

**STATEMENT OF SCOPE
WISCONSIN DEPARTMENT OF HEALTH SERVICES**

CHAPTER: DHS 10, 38, 73, 92, 101, 105, 106, 107, 108, AND 109

RELATING TO: Telehealth

RULE TYPE: Permanent and Emergency

SCOPE TYPE: Original

FINDINGS OF EMERGENCY: Not required¹

SUMMARY

1. Description of rule objective/s

In 2019 Wis. 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 of health services (“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, and care management services. It also directs the department to identify certain Medical Assistance reimbursable telehealth services and authorizes the department to identify certain Medical Assistance non-reimbursable telehealth services in administrative code.

2. Existing policies relevant to the rule

- Chapter DHS 92 Confidentiality of Treatment Records
- Chapter DHS 107 Covered Services

3. Policies proposed to be included in the rule

The department intends to promulgate administrative rules necessary to effectuate the purpose of 2019 Wisconsin Act 56, namely reimbursing identified Medical Assistance covered services through telehealth and communications technology services. The act also requires the department to promulgate rules specifying certain reimbursable Medical Assistance telehealth services and authorizes the department to promulgate rules specifying certain non-reimbursable Medical Assistance telehealth services.

4. Analysis of policy alternatives

There are no reasonable alternatives to the proposed rulemaking. The Wisconsin Legislature has explicitly directed the department to promulgate rules identifying certain reimbursable Medical Assistance services and therefore authorized the department to promulgate rules identifying certain non-reimbursable Medical Assistance services.

5. Statutory authority for the rule

a. Explanation of authority to promulgate the proposed rule

The Department’s authority to promulgate the proposed rules is provided in ss. 227.11 (2) and 49.45 (61) (d), Stats., and 2019 Wis. Act 56 s. 8 (3).

¹ 2019 Wis. Act 56 s. 8 (3) permits the department to promulgate emergency rules under s. 227.27 (1) (a), Stats., without providing evidence that such a rule is necessary to preserve the public peace, health, safety, or welfare.

b. Statutes that authorize the promulgation of the proposed rule

Section 227.11 (2), Stats., reads:

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., reads:

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.

2019 Wisconsin Act 56 Section 8 (3) reads:

RULES REGARDING COVERAGE OF TELEHEALTH SERVICES. The department of health services may promulgate rules allowed under this act as emergency rules under

s. 227.24. Notwithstanding s. 227.24 (1) (a) and (3), the department of health services is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection. Notwithstanding s. 227.24 (1) (c) and (2), emergency rules promulgated under this subsection remain in effect until the sooner of July 1, 2022, or the date the permanent rules take effect, except that, if the department of health services has submitted in proposed form permanent rules to the legislative council staff under s. 227.15 (1) before July 1, 2022, emergency rules promulgated under this subsection remain in effect until the permanent rules take effect.

c. Statute/s or rule/s that will affect the proposed rule or be affected by it

- Chapter DHS 10 Family Care
- Chapter DHS 38 Substance Abuse Screening, Testing and Treatment for Certain Department Employment and Training Programs
- Chapter DHS 73 Selected Fiscal Management Procedures And Standards Under The Community Options Program And Medical Assistance Home And Community-Based Services Waiver
- Chapter DHS 92 Confidentiality of Treatment Records
- Chapter DHS 101 Introduction and Definitions
- Chapter DHS 105 Provider Certification
- Chapter DHS 106 Provider Rights and Responsibilities
- Chapter DHS 107 Covered Services
- Chapter DHS 108 General Administration
- Chapter DHS 109 Senior Care

6. Estimates of the amount of time that state employees will spend to develop the rule and other necessary resources

The estimated time for state employees to develop the rule is 2,080 hours.

7. Description of all of the entities that may be affected by the rule, including any local governmental units, businesses, economic sectors, or public utility ratepayers who may reasonably be anticipated to be affected by the rule

- Members receiving Medical Assistance services
- Providers providing Medical Assistance services
- Medical Assistance health maintenance and managed care organizations
- Hospitals and healthcare facilities, including federally qualified health centers, community health centers, rural health centers, state run facilities, and opioid treatment programs
- Tribal governing bodies and providers
- The department of health services
- The department of public instruction
- The department of corrections
- County departments and administering agencies designated by county departments
- Local education agencies

8. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule

42 USC s. 1396a(a)(30)(A) requires that states “assure that [Medical Assistance] payments are consistent with efficiency, economy, and quality of care.” 42 USC s. 1395m(m)(1) requires that reimbursable Medical Assistance services include “telehealth services that are furnished via a telecommunications system by a physician . . . or a practitioner . . . to an eligible telehealth individual.” 42 CFR p. 440.70(f)(6) states that certain Medical Assistance covered face-to-face home health services “may occur through telehealth services, as implemented by the State.”

9. Anticipated economic impact, locally or statewide

The proposed rule may have a moderate economic impact.

10. Agency contacts

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