

STATEMENT OF SCOPE
WISCONSIN DEPARTMENT OF HEALTH SERVICES

CHAPTER: DHS 107.03(23)-(24) and DHS 107.10(4)(p)

RELATING TO: Covered Services

RULE TYPE: Emergency & Permanent

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. It is likely that certain Medicaid beneficiaries are failing to seek or receive critical treatment for conditions affecting transgender individuals because the rule provisions excluding this coverage have not yet been repealed.

SCOPE TYPE: Original

SUMMARY

1. Description of rule objective/s

On July 25, 2018, in *Flack, Cody et al v. Wisconsin Department of Health Service et al*, case number 18-CV-309, the Honorable District Judge William M. Conley granted a motion for preliminary injunction, enjoining the Department from enforcing s. DHS 107.03(23)-(24). These rule provisions exclude from Medicaid coverage “[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics” and “[t]ranssexual surgery.”

The Department proposes to repeal s. DHS 107.03(23)-(24), as well as s. DHS 107.10(4)(p)—which reiterates the exclusion contained in s. DHS 107.03(23)—and permit coverage for services related to the treatment of certain conditions affecting transgender individuals.

2. Existing policies relevant to the rule

The exclusions deny Medicaid coverage for “[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics” and “[t]ranssexual surgery.”

3. Policies proposed to be included in the rule

The Department proposes to repeal the above-referenced exclusions.

4. Analysis of policy alternative

There are no reasonable alternatives to the repeal because the United States District Court for the Western District of Wisconsin has enjoined the Department from enforcing them. In addition, an identical exclusion relating to coverage from the Department of Employee Trust Fund was already overturned in the same court, and by the same judge, in *Boyden v. Wisconsin Dep't of Employee Trust*, case number 17-CV-264.

The exclusions must be repealed to ensure consistency between Department policy and its rule and to ensure the public is aware that Medicaid coverage is available for treatment services. Repeal of the exclusions may also assist the Department in securing a stay of current litigation and mitigating damages the Court may award in the case.

5. Statutory authority for the rule

a. Explanation of authority to promulgate the proposed rule

The Medicaid program is jointly funded with federal and state dollars. There are numerous federal requirements that states must meet in order to receive federal funding. The two primary requirements are to designate a single state agency to administer the state's Medicaid program, and to have that agency develop a Medicaid State plan, which sets forth how the Medicaid program will be administered. Wisconsin's State Plan designates the Department as Wisconsin's single state agency to administer the Medicaid program.

Consistent with this framework, the Legislature explicitly 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 the provisions of any statutes they enforce or administer.

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

Sections 49.45(1)-(2) and 227.11(2)(a)

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

None

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 160 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

Repeal of the exclusions will affect Medicaid beneficiaries and providers of services for treatment of certain conditions affecting transgender individuals. Repeal of the exclusions will also align coverage of these conditions with coverage provided by the rest of Wisconsin's insurance industry.

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

There are no existing or proposed federal regulations that directly address activities to be regulated by the rule. However, Section 1557 of the Affordable Care Act makes it unlawful for any health care provider that receives funding from the Federal government to refuse to treat an individual – or to otherwise discriminate against the individual – based on race, color, national origin, sex, age or disability.

9. Anticipated economic impact, locally or statewide

Repeal of the exclusions is anticipated to have a minimal impact on state Medicaid expenditures.

10. Agency contact

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