

**DEPARTMENT OF HEALTH AND FAMILY SERVICES
ORDER ADOPTING EMERGENCY RULES**

The Wisconsin Department of Health and Family Services hereby adopts emergency rules to amend HFS 10.55 (1) and 10.56 (2); and to create HFS 10.55 (1m) and 10.56 (2m), relating to fair hearings and continuation of benefits pending the outcome of a grievance, Department review, or fair hearing under the family care program.

FINDING OF EMERGENCY

The Department of Health and Family Services finds that an emergency exists and that the adoption of an emergency rule is necessary for the immediate preservation of the public, health, safety and welfare. The facts constituting the emergency are as follows:

2007 Wisconsin Act 20 eliminates entitlement to non-Medicaid eligibility for Family Care, which could result in some Family Care enrollees being determined ineligible and disenrolled from the program.

In addition, the federal Centers for Medicare & Medicaid Services (CMS) has restricted the Family Care benefit for enrollees at the non-nursing home level of care.

Currently, under ss. HFS 10.55 and 10.56, persons whose services are terminated may request a hearing and continuation of benefits during an appeal. Individuals who appeal the loss of non-Medicaid eligibility or reduction of services as a result of the restriction of the benefit for people eligible at the non-nursing home level of care will lose the appeal because the change in law and federal policy makes it clear that they are no longer entitled to those benefits. In addition, if benefits continued during an appeal, the individual would be responsible for repayment of the cost of continued services. Therefore, the right to appeal is of no real benefit.

HFS 10.56 (2) gives enrollees whose services are reduced or terminated the option to request continuation of services during a fair hearing, grievance, or Department review of the termination or reduction of services. For individuals appealing the loss of non-Medicaid eligibility, or termination or reduction of services as a result of the restriction of the benefit for people eligible at the non-nursing home level of care, continuation of services will be counter-productive to the welfare of the appellant, because the termination and reduction of benefits will have resulted from a change in law. The appellant will lose the appeal and as a result of the loss, be responsible for the cost of the continued services, which may be significant as costs could be in the thousands of dollars.

Under this emergency order, the Department is providing an exception to the right to a fair hearing and continuation of services during a fair hearing, grievance, or Department review when Family Care benefits are reduced or terminated by an act of the federal government or the state legislature and the individual whose benefits have been terminated or reduced does not dispute that he or she falls within the category of persons for whom the benefit was reduced or terminated. The Department has determined that appeals and continuation of benefits under these circumstances would be detrimental to the welfare of approximately 730 individuals and should be prevented.

SUMMARY OF EMERGENCY RULE

Statutes interpreted: Wis.Stat. § 46.287

Statutory authority: Wis.Stat. § 46.286(3)(a), as revised by 2007 Wisconsin Act 20

Explanation of agency authority:

The 2007 -2009 Biennial Budget (2007 Act 20) eliminates the entitlement to Family Care Non-Medicaid eligibility. In addition, the federal Centers for Medicare & Medicaid Services has restricted the Family Care benefit for enrollees at the non-nursing home level of care .

Related statute or rule: Wis.Stat. § 46.287

Plain language analysis:

There are two changes in Federal and State policy that precipitate this emergency rulemaking.

First, non-Medicaid entitlement to Family Care benefits was eliminated under 2007 Act 20. Consequently, persons who are currently enrolled in the Family Care program but who are ineligible for Medicaid benefits will be disenrolled from the Family Care program, unless they become eligible for Medicaid benefits on or before July 1, 2008. Non-Medicaid eligible persons enrolled on December 31, 2008 may stay enrolled until June 30, 2008, in order to have time to attain Medicaid eligibility. The Department, the Family Care managed care organizations, and the local aging and disability resource centers will assist individuals in that attempt. The Department will provide notice to individuals subject to disenrollment under 2007 Act 20.

Second, the federal Centers for Medicare & Medicaid Services has restricted the Family Care benefit for persons at the non-nursing home level of care. Individuals at the non-nursing home level of care are no longer entitled to receive the home and community-based services more typically provided to people who do have a nursing home level of care and, therefore, may have some services reduced or terminated because of the change in CMS policy. The Department will provide notice of reduction or termination to these individuals.

Section HFS 10.55 provides enrollees with a right to a fair hearing when services are reduced or terminated, or eligibility is denied. In addition, s. HFS 10.56 (2) provides that enrollees whose Family Care benefits are reduced or terminated have a right to have their current services continued pending the outcome of a grievance, Department review, or fair hearing. If a person notified of the elimination of the non-Medicaid benefit in Family Care or a reduction of services because of the change in benefit for people at the non-nursing home level of care appealed and requested continuation of services, under the current rules a hearing and continuation of services would have to be granted.

However, persons who are non-Medicaid eligible who appeal the loss of services will lose the appeal, because the loss of benefits is due to a change in state law, which makes it clear that the Family Care benefit is no longer available to them. Similarly, persons who have a non-nursing home level of care who have home and community-based services reduced or terminated as a result of the change in the available benefit will lose, because the CMS policy change in the benefit package makes it clear that such individuals are no longer entitled to those services. Holding a fair hearing in these situations would be an inefficient use of resources for the participant, the Department, and the Division of Hearings and Appeals.

If these persons receive continuation of services during a fair hearing, Department review, or grievance and lose they will be responsible to pay for the cost of the services provided pending the outcome of the fair hearing, Department review, or grievance. The cost to the individual could amount to thousands of dollars. Such a situation would be detrimental to the welfare of affected individuals and should be prevented.

Under this emergency order, the Department is providing an exception to the right to a fair hearing and continuation of services during a fair hearing, grievance, or Department review when Family Care benefits are reduced or terminated by an act of the federal government or the state legislature and the individual whose benefits have been terminated or reduced does not dispute that he or she falls within the category of persons for whom the benefit was reduced or terminated.

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

There are similar provisions in Medicaid rules at 42 CFR §431.220(b), which provides that the State Medicaid Agency “need not grant a hearing if the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all recipients.” And, at 42 CFR § 431.230(a)(1), which provides that individuals have a right to continuation of services pending the outcome of an appeal unless, “it is determined at the hearing that the sole issue is one of Federal or State law or policy.”

Comparison with rules in adjacent states:

Illinois: does not have a program similar to Family Care.

Iowa: does not have a program similar to Family Care.

Michigan: does not have a program similar to Family Care.

Minnesota: does not have a program similar to Family Care.

Summary of factual data and analytical methodologies:

The Department reviewed 2007 Act 20, and the policy change by the Center for Medicare and Medicaid Services. The Department also assessed the adverse impact of these changes on the individuals affected.

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

The rule change will not affect “small business” as defined under s. 227.114 (1) (a), Stats.

Effect on small business:

The rule change will not affect “small business” as defined under s. 227.114 (1) (a), Stats.

Agency contact person:

Charles Jones, Family Care Program Manager
Office of Family Care Expansion, Managed Care Section
1 W. Wilson St., Room 518
P.O. Box 7851
Madison, WI 53707-7851
Phone: (608) 266-0991
FAX: (608) 266-5629
e-mail: jonescm@dhfs.state.wi.us

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 deadline for submitting comments and the notice of public hearing will be posted on the Wisconsin Administrative Rules Website at <http://adminrules.wisconsin.gov> after the hearing is scheduled.

TEXT OF PROPOSED RULE

SECTION 1. HFS 10.55 (1) is amended to read:

HFS 10.55 (1) RIGHT TO FAIR HEARING. Except as limited in subs. (1m), (2) and (3) and s. HFS 10.62 (4), a client has a right to a fair hearing under s. 46.287, Stats. The contested matter may be a decision or action by the department, a resource center, county agency or CMO, or the failure of the department, a resource center, county agency or CMO to act on the contested matter within timeframes specified in this chapter or in the contract with the department. The following matters may be contested through a fair hearing:

SECTION 2. HFS 10.55 (1m) is created to read:

HFS 10.55 (1m) EXCEPTION TO RIGHT TO FAIR HEARING. An enrollee does not have a right to a fair hearing under sub. (1) for adverse actions that are the result of a change in state or federal statute, rules or family care program authority.

SECTION 3. HFS 10.56 (2) is amended to read:

HFS 10.56 (2) REQUIREMENT FOR CONTINUATION. ~~The~~ Except as provided in sub. (2m), a CMO may not reduce or terminate services under dispute pending the outcome of the enrollee's grievance under s. HFS 10.53 (2), department review under s. HFS 10.54 or fair hearing under s. HFS 10.55 if a request for continued benefits was made under sub. (1).

SECTION 4. HFS 10.56 (2m) is created to read:

HFS 10.56 (2m) EXEMPTION FROM RIGHT TO CONTINUATION. In circumstances where the availability or amount of the family care benefit is reduced or eliminated by an act of the federal government or the state legislature, and the individual does not dispute that he or she falls within the category of individuals for whom the benefit was reduced or eliminated, the individual does not have the right to continuation of services pending the outcome of the enrollee's grievance under s. HFS 10.53 (2), department review under s. HFS 10.54, or fair hearing under s. HFS 10.55. A CMO will not receive a monthly capitated payment for such an individual and is not required to continue services in such circumstances.

SECTION 5. EFFECTIVE DATE: The rules contained in this order shall take effect as emergency rules upon publication in the official state newspaper, as provided in s. 227.24 (1) (c), Stats.

Dated: April 3, 2008