

STATEMENT OF SCOPE
WISCONSIN DEPARTMENT OF HEALTH SERVICES

CHAPTER: DHS 34, 35, 36, 40, 63, AND 75

RELATING TO: TELEHEALTH

RULE TYPE: PERMANENT AND EMERGENCY

SCOPE TYPE: ORIGINAL

FINDINGS OF EMERGENCY: NOT REQUIRED: 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.

SUMMARY

1. Description of rule objective/s

In 2019 Wisconsin Act 56 (“Act 56”), the Wisconsin Legislature explicitly identified certain types of reimbursable Medical Assistance 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 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 the Administrative Code.

Based on the directives in Act 56, it is necessary for the department’s Division of Care and Treatment Services (“DCTS”) to update administrative rules which administer behavioral health treatment programs reimbursable by Medical Assistance. Specifically, these rules need to be updated to align with the requirements of Act 56 and the ensuing Division of Medicaid Services (“DMS”) telehealth policies.¹ Such changes will bring DCTS rules into compliance with Act 56 and allow affected providers to be in compliance with DMS administrative rules and telehealth policies for billing and other purposes.

¹ The department is actively promulgating Division of Medicaid Services’ rules in relation to the directives in Act 56. A statement of scope was approved by the Governor on June 4, 2020, and the statement of scope was published in the administrative register on June 8, 2020. See SS 061-20, available at https://docs.legis.wisconsin.gov/code/scope_statements/all/061_20.

2. Existing policies relevant to the rule

- DHS 34, relating to Emergency Mental Health Services Programs.
- DHS 35, relating to Outpatient Mental Health Clinics.
- DHS 36, relating to Comprehensive Community Services for Persons with Mental Disorders and Substance-Use Disorders.
- DHS 40, relating to Mental Health Day Treatment Services for Children.
- DHS 50, relating to Youth Crisis Stabilization Facilities.
- DHS 61, relating to Community Mental Health and Developmental Disabilities.
- DHS 63, relating to Community Support Programs for Chronically Mentally Ill Persons.

- DHS 75, relating to Community Substance Abuse Service Standards.
- DHS 92, relating to Confidentiality of Treatment Records.
- DHS 94, relating to Patient Rights and Resolution of Patient Grievances.
- DHS 107, relating to Covered Services.

3. Policies proposed to be included in the rule

The department intends to promulgate administrative rules necessary to effectuate the purpose of Act 56 because the department is promulgating rules covering identified Medical Assistance-covered services through telehealth and communications technology services. The rules included in this scope must be amended to allow these services to take place under them. This will allow providers of these services to qualify for Medical Assistance reimbursement for services provided through telehealth and communications technology.

4. Analysis of policy alternative

There are no reasonable alternatives to the proposed rulemaking. The Legislature has explicitly directed the department to promulgate rules identifying certain reimbursable Medical Assistance services and authorizes the department to promulgate rules identifying certain non-reimbursable Medical Assistance services. The rules included in this statement of scope must be amended to be brought into alignment with the policies under Act 56.

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 ss. 3 (d) and 8 (3).

b. Statute/s that authorize/s 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 Wis. Act 56 ss. 3 (c) to (d) and 8 (3) read:

SECTION 3. 49.45 (61) of the statutes is created to read:

...

(c) Subject to par. (e), the department shall provide reimbursement under the Medical Assistance program for all of the following:

1. Except as provided by the department by rule, a consultation pertaining to a Medical Assistance recipient conducted through interactive telehealth between a certified provider of Medical Assistance and the Medical Assistance recipient's treating provider that is certified under Medical Assistance.

2. Except as provided by the department by rule, remote patient monitoring of a Medical Assistance recipient and asynchronous telehealth service in which the medical data pertains to a Medical Assistance recipient.

3. Except as provided by the department by rule and subject to par. (e) 4., services that are covered under the Medicare program under 42 USC 1395 et seq. for which the federal department of health and human services provides Medical Assistance federal financial participation and that are any of the following:

a. Telehealth services as defined under 42 USC 1395m (m) (4) (F).

b. Remote physiologic monitoring.

c. Remote evaluation of prerecorded patient information.

d. Brief communication technology-based services.

e. Care management services delivered through telehealth.

f. Any other telehealth or communication technology-based services.

(d) 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.

...

SECTION 8. Nonstatutory provisions.

...

(3) 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

- DHS 34, relating to Emergency Mental Health Services Programs.
- DHS 35, relating to Outpatient Mental Health Clinics.
- DHS 36, relating to Comprehensive Community Services for Persons with Mental Disorders and Substance-Use Disorders.
- DHS 40, relating to Mental Health Day Treatment Services for Children.
- DHS 50, relating to Youth Crisis Stabilization Facilities.
- DHS 61, relating to Community Mental Health and Developmental Disabilities.
- DHS 63, relating to Community Support Programs for Chronically Mentally Ill Persons.
- DHS 75, relating to Community Substance Abuse Service Standards.

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 and implement 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

- Individuals and families receiving behavioral health services in programs governed by these administrative rules.
- Providers providing behavioral health services in programs governed by these administrative rules.
- 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.
- Department of Public Instruction.
- 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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