

**ORDER OF
DEPARTMENT OF HEALTH SERVICES
TO ADOPT PERMANENT RULES**

The Wisconsin Department of Health Services proposes an order to repeal DHS 35.16 (4) (b), 107.02 (2m) (a) 7., and 107.13 (2) (a) 2. and (b) 4. b.; to amend 107.13 (2) (a) (intro.) and (d) (intro) and 1. to 4.; and to create 107.13 (2) (a) 4. g. and (d) 3. Note, relating to medical assistance (MA) coverage for outpatient mental health services.

RULE SUMMARY

Statute interpreted

Sections 49.45 (30f) and 49.46 (2) (b) 6. f., fm., k., and Lr., Stats.

Statutory authority

The department's authority to revise the referenced rules is as follows:

Sections 49.45 (10), Stats. and 227.11 (2) (a) 1. to 3., Stats.

Explanation of agency authority

The department's authority to revise the proposed rules is as follows:

Section 49.45 (10), Stats., reads: **RULE-MAKING POWERS AND DUTIES.** The department is authorized to promulgate such rules as are consistent with its duties in administering medical assistance.

Section 227.11 (2) (a) 1. to 3., Stats. reads: Rule-making authority is expressly conferred 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 on the agency the 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.

Related statute or rule

See the "Statute interpreted" section.

Plain language analysis

Section DHS 35.16 (4) (b) requires as a condition for MA reimbursement, a physician's prescription for psychotherapy services. Similarly, ss. DHS 107.02 (2m) (a) 7. and 107.13 (2) (a) (intro.) and 2. and (b) 4. b., require a physician's prescription for mental health services, alcohol and other drug abuse services, and psychotherapy services as a condition for MA reimbursement. Pursuant to ss. 49.45 (30f) and 49.46 (2) (b) 6. f., fm., k., and Lr., Stats., the department is prohibited from requiring a prescription from a physician or other health care provider for psychotherapy services, medical day treatment services, or mental health and alcohol and other drug abuse services as a condition for MA reimbursement. Thus, the department proposes to conform ss. DHS 35.16 (4) (b), 107.02 (2m) (a) 7., and 107.13 (2) (a) (intro.) and 2. and (b) 4. b. to existing state law.

2013 Wisconsin Act 20 included funding to expand MA outpatient mental health coverage to in-home psychotherapy services for children. See, *LFB Budget Summary*. To effectuate this, the department proposes to revise s. DHS 107.13 (2) (a) 4. and (d) 3. to permit in-home psychotherapy services as a covered service for children.

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

There appear to be no existing or proposed federal regulations that address the activities to be regulated by the rules.

Comparison with rules in adjacent states**Illinois:**

In-home psychotherapy services as a MA covered service for children is implemented by Illinois statutes only. There are no administrative rules.

Iowa:

The Iowa Administrative Code provides broad latitude as to the location of service. Iowa administrative code section 441 IAC 78.1 permits payments for all medically necessary services and supplies provided by the physician including services rendered in the physician's office or clinic, the home, in a hospital, nursing home or elsewhere.

Michigan:

In-home psychotherapy services as a MA covered service for children is implemented by Michigan statutes only. There are no administrative rules.

Minnesota:

In-home psychotherapy services as a MA covered service for children is implemented by Minnesota statutes only. There are no administrative rules.

Summary of factual data and analytical methodologies

The department reviewed ss. 49.45 (30f) and 49.46 (2) (b) 6. f., fm., k., and Lr., Stats.; 2013 Wisconsin Act 20 relating to expansion of the MA outpatient mental health coverage to in-home psychotherapy services for children (see, *LFB Budget Summary*); and the existing rules affected by this proposed rule to

determine the changes required to conform the rules to statute and to effectuate the changes necessary to permit the provision of in-home psychotherapy services for children.

Analysis and supporting documents used to determine effect on small business

The proposed rules do not impose regulatory requirements on businesses, including small businesses.

Effect on small business

The proposed rules do not impose requirements on businesses, including small businesses.

Agency contact person

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Statement on quality of agency data

To prepare the text and analysis of the proposed rules, the department relied on the language in ss. 49.45 (30f) and 49.46 (2) (b) 6. f., fm., k., and Lr., Stats.; 2013 Wisconsin Act 20 relating to expansion of the MA outpatient mental health coverage to include in-home psychotherapy services for children (see, *LFB Budget Summary*); and the existing rules affected by this proposed rule to determine the changes required to conform the rules to statute and to effectuate the changes necessary to permit the provision of in-home psychotherapy services for children.

RULE TEXT

SECTION 1. DHS 35.16 (4) (b) is repealed.

SECTION 2. DHS 35.16 (4) (a) is renumbered s. DHS 35.16 (4).

SECTION 3. DHS 107.02 (2m) (a) 7. is repealed.

SECTION 4. DHS 107.13 (2) (a) (intro.) is amended to read:

DHS 107.13 (2) OUTPATIENT PSYCHOTHERAPY SERVICES. (a) *Covered services.* Except as provided in par. (b), outpatient psychotherapy services shall be covered services when ~~prescribed by a physician, when~~ provided by a provider certified under s. DHS 105.22, and when the following conditions are met:

SECTION 5. DHS 107.13 (2) (a) 2. is repealed.

SECTION 6. DHS 107.13 (2) (a) 4. (intro.) is amended to read:

DHS 107.13 (2) (a) 4. (intro.) Psychotherapy is performed only in any of the following:

SECTION 7. DHS 107.13 (2) (a) 4. g. is created to read:

DHS 107.13 (2) (a) 4. g. The home.

SECTION 8. DHS 107.13 (2) (b) 4. b. is repealed.

SECTION 9. DHS 107.13 (2) (d) (intro.) and 1. to 3. are amended to read:

DHS 107.13 (2) (d) *Non-covered services.* ~~The~~ 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. DHS 107.06 (4) (d);

2. Psychotherapy for persons with the primary diagnosis of developmental disabilities, including mental retardation, except when they experience psychological problems that necessitate psychotherapeutic intervention;

3. ~~Psychotherapy~~ For individuals age 21 and over, psychotherapy provided in a person's home;

SECTION 10. DHS 107.13 (2) (d) 3. Note is created to read:

DHS 107.13 (2) (d) 3. Note: Section 49.45 (45), Stats., provides for in-home community mental health and alcohol and other drug abuse (AODA) services for individuals age 21 and over. However, these services are available to an individual only if the county, city, town or village in which the individual resides elects to make the services available and agrees to pay the non-federal share of the cost of those services.

SECTION 11. DHS 107.13 (2) (d) 4. is amended to read:

DHS 107.13 (2) (d) 4. Self-referrals. For purposes of this paragraph, "self-referral" means that a provider refers a recipient to an agency in which the provider has a direct financial interest, or to himself or herself acting as a practitioner in private practice; ~~and~~.

SECTION 12. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2), Stats.

Wisconsin Department of Health Services

Dated: July 17, 2015

Kitty Rhoades, Secretary

SEAL: