

Significant Legislative Rule Analysis

Chapter 246-341 WAC a Rule Concerning the Licensure of Behavioral Health Agencies and Certification of Behavioral Health Services

February 1, 2019

SECTION 1:

Describe the proposed rule, including a brief history of the issue, and explain why the proposed rule is needed.

The Department of Health (department) is proposing permanent rules to replace initial emergency rules filed on June 25, 2018 as WSR 18-14-018 and extended by a second emergency filing on October 18, 2018 as WSR 18-21-122 regarding the licensing and certification of behavioral health services. These emergency rules were necessary because of the passing of 2ESHB 1388 that enacted Behavioral Health Integration in Washington state. Behavioral Health Integration transferred the authority for behavioral health agency licensing and certification from the Department of Social and Health Services (DSHS) to the department effective July 1, 2018. The emergency rule chapter 246-341 WAC established the department's licensure and certification of behavioral health agencies who provide mental health, substance use disorder, and problem and pathological gambling services.

The department, when enacting these emergency rules, only made a few minor and necessary changes to the DSHS rules. The one significant change the department made was to modify the certification for Less Restrictive Alternative treatment services so that agencies can provide involuntary outpatient substance use disorder treatment services as described in ESSB 6491 (Chapter 291, Laws of 2018).

These proposed permanent rules adopt the emergency rules without change.

The following is a summary of the differences between the department's rules compared to the requirements in chapter 388-877 WAC that were repealed by DSHS. The department:

- a) Changed the WAC numbers and internal references from 388-877-XXXX to 246-341-XXXX. For example, 388-877-0100 became 246-341-0100. Other references to chapter 388-877 are changed to the Health Care Authority (HCA) chapter 182-538D WAC where appropriate for functions transferred to HCA by 2ESHB 1388.
- b) Changed the names of state organizations throughout the document. For example, the term "DBHR" for the Division of Behavioral Health and Recovery" will now say "the department" and refer to the Department of Health.
- c) Removed specific information about the grievance process and added cross references to HCA rules in WAC 246-341-0100, 246-341-0420, 246-341-0600, 246-341-0605, and 246-341-1156.
- d) Added modifications to a certification to allow for substance use disorder Less Restrictive Alternative (LRA) and conditional release support services (also called assisted outpatient behavioral health treatment) which is listed in WAC 246-341-0110 and described in WAC 246-341-0805
- e) Adjusted definitions that would become confusing or conflicting in WAC 246-341-0200 including the definitions of: "administrative hearing", "authority", "background check", "behavioral health organization", "certified", "chemical dependency professional", "clinical supervision", "complaint", "deemed", "department", "designated chemical dependency specialist", "designated mental

health professional”, “detoxification”, “Division of behavioral health and recovery”, “grievance”, “individual”, “licensed”, “mental health professional”, “peer counselor”, “secretary”, “state minimum standards”, “triage facility”, “tribal authority”, and “vulnerable adult”.

- f) Changed information about where and how to send in licensure applications in WAC 246-341-0300 to comply with Department of Health processes.
- g) Changed how the department sends a behavioral health agency a statement of deficiencies report in WAC 246-341-0320 by indicating that the report is after the on-site review rather than during the review.
- h) Added a statement that indicates that the department may summarily suspend an agency's license or certification when an immediate danger to public health, safety, or welfare requires emergency action in WAC 246-341-0335.
- i) Updated the directions on how to appeal a decision made by the department regarding licensure or certification in WAC 246-341-0370.
- j) Added an exemption to WAC 246-341-1118(5) for state psychiatric hospitals, U.S. Veterans Administration facilities, and other federal facilities for inpatient behavioral health services that was inadvertently left out of the DSHS single set but was in rule prior to April 2018.
- k) Added a cross reference to requirements for adult Secure Withdrawal Management and Stabilization services in the youth services in WAC 246-341-1106 that was inadvertently left out of the DSHS single set rule but was in rule prior to April 2018.
- l) Fixed a small handful of typos in the document.

In working with stakeholders and partners, the department has learned of many potential changes to the delivery of behavioral health services that will likely be proposed during the 2019 Washington state Legislative Session. The department has decided to make the emergency rules permanent as quickly as possible so that the rules are easier to find and use, and to bring the rules out of temporary, emergency status. The department has announced plans to embark on a thorough rewrite of these regulations after the legislative session in the spring of 2019. The department held a stakeholder information webinar on November 13, 2018 describing these plans and has posted a recording of this webinar on our public website at www.doh.wa.gov/BHI.

SECTION 2:

Is a Significant Analysis required for this rule?

A Significant Analysis is not required for most of this proposed rule, but is required for the proposed requirements to implement the new substance use disorder treatment outlined in ESSB 6491 (Chapter 291, Laws of 2018), which can be found in WAC 246-341-0805.

Rules in new chapter 246-341 WAC

Chapter 246-341 WAC is substantially the same as the "single set" of licensing and certification rules in chapter 388-877 WAC filed by DSHS as WSR 18-06-043 that were repealed by DSHS as a result of 2ESHB 1388. These rules replace the sections in chapter 388-877 WAC that refer to licensing and certification of behavioral health agencies. According to RCW 34.05.328(5)(b)(iii), "rules adopting or incorporating by reference without material change....rules of other Washington state agencies...if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rules" do not require a Significant Analysis. Similarly, according to RCW 34.05.328(5)(b)(iv), "rules that only correct typographical errors, make address or name changes, or clarify the language of a rule without changing its effect" do not require a Significant Analysis. Most of the rules in chapter 246-341 WAC meet these standards. Section 1 of this Analysis outlines the exact changes that the department made to the DSHS rules, and a strikeout and underline version of the department rules compared to the DSHS rules can be found on the department's public web site at: www.doh.wa.gov/BHI .

WAC 246-341-0805

The department is proposing the amendment of the DSHS rule regarding the certification of outpatient mental health Less Restrictive Alternative treatment to now include assisted outpatient behavioral health treatment that was enacted by ESSB 6491 (Chapter 291, Laws of 2018) and that the department enacted by emergency rule on July 1 as WAC 246-341-0805.

According to RCW 34.05.328(5)(c)(iii), a significant legislative rule is "a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program." Proposed WAC 246-341-0805 adopts substantial provisions of the laws in chapter 71.05 RCW that were amended by ESSB 6491 by allowing behavioral health agencies to apply for and become certified to provide substance use disorder treatment to persons under a Less Restrictive Alternative order for assisted outpatient behavioral health treatment.

SECTION 3:

Clearly state in detail the general goals and specific objectives of the statute that the rule implements.

Rules in new chapter 246-341 WAC and 2ESHB 1388

The authority for behavioral health agency licensing and certification transferred from DSHS to the department on July 1, 2018. Effective July 1, the department adopted emergency rules under chapter 246-341 WAC. The department is using the emergency rules as a foundation for these proposed permanent rules that will establish licensure and certification standards for behavioral

health services providing mental health, substance use disorder, and problem and pathological gambling services, under statutory authorities transferred to the department by 2ESHB 1388. New chapter 246-341 WAC is intended to replace the sections of chapter 388-877 WAC regarding licensing and certification of behavioral health agencies that were repealed by DSHS as a result of 2ESHB 1388.

WAC 246-341-0805 and ESSB 6491

The general goal behind ESSB 6491 (Chapter 291, Laws of 2018) implemented by WAC 246-341-0805 is to increase the availability of assisted outpatient behavioral health treatment. This bill creates the ability to serve people who are, because of a substance use disorder, found to need involuntary treatment in a Less Restrictive Alternative setting (an outpatient setting) rather than an inpatient setting. Practically speaking, the bill expands assisted outpatient mental health treatment to now include treatment related to a substance use disorder, and renamed it assisted outpatient behavioral health treatment.

To be eligible for assisted outpatient behavioral health treatment, a person, because of a mental health or substance use disorder, must:

- Have been placed in involuntary detention by a court at least twice during the preceding 36 months;
- Be unlikely to voluntarily go to outpatient treatment without an order to do so, based on history or current behavior
- Be unlikely to survive safely in the community without supervision
- Be likely to benefit from this kind of treatment; and
- Require this treatment to prevent likely deterioration or relapse in a short period of time

“Assisted,” in this case, means that the individual has a court order “assisting” the individual to make it to outpatient treatment that is needed for their mental health or substance use disorder, as a (less restrictive) alternative to being involuntarily committed to a hospital or secure inpatient setting, like an Evaluation and Treatment facility or a Secure Withdrawal Management and Stabilization facility.

The department describes these services in WAC 246-341-0805 as Less Restrictive Alternative or Conditional Release Support Behavioral Health Services.

SECTION 4:

Explain how the department determined that the rule is needed to achieve these general goals and specific objectives. Analyze alternatives to rulemaking and the consequences of not adopting the rule.

Rules in new chapter 246-341 WAC

2ESHB 1388 transferred authority and responsibility for behavioral health agency licensing and certification from DSHS to the department on July 1, 2018, on the same date the department began implementing and enforcing the licensure and certification of behavioral health agencies.

Since DSHS repealed its behavioral health agency licensing and certification rules, the department's emergency rules were needed to prevent a lapse of regulation. These proposed permanent rules are intended to replace the emergency rules.

RCW 71.24.037(1) states: "The secretary shall by rule establish state minimum standards for licensed or certified behavioral health service providers and services, whether those service providers and services are licensed or certified to provide solely mental health services, substance use disorder treatment services, or services to persons with co-occurring disorders." This legislative directive cannot be achieved by any other method than rule-making. If the department does not adopt rules, it will be out of compliance with this legislative directive and the safety of individuals receiving behavioral health services could be at risk.

WAC 246-341-0805

Additionally, Section 3 of ESSB 6491 (now codified as RCW 71.05.148) requires that a petition requesting the court to enter an order for up to ninety days Less Restrictive Alternative treatment (for assisted outpatient substance use disorder treatment) include, "the name of an agency or facility which agreed to assume the responsibility of providing less restrictive alternative treatment if the petition is granted by the court." Rules are needed to enable the department to certify agencies to provide assisted outpatient substance use disorder treatment for these individuals. Without this certification in rule, there would be no agencies certified to provide this new treatment category, which could potentially lead to individuals being inappropriately housed in a locked, secure inpatient facility for longer than the court deems necessary or being released due to the lack of a department-certified outpatient substance use disorder treatment program able to treat these individuals. Public funding for these Less Restrictive Alternative substance use disorder treatment services became available to pay for placement on July 1, 2018 according to appropriations in ESSB 6032 Section 213 (1)(zz), when the department's emergency rules went into effect.

SECTION 5:

Explain how the department determined that the probable benefits of the rule are greater than the probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.

The rules explain the requirements for becoming licensed and certified to be a behavioral health agency. With the exception of WAC 246-341-0805, these proposed rules adopt the DSHS licensing and certification rules without significant change. WAC 245-341-0805 allows behavioral health agencies who provide less restrictive alternative treatment to provide services to persons who are involuntarily detained because of a substance use disorder as enacted by ESSB 6491.

At the time ESSB 6491 was passed by the legislature, DSHS estimated that there might be 3,089 individuals that might become able to receive this new substance use disorder Less Restrictive

Alternative treatment. This number was based on the number of persons sent to county jails for felony drug crimes (4,589) and adjusted by 67 percent, which is the percentage of offenders who have a likely substance use disorder, based on research by the Washington Institute for Public Policy and the Department of Corrections, as referenced in the [DSHS fiscal note for ESSB 6491](#). DSHS estimated that this population of individuals requiring substance use treatment would receive a mix of outpatient treatment, withdrawal management, and residential services based on need.

Costs

There are no new costs to behavioral health agencies associated with providing less restrictive alternative treatment to persons who are involuntarily detained for a substance use disorder.

The department is proposing to implement ESSB 6491 in a way that expands an existing certification to allow behavioral health agencies to be reimbursed for providing less restrictive alternative services to persons who are detained for a substance use disorders. This proposed expansion allows for, but does not require, an agency to provide substance use disorder services.

Proposed requirements will provide behavioral health agencies who currently provide less restrictive alternative services to not need to pay a new fee to obtain an additional certification to serve persons who are detained because of a substance use disorder.

Agencies who do not currently provide Less Restrictive Alternative services who choose to add these services to serve individuals who are detained for a substance use disorder would pay the current fee required in WAC 246-341-0365 for adding an outpatient substance use disorder service. Agencies who wish to only provide Less Restrictive Alternative services to individuals who are detained for mental health disorders would not be assessed a fee in accordance with WAC 246-341-0365.

Benefits

Without the proposed rule for Less Restrictive Alternative treatment, behavioral health agencies would not be able to provide the service to persons who are detained for a substance use disorder and would not be able to get reimbursed for providing these services.

The benefits to the proposed modification of the current mental health Less Restrictive Alternative certification to include the ability to provide these services to persons with substance use disorders are numerous.

- Courts are able to order persons involuntarily detained because of a substance use disorder to appropriate settings in certified facilities
- Certified facilities are able to receive reimbursement for providing these services to persons being detained with a substance use disorder.
- Individuals are able to be housed appropriately rather than in a locked, secure inpatient facility for longer than the court deems necessary or being in appropriately released.

- Behavioral health agencies who provide less restrictive alternative services are able to provide services to new individuals without having to add and pay for a separate certification to their behavioral health agency license.

Cost/Benefit Conclusion

The department anticipates no new costs. The probable benefits include being able to provide this kind of care for persons who need involuntary treatment for a substance use disorder.

SECTION 6:

Identify alternative versions of the rule that were considered, and explain how the department determined that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives state previously.

Rules in new chapter 246-341 WAC

Department staff considered recodifying (administratively transferring) the DSHS rules from chapter 388-877 WAC to the department's title 246 WAC. However, this method would have only changed the WAC numbers and not the internal content and cross references that became obsolete on July 1, 2018. This would leave inaccurate and potentially confusing rules in place for up to a year while the department completes the permanent rulemaking process with input from stakeholders and tribal partners.

The department, after weighing several alternatives, has chosen to propose the permanent codification of the emergency rules without material change. This will give behavioral health agencies an easier time finding the rules and will give the department time to prepare for future changes.

The department held a Stakeholder Information Webinar on November 13, 2018 to outline the intended plans for this rulemaking and to initiate planning for future stakeholder work in 2019. The department communicated our intent to make the current emergency rules permanent without material change. This webinar was recorded and can be found at www.doh.wa.gov/BHI.

WAC 246-341-0805

The department, after consulting with partners and experts in DSHS and HCA, was able to make minimal revisions to the DSHS rule that is now WAC 246-341-0805 to implement the new ability created by ESSB 6491 to serve persons who are qualify for assisted outpatient behavioral health treatment because of a substance use disorder.

The department considered creating a new WAC section specifically to address Less Restrictive Alternative substance use disorder treatment, but decided to follow the bill by substituting the term "behavioral health" for the term "mental health" and adjusting the requirement for medication management to be optional, rather than mandatory.

The department considered not writing this rule and instead waiting to add this new certification for the larger rewrite of chapter 246-341 in the spring of 2019. However, it was determined that this could potentially lead to individuals being inappropriately housed in a locked, secure inpatient facility for longer than the court deems necessary or being released due to the lack of a department-certified outpatient substance use disorder treatment program able to treat these individuals.

SECTION 7:

Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.

The proposed rules do not violate federal or state laws.

SECTION 8:

Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law.

The proposed rules do not impose more stringent performance requirements on private entities.

SECTION 9:

Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by an explicit state statute or by substantial evidence that the difference is necessary.

The proposed rules do not differ from any federal regulation or statute applicable to the same activity or subject matter.

SECTION 10:

Demonstrate that the rule has been coordinated, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.

Rules in new chapter 246-341 WAC

The proposed rules have been part of ongoing coordination efforts between the department, the Department of Social and Health Services, the Health Care Authority, the Department of Children, Youth, and Families, our Legislative and Governor's Office partners, and the federal Substance Abuse and Mental Health Services Administration to ensure that the intent of 2ESHB 1388 has been carried out appropriately.

WAC 246-341-0805

The department has worked closely with the involuntary treatment experts at both the Department of Social and Health Services and the Health Care Authority to coordinate the implementation timelines. The three agencies wrote and reviewed WAC 246-341-0805 as a team. The department coordinated with and consulted with the Health Care Authority staff who have the responsibility to train Designated Crisis Responders so that the department's rule changes would correspond to the information and training provided to the individuals who order persons to this new type of certified treatment.