

STATEMENT OF SCOPE
WISCONSIN DEPARTMENT OF HEALTH SERVICES

| | |
|------------------------------|--|
| CHAPTER: | DHS 10 |
| RELATING TO: | Requirements for Adult Long-Term Care |
| RULE TYPE: | Permanent and Emergency |
| SCOPE TYPE: | Revised. This statement of scope modifies SS 048-20, which was approved by the Governor and published in Register 773B on May 26, 2020, and approved by the Secretary of the Department of Health Services (“the Department”) on July 9, 2020, relating to requirements for adult long-term care during the COVID-19 pandemic. This revised statement of scope seeks to promulgate a permanent rule in addition to an emergency rule. |
| FINDING OF EMERGENCY: | Preservation of the public peace, health, safety, or welfare necessitates adoption of an emergency rule. Section 105 (1) (d) of 2019 Wis. Act 185 (“Act 185”) permits the state, in order to qualify for increased federal funding under s. 6008 of the Families First Coronavirus Response Act (“the FFCRA”), Pub. L. No. 116-127, to maintain continuous Medicaid eligibility for persons enrolled in Medicaid (unless the person leaves the state or requests disenrollment) during the federal emergency period declared in response to the COVID-19 pandemic. Strict compliance with eligibility redetermination, payment of cost share, and disenrollment requirements might result in large numbers of enrollees being involuntarily disenrolled from receiving financial assistance for necessary long-term care and treatment. Disenrollment under these provisions would be inconsistent with the requirements of the FFCRA—which would result in the loss of enhanced federal funding of about \$150 million per quarter. |

SUMMARY

1. Description of rule objective

The intent of the rule is to take action permitted under s. 105 (1) of 2019 Wis. Act 185 (“Act 185”), and thereby qualify for increased federal funding under s. 6008 of the FFCRA. Section 6008 of the FFCRA provides a temporary 6.2 percentage point federal medical assistance percentage (“FMAP”) increase to each state that maintains continuous eligibility for persons enrolled in Medicaid (unless the person leaves the state or requests disenrollment) and does not increase Medicaid premiums during the federal emergency period defined in par. (1)(B) of s. 1135(g) of the Social Security Act, 42 USC 1320-5(g), and declared by the United States Secretary of Health And Human Services in relation to the COVID-19 pandemic. The increased FMAP provided to the state under the FFCRA amounts to approximately \$150 million per quarter.

On April 17, 2020, Act 185 became effective. Section 105 (1) of Act 185 provided that, in order to comply with section 6008 of the FFCRA and obtain an enhanced medical assistance percentage from the federal government, the state may suspend certain Medicaid requirements and maintain continuous Medicaid eligibility for those who were enrolled on March 18, 2020 or later, unless that person requested disenrollment or lost state residency.

The first federal emergency declaration took effect in January 2020.¹ That declaration has been renewed several times, and the public health emergency remains in effect through July 2021.² In a letter to governors, the United States Secretary of Health and Human Services represented that the federal public health emergency will likely

¹ A copy of the original Determination that a Public Health Emergency Exists is available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

² A copy of the April 2021 Renewal of Determination That a Public Health Emergency Exists is available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVID-15April2021.aspx>.

remain in place for the entirety of 2021.³ As vaccination rates across the country slow down,⁴ it is possible that the federal emergency could be extended into 2022.

Several measures have been taken in accordance with Act 185 in order to comply with s. 6008 of FFCRA. In May 2020, Governor Evers and then-Department-Secretary-designee Palm issued Emergency Order 35, which ordered the suspension of a number of administrative rules which contained requirements that could result in Medicaid recipients being disenrolled during the federal public health emergency. The Governor's public health emergency subsequently expired, which effectively nullified Emergency Order 35. Following the expiration of Emergency Order 35, the Department, in accordance with s. 227.24, Stats., promulgated emergency rule 2040 ("EmR2040"), which suspended provisions in ch. DHS 10 in order to comply with s. 6008 of FFCRA. EmR2040 was extended for the maximum 120 days allowed under s. 227.24 (2), Stats., and will expire on July 20, 2021.

In order to continue complying with section 6008 of the FFCRA and to receive approximately \$150 million in federal funding per quarter, the Department has determined that, in light of the ongoing need to suspend rule provisions to comply with s. 6008 of the FFCRA, permanent rules that supplant the emergency rule currently in effect and temporarily suspend certain Medicaid eligibility provisions are necessary so that the Department maintains continuous enrollment in Medicaid during the declared emergency period. The permanent rule will create sunset provisions that seek to amend or create provisions in ch. DHS 10 specific to maintaining continuous enrollment, and then repeal those provisions after end of the federal public health emergency.

Additionally, the rule seeks to align with federally-approved program changes permitted under s. 105 (10) (a) of Act 185, which authorized the Medicaid program to amend program waivers in response to the COVID-19 pandemic. The Family Care program operates under concurrent 1915(b) and 1915(c) waivers, as described by section 1915 of the Social Security Act. *See* 42 USC 1396n(b)-(c). Based on s. 105 (10) (a) of Act 185, the Department requested, and the Centers for Medicare and Medicaid Services approved, an amendment to the Family Care 1915(c) waiver. This waiver amendment, known as an Appendix K waiver, is in effect from March 1, 2020 to no later than six months after the expiration of the federal public health emergency.

2. Existing policies relevant to the rule and proposed policies to be included in the rule.

The current rule includes requirements that could result in benefit recipients being disenrolled and no longer receiving financial assistance for necessary treatment. Temporarily suspending these requirements will ensure that enrollees continue to receive necessary treatment and are not disenrolled under strict application of existing rules. These suspensions are consistent with 2019 Wis. Act. 185, which permits suspension of certain Medicaid requirements in order to maintain continuous enrollment in compliance with section 6008 (b) (3) of the FFCRA.

Additionally, the current rule includes requirements that contradict federally-approved Family Care program waiver flexibilities. Temporarily suspending these requirements will ensure that the Family Care program operates in accordance with federally-approved program waivers.

3. Analysis of policy alternative

As explained in sections 1 and 2, there are no reasonable alternatives to rulemaking.

4. Statutory authority for the rule

a. Explanation of authority to promulgate the proposed rule

³ A copy of this letter is available at <https://ccf.georgetown.edu/wp-content/uploads/2021/01/Public-Health-Emergency-Message-to-Governors.pdf>

⁴ As of June 3, 2021, the 7-day average number of administered vaccines reported to the CDC per day decreased by 38% from the previous week. *See Covid Data Tracker: Trends in Number of COVID-19 Vaccinations in the US*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#vaccination-trends> (last visited June 8, 2021).

The Department is authorized to promulgate the rule based upon explicit statutory language.

b. Statute/s that authorize/s the promulgation of the proposed rule

The Department is authorized to promulgate the emergency rule based upon the following statutory sections:

Section 252.02 (4) and (6), Stats.:

- (4) . . . [T]he department may promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, for the control or suppression of communicable diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease . . .
- (6) The department may authorize and implement all emergency measures necessary to control communicable diseases.

Section 227.11 (2) (a), 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 rule-making 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.

Section 227.24 (1) (a) , Stats.: An agency may, except as provided in s. 227.136 (1), promulgate rule as an emergency rule without complying with the notice, hearing, and publication requirements under this chapter if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.

Section 46.286 (2) (c), Stats.: A person who is required to contribute to the cost of his or her care but who fails to make the required contributions is ineligible for the family care benefit unless he or she is exempt from the requirement under rules promulgated by the department

Section 46.288, Stats.: The department shall promulgate as rules all of the following:

- (1) Standards for performance by resource centers and for certification of care management organizations, including requirements for maintaining quality assurance and quality improvement.
- (2) Criteria and procedures for determining functional eligibility under s. 46.286 (1) (a), financial eligibility under s. 46.286 (1) (b), and cost sharing under s. 46.286 (2) (a).
- (3) Procedures and standards for procedures for s. 46.287 (2), including time frames for action by a resource center or a care management organization on a contested matter

Section 50.02 (2) (d), Stats.: The department shall promulgate rules that prescribe all of the following:

1. The method by which community-based residential facilities shall make referrals to resource centers or county departments under s. 50.035 (4n) and the method by which residential care apartment complexes shall make referrals to resource centers under s. 50.034 (5n).

2. The time period for nursing homes to provide information to prospective residents under s. 50.04 (2g) (a) and the time period and method by which nursing homes shall make referrals to resource centers under s. 50.04 (2h) (a).

2019 Wis. Act 185 s. 105:

(1) ENHANCED FEDERAL MEDICAL ASSISTANCE PERCENTAGE. If the federal government provides an enhanced federal medical assistance percentage during an emergency period declared in response to the novel coronavirus pandemic, the department of health services may do any of the following during the period to which the enhanced federal medical assistance percentage applies in order to satisfy criteria to qualify for the enhanced federal medical assistance percentage:

- (a) Suspend the requirement to comply with the premium requirements under s. 49.45 (23b) (b) 2. and (c).
- (b) Suspend the requirement to comply with the health risk assessment requirement under s. 49.45 (23b) (b) 3.
- (c) Delay implementation of the community engagement requirement under s. 49.45 (23b) (b) 1. until the date that is 30 days after either the day the federal government has approved the community engagement implementation plan or the last day of the calendar quarter in which the last day of the emergency period under 42 USC 1320b-5 (g) (1) that is declared due to the novel coronavirus pandemic occurs, whichever is later.
- (d) Notwithstanding any requirement under subch. IV of ch. 49 to disenroll an individual to the contrary, maintain continuous enrollment in compliance with section 6008 (b) (3) of the federal Families First Coronavirus Response Act, P.L. 116-127.

...

(10) LEGISLATIVE OVERSIGHT OF THE MEDICAL ASSISTANCE PROGRAM.

(a) Section 20.940 does not apply to a request for a waiver, amendment to a waiver, or other federal approval from the department of health services submitted to the federal department of health and human services during the public health emergency declared under 42 USC 247d by the secretary of the federal department of health and human services on January 31, 2020, in response to the 2019 novel coronavirus, only if the request is any of the following, relating to the Medical Assistance program:

...

17. Allowing flexibility for submission of electronic signatures on behalf of a Medical Assistance recipient by application assistors if a signature cannot be captured in person.

...

37. Relating to the home and community-based waiver programs of Family Care, IRIS, and Children's Long-Term Supports, any of the following:

...

a. Allowing all waiver services and administrative requirements that that can be provided with the same functional equivalency of face-to-face services to occur remotely.

...

zb. Adding a verbal and electronic method to signing required documents.

zc. Allowing the option to conduct evaluations, assessments, and person-centered service planning meetings virtually or remotely in lieu of face-to-face meetings.

...

zs. Allowing the suspension of involuntary disenrollments.

c. Statutes or rules that will affect the proposed rule or be affected by it

Section 46.286 (2), (4) to (7), Stats.

Section 46.287 (2) (a) 1, Stats.

Section 50.02, Stats.

2019 Wis. Act 185 s. 105.

5. 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 100 hours.

6. 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

Aging and Disability Resource Centers (ADRCs), Tribal Aging and Disability Resource Specialists (Tribal ADRS), income maintenance agencies and consortia, managed care organizations (MCOs), WI Department of Administration – Division of Hearings and Appeals, Medicaid enrollees and their families

7. 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 CFR 435.916 (b)

- This regulation requires that Medicaid eligibility be redetermined at least every 12 months. However, due to the Families First Coronavirus Response Act and the risk in completing in-person eligibility screening, DHS is seeking flexibility through various authorities (Appendix K, D-SPA) to suspend involuntary member disenrollments and when annual eligibility redeterminations cannot be completed on a timely basis.

42 CFR 438.56

- This regulation describes the manner in which states and their managed care partners may disenroll Medicaid members. However, due to the Families First Coronavirus Response Act's preservation of Medicaid eligibility, DHS is seeking flexibility via Appendix K from involuntarily disenrolling members during the emergency period.

8. Anticipated economic impact, locally or statewide

The proposed rule may have a moderate economic impact.

9. Agency contacts

Mark R. Thompson, Admin. Rules Attorney
Office of Legal Counsel
(608) 266-1279
mark.thompson1@dhs.wisconsin.gov

Jackson Keuler, Admin. Rules Officer
Office of Legal Counsel
(608) 266-0387
jackson.keuler@dhs.wisconsin.gov