

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

The Wisconsin Department of Health Services proposes an order to: **repeal** DHS 107.36 (3) (j) and (k); **amend** DHS 105.53 (3) (a) 1.to 4., (b) (intro.) and 1. to 5., (c) 1., and (6) (b), 107.36 (1) (b) to (i), (2) (b) 1. to 3., and (3) (a) to (i) and (L); and **create** DHS 105.53 (1m), 107.36 (1) (j) to (L), relating to school-based services and school-based service providers under Medical Assistance.

**RULE SUMMARY**

**Statutes interpreted**

Sections 49.45 (2) (a) 1., 5., and 11., and 49.46 (2) (b) 14., Stats.

**Statutory authority**

The department is authorized to promulgate the proposed rules based on ss. 49.45 (10), (39) (c) and 49.471 (12) Stats.

**Explanation of agency authority**

The department's authority to administer medical assistance ("MA") is provided in s. 49.45, Stats. Section 49.45 (2) (a), Stats., lists the department's duties in administering the state MA program, including all of the following relevant obligations:

- Exercising responsibility relating to fiscal matters and eligibility for MA benefits. Section 49.45 (2) (a) 1., Stats.
- Cooperat(ing) with the division for learning support in the department of public instruction to carry out the provisions of Title XIX. Section 49.45 (2) (a) 5<sup>1</sup>.
- Establish(ing) criteria for the certification of providers of medical assistance and promulgating rules to implement that authority. Section 49.45 (2) (a) 11, Stats.

Section 49.45 (10), Stats., authorizes the department to "promulgate such rules as are consistent with its duties in administering medical assistance," including its duties relating to reimbursement for services by certified providers. Section 49.471, Stats., includes provisions for BadgerCare Plus related to eligibility criteria. Subsection (12) of the statute authorizes the "department to promulgate any rules necessary for and consistent with its administrative responsibilities under this section, including additional eligibility criteria."

Section 49.45 (39), Stats., directs the department to submit an amendment to the federal department of health and human services requesting to allow MA coverage of SBS and, if approved, authorizes the department to reimburse for school medical services. Section 49.45 (39) (c) directs the department to promulgate rules establishing certification and reporting requirements with respect to these school medical services.

Section 49.46 (2). Stats., lists benefits for which "the department shall audit and pay allowable charges to certified providers for medical assistance on behalf of recipients." Section 49.46 (2) (b) 14. Identifies school medical services (SBS) as MA reimbursable services.

**Related statute or rule**

42 USC 1396a, specifically the note created in Pub. L. 117-159, div. A, title I, s. 110033 (June 25, 2022)

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<sup>1</sup> This division is now known as the Division of Academics.

### **Plain language analysis**

The Department is seeking to revise DHS chs. 105 and 107 to clarify what services are allowable SBS and which providers can be reimbursed by MA for these services. These changes are expected to expand access to medically-necessary services for kids in school. Under current administrative code, MA-covered SBS are limited to services specifically identified in a student's IEP. IEPs are the only type of care plan that can document medical necessity under current admin code. These changes will allow MA to cover other medically-necessary services by allowing other types of care plans to document medical necessity.

Based on requirements in the Pub. L. 117-159, div. A., title I, s. 11003, which required guidance from CMS on SBS, the Department has submitted a SPA to expand access to covered SBS consistent with that guidance. The SPA is expected to take effect July 1, 2025. The Department's administrative rules must be updated to align with the state plan changes.

Specifically, the Department proposes to make the following changes:

- Revise ch. DHS 105 to clarify the record-keeping requirements for SBS providers and what types of treatment plans may be used to document medical necessity.
- Revise ch. DHS 107 to clarify the types of SBS that will be reimbursed by MA.
- Revise ch. DHS 107 to clarify the provider types who may be reimbursed for services provided in school-based settings.

Additionally, in accordance with s. 227.14 (1), Stats., the proposed rule amends portions of ss. DHS 105.53 and 107.36 to align with s. 1.11(3) of the Administrative Rules Procedures Manual, relating to subunits following introductory material ending with periods rather than semicolons.

There are no reasonable alternatives to rulemaking. The department's current administrative rules conflict with the state plan amendment that is expected to take effect before the start of the 2025-2026 school year.

These changes may impact school districts. School districts will be able to be reimbursed for services they already provide to MA-enrolled students. Under current administrative rules, these services cannot be reimbursed unless they are identified in a student's IEP. The additional reimbursement is composed only of additional federal dollars, and does not impact general purpose revenue.

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

The Individuals with Disabilities Education Act (IDEA)... makes available "a free appropriate public education to eligible children with disabilities throughout the nation and ensures special education and related services to those children, supports early intervention services for infants and toddlers and their families, and awards competitive discretionary grants."<sup>2</sup> [34 CFR 300.154](#) describes the role of MA in providing for these services, including MA reimbursement of SBS.

The 2014 State Medicaid Director Letter #14-006, [Medicaid Payment for Services Provided without Charge](#), pertains to "free care," or MA covered services that are available without charge to the community at large. SMDL #14-006 withdrew prior guidance on free care policy, noting that "Medicaid reimbursement is available for covered services under the approved state plan that are provided to Medicaid beneficiaries, regardless of whether there is any charge for the service to the beneficiary or the community at large."<sup>3</sup>

As a result, MA payment is available for MA-covered services that are provided to MA beneficiaries, regardless of whether there is any charge for the service to the beneficiary or the community at large. This

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<sup>2</sup> Department of Education. [Individuals with Disabilities Education Act \(IDEA\) | U.S. Department of Education](#)

<sup>3</sup> State Medicaid Director Letter #14-006. [smd-medicaid-payment-for-services-provided-without-charge-free-care.pdf](#)

expands the population of students eligible to receive SBS from only students with IEPs to all MA enrolled students.

In 2023, the Centers for Medicare & Medicaid services (“CMS”) issued guidance<sup>4</sup> related to implementation of the Bipartisan Safer Communities Act, Public Law 117-159 s. 11003, to encourage states to increase student access to school-based services (“SBS”). To date, 25 states<sup>5</sup> have allowed MA coverage for some or all SBS outside of an IEP, including Florida, Tennessee, Georgia, and South Carolina.<sup>6</sup>

CMS specifies that if states that have language in their state plans tying coverage of services to an IEP, these states would need to submit a State Plan Amendment to CMS to remove this requirement. Wisconsin has submitted a State Plan Amendment to this effect, and anticipates an effective date of July 1, 2025.

The Early and Periodic Screening, Diagnostic, and Treatment (“EPSDT”) benefit provides a comprehensive array of prevention, diagnostic, and treatment services for low-income infants, children, and adolescents under age 21, as specified in Section 1905(r) of the Social Security Act. The EPSDT benefit encompasses any medically necessary services for eligible MA-enrolled members, including in a school-based setting. EPSDT benefits are described in the Wisconsin MA State Plan.

### Comparison with rules in adjacent states

**Illinois:** Illinois MA covers SBS provided outside of an IEP. Illinois administrative rules do not reference coverage of SBS. Illinois further details requirements for MA SBS in the Illinois MA State Plan. [Illinois State Plan Amendment # 21-0008-CP](#) gave Illinois the authority to expand coverage of SBS outside of an IEP/IFSP where medical necessity has been established.

**Iowa:** Iowa MA only covers SBS when provided for in a student’s IEP. Section [441.78.50](#) of the of Iowa administrative code speaks to MA coverage of SBS and does not refer to IEP/IFSP. The [Iowa state website](#) outlines that SBS may be covered when provided to students within an approved IEP or IFSP.

**Michigan:** Michigan MA covers SBS provided outside of an IEP. Michigan administrative rules speak to SBS, but do not reference requirements related to IEPs. Michigan further details requirements for SBS in the [Medicaid Provider Manual section 6.25](#). The handbook explains that evaluations, testing, and other services not related to a student IEP/IFSP may be covered by MA.

**Minnesota:** Minnesota MA covers SBS provided outside of an IEP. Minnesota administrative rules do not speak to these SBS.

Minnesota Stat. s. 256B.0625 Subd. 26 allows for SBS when provided for in an IEP/IFSP. Minnesota Stat. s. [145.903](#) directs the commissioner of health to “administer a program to provide grants to school districts and school-based health centers to support existing centers and facilitate the growth of school-based health centers in Minnesota.”

Minnesota further details requirements for Medicaid SBS in the [MA Provider Manual](#), where the School-Based Community Services benefit is described. These services are covered as part of the MA benefit and coverage applies for students who are not receiving SBS through an IEP/IFSP.

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<sup>4</sup> Delivering Service in School-based Settings: A Comprehensive Guide to Medicaid Services and Administrative Claiming | CMS, available at <https://www.cms.gov/newsroom/fact-sheets/delivering-service-school-based-settings-comprehensive-guide-medicaid-services-and-administrative>.

<sup>5</sup> MACPAC: School-Based Services for Students Enrolled in Medicaid, available at <https://www.macpac.gov/publication/school-based-services-for-students-enrolled-in-medicaid/>.

<sup>6</sup> Florida, Tennessee, Georgia, and South Carolina are 4 of the 10 states (including Wisconsin) that have not expanded Medicaid. See KFF: Status of State Action on the Medicaid Expansion Decision, available at <https://www.kff.org/status-of-state-medicaid-expansion-decisions/>.

## Summary of factual data and analytical methodologies

In accordance with s. 227.13, Stats., the department conducted informal consultation and gathered feedback from the Department of Public Instruction, Madison Metropolitan School District, and the Wisconsin Association of School Nurses. The Department also attended several industry conferences to socialize potential SBS changes with impacted parties, and distributed two surveys to all Wisconsin school districts to better understand barriers to providing SBS and potential approaches to address these barriers.

All feedback has been incorporated into the proposed rule changes.

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

The proposed rules are unlikely to affect small businesses.

## Effect on small business

The proposed rules are unlikely to affect small businesses. It is possible that a school could contract with a small business to offer some SBS, and the proposed rules would allow for more services to be provided and reimbursed. However, no school district in Wisconsin currently contracts for services in this manner, and its likelihood is too remote to accurately quantify.

## Agency contact person

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## Statement on quality of agency data

The data used by the Department to prepare these proposed rules and analysis comply with s. 227.14 (2m), Stats.

## 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/active-rulemaking-projects.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 105.53 (1m) is created to read:

105.53 **(1m)** DEFINITION. In this section, "treatment plan" means any of the following:

- (a)** An MA member's IEP
- (b)** An IFSP.
- (c)** A section 504 accommodation plan under 34 CFR 104.36.
- (d)** Any other care plans documenting medical necessity for each service.

**SECTION 2.** DHS 105.53 (3) (a) 1. and 4., (b) (intro.) and 1. to 5., and (c) 1 are amended to read:

- 105.53 **(3) (a) 1.** ~~The recipient's member's~~ first and last name and date of birth;.
- 2.** The prescription or, if referred, the referral for the service;.
- 3.** Documentation used to develop ~~the recipient's IEP and to annually revise the IEP; and~~ member's treatment plan.

4. Annual documentation of the individual's progress toward treatment goals, as identified in the IEP member's treatment plan, changes in the individual's physical or mental status and changes in the treatment plan ~~identified in the IEP~~.

(b) For each date of service, the provider shall keep a service record within the ~~recipient's~~ member's record containing all of the following:

1. The date of service;<sub>2</sub>
2. The general type of service provided;<sub>2</sub>
3. A brief description of the specific service provided;<sub>2</sub>
4. The unit of service delivered as defined through handbooks distributed by the department under s. DHS 108.02 (4);<sub>2</sub>
5. A description and the cost of each durable medical equipment item with sufficient detail to allow the MA program to determine the reimbursement rate, when appropriate; ~~and~~<sub>2</sub>

105.53 (3) (c) 1. For each service provided, a brief description of the recipient's response to the service and progress toward the treatment goals identified in the ~~IEP~~; and treatment plan.

**SECTION 3.** DHS 105.53 (6) (b) is amended to read:

105.53 (6) (b) *Coordination with fee-for-service providers.* When a ~~recipient member~~ receives similar services from both an MA fee-for-service provider and a school-based service provider, the school-based service provider shall document, at least annually, regular contacts with the MA fee-for-service provider, and provide the MA fee-for-service provider with copies of the ~~recipient's IEP~~ member's treatment plan and relevant components of the multidisciplinary team evaluation under s. 115.80 (3) and (5), Stats., upon request.

**SECTION 4.** DHS 107.36 (1) (b) to (i) are amended to read:

DHS 107.36 (1) (b) *Speech, language, hearing and audiological services.* Speech, language, hearing and audiological services for a recipient with a speech, language or hearing disorder that adversely affects the individual's functioning are covered school-based services. These services include evaluation and testing to determine the individual's need for the service, recommendations for a course of treatment, ~~and treatment, and coaching~~. The services may be delivered to an individual or to a group of 2 to 7 individuals. These services must be prescribed or referred by a provider certified under ch. DHS 105, and acting within the scope of their practice under applicable statutes and rules that govern the provider's practice. The services shall be performed by ~~or under the direction of~~ a speech and language pathologist ~~licensed by the department of public instruction under s. PI 34.0475~~ or by an audiologist licensed by the department of public instruction ~~under s. PI 34.090~~, and shall be identified in the ~~recipient's IEP~~ member's treatment plan.

(c) *Occupational therapy services.* Occupational therapy services which identify, treat, or compensate for medical problems that interfere with age-appropriate functional performance are covered school-based services. These services include evaluation to determine the individual's need for occupational therapy, recommendations for a course of treatment, ~~and rehabilitative, active or restorative treatment services, and coaching~~. The services may be delivered to an individual or to a group of 2 to 7 individuals. These services must be prescribed by a provider certified under ch. DHS 105, and acting within the scope of their practice under applicable statutes and rules that govern the provider's practice. The services shall be performed by or under the direction of an occupational therapist licensed by the department of public instruction ~~under s. PI 34.091~~ and shall be identified in the ~~recipient's IEP~~ member's treatment plan.

(d) *Physical therapy services.* Physical therapy services which identify, treat, or compensate for medical problems are covered school-based services. These services include evaluation to determine the individual's need for physical therapy, recommendations for a course of treatment, ~~and therapeutic exercises and rehabilitative procedures, and coaching~~. The services may be delivered to an individual or to a group of 2 to 7 individuals. These services must be prescribed

by a provider certified under ch. DHS 105, and acting within the scope of their practice under applicable statutes and rules that govern the provider's practice. The services shall be performed by or under the direction of a physical therapist licensed by the department of public instruction under s. PI 34.093 and shall be prescribed by a physician when required by the physical therapists affiliated credentialing board and identified in the recipient's IEP member's treatment plan.

- (e) *Nursing services.* Professional nursing services relevant to the recipient's medical needs are covered school-based services. These services include evaluation and management services, including screens and referrals for treatment of health needs; treatment; medication management; and explanations given of treatments, therapies and physical or mental conditions to members, family members, or school district or CESA staff. The services shall be performed by a registered nurse licensed under s. 441.06, Stats., or a licensed practical nurse licensed under s. 441.10, Stats., or be delegated under nursing protocols pursuant to ch. N 6. The services shall be prescribed or referred by a ~~physician or an advanced practice nurse as defined under s. N 8.02 (1) with prescribing authority granted under s. 441.16 (2), Stats.,~~ provider acting within the scope of their practice under applicable statutes and rules that govern the provider's practice. ~~and~~ The services shall be identified in the recipient's IEP member's treatment plan.
- (f) *Psychological, counseling, social work, behavioral and mental health services.* Psychological counseling and social work services relevant to the ~~recipient's member's~~ mental health needs with the intent to reasonably improve the ~~recipient's member's~~ functioning are covered school-based services. These services include testing, assessment and evaluation that appraise cognitive, emotional and social functioning and self-concept; therapy or treatment that plans, manages and provides a program of psychological counseling or social work services to individuals with psychological or behavioral problems; and crisis intervention. The services may be delivered to an individual or to a group of 2 to 10 individuals. The services shall be performed by a school psychologist, school counselor, ~~or school social worker, or other practitioner licensed and authorized by the department of public instruction under ch. PI 34.~~ The services shall be identified in the ~~individual's IEP member's treatment plan.~~
- (g) *Developmental testing and assessments under IDEA.* Developmental testing and assessments under the individuals with disabilities education act (IDEA), 20 USC 1400 to 1485, are covered school-based services ~~when an IEP results.~~ These services include evaluations, tests and related activities that are performed to determine if motor, speech, language or psychological problems exist, or to detect developmental lags for the determination of eligibility under IDEA. The services are also covered when performed by a therapist, psychologist, social worker, counselor or nurse licensed by the department of public instruction ~~under ch. PI 34,~~ as part of their respective duties.
- (h) *Transportation.* Transportation services provided to individuals who require special transportation accommodations are covered school-based services if the recipient receives a school-based service other than transportation on the day transportation is provided. These services include transportation from the recipient's home to and from school on the same day if the school-based service is provided in the school, and transportation from school to a service site and back to school or home if the school-based service is provided at a non-school location, such as at a hospital. Transportation shall be performed by a school district, CESA or contracted provider. The service shall be included in the ~~IEP treatment plan.~~ The covered service that the recipient is transported to and from shall meet MA requirements for that service under ch. DHS 105 and this chapter.
- (i) *Durable medical equipment.* Durable medical equipment except equipment covered in s. DHS 107.24 is a covered service if the need for the equipment is identified in the ~~IEP member's treatment plan,~~ the equipment is ~~recipient member-specific,~~ the equipment is not duplicative of equipment the ~~recipient member~~ currently owns and the equipment is for the ~~recipient's member's~~ use at school and home. Only durable medical equipment related to speech-language pathology, physical therapy or occupational therapy will be covered under the school based services benefit. The ~~recipient member,~~ not the school district or the CESA, shall own the equipment.

**SECTION 5.** DHS 107.36 (1) (j) to (L) are created to read:

- (j) *Personal Care and Attendant Care.*** Services defined under s. DHS 107.112 (1) (b) 4., 6. to 9., and 11. to 13 are covered services when rendered by a provider qualified under 42 CFR 440.167.
- (k) *Physician Services.*** Physician services that are covered under s. DHS 107.06 (1) that are relevant to the recipient's medical needs and provided by a school district or CESA are covered school-based services. The services shall be performed by a physician or other provider operating within the scope of their practice, with prescribing authority granted under s. 441.16 (2), Stats., and shall be identified in the member's treatment plan.
- (L) *Dental Services.*** Preventive dental services including oral evaluations, oral assessments, application of fluoride, and dental sealants are covered services when provided by a dentist or dental hygienist as described in s. DHS 105.06 (1) and (2) and identified in the member's treatment plan.

**SECTION 6.** DHS 107.36 (2) (b) 1. to 3., and (3) (a) to (i) are amended to read:

DHS 107.36 **(2) (b) 1.** Identify, treat, manage or address a medical problem or a mental, emotional or physical disability;\_

**2.** Are identified in ~~an IEP~~; a member's treatment plan.

**3.** Are necessary for a recipient to benefit from special education; ~~and.~~

DHS 107.36 **(3) (a)** Art, music and recreational therapies;\_

**(b)** Services that are strictly educational, vocational or pre-vocational in nature, or that are otherwise without a defined medical component;\_

**(c)** Services that are not in the ~~recipient's IEP or IFSP~~; member's treatment plan.

**(d)** Services performed by a provider not specifically certified under s. DHS 105.53;\_

**(e)** General classroom instruction and programming;\_

**(f)** Staff development;\_

**(g)** In-school services to school staff and parents;\_

**(h)** General research and evaluation of the effectiveness of school programs;\_

**(i)** Administration or coordination of gifted and talented programs or student assistance programs;\_

**SECTION 7.** DHS 107.36 (3) (j) and (k) are repealed.

**SECTION 8.** DHS 107.36 (3) (L) is amended to read:

DHS 107.36 **(3) (L)** Durable medical equipment covered under s. DHS 107.24; ~~and.~~

**SECTION 9.** DHS 107.36 (3) (j) and (k) are repealed.

**SECTION 10. EFFECTIVE DATE.** This rule shall take effect upon publication in the state newspaper and shall remain in effect as provided in s. 227.24 (1) (c) and (2), Stats.