

STATEMENT OF SCOPE
WISCONSIN DEPARTMENT OF HEALTH SERVICES

CHAPTER: DHS 90
RELATING TO: Birth to 3 Program
RULE TYPE: Emergency
SCOPE TYPE: Original

EMERGENCY: Preservation of the public peace, health, safety, or welfare necessitates adoption of an emergency rule because, due to the continued spread of COVID-19, it is important that operational practices be adjusted in order to maintain essential Medicaid services and operations so that the health and safety of patients is ensured and certain federal dollars are secured. The proposed rules will reduce financial burdens on families, ensure access to early intervention services and policy consistency throughout the state.

SUMMARY

1. Description of rule objectives

On March 12, 2020, Governor Evers issued Executive Order 72, which, in accordance with s. 323.10, Stats., declared a public health emergency related to COVID-19. Executive Order 72 further designated the Department of Health Services (“the department”) as the lead agency to respond to the public health emergency. The Governor directed the department to take all necessary and appropriate measures to respond to, and prevent the spread of, COVID-19 in the state—including suspending any administrative rule provisions for which strict compliance would prevent, hinder, or delay necessary actions to respond to the emergency and increase the health threat.

On May 4, 2020 Governor Evers and Secretary-designee Palm issued Emergency Order 35, which ordered the suspension of a number of administrative rules, including parts of chs. DHS 1 and 90. Due to the financial hardships created for many families from the COVID-19 pandemic, Executive Order 35 suspended ss. DHS 90.06 (2) (f) and (j), 90.10 (2) (a) 3. and (b), 90.11 (2) (a) 1., 90.12 (2) (a) 1. and 2., and 90.12 (2) (b). These rule sections are related to the Birth to 3 program and establish requirements for parental consent prior to conducting assessments or evaluations, beginning early intervention services, and implementing individualized family services.

The Governor’s public health emergency declaration expired on May 11, 2020, per s. 323.10, Stats., and that expiration will effectively nullify Emergency Order 35. In order to preserve the public peace, health, safety, and welfare under s. 227.24 (1) (a), Stats., and in accordance with the department’s authority under s. 252.02 (4) and (6), Stats., to promulgate rules and implement emergency measures to protect against, and control the spread of, communicable diseases, the department proposes to temporarily suspend ss. DHS 90.06 (2) (f) and (j), 90.10 (2) (a) 3. and (b), 90.11 (2) (a) 1., 90.12 (2) (a) 1. and 2., and 90.12 (2) (b) in a manner consistent with Emergency Order 35. Additionally, the department proposes to suspend DHS 90.11 (2) (a) 3., which requires that funds allocated for the Birth to 3 Program only be used for early intervention services that an eligible child needs but is not currently entitled to under any other federal, state, local government or private funding source.

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

Sections DHS 90.06 (2) (f), 90.10, 90.11, and 90.12 all include requirements that parental consent is provided in writing before beginning early intervention services and implementing individualized family services. Due to the current need to adjust operational practices in response to the COVID-19 emergency, it is impractical and inconsistent with social distancing practices to require an in-person signature from a parent. Temporarily suspending this rule will allow agencies to permit parents to provide verbal consents by telephone or video followed by a written consent (electronic signature) in order to begin early intervention services and implement family services plans.

Section DHS 90.11 (2) (a) 3. currently requires that funds allocated for the Birth to 3 Program may only be used for early intervention services that an eligible child needs, but is not currently entitled to under any other federal, state, local government or private funding source. Once a child who receives early intervention services reaches 3 years old, that child is supposed to transition to receiving appropriate special education services through the school district. As many local school districts are currently closed and unable to provide services remotely, transition to those entitled services are not guaranteed for children discharging from the Birth to 3 Program. Temporarily suspending s. DHS 90.11 (2) (a) 3 will permit the continuance of early intervention services for children who are age 3 or older without a lapse in providing services due to school closures. The department proposes to suspend DHS 90.11 (2) (a) 3 to the ensure continuance of services for children who are age 3 and older rather than DHS 90.10 (5) (f), which was included in Emergency Order 35, as DHS 90.10 (5) (f) solely addressed transition planning requirements from the Birth to 3 program to appropriate special education services.

Section DHS 90.11 (2) (b) 2. requires that providers of early intervention services obtain 5 hours of training each year related to early intervention. Many training opportunities—which include in-service trainings, conferences, workshops, or higher education credits—have been cancelled or are unavailable due to the COVID-19 pandemic. Suspending this requirement will ensure that children will continue to receive services from providers who are, aside from the training requirement, qualified to provide services to these children, and will further ensure no delays or interruptions in the services received.

3. Analysis of policy alternative

There are no reasonable alternatives to emergency rulemaking. Governor Evers and Secretary-designee Palm jointly ordered that these above-referenced administrative rules be suspended on May 4, 2020, and that order expired on May 11, 2020.

4. Statutory authority for the rule

a. Explanation of authority to promulgate the proposed rule

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 51.44 (5) (a), Stats.: The department shall do all of the following:

- (a) Promulgate rules for the statewide implementation of the program under this section that do all of the following:
 - 1. Specify the population of children who would be eligible for services under the program.
 - 2. Define the term "early intervention services".
 - 3. Establish personnel standards and a comprehensive plan for the development of personnel providing services in the program.

4. Establish procedures for the resolution of complaints by clients in the program.
5. Specify data collection requirements, including a system for making referrals to service providers.
6. Establish monitoring and supervision authority.
7. Establish policies and procedures for the implementation of individual family services plans and case management services.
8. Develop requirements for local coordination and interagency agreements at state and local levels.
9. Establish requirements for public awareness activities and a statewide directory of services.

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

There do not appear to be any other statutes that will be affected by the proposed emergency rule.

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 40 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

- Local Birth to 3 Programs, which in accordance with s. 51.44, Stats., may be a county department under ss. 46.21, 46.23 or 51.437, Stats.
- The local health department of the county or another entity.
- Providers of early intervention services.

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

The Individuals with Disabilities Education Act (IDEA) allows states to make early intervention services available to children age 3 or older, but 34 CFR p. 303.211 provides that states are required to include their policies for providing early intervention services to children age 3 or older in their annual state applications under Part C (services for infants and toddlers with disabilities) of the IDEA. However, the United States Secretary of Education recently issued IDEA waiver authority recommendations. These recommendations would include explicit authorization for Part C services to continue during the delayed evaluation for, and transition to, Part B services (services for school-aged children) due to the COVID-19 Pandemic. This would give the Secretary of Education the authority to extend the IDEA Part B transition evaluation timelines, such that calculation of a timeline obligation shall resume no later than the day on which health and safety factors allow for face-to-face meetings to resume and the toddler is able to be evaluated. This waiver authority would also include explicit authorization for Part C services to continue

during the delayed Part B transition evaluation timeline so that a toddler may continue to receive Part C services after his or her third birthday and until a Part B evaluation is completed and an eligibility determination made.

No other existing or proposed federal regulations appear to be affected by the proposed emergency rule.

8. Anticipated economic impact, locally or statewide

The proposed emergency rule may have a moderate economic impact.

9. Agency contact

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