

WSR 21-21-106

PROPOSED RULES

DEPARTMENT OF HEALTH

[Filed October 19, 2021, 9:10 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-14-108.

Title of Rule and Other Identifying Information: WAC 246-322-025, private psychiatric hospitals - responsibilities and rights - licensee and department. The department of health (department) is proposing a severity matrix for civil fines related to private psychiatric hospital enforcement in order to implement SHB 2426 (chapter 115, Laws of 2020).

Hearing Location(s): On November 30, 2021, at 10:00 a.m. In response to the coronavirus disease 2019 (COVID-19) public health emergency, the department will not provide a physical location for this hearing to promote social distancing and the safety of the citizens of Washington state. A virtual public hearing, without physical meeting space, will be held instead.

Register in advance for this webinar <https://us02web.zoom.us/join/91182820000>

After registering, you will receive a confirmation email containing information about joining the webinar.

Date of Intended Adoption: December 7, 2021.

Submit Written Comments to: Dan Overton, P.O. Box 47843, Olympia, WA 98504, email <https://fortress.wa.gov/doh/policyreview>, fax 360-236-2321, by November 30, 2021.

Assistance for Persons with Disabilities: Contact Dan Overton, phone 360-236-2953, TTY 711, email dan.overton@doh.wa.gov, by November 23, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department is proposing to amend WAC 246-322-025 to establish a severity matrix for civil fines for private psychiatric hospitals. SHB 2426 allows the department, under RCW 43.70.095, to assess a civil fine of up to \$10,000 per violation, not to exceed a total fine of one million dollars, on a licensed hospital when the department determines the psychiatric hospital has previously been subject to an enforcement action for the same or similar type of violation of the same statute or rule, or has been given any previous statement of deficiency that included the same or similar type of violation of the same or similar statute or rule, or when the psychiatric hospital failed to correct noncompliance with a statute or rule by a date established or agreed to by the department. The proposed rules establish when and how fines will be assessed in relation to the severity and frequency of the violation of noncompliance.

Reasons Supporting Proposal: The legislature found that current regulatory oversight of private psychiatric hospitals licensed under chapter 71.12 RCW needed to be enhanced to protect the health, safety, and well-being of patients seeking behavioral health care in these facilities. SHB 2426 was passed, which requires the department to adopt rules establishing specific fine amounts in relation to the severity of noncompliance by a private psychiatric hospital. The department conducted workshops and solicited input from interested parties in order to create a fair yet binding document that addresses the intent of the bill. The proposed rule sets these fine amounts and establishes a matrix of severity and process by which they will be applied.

Statutory Authority for Adoption: RCW 71.12.670, 71.12.710.

Statute Being Implemented: SHB 2426 (chapter 115, Laws of 2020); RCW 43.70.095.

Rule is not necessitated by federal law, federal or state court decision.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: None.

Name of Proponent: Washington state department of health, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Dan Overton, 111 Israel Road S.E., Tumwater, WA 98501, 360-236-2953.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Dan Overton, P.O. Box 47843, Olympia, WA 98504, phone 360-236-2953, fax 360-236-2321, TTY 711, email dan.overton@doh.wa.gov.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. This proposed rule only applies to licensed private psychiatric hospitals; these do not meet the definition of "small business" in RCW 19.85.020. Additionally, the proposed rule establishes fine amounts related to severity of repeated noncompliance that would only be assessed on a psychiatric hospital that repeatedly did not comply with regulations; the rule does not impose costs for compliance with regulations.

October 19, 2021
 Kristin Peterson, JD
 Deputy Secretary
 Policy and Planning
 for Umair A. Shah, MD, MPH
 Secretary

OTS-3339.2

AMENDATORY SECTION (Amending WSR 95-22-012, filed 10/20/95, effective 11/20/95)

WAC 246-322-025 Responsibilities and rights—Licensee and department. (1) The licensee shall:

(a) Comply with the provisions of chapter 71.12 RCW and this chapter;

(b) Post the private psychiatric hospital license in a conspicuous place on the premises;

(c) Maintain the bed capacity at or below the licensed bed capacity;

(d) Cooperate with the department during on-site surveys and investigations;

(e) Respond to a statement of deficiencies by submitting to the department, according to the dates specified on the statement of deficiencies form:

- (i) A written plan of correction for each deficiency stated in the report and date to be completed; and
 - (ii) A progress report stating the dates deficiencies were corrected.
 - (f) Obtain department approval before changing the bed capacity;
 - (g) Obtain department approval before starting any construction or making changes in department-approved plans or specifications;
 - (h) Notify the department immediately upon a change of administrator or governing body;
 - (i) When assuming ownership of an existing hospital, maintain past and current clinical records, registers, indexes, and analyses of hospital services, according to state law and regulations; and
 - (j) Obtain department approval of a plan for storing and retrieving patient records and reports prior to ceasing operation as a hospital.
- (2) An applicant or licensee may contest a disciplinary decision or action of the department according to the provisions of RCW 43.70.115, chapter 34.05 RCW and chapter 246-10 WAC.
- (3) The department shall:
- (a) Issue or renew a license when the applicant or licensee meets the requirements in chapter 71.12 RCW and this chapter;
 - (b) Conduct an on-site inspection of the hospital prior to granting an initial license;
 - (c) Conduct on-site inspections at any time to determine compliance with chapter 71.12 RCW and this chapter;
 - (d) Give the administrator a written statement of deficiencies of chapter 71.12 RCW and this chapter observed during on-site surveys and investigations; and
 - (e) Comply with RCW 43.70.115, chapter 34.05 RCW and chapter 246-10 WAC when denying, suspending, modifying, or revoking a hospital license.
- (4) The department may deny, suspend, or revoke a private psychiatric hospital license if the department finds the applicant, licensee, its agents, officers, directors, or any person with any interest therein:
- (a) Is unqualified or unable to operate or direct operation of the hospital according to chapter 71.12 RCW and this chapter;
 - (b) Makes a misrepresentation of, false statement of, or fails to disclose a material fact, to the department:
 - (i) In an application for licensure or renewal of licensure;
 - (ii) In any matter under department investigation; or
 - (iii) During an on-site survey or inspection;
 - (c) Obtains or attempts to obtain a license by fraudulent means or misrepresentation;
 - (d) Fails or refuses to comply with the requirements of chapter 71.12 RCW or this chapter;
 - (e) Compromises the health or safety of a patient;
 - (f) Has a record of a criminal or civil conviction for:
 - (i) Operating a health care or mental health care facility without a license;
 - (ii) Any crime involving physical harm to another individual; or
 - (iii) Any crime or disciplinary board final decision specified in RCW 43.43.830;
 - (g) Had a license to operate a health care or mental health care facility denied, suspended or revoked;
 - (h) Refuses to allow the department access to facilities or records, or fails to promptly produce for inspection any book, record,

document or item requested by the department, or interferes with an on-site survey or investigation;

- (i) Commits, permits, aids or abets the commission of an illegal act on the hospital premises;
- (j) Demonstrates cruelty, abuse, negligence, assault or indifference to the welfare and well-being of a patient;
- (k) Fails to take immediate appropriate corrective action in any instance of cruelty, assault, abuse, neglect, or indifference to the welfare of a patient;
- (l) Misappropriates the property of a patient;
- (m) Fails to exercise fiscal accountability and responsibility toward individual patients, the department, or the business community; or
- (n) Retaliates against a staff person, patient or other individual for reporting suspected abuse or other alleged improprieties.

(5) The department may summarily suspend a license pending proceeding for revocation or other action if the department determines a deficiency is an imminent threat to a patient's health, safety or welfare.

(6) The department may assess civil fines on a psychiatric hospital according to RCW 71.12.710.

(a) The department may assess a civil fine of up to \$10,000 per violation, not to exceed a total fine of \$1,000,000, on a psychiatric hospital when:

- (i) The psychiatric hospital has previously been subject to an enforcement action for the same or similar type of violation of the same or similar statute or rule; or
- (ii) The psychiatric hospital has been given any previous statement of deficiency that included the same or similar type of violation of the same or similar statute or rule; or
- (iii) The psychiatric hospital failed to correct noncompliance with a statute or rule by a date established or agreed to by the department.

(b) The department will assess a civil fine in accordance with Table 1 of this section:

Table 1

Fine Amounts in Relation to the Severity of the Violation			
Scope	Impact of Potential or Actual Harm		
	Low	Moderate	High
Limited	Up to \$1,000	\$1,000 - \$4,000	\$2,000 - \$10,000
Pattern	Up to \$2,000	\$2,000 - \$5,500	\$3,500 - \$10,000
Widespread	Up to \$3,000	\$3,000 - \$7,000	\$6,500 - \$10,000

(c) The "severity of the violation" will be considered when determining fines. Levels of severity are categorized as low, moderate, or high, and defined as:

- (i) "Low" means harm could happen but would be rare. The violation undermines safety or quality or contributes to an unsafe environment but is very unlikely to directly contribute to harm;
- (ii) "Moderate" means harm could happen occasionally. The violation could cause harm directly, but is more likely to cause harm as a continuing factor in the presence of special circumstances or additional failures. If the deficient practice continues, it would be possible that harm could occur but only in certain situations or patients;

(iii) "High" means harm could happen at any time or did happen. The violation could directly lead to harm without the need for other significant circumstances or failures. If the deficient practice continues, it would be likely that harm could happen at any time to any patient.

(d) Factors the department will consider when determining the severity of the violation include, but are not limited to:

(i) Whether harm to the patient has occurred, or could occur including, but not limited to, a violation of patient's rights;

(ii) The impact of the actual or potential harm on the patient;

(iii) The degree to which the hospital failed to meet the patient's highest practicable physical, mental, and psychosocial well-being;

(iv) Whether a fine at a lower severity has been levied and the condition or deficiency related to the violation has not been adequately resolved; and

(v) Whether the hospital has been offered, or requested, and received and implemented technical assistance from the department.

(e) The scope of the violation is the frequency, incidence or extent of the occurrence of the violation(s). The levels of scope are defined as follows:

(i) "Limited" means a unique occurrence of the deficient practice that is not representative of routine or regular practice and has the potential to impact only one or a very limited number of patients, visitors, staff. It is an outlier. The scope of the violation is limited when one or a very limited number of patients are affected or one or a very limited number of staff are involved, or the deficient practice occurs in a very limited number of locations.

(ii) "Pattern" means multiple occurrences of the deficient practice, or a single occurrence that has the potential to impact more than a limited number of patients, visitors, staff. It is a process variation. The scope of the violation becomes a pattern when more than a very limited number of patients are affected, or more than a very limited number of staff are involved, or the situation has occurred in several locations, or the same patient(s) have been affected by repeated occurrences of the same deficient practice.

(iii) "Widespread" means the deficient practice is pervasive in the facility or represents a systemic failure or has the potential to impact most or all patients, visitors, staff. It is a process failure. Widespread scope refers to the entire organization, not just a subset of patients or one unit.

(f) A hospital may appeal the department's action of assessing civil fines under RCW 43.70.095.

[Statutory Authority: Chapter 71.12 RCW and RCW 43.60.040. WSR 95-22-012, § 246-322-025, filed 10/20/95, effective 11/20/95.]