

## WISCONSIN DEPARTMENT OF HEALTH SERVICES PROPOSED ORDER TO ADOPT PERMANENT RULES

The Wisconsin Department of Health Services proposes an order to: **repeal** ss. DHS 90.05 (4) (a) 2. (Note 1), 90.06 (1) (a) (Note) and (1m) (Note), 90.07 (3) (c) 2. (Note), 90.12 (5) (b) 3. (Note), (6) (a) 2. c. (Note), and (6) (b) (Note); 103.085 (3) (b) 2. and (6); 104.01 (9) (b) 2. g., 104.02 (1) (Note), 106.06 (27), 107.06 (4) (e), 107.09 (4) (v), 107.30 (3) (b) and (Note), 152.02 (25); 250.03 (1), and 251.03 (13); **consolidate, renumber and amend** s. DHS 103.085 (3) (b) (intro) and 1. a. to d.; **amend** ss. DHS 90.06 (1) (a), Table: Assignment of Parental Cost Share (Note), and (2) (o) 2., 90.07 (3) (b) (Note), 90.10 (5) (f) 4. a. and 5. b., 90.12 (3) (g), 90.12 (4) (a), (4) (b) 1., (5) (c), and (6) (d) 4. d., 103.04 (7) (d), 104.01 (3), 104.02 (1), 105.02 (5), 105.16 (6) (a) (intro.), 105.19 (1) (b), 105.22 (1) (b) and (3), 105.23 (1) (c), 105.39 (4) (b) 2. 107.03 (12), 107.112 (2) (a) and (4) (e); 107.13 (2) (d) 1.; 107.24 (2) (c) 1. and 4. to 6.; 109.03 (12); and 250.06 (1) (a); and **create** ss. DHS 105.22 (1) (bn) to (br); and 250.03 (15), relating to biennial review.

### RULE SUMMARY

#### Statute interpreted

Section 227.29, Stats.

#### Statutory authority

Sections 49.02 (7m), 49.45 (10), 49.665 (3), 49.68 (2), and 51.44 (5) (a), Stats.

#### Explanation of agency authority

Under s. 227.29 (1) (a) to (e), Stats., the Department is required to complete an agency review of rules on a biennial basis and make changes to rules that are: unauthorized rules, as defined in s. 227.26 (4) (a), Stats., together with a description of the legislation that eliminated the agency's authority to promulgate any such rule; rules for which the authority to promulgate has been restricted, together with a description of the legislation that restricted that authority; rules that are obsolete or that have been rendered unnecessary, together with a description of why those rules are obsolete or have been rendered unnecessary; rules that are duplicative of, superseded by, or in conflict with another rule, a state statute, a federal statute or regulation, or a ruling of a court of competent jurisdiction, together with a citation to or the text of any such statute, regulation, or ruling; or rules that the agency determines are economically burdensome..

#### Related statute or rule

Sections 227.29 and 227.11 (2), Stats.

#### Plain language analysis

The Department has identified needed administrative rule changes under s. 227.29, Stats., and based upon information provided to the Department by the Legislative Reference Bureau. The department proposes the following rule changes:

**1. Chapter DHS 90, relating to early intervention services.** The proposed rulemaking seeks to: (1) outdated provisions that are inconsistent with 34 CFR 303 regarding how to submit complaints; (2) revise provisions for written transition plan timelines, contents of permanent records, parent access to early intervention records, procedures for appointing mediators to resolve disputes regarding early intervention evaluation processes or determinations; and timelines for written decisions following a hearing to resolve an evaluation or determination dispute; (3) remove outdated references to s. 46.985, Stats., and ch. DHS 65, which have been repealed, and replace those references with appropriate authority; and (4) remove outdated

department contact information.

**2. Chapter DHS 103, relating to medical assistance eligibility.** The proposed rulemaking seeks to: (1) revise eligibility standards for recipients under 19 years old for consistency with federal modified adjusted gross income rules and 42 CFR 435.603; and (2) Remove provisions relating to eligibility lock-out periods that are outdated inconsistent with 42 CFR 457.10 and 457.570, and maximum income requirements that are inconsistent with s. 49.471 (4) (a) 4. b., Stats.

**3. Chapter DHS 104, relating to recipient rights and duties.** The proposed rulemaking seeks to remove duplicative, superseded, or conflicting provisions describing confidentiality of medical information, mailing written notice to AFDC children, and an exception to recipient duties to not seek same or similar services from more than one provider. Citations to outdated statutory provisions would be removed, and references to 42 CFR 2 and ss. 146.81 to 146.83, Stats will be added to confidentiality sections.

**4. Chapter DHS 105, relating to provider certifications.** The proposed rulemaking seeks to: (1) expand the type of providers that participate in surveys conducted for research and MA policy purposes, consistent with CMS-2345-FC; (2) remove an outdated references to ch. Med 20 in home health agency certification and respiratory care service requirements; (3) remove psychotherapy and AODA treatment provider certification requirements that were superseded by s. 49.45 (30f), Stats; and (4) replace “emergency medical technician,” with “emergency medical services practitioner,” in accordance with 2017 Wis. Act 12.

**5. Chapter DHS 106, relating to provider rights and responsibilities.** The proposed rulemaking will repeal an outdated provision describing involuntary termination or suspension of a provider for refusal to purge a contempt order, which is unauthorized following the repeal of s. 49.45 (3) (h) 1., Stats.

**6. Chapter DHS 107, relating to covered services.** The proposed rulemaking seeks to: (1) remove outdated references to DHS 107.06 (4) (d) relating to mental health services, and update with reference 49.45 (29y), Stats.; (2) remove outdated requirements for, or restrictions on, a second surgical opinion, which were superseded by 2005 Wis. Act 25; (3) remove a provision describing reduction in MA payments when an institution for mental disease resident is relocated to the community, for which the statutory authority was repealed by 2015 Wis. Act 5; (4) amend prior authorization for services requirements to comport with s. 49.45 (42), Stats.; (5) remove requirements that categories of durable medical equipment be used in a recipient’s home, which is inconsistent with CMS-2348-F;

**7. Chapter DHS 109, relating to senior care.** The proposed rulemaking seeks to remove an additional 5% from the program payment rate, which was struck from s. 49.688 (1) (e) by 2009 Wis. Act 28.

**8. Chapter DHS 152, relating to reimbursement for treatment of chronic renal disease.** The proposed rulemaking seeks to repeal a provision defining “resident” in accordance with s. DWD 11.15, which has been repealed.

**9. Chapter DHS 250, relating to tribal medical relief programs.** The proposed rulemaking seeks to: (1) repeal a provision defining or referring to “AFDC,” a program which was replaced by the Wisconsin Works program; and (2) create a provision defining “Wisconsin Works” and replace any references to AFDC with Wisconsin Works.

**10. Chapter DHS 251, relating to county relief programs.** The proposed rulemaking seeks to repeal a provision defining relief block grants, for which the statutory authority was repealed in

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

Not applicable – The proposed rule order is based on requirements set forth in s. 227.29, Stats.

**Comparison with rules in adjacent states**

**Illinois:**

Not applicable – The proposed rule order is based on requirements set forth in s. 227.29, Stats.

**Iowa:**

Not applicable – The proposed rules order is based on requirements set forth in s. 227.29, Stats.

**Michigan:**

Not applicable – The proposed rule order is based on requirements set forth in s. 227.29, Stats.

**Minnesota:**

Not applicable – The proposed rule order is based on requirements set forth in s. 227.29, Stats.

**Summary of factual data and analytical methodologies**

The Department relied upon requirements under s. 227.29, Stats., and information provided to the Department by the Legislative Reference Bureau.

**Analysis and supporting documents used to determine effect on small business**

The department’s fiscal estimate and economic impact analysis determined that the proposed rules would not have any effect on small businesses.

**Effect on small business**

The rules are anticipated to have no economic impact on small businesses.

**Agency contact person**

Laura Brauer, DHS, DMSAdminRules@dhs.wisconsin.gov, 608.266.5368

**Statement on quality of agency data**

See “summary of factual data and analytical methodologies” section above.

**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 90.05 (4) (a) 2. (Note 1) is repealed.

**SECTION 2.** DHS 90.06 (1) (a) is amended to read:

DHS 90.06 (1) (a) “Annual income after disability deductions” means the annual parental income less a deduction of \$3,300 for each member of the family participating in the birth to 3

program and each child under 19 years of age with a disability as defined in ~~s. DHS 65.02 (5)s. 46.272 (1) (b), Stats.~~

**SECTION 3.** DHS 90.06 (1) (a) (Note) and (1m) (Note) are repealed.

**SECTION 4.** DHS 90.06 Table: Assignment of Parental Cost Share (Note) is amended to read:

DHS 90.06 Table: Assignment of Parental Cost Share Note: The federal poverty guidelines are adjusted yearly and are published annually in the Federal Register. The department will distribute the applicable federal poverty guidelines information that is effective each year. ~~To receive the current Federal Poverty Guidelines, contact the Birth to 3 Program Coordinator at the Division of Disability and Elder Services, P.O. Box 7851, Madison, WI 53707, or call 608-266-8276, or fax 608-261-6752.~~

**SECTION 5.** DHS 90.06 (2) (o) 2. is amended to read:

DHS 90.06 (2) (o) 2. The early intervention record is kept separate from other records on the child maintained by the agency unless the parent specifically agrees in writing that another record and the early intervention record be kept together. ~~Other records~~ Records that might be kept with the early intervention record ~~are the family support assessment and plans include an individual service plan under s. 46.985, Stats., and ch. DHS 65, and the community options program assessment under s. 46.27 (6), Stats~~ the programs established in ss. 46.011 (1g) and 46.272, Stats.

~~Note: Section 46.985, Stats., was repealed by 2015 Wis. Act 55 rendering Chapter DHS 65 unenforceable and without effect. Chapter DHS 65 will be repealed in future rulemaking.~~

**SECTION 6.** DHS 90.07 (3) (b) (Note) is amended to read:

DHS 90.07 (3) (b) (Note): Referral sources should differentiate between a request or need for a formal screening and referral for an evaluation. ~~For example, a child diagnosed as having Down syndrome, which has a high probability of resulting in a developmental delay, should be referred for an evaluation rather than a formal screening, whereas a child who seems slow in speech or motor development may first be formally screened to determine if there is need for an evaluation.~~

**SECTION 7.** DHS 90.07 (3) (c) 2. (Note) is repealed.

**SECTION 8.** DHS 90.10 (5) (f) 4. a. and 5. b. are amended to read:

DHS 90.10 (5) (f) 4. a. ~~Prepare~~ At least 90 days but not more than 9 months before the child reaches age 3, prepare a written transition plan to reflect decisions made at the conference and the roles of sending and receiving agencies; and

DHS 90.10 (5) (f) 5. b. ~~Prepare~~ At least 90 days but not more than 9 months before the child reaches age 3, prepare a written transition plan to reflect decisions made at the conference and the role of sending and receiving agencies.

**SECTION 9.** DHS 90.12 (3) (g) is amended to read:

DHS 90.12 (3) (g) The county administrative agency shall inform the parent when personally identifiable information contained in the early intervention record is no longer needed to provide early intervention services. The information shall be destroyed at the request of the parent except that a permanent record of the child's name, date of birth, the parent's address, the parent's phone number, and dates of enrollment in the program names of service coordinators and service providers, and exit data, including year and age upon exit and any programs

entered into upon exiting, may be maintained. In this paragraph, “destruction” means physical destruction or removal of personally identifiable information from the early intervention record.

**SECTION 10.** DHS 90.12 (4) (a) is amended to read:

DHS 90.12 (4) (a) The parent of a child may review all early intervention records concerning the child unless the county administrative agency has been ~~advised~~ provided documentation that the parent does not have the authority ~~under state law~~ to review a record under state law governing such matters as custody, foster care, guardianship, separation and divorce.

**SECTION 11.** DHS 90.12 (4) (b) 1. is amended to read:

DHS 90.12 (4) (b) 1. Make the records available to the parent without unnecessary delay but not later than ~~15 working~~ 10 days following the date of the request except that, if the request is in connection with a meeting on the individualized family service plan or a hearing to resolve a dispute or complaint involving the parent and the county agency or service provider, the records shall be made available at least 5 days before the meeting or hearing but in no case later than ~~15 working~~ 10 days following the date of the request;

**SECTION 12.** DHS 90.12 (5) (b) 3. (Note) is repealed.

**SECTION 13.** DHS 90.12 (5) (c) is amended to read:

DHS 90.12 (5) (c) *Appointment of mediator.* 1. ~~a. A party that requests mediation may nominate a mediator from the roster under par. (d). If a party nominates a mediator, the department shall include in the notice under par. (b) 1. the name of the nominated mediator.~~  
~~b. If both parties nominate the same person as mediator, the department shall appoint that person as mediator if he or she is on the roster under par. (d) and available to mediate.~~  
~~c. If both parties request mediation but neither party nominates a mediator, the department shall propose a mediator from the roster under par. (d).~~  
~~d. If both parties consent to mediation but the party that requests mediation does not nominate a mediator, the nominated mediator is not available or the other party does not consent to the appointment of the nominated mediator, the department shall propose a mediator from the roster under par. (d).~~  
2. ~~Whenever the department proposes a mediator under subd. 1. c. or d., the department shall send information about the mediator’s training and experience to both parties. Within 2 business days after receiving the information, either party may request the department to propose a different mediator from the roster under par. (d).~~  
3. ~~Both parties may agree to use a mediator not listed on the roster in par. (d). If the parties choose a non-roster mediator, the parties shall agree to pay the compensation of that mediator as provided in par. (g) 3.~~ The department shall select mediators on a random, rotational, or other impartial basis.

**SECTION 14.** DHS 90.12 (6) (a) 2. c. (Note) is repealed.

**SECTION 15.** DHS 90.12 (6) (b) (Note) is repealed.

**SECTION 16.** DHS 90.12 (6) (d) 4. d. is amended to read:

DHS 90.12 (6) (d) 4. d. Issue a written decision, and mail it to both parties and to the state birth to 3 program coordinator not later than ~~45~~ 30 days after receipt of the request for hearing under par. (b), unless granting an extension of the time period limit at the request of either party. If an extension is granted, the impartial decision-maker shall include that extension and the reason for it in the hearing record; and

**SECTION 17.** DHS 103.04 (7) (d) is amended to read:

DHS 103.04 (7) (d) ~~18~~Case of a person under 19 years old. An 18Any person under 19 years old who resides with a parent or parents ~~may~~must include the parents in the BadgerCare application.

**SECTION 18.** DHS 103.085 (3) (b) (intro) and 1. a. to d. are consolidated and renumbered (3) (b) 1. to 4. and amended to read:

DHS 103.085 (3) (b) *Reasons restriction on re-enrollment may not apply.* The restriction on re-enrollment under this section does not apply ~~for either of the following reasons:~~1. The if the failure to pay premiums was due to a circumstance beyond the group's control, provided that all past due premiums have been paid in full. A circumstance beyond the group's control includes any of the following:

a1. A problem with an electronic funds transfer from a bank account to the BadgerCare program.

b2. A problem with an employer's wage withholding.

c3. An administrative error in processing the premium.

d4. Any other circumstance affecting payment of the premium which the department determines is beyond the group's control, but not including insufficient funds.

**SECTION 19.** DHS 103.085 (3) (b) 2. is repealed.

**SECTION 20.** DHS 103.085 (6) is repealed.

**SECTION 21.** DHS 104.01 (3) is amended to read:

DHS 104.01 (3) CONFIDENTIALITY OF MEDICAL INFORMATION. Information about recipients shall be confidential and only disclosable in accordance with ~~ss. 146.81 to 146.83, Stats.~~ 42 CFR pt. 2 and ss. 146.81 to 146.83, Stats. No privilege exists under MA regarding communications or disclosures of information requested by appropriate federal or state agencies or their authorized agents concerning the extent or kind of services provided recipients under the program. The disclosure by a provider of these communications or medical records, made in good faith under the requirements of this program, shall not create any civil liability or provide any basis for criminal actions for unprofessional conduct.

**SECTION 22.** DHS 104.01 (9) (b) 2. g., is repealed.

**SECTION 23.** DHS 104.02 (1) is amended to read:

DHS 104.02 Recipient duties. (1) NOT TO SEEK DUPLICATION OF SERVICES. A recipient may not seek the same or similar services from more than one provider, ~~except as provided in s. DHS 104.04.~~

**SECTION 24.** DHS 104.02 (1) (Note) is repealed.

**SECTION 25.** DHS 105.02 (5) is amended to read:

DHS 105.02 (5) PARTICIPATION IN SURVEYS. ~~Nursing home and hospital providers~~Providers shall participate in surveys conducted for research and MA policy purposes by the department or its designated contractors. Participation involves accurate completion of the survey questionnaire and return of the completed survey form to the department or to the designated contractor within the specified time period.

**SECTION 26.** DHS 105.16 (6) (a) (intro.) is amended to read:

DHS 105.16 (6) (a) A certified home health agency may be certified to provide respiratory care services under s. DHS 107.113 if registered nurses, licensed practical nurses and respiratory therapists employed by or under contract to the agency ~~and providing~~ provide these services ~~are certified under ch. Med 20 and:~~

**SECTION 27.** DHS 105.19 (1) (b) is amended to read:

DHS 105.19 (1) (b) For MA certification to perform respiratory care services as a provider in independent practice, the provider ~~shall be certified pursuant to ch. Med 20 and~~ shall be a nurse described in par. (a) or a respiratory therapist. Any person providing or supervising respiratory care who is not credentialed by the national board on respiratory care shall know how to perform the services under s. DHS 107.113 (1) and shall have the skills necessary to perform those services. Skills required to perform services listed in s. DHS 107.113 (1) (e) to (f) are required on a case-by-case basis, as appropriate. In no case may a person provide respiratory care before that person has demonstrated competence in all areas under s. DHS 107.113 (1) (a) to (d). A registered nurse who fulfills these requirements shall coordinate the recipient's care.

**SECTION 28.** DHS 105.22 (1) (b) is amended to read:

DHS 105.22 (1) (b) A psychologist licensed under ch. 455, Stats., ~~who is listed or eligible to be listed in the national register of health service providers in psychology;~~

**SECTION 29.** DHS 105.22 (1) (bn) to (br) are created to read:

DHS 105.22 (1) (bn) A marriage and family therapist licensed under ss. 457.10, 457.11, and 457.14, Stats., including holding a valid training or temporary license;

DHS 105.22 (1) (bo) A professional counselor licensed under ss. 457.12 to 457.14, Stats., including holding a valid training or temporary license;

DHS 105.22 (1) (bp) An advanced practice social worker certified under s. 457.08 (2), Stats.;

DHS 105.22 (1) (bq) An independent social worker certified under s. 457.08 (3), Stats.;

DHS 105.22 (1) (br) A clinical social worker licensed under s. 457.08 (4), Stats.;

**SECTION 30.** DHS 105.22 (3) is amended to read:

DHS 105.22 (3) REIMBURSEMENT FOR OUTPATIENT PSYCHOTHERAPY SERVICES. Reimbursement shall be made to any certified ~~outpatient mental health clinic meeting the requirement under sub. (1) (c) for services rendered by any provider who meets the applicable requirements under ch. DHS 35 and working for that clinic, except that a provider certified under sub. (1) (a), (b), or (bm) may be reimbursed directly~~ psychotherapy provider whose practice, as described by individual licensure or clinic certification regulations, allows for the delivery of psychotherapy without clinical supervision. For outpatient psychotherapy services delivered by certified providers who are required, under individual licensure or clinic certification regulations, to practice under a clinical supervisor, reimbursement shall be made to the supervising provider. The supervising provider must be MA certified.

**SECTION 31.** DHS 105.23 (1) (c) is amended to read:

DHS 105.23 (1) TYPES OF PROVIDERS. For MA certification, an outpatient alcohol and other drug abuse (AODA) treatment provider shall be:

(a) An outpatient facility operated by a board and certified under s. DHS 75.13;

(b) An outpatient facility or hospital outpatient AODA facility certified under s. DHS 75.13; or

(c) A provider certified under ss. DHS 105.05 (1) ~~or~~ 105.22 (1) (b), 105.22 (1) (bn), 105.22 (1) (bo), or 105.22 (1) (br). Providers that hold a training or temporary license under ss. DHS 105.22 (1) (bn) or (bo) are excluded.

**SECTION 32.** DHS 105.39 (4) (b) 2. Is amended to read:

DHS 105.39 (4) (b) 2. Each driver shall receive refresher training in first aid at least every 3 years and shall maintain CPR certification. A driver who is an ~~emergency medical technician~~ emergency medical services practitioner licensed under ch. DHS 110, a licensed practical nurse, a registered nurse or a physician assistant shall be considered to have met these requirements by completion of continuing education which includes first aid and CPR.

**SECTION 33.** DHS 106.06 (27) is repealed.

**SECTION 34.** DHS 107.03 (12) is amended to read:

DHS 107.03 (12) Consultations between or among providers, except as specified in s. 49.45 (29y), Stats. ~~s. DHS 107.06 (4) (e)~~;

**SECTION 35.** DHS 107.06 (4) (e) is repealed.

**SECTION 36.** DHS 107.09 (4) (v) is repealed.

**SECTION 37.** DHS 107.112 (2) (a) and (4) (e) are amended to read:

DHS 107.112 (2) (a) Prior authorization is required for personal care services in excess of 25050 hours per calendar year.

DHS 107.112 (4) (e) Personal care services provided in excess of 25050 hours per calendar year without prior authorization;

**SECTION 38.** DHS 107.13 (2) (d) 1. is amended to read:

DHS 107.13 (2) (d) *Non-covered services*. All of the following services are not covered services:

1. Collateral interviews with persons not stipulated in par. (c) 1., and consultations, except as provided in s. 49.45 (29y), Stats., and s. DHS 107.06 (4) (d).

**SECTION 39.** DHS 107.24 (2) (c) 1. and 4. to 6. are amended to read:

DHS 107.24 (2) (c) 1. Occupational therapy assistive or adaptive equipment. This is medical equipment used ~~in a recipient's home~~ to assist a disabled person to adapt to the environment or achieve independence in performing daily personal functions. Examples are adaptive hygiene equipment, adaptive positioning equipment and adaptive eating utensils.

DHS 107.24 (2) (c) 4. Other home health care durable medical equipment. This is medical equipment used ~~in a recipient's home~~ to increase the independence of a disabled person or modify certain disabling conditions. Examples are patient lifts, hospital beds and traction equipment.

DHS 107.24 (2) (c) 5. Oxygen therapy equipment. This is medical equipment used ~~in a recipient's home~~ for the administration of oxygen or medical formulas or to assist with respiratory functions. Examples are a nebulizer, a respirator and a liquid oxygen system.

DHS 107.24 (2) (c) 6. Physical therapy splinting or adaptive equipment. This is medical equipment used ~~in a recipient's home~~ to assist a disabled person to achieve independence in performing daily activities. Examples are splints and positioning equipment.



**SECTION 40.** DHS 107.30 (3) (b) and (Note) are repealed.

**SECTION 41.** DHS 109.03 (12) is amended to read:

DHS 109.03 (12) "Program payment rate" means the rate of payment made for the identical drug specified under s. 49.46 (2) (b) 6. h., Stats., ~~plus 5%,~~ plus a dispensing fee that is equal to the dispensing fee permitted to be charged for prescription drugs for which coverage is provided under s. 49.46 (2) (b) 6. h., Stats.

**SECTION 42.** DHS 152.02 (25) is repealed.

**SECTION 43.** DHS 250.03 (1) is repealed.

**SECTION 44.** DHS 250.03 (15) is created to read:

DHS 250.03 (15) "Wisconsin Works" means the assistance program under ss. 49.141 to 49.161, Stats.

**SECTION 45.** DHS 250.06 (1) (a) is amended to read:

DHS 250.06 (1) (a) Waiver of the prohibition against receiving ~~AFDC~~ Wisconsin Works or SSI may be granted in cases of unusual misfortune or hardship as determined by the tribal governing body.

**SECTION 46.** DHS 251.03 (13) is repealed.

**SECTION 47.** EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in § 227.22 (2), Stats.

Wisconsin Department of Health Services

Dated: \_\_\_\_\_

\_\_\_\_\_

Karen Timberlake, Secretary-designee

SEAL: