

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

The Wisconsin department of health services proposes an order to **repeal** DHS 35.08 (1) (b), 35.08 (2) (d), 36.05 (3), (7) (a) 2., (b), (8); **consolidate, renumber and amend** DHS 35.08 (1) (title) and (1) (a); **amend** DHS 34.03 (2) (title) and (intro.), (3) (intro.) (8) (intro.), (10) (a), (f) and (g), and (12) (a), 35.08 (1) (title) and (a),(2) (a) (intro.), (3) (a) 1. to 3., 35.10, 35.11 (3) (b), 61.20 (5) (e), 63.04 (2) (title), (intro.) and (3); **repeal and recreate** DHS 34.03 (6), (7), 35.08 (3) (b), (4), 63.03 (6); and **create** DHS 36.05 (10), (11), 61.69, 61.695, 63.03 (7), relating to allowing non-expiring certificates and biennial reporting and submission of fees.

RULE SUMMARY

Statute interpreted

Section 51.04, Stats.

Statutory authority

Sections 49.45 (2) (a) 11., (30e) (b), 51.42 (7) (b) 11., 51.421 (3) (a) and (c), and 227.11 (2), Stats.

Explanation of agency authority

Section 227.11 (2), Stats., gives the department authority to “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.” Section 227.11 (2) (b), Stats., provides authority “to prescribe forms and procedures in connection with any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute” The following statutory sections authorize the department to promulgate rules for certifying emergency health service programs, outpatient mental health clinics, community-based psychosocial service and rehabilitation programs, community mental health and developmental disability programs, and community support programs for persons with chronic mental illness:

- Section 49.45 (2) (a) 11. a. and b., Stats., provides that the department shall establish certification of providers of medical assistance, certify providers who meet that criteria, and promulgate rules to implement that subdivision.
- Section 49.45 (30e) (b), Stats., provides that the department shall promulgate rules for determining eligibility for psychosocial services, the scope of psychosocial services that may be provided, requirements for certification, and any other conditions for coverage of community-based psychosocial services under MA.
- Section 51.42 (7) (b) 11., Stats., provides that the department shall promulgate rules to prescribe requirements for certification of community mental health programs.
- Section 51.421 (3) (a) and (c), Stats., provides that the department shall promulgate rules establishing standards for certification of community support programs by county departments.

Additionally, section 51.04, Stats., provides that any treatment facility may apply to the department for certification, and that the department shall charge a certification fee.

Related statute or rule

DHS 50, relating to youth crisis stabilization facilities.

Plain language analysis

Chapters DHS 34, 35, 36, 61, and 63 pertain to behavioral health services provided on emergency, outpatient, and community bases. Chapters 34, 35, 36, and 63 currently require a program to recertify every one, two, or three years, depending on the governing rule. Such recertification processes are burdensome to the department and service providers due to their lack of uniformity and costs to implement. Chapter DHS 61 does not have certification language although it does have policies for decertification and certificate termination. The goal in modifying these rules is to create a more uniform, easy-to-apply standard, reduce administrative burdens on the department, and reduce regulatory burdens on certified facilities.

The department therefore proposes to revise these chapters to (1) make certification requirements uniform, (2) allow non-expiring certificates, and (3) allow for biennial reporting and submission of fees. The changes would specifically accomplish all of the following:

1. Allow the department to issue providers certificates with no expiration date and only require the issuance of new certificates when the provider makes changes.
2. Remove the requirement that providers complete and submit full renewal applications every year. Instead, a biennial summary report listing information the department has on file for the provider would be required. The provider would be required to sign to attest to the accuracy of the information and compliance with regulations, provide staffing information, and biennial fees.
3. Give the department more flexibility in scheduling biennial onsite surveys.
4. Require an application and new fee if a provider is adding services or branch offices.
5. Allow for submission of notifications of all closed certificates to Forward Health.

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 proposed rules.

Comparison with rules in adjacent states

Illinois:

Illinois law is a highly complicated array of requirements based on the type of program or facility. The state administrative code does not have consistency across certification requirements or processes.

Iowa:

There is a uniform accreditation process for all mental health agencies. This includes a provisional 270-day accreditation period. The state then performs a detailed review of the application, including an on-site performance compliance review. This review is scored and the length of accreditation is based on the score. A score of 80% or higher is granted a three-year accreditation. A score of 70-79% is granted a one-year accreditation with a corrective action plan. A score of 60-69% is granted a provisional 180-day accreditation. An agency is denied an accreditation if their score is below 59%.

Michigan:

Michigan Licensing and Regulatory Affairs grants licenses for substance use disorder programs and facilities which must be renewed annually by August 1. This is a uniform and streamlined online process. Mental health programs fall under separate authority and there is a more varied process based on the agency or program type.

Minnesota:

Minnesota statute requires licenses for residential and non-residential programs, however, there are many types of programs that do not require a license, including outpatient mental health services. The process therefore is based on program type and type of consumers served.

Summary of factual data and analytical methodologies

The department relied upon requirements under ch. 227, 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 solicited public comments on the economic impact of the proposed rules from October 24, 2022 to November 7, 2022. No public comments were received. The proposed rules are not anticipated to have an effect on small business. *See* the associated fiscal estimate & economic impact analysis.

Effect on small business

The proposed rules are not anticipated to have an effect on small businesses.

Agency contact person

Sarah Coyle, sarah.coyle@dhs.wisconsin.gov, 608-266-2715

Statement on quality of agency data

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

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/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 34.03 (2) (title) and (intro.) are amended to read:

DHS 34.03 (2) ~~CERTIFICATION~~ INITIAL CERTIFICATION PROCESS. On review of an application for initial certification ~~or renewal of certification~~, the department shall do all of the following:

SECTION 2. DHS 34.03 (3) (intro.) is amended to read:

DHS 34.03 (3) ISSUANCE OF CERTIFICATION. (a) Within 60 days after receiving a completed application for initial certification ~~or renewal of certification~~, the department shall do one of the following:

SECTION 3. DHS 34.03 (6) is repealed and recreated to read:

DHS 34.03 (6) DURATION OF CERTIFICATION.

(a) Certification remains valid until it is suspended or terminated by the department in accordance with sub. (8), (9) (c), (10) (f), or (11).

(b) Certification becomes invalid due to non-submission of the biennial report or non-payment of biennial fees in accordance with sub. (7) (c).

SECTION 4. DHS 34.03 (7) is repealed and recreated to read:

DHS 34.03 (7) BIENNIAL REPORT AND FEES.

(a) Every 24 months, on a date determined by the department, the program shall submit a biennial report on the form provided by the department and shall submit payment of the certification continuation fees under s. 51.04, Stats.

(b) The department shall send the certification continuation materials to the provider, which the provider is expected to complete and submit to the department according to the instructions provided.

(c) A certification shall be suspended or terminated if biennial reports and fees are not submitted prior to the end of the biennial cycle.

SECTION 5. DHS 34.03 (8) (intro.) is amended to read:

DHS 34.03 (8) ACTIONS AGAINST A CERTIFIED PROGRAM. The department may terminate, or suspend, ~~or refuse to renew~~ a program's certification after providing the program with prior written notice of the proposed action which shall include the reason for the proposed action and notice of opportunity for a hearing under sub. (12), whenever the department finds that any of the following has occurred:

SECTION 6. DHS 34.03 (10) (a), (f) and (g) are amended to read:

DHS 34.03 (10) (a) If, during ~~a survey for renewal or~~ an inspection, the department determines that minor deficiencies exist, the department shall issue a notice of deficiency to the program and offer the program a provisional certificate pending correction of the identified deficiencies.

(f) If the goals of the plan of correction have not been accomplished, the department may ~~deny the application for renewal,~~ suspend or terminate the program's certification or allow the program one extension of no more than 30 additional days to complete the plan of correction. If after this extension the program has still not remedied the identified deficiencies, the department shall ~~deny the application for renewal,~~ or suspend or terminate the certification.

(g) If the department denies ~~the application for renewal or~~ suspends, or terminates the certification, the department shall provide the program with a written notice of the reasons for the action and inform the program of its right to a hearing under sub. (12).

SECTION 7. DHS 34.03 (12) (a) is amended to read:

DHS 34.03 (12) (a) In the event that the department denies, terminates, or suspends ~~or refuses to renew~~ certification, or gives prior notice of its intent to do so, an applicant or program may request a hearing under ch. 227, Stats.

SECTION 8. DHS 35.08 (1) (title) and (a) consolidated and renumbered DHS 35.08(1) and amended to read:

DHS 35.08 (1) ~~APPLICATION~~ INITIAL APPLICATION. Application to the department for initial ~~or renewal~~ outpatient mental health clinic certification shall be made to the department on a form provided by the department and shall include applicable fees, proof of malpractice and liability insurance for the clinic and each staff member who provides psychotherapy or who is a prescriber, and all of the information requested in the application. Additional offices do not require separate certification, but the clinic shall identify each office location and respond to any questions regarding each office in the application for initial ~~or renewal~~ certification.

SECTION 9. DHS 35.08 (1) (b) is repealed.

SECTION 10. DHS 35.08 (2) (a) (intro.) is amended to read:

DHS 35.08 (2) (a) Upon receipt of a complete initial ~~or renewal~~ application, department staff, ~~except as provided in par. (d)~~, may conduct an on-site inspection of any office identified in the clinic application and may review any of the following information to determine if the clinic is in compliance with this chapter:

SECTION 11. DHS 35.08 (2) (d) is repealed.

SECTION 12. DHS 35.08 (3) (a) 1. to 3. are amended to read:

DHS 35.08 (3) (a) 1. Within 60 days after receiving a complete application for initial ~~or renewal~~ certification, the department shall grant the clinic initial ~~or renewal~~ certification, ~~whichever is applicable~~, or deny certification.

2. If the department determines that a clinic applying for initial ~~or renewal~~ certification has a deficiency that is not a major deficiency as defined under s. DHS 35.03 (9m), the department may grant or deny certification to the clinic. If the department grants initial ~~or renewal~~ certification to a clinic with a deficiency, the department shall issue a notice of deficiency under s. DHS 35.11 (1m) (a).

3. If the department determines that a clinic applying for initial ~~or renewal~~ certification has a major deficiency, the department shall issue a notice of deficiency under s. DHS 35.11 (1m) (a) and may deny initial ~~or renewal~~ certification, whichever is applicable.

SECTION 13. DHS 35.08 (3) (b) is repealed and recreated to read:

DHS 35.08 (3) (b) *Duration of certification.*

1. Certification remains valid until it is suspended or terminated by the department in accordance with s. DHS 35.11 (2)

2. Certification becomes invalid due to non-submission of the biennial report or non-payment of biennial fees in accordance with sub. (4).

SECTION 14. DHS 35.08 (4) is repealed and recreated to read:

(4) **BIENNIAL REPORT AND FEES.**

(a) Every 24 months, on a date determined by the department, the program shall submit a biennial report on the form provided by the department and shall submit payment of the certification continuation fees under s. 51.04, Stats.

(b) The department shall send the certification continuation materials to the provider, which the provider is expected to complete and submit to the department according to the instructions provided

(c) A certification shall be suspended or terminated if biennial reports and fees are not submitted prior to the end of the biennial cycle.

SECTION 15. DHS 35.10 is amended to read:

DHS 35.10 Scope and transferability of certification. Certification is issued only for the offices identified in the application for initial ~~or renewal~~ certification and only for the individual or individuals, corporations or other legal entities named in the application for initial ~~and renewal~~ certification. Certification may not be transferred or assigned, including by change of ownership or control of a corporation or other legal entity named in the certification. A change in ownership or control includes a majority change in the shares of stock held or in the board of directors of a corporation certified under this chapter, or any other change that results in transfer of control or transfer of a majority share in the control of the operations of a clinic. A change in ownership requires application for new certification. Additional offices at which services are provided do not require separate certification but shall be identified in the application for initial ~~and renewal~~ certification.

SECTION 16. DHS 35.11 (3) (b) is amended to read:

DHS 35.11 (3) (b) A clinic's request for hearing shall be submitted in writing to the department of administration's division of hearings and appeals within 30 days after the date of the notice of the department's action. If the clinic makes a timely request for hearing on the department's decision to terminate or deny ~~renewal~~ certification, that action is stayed pending a decision on the appeal, unless the certification has been summarily suspended.

SECTION 17. DHS 36.05 (3), (7) (a) 2. And (b), and (8) are repealed.

SECTION 18. DHS 36.05 (10) is created to read:

DHS 36.05 (10) DURATION OF CERTIFICATION. A certification remains valid until one of the following occur:

(a) The certification remains valid until it is revoked or suspended by the department in accordance with s. DHS 36.06 (1).

(b) The certification becomes invalid due to non-submission of the biennial report or non-payment of biennial fees in accordance with sub. (11).

SECTION 19. DHS 36.05 (11) is created to read:

DHS 36.05 (11) BIENNIAL REPORT AND FEES.

(a) Every 24 months, on a date determined by the department, the program shall submit a biennial report on the form provided by the department and shall submit payment of certification continuation fees under s. 51.04, Stats.

(b) The department will send the certification continuation materials to the provider, which the provider is expected to complete and submit to the department according to instructions provided.

(c) A certification will be suspended or terminated if biennial reports and fees are not submitted prior to the end of the biennial cycle.

SECTION 20. DHS 61.20 (5) (e) is amended to read:

DHS 61.20 (5) (e) ~~Programs which allow certification to expire and do not initiate an application for renewal prior to the date of expiration~~ Certification for programs that do not submit biennial reports and fees required under s. DHS 61.695 by the end of the biennial cycle will be terminated on the date of expiration without right to a hearing, ~~thereafter.~~ Thereafter, a new application for certification must be submitted.

SECTION 21. DHS 61.69 and 61.695 are created to read:

DHS 61.69 Duration of certification for community mental health programs.

- (1) A certification under this subchapter remains valid until it is suspended or terminated by the department in accordance with s. DHS 61.20 (5).
- (2) Certification becomes invalid due to non-submission of the biennial report or non-payment of biennial fees in accordance with s. DHS 61.695.

DHS 61.695 Biennial report and fees for community mental health programs.

- (1) Every 24 months, on a date determined by the department, the program shall submit a biennial report on the form provided by the department and shall submit payment of certification continuation fees.
- (2) The department shall send the certification continuation materials to the provider, which the provider is expected to complete and submit to the department according to instructions provided under s. 51.04, Stats.
- (3) A certification will be suspended or terminated if biennial reports and fees are not submitted prior to the end of the biennial cycle.

SECTION 22. DHS 63.03 (6) is repealed and recreated to read:

DHS 63.03 (6) DURATION OF CERTIFICATION.

- (a) Certification remains valid until it is terminated or suspended by the department in accordance with s. DHS 63.04.
- (b) Certification becomes invalid due to non-submission of the biennial report or non-payment of biennial fees in accordance with sub. (7) (c).

SECTION 23. DHS 63.03 (7) is created to read:

DHS 63.03 (7) BIENNIAL REPORT AND FEES.

- (a) Every 24 months, on a date determined by the department, the program shall submit a biennial report on the form provided by the department and shall submit payment of certification continuation fees under s. 51.04, Stats.
- (b) The department shall send the certification continuation materials to the provider, which the provider is expected to complete and submit to the department according to instructions provided.
- (c) A certification will be suspended or terminated if biennial reports and fees are not submitted prior to the end of the biennial cycle.

SECTION 24. DHS 63.04 (2) (title), (intro.) and (3) are amended to read:

DHS 63.04 (2) TERMINATION, SUSPENSION, OR DENIAL OF CERTIFICATION AFTER PRIOR NOTICE AND REQUESTED HEARING. The department may terminate, suspend, or deny ~~or refuse to renew~~ a CSP's certification after providing the CSP with prior written notice of the proposed action which includes the reason for the proposed action and a notice of opportunity for a hearing whenever the department finds that:

(3) RIGHT TO A HEARING. In the event that the department denies, terminates, or suspends ~~or refuses to renew~~ a certification, a CSP may request a hearing under s. 227.42, Stats. The request for a hearing shall be submitted in writing to and received by the department of administration's division of hearings and appeals within 30 days after the date on the notice required under sub. (2).

SECTION 25. EFFECTIVE DATE. This rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

Wisconsin Department of Health Services

Dated: _____

Kirsten Johnson, Secretary-designee

SEAL: