

WISCONSIN DEPARTMENT OF HEALTH SERVICES PROPOSED ORDER TO ADOPT EMERGENCY RULES

The Wisconsin Department of Health Services (the “department”) proposes an order to **repeal** DHS 107.03 (23) and (24), and DHS 107.10 (4) (p), relating to Medicaid-covered services.

FINDING OF EMERGENCY

Preservation of the public peace, health, safety, or welfare necessitates adoption of an emergency rule prior to the time it would take to promulgate an equivalent permanent rule. Exclusions in ss. DHS 107.03 (23) and (24) and DHS 107.10 (4) (p) were ruled unconstitutional and unenforceable by a federal district court. However, it is likely that certain Medicaid beneficiaries are failing to seek or receive critical treatment because the rule provisions excluding this coverage have not yet been repealed.

RULE SUMMARY

Statute interpreted

Not applicable.

Statutory authority

Section 49.45 (1) and (2), 227.11 (2) (a), Stats.

Explanation of agency authority

The Medicaid program is jointly funded with federal and state dollars. There are numerous federal requirements that states must meet in order to receive funding. Under 42 CFR 431.10, two primary requirements are to (1) designate a single state agency to administer the state’s Medicaid program, and (2) have that agency develop a state Medicaid plan which sets forth how the Medicaid program will be administered. Section 49.45 (1), Stats., designates the department as the state agency responsible for administering the Medicaid program in Wisconsin. In accordance with this framework, the legislature has expressly directed the department to administer and supervise the Medicaid program in order to provide appropriate health care for eligible persons. Within certain parameters, agencies are authorized to promulgate rules interpreting provisions of any statutes they enforce or administer.

Related statute or rule

U.S. CONST. amend. XIV, s. 1; 42 USC s. 18116.

Plain language analysis

The department proposes to repeal s. DHS 107.03 (23) and (24) which, respectively, 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.” The department also proposes to repeal DHS 107.10 (4) (p), which reiterates that drugs related to the excluded services in s. DHS 107.03 (23) and (24) are non-covered services.

The basis for the proposed repeal is *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 that the challenged exclusions in ss. DHS 107.03 (23) and (24) and 107.10 (4) (p) 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).

There are no reasonable alternatives to the proposed repeal, and these exclusions must be repealed in order to ensure that the department complies 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 the currently-excluded services.

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

There are no existing or proposed federal regulations that directly address activities to be regulated under Medicaid laws. However, 42 USC s. 18116 makes it unlawful for any health program or activity that receives funding from the federal government to refuse to treat an individual, or otherwise discriminate against the individual, on the basis of race, color, national origin, sex, age, or disability.

Comparison with rules in adjacent states

Illinois:

Ill. Admin. Code tit. 89, § 140.6 provides that the state's Medicaid program does not cover "medical or surgical transsexual treatment, for dates of service prior to April 1, 2015."

Iowa:

Iowa Admin. Code r. 441-78.1(4) excludes sex reassignment surgeries and "procedures related to transsexualism . . . [and] gender identity disorders" from coverage for state Medicaid. However, in 2019, the Supreme Court of Iowa held that this rule was unconstitutional and in violation of the Iowa Civil Rights Act. *Good v. Iowa Dept. of Human Servs.*, 924 N.W.2d 853 (Iowa 2019).

Michigan:

The Michigan Medicaid Provider Manual contains a nondiscrimination provision consistent with the nondiscrimination provision in Section 1557 of the Affordable Care Act.

Minnesota:

Minn. R. 9505.0020 lists services not covered by state Medicaid, and transsexual surgery and related drugs are not included in the list of services not covered.

Summary of factual data and analytical methodologies

No factual data or analytical methodologies were relied upon. This repeal is based on a federal court's order permanently enjoining the Department from enforcing ss. DHS 107.03(23) to (24) and DHS 107.10 (4) (p).

Analysis and supporting documents used to determine effect on small business

The department published a notice in the Administrative Register which requested comments on the economic impact on the proposed rule. The economic impact commenting period ran from May 26, 2020 to June 9, 2020.

Effect on small business

The proposed rule will not affect small businesses.

Agency contact person

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Statement on quality of agency data

As provided in the “summary of factual data and analytical methodologies,” no data was used for this proposal rule section repeal.

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/permanent.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 107.03 (23) and (24) are repealed.

SECTION 2. DHS 107.10 (4) (p) is repealed.

SECTION 3. EFFECTIVE DATE. As provided in s. 227.24 (1) (c), Stats., this emergency rule shall take effect upon publication in the official state newspaper. It shall remain in effect for the time provided in s. 227.24 (1) (c), Stats., and, if applicable, s. 227.24 (2), Stats.

Wisconsin Department of Health Services

Dated: _____

Andrea Palm, Secretary-designee

SEAL: