal law does not establish distinct requirements for Medical Assistance program reimbursement of services provided via telehealth. Instead, the Medical Assistance program may reimburse services provided via telehealth when the underlying service provided meets federal laws and policies. The Centers for Medicare and Medicaid Services ("CMS") looks to and generally models its definition of telehealth on the Medicare definition of telehealth services.

Federal law establishes a more robust definition and requirements for Medicare program reimbursement of telehealth services. Section 1834(m) of the Social Security Act authorizes reimbursement for "telehealth services that are furnished via a telecommunications system by a physician . . . or a practitioner . . . to an eligible telehealth individual enrolled under [Medicare] notwithstanding that the individual physician or practitioner providing the telehealth service is not at the same location as the beneficiary." Telehealth services include "professional consultations, office visits, and office psychiatry services . . . , and any additional service specified." Excluding stroke and treatment of substance use disorders, reimbursement for services provided via telehealth are limited to services provided by a physician or practitioner located at a distant site.

Additionally, federal regulation provides requirements for Medicare program reimbursement of telehealth

services. 42 CFR §410.78 requires that covered telehealth services provided by an interactive telecommunication system when (1) the physician or practitioner must be licensed to furnish the service under State law, (2) the physician or practitioner must provide services from a designated location, (3) the member must receive services at a designated location, and (4) the medical examination is under the control of the physician or practitioner providing the telehealth service. 42 CFR §414.65 allows the physician or practitioner providing the telehealth service to bill for services rendered at the same rate as for in-person services and allows the site where the member is located to charge a fee.

The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) also applies to services provided via telehealth. Applicable HIPAA requirements include the privacy and security rules to ensure the protection of personal health information transmitted and stored. In order to comply with these requirements, providers must ensure that the platforms used to provide services via telehealth contain adequate security measures.

Comparison with rules in adjacent states

Illinois:

As of September 2020, Illinois statute authorizes permanent reimbursement of behavioral health services provided via telehealth when provided by a certain state certified provider under 305 ILCS 5/5-5.25 (b)-(c). Under 89 Ill. Adm. Code 140.403, Illinois regulation permanently authorizes reimbursement of asynchronous and real-time video services provided via telehealth under certain conditions. These conditions include requiring a certified professional to be present at the originating site at all times, the distant site provider to be a certified professional, and the communication platform to be capable of allowing for proper diagnosis and transmission of clearly audible heart tones and lung sounds, clear video of the patient and diagnostic tools. It also excludes group psychotherapy via telehealth from reimbursement.

Iowa:

As of September 2020, Iowa statute authorizes permanent reimbursement of healthcare services provided via telehealth when provided via an interactive audio and video platform and the services meet legal and generally accepted healthcare practices and standards under Iowa Code § 514C.34 1. c. and 3.. Services provided via telehealth are to be reimbursed at the same rate as services provided in-person under Iowa Code § 514C.34 2. Iowa regulation authorizes reimbursement of services via telehealth that meet professional standards under Iowa Admin Code § 441-78.55(294A). The Iowa board of medicine authorizes provision of services via telehealth with or without the presence of a health care provider with the member and holds providers to the same standards of care and professional ethics as in-person services under Iowa Admin Code § 653-13.11(147,148,272C).

Michigan:

As of October 2020, Michigan statute authorizes permanent reimbursement of healthcare services provided via telehealth when provided through real-time, interactive audio or video or asynchronously with HIPAA privacy and security rule compliant platform under MCLS s. 400.105h. Services may be provided at a provider site, a school, a member’s home, or other appropriate location, with member consent, and, in limited circumstances, with accessible follow-up services under MCLS s. 330.1100d, 333.16284, 333.16285, and 400.105h.

Minnesota:

As of September 2020, Minnesota statute authorized permanent reimbursement of healthcare services provided via telehealth when provided through real-time, interactive audio and visual communications and asynchronous services if provided “in the same manner as if the service or consultation was delivered in person” under Minn. Stat. s. 256B.0625 subd. 3b. Services provided via telehealth must be reimbursed at the same rate as service provided in person and are generally limited to three visits per calendar week under Minn. Stat. s. 256B.0625 subd. 3b. Provider-to-provider consultations via telephone, email or facsimile and member-to-provider communications via email or facsimile are not reimbursable under Minn. Stat. s. 147.033. With limited exceptions, physicians that do not practice in but are registered in Minnesota may be reimbursed for services provided via telehealth if they are in good standing outside of Minnesota under Minn. Stat. s. 147.032. Minnesota regulation authorizes reimbursement of mental health services via telehealth when provided via two-way interactive video and the equipment and the connection complies with Medicare standards under Minn. R. 9505.0371 Subp. 10.

Summary of factual data and analytical methodologies

The department formed an advisory committee including representatives from: ABC for Health, Inc.; Bad River Health & Wellness Center; Disability Rights Wisconsin, Inc.; The Alliance of Health Insurers, LLC; LeadingAge Wisconsin, Inc.; Pharmacy Society of Wisconsin, Inc.; Wisconsin Assisted Living Association, Inc.; Wisconsin Association of Family & Children’s Agencies, Inc.; Wisconsin Association of Health Plans, Inc.; Wisconsin County Human Service Association, Inc.; Wisconsin Hospital Association, Inc.; Wisconsin Medical Society, Inc.; Milwaukee County Behavioral Health Division; and Wisconsin Primary Health Care Association, Inc. Advisory committee members were provided a copy of draft language of the proposed rules and asked to provide comments.

Analysis and supporting documents used to determine effect on small business

The department solicited the input of Medical Assistance providers, including small businesses, throughout the telehealth policy and proposed rule change process. In addition, the department published a solicitation in the Administrative Register from March 7, 2022, to April 4, 2022, in which it requested public comments on the economic impact of the proposed rule.

Effect on small business

The proposed rule changes have the potential to impact Medical Assistance providers that are small businesses. These providers have the opportunity to provide covered services via telehealth, which expands the pool of potential members and services provided beyond that potentially available for traditional in-person services, but must ensure that the technology used meets applicable federal and state standards. These providers may also experience increased competition from non-local providers providing similar covered services, including out-of-state providers who meet certification criteria.

Agency contact person

Bailey Dvorak, DHSAdminRules@dhs.wisconsin.gov

Statement on quality of agency data

See summary of factual data and analytical methodologies.

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/active-rulemaking-projects.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 101.03 (66m), and (174m) are created to read:

DHS 101.03 (66m) “Functionally equivalent” means a service provided via telehealth where the transmission of information is of sufficient quality as to be the same level of service as an in person visit. Transmission of voices, images, data, or video must be clear and understandable.

DHS 101.03 (174m) (a) “Telehealth” means the use of telecommunications technology by a certified provider to deliver services allowable under s. DHS 107.02 (5) and ss. 49.45 (61) and 49.46 (2) (b) 21. to 23., Stats., including assessment, diagnosis, consultation, treatment, or transfer of medically relevant data in a functionally equivalent manner as that of an in-person contact.

(b) “Telehealth” may include real-time interactive audio-only communication.

(c) “Telehealth” does not include communication between a certified provider and a recipient that consists solely of an electronic mail message, text, or facsimile transmission.

SECTION 2. DHS 105.24 (1) (b) 1. is amended to read:

DHS 105.24 (1) (b) 1. A registered nurse and a registered occupational therapist shall be ~~on duty~~ available to participate in program planning, program implementation and daily program coordination;

SECTION 3. DHS 105.25 (2) (a) is amended to read:

DHS 105.25 (2) (a) An alcohol and drug counselor certified as provided in ss. DHS 75.02 (84) and 75.03 (4) (d) shall be ~~on duty~~ available during all hours in which services are provided to participate in treatment planning and implementation and daily program coordination.

SECTION 4. DHS 105.27 (2) is amended to read:

DHS 105.27 (2) PHYSICAL THERAPIST ASSISTANTS. For MA certification, physical therapist assistants shall have graduated from a 2-year college-level program approved by the American physical therapy association, and shall provide their services under the ~~direct, immediate, on-premises~~ supervision of a physical therapist certified pursuant to sub. (1) and ss. 448.53, 448.56, and 448.985, Stats. Documentation of supervision shall be maintained and provided to the department upon request. Physical therapist assistants may not bill or be reimbursed directly for their services. When performing services, physical therapist assistants are to be submitted as renderer on billing claims.

SECTION 5. DHS 105.27 (2) (Note 1) is created to read:

DHS 105.27 Note: The declaration of supervision for non-billing providers’ form is available by accessing: <https://www.dhs.wisconsin.gov/library/f-01182.htm>.

SECTION 6. DHS 105.28 (2) (intro.) is renumbered DHS 105.28 (2) and amended to read:

DHS 105.28 (2) OCCUPATIONAL THERAPY ASSISTANTS. For MA certification, occupational therapy assistants shall be certified by the American occupational therapy association. Occupational therapy assistants may not bill or be reimbursed directly for their services. When performing services, occupational therapy assistants are to be submitted as renderer on billing claims. Occupational therapy assistants shall provide services under the ~~direct, immediate on-premises~~ supervision of an occupational therapist certified under sub. (1) ~~except that they may provide services under the general supervision of an occupational therapist certified under sub. (1) under the following circumstances:~~ and ss. 448.961, 448.963, and 448.966, Stats. Documentation of supervision shall be maintained and provided to the department upon request.

SECTION 7. DHS 105.28 (2) (a) to (c) are repealed.

SECTION 8. DHS 105.28 (2) (Note 2) is created to read:

DHS 105.28 (2) Note: The declaration of supervision for non-billing providers' form is available by accessing: <https://www.dhs.wisconsin.gov/library/f-01182.htm>.

SECTION 9. DHS 105.48 (2m) is created to read:

DHS 105.48 (2m) Out-of-state providers who meet the definition of a border-status provider as described in s. DHS 101.03 (19) and who provide services to Wisconsin members via telehealth, regardless of provider location, may apply for certification as Wisconsin border-status providers if they are licensed in Wisconsin under applicable Wisconsin statute and administrative code.

SECTION 10. DHS 106.02 (9) (b) (intro.) and 1. to 7. are amended to read:

DHS 106.02 (9) (b) *Medical record content.* (intro.) A provider shall include in a recipient's medical record all of the following written documentation, as applicable:

1. Date, department or office of the provider, as applicable, and provider name and profession;;
2. Chief medical complaint or purpose of the service or services;;
3. Clinical findings;;
4. Diagnosis or medical impression;;
5. Studies ordered, such as laboratory or x-ray studies;;
6. Therapies or other treatments administered;;
7. Disposition, recommendations and instructions given to the recipient, including any prescriptions and plans of care or treatment provided;; ~~and.~~

SECTION 11. DHS 106.02 (9) (b) 9. is created to read:

DHS 106.02 (9) (b) 9. Delivery mode of the services provided, when provided via telehealth as established under s. DHS 107.02 (5), including all of the following:

- a. Whether provided via audio-visual telehealth, via audio-only telehealth, or via telehealth externally acquired images.
- b. Whether provided synchronously or asynchronously.

SECTION 12. DHS 107.01 (2) (d) is amended to read:

DHS 107.01 (2) (d) The student provides services under the direct, immediate ~~on-premises~~ supervision of a certified provider in accordance with their profession's regulatory body; and

SECTION 13. DHS 107.02 (5) is created to read:

DHS 107.02 (5) **SERVICES PROVIDED VIA TELEHEALTH.** The department shall reimburse providers for medically necessary and appropriate health care services listed in this chapter and ss. 49.46 (2) and 49.47 (6) (a), Stats., when provided to currently eligible MA recipients via telehealth. Services provided via telehealth are subject to the same restrictions as services provided in an in person setting unless otherwise specified in chs. DHS 101 to 109. Providers shall ensure that the locations from which they provide services via telehealth ensure privacy and confidentiality of recipient information and communications in a functionally equivalent manner to services provided in person. Benefits or services that may not be delivered via telehealth include any of the following:

- (a) Services that are not covered when provided in person.

- (b) Services that do not meet applicable laws, regulations, licensure requirements, or procedure code definitions if delivered via telehealth.
- (c) Services when a provider is required to physically touch or examine the recipient and delegation is not appropriate.
- (d) Services the provider declines to deliver via telehealth.
- (e) Services the recipient declines to receive via telehealth.
- (f) Services provided by personal care workers, home health aides, private duty nurses, or school based service care attendants.
- (g) Transportation.

SECTION 14. DHS 107.03 (1) is amended to read:

DHS 107.03 (1) ~~Charges~~ Service charges for telephone calls;

SECTION 15. DHS 107.06 (1) is amended to read:

DHS 107.06 (1) COVERED SERVICES. Physician services covered by the MA program are, except as otherwise limited in this chapter, any medically necessary diagnostic, preventive, therapeutic, rehabilitative or palliative services provided in a physician's office, in a hospital, in a nursing home, in a recipient's residence or elsewhere, and performed by or under the direct, ~~on-premises~~ supervision of a physician within the scope of the practice of medicine and surgery as defined in s. 448.01 (9), Stats. These services shall be in conformity with generally accepted good medical practice.

SECTION 16. DHS 107.06 (4) (cm) is created to read:

DHS 107.06 (4) (cm) *Interprofessional consultation*. Interprofessional consultations shall be covered if all of the following apply:

1. The consultation is a professional service furnished to a recipient by a certified provider at the request of the treating provider.
2. The consultation constitutes an evaluation and management service in which the certified provider treating a recipient requests the opinion or treatment advice of a consulting provider with specific expertise to assist the treating provider in the evaluation or management of the recipient's problem without requiring the recipient to have face-to-face contact with the consulting provider.
3. The consulting provider provides a written report that becomes a part of the recipient's permanent medical record.

SECTION 17. DHS 107.06 (5) (c) and 107.07 (4) (b) are repealed.

SECTION 18. DHS 107.07 (4) (c) is amended to read:

DHS 107.07 (4) (c) Equivalent services ~~or separate components of a service~~ performed on the same day.

SECTION 19. DHS 107.07 (4) (k) 1. is repealed.

SECTION 20. DHS 107.11 (1) (c) is amended to read:

DHS 107.11 (1) (c) "Home health visit" or "visit" means a period of time of any duration during which home health services are provided through personal contact by agency personnel of less than 8 hours a day in the recipient's place of residence for the purpose of providing a covered home health service. The services are provided by a home health provider employed by a home health agency, by a home health provider under contract to a home health agency according to the requirements of s. DHS 133.19 or by arrangement with a home health agency. A visit begins when the home health provider ~~enters the~~

~~residence to~~ starts to provide a covered service and ends when ~~the worker leaves the residence~~ the service is complete.

SECTION 21. DHS 107.13 (2) (a) 4. h. is created to read:

DHS 107.13 (2) (a) 4. h. Via telehealth when the provider is in a location that ensures privacy and confidentiality of recipient information and communications.

SECTION 22. DHS 107.13 (2) (a) 5. and (b) 4. e., (3) (a) 5. and 6., (b) 4. d., (3m) (d) 6., and (4) (a) 8. and (d) 7. are amended to read:

DHS 107.13 (2) (a) 5. The provider who performs psychotherapy shall engage in ~~face-to-face contact with the recipient~~ in person, real-time interactive audio-visual telehealth, or real-time interactive audio-only telehealth for at least 5/6 of the time for which reimbursement is claimed under MA;

DHS 107.13 (2) (b) 4. e. A statement of the estimated frequency of treatment sessions, the estimated cost of treatment and the anticipated ~~location~~ place of service of treatment.

DHS 107.13 (3) (a) 5. AODA treatment services are performed only in the office of the provider, a hospital or hospital outpatient clinic, an outpatient facility, a nursing home or a school or by telehealth when functionally equivalent to services provided in person;

DHS 107.13 (3) (a) 6. The provider who ~~provides~~ performs ~~alcohol and other drug abuse treatment~~ AODA treatment services ~~engages in face-to-face contact~~ shall engage in contact with the recipient via in person, real-time interactive audio-visual telehealth, or real-time interactive audio-only telehealth for at least 5/6 of the time for which reimbursement is claimed; and

DHS 107.13 (3) (b) 4. d. A statement of the estimated frequency of treatment sessions, the estimated cost of treatment and the anticipated ~~location~~ place of service of treatment.

DHS 107.13 (3m) (d) 6. AODA day treatment provided in person in the recipient's home.

DHS 107.13 (4) (a) 8. The groups shall be led by a qualified professional staff member, as defined under s. DHS 105.24 (1) (b) 4. a., and the staff member shall be ~~physically~~ present throughout the group sessions and shall perform or direct the service.

DHS 107.13 (4) (d) 7. Day treatment provided in person in the recipient's home; and

SECTION 23. DHS 107.16(1) (a) is amended to read:

DHS 107.16 (1) (a) *General.* Covered physical therapy services are those medically necessary modalities, procedures and evaluations enumerated in pars. (b) to (d), when prescribed by a physician and performed by a qualified physical therapist (PT) or a certified physical therapy assistant under the ~~direct, immediate, on-premises~~ supervision of a physical therapist pursuant to s. PT 5.01. Specific services performed by a physical therapy aide under par. (e) are covered when provided in accordance with supervision requirements under par. (e) 3.

SECTION 24. DHS 107.16(1) (e) 3. a. is renumbered DHS 107.16 (1) (e) 3. and amended to read:

DHS 107.16 (1) (e) 3. The physical therapy aide shall provide services under the ~~direct, immediate, one-to-one~~ supervision of a physical therapist under s. PT 5.02. ~~In this subdivision, "direct immediate, one-to-one supervision" means one-to-one supervision with face-to-face contact between the physical therapy aide and the supervising therapist during each treatment session, with the physical therapy aide~~

~~assisting the therapist by providing services under subd. 1. The direct immediate one-to-one supervision requirement does not apply to non-billable physical therapy aide services.~~

SECTION 25. DHS 107.16(1) (e) 3. b. is repealed.

SECTION 26. DHS 107.24(4) (j) is created to read:

DHS 107.24 (4) (j) The cost of mailing or delivery, such as shipping and handling charges and fees, of diagnostic tools or equipment needed to assess, diagnose, repair or setup medical supplies, hearing aids, cochlear implants, or other equipment cannot be billed to the recipient.

SECTION 27. 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.