

WSR 24-16-107
PROPOSED RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
(Behavioral Health Administration)
[Filed August 2, 2024, 1:52 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-21-057.

Title of Rule and Other Identifying Information: WAC 388-878-0010 Introduction and overview, 388-878-0020 Outpatient competency restoration program (OCRCP)—Definitions, 388-878-0030 Clinically appropriate for outpatient competency restoration services, 388-878-0040 Assignment of clients and initial intake, 388-878-0050 Conditions of participation, 388-878-0060 OCRCP provider reporting, 388-878-0070 Early competency evaluation, 388-878-0080 Program removal, 388-878-0090 Program end, and newly added 388-878-0051 Leave of absence.

Hearing Location(s): On September 10, 2024, at 10:00 a.m., virtually via Microsoft Teams or call in. See the department of social and health services (DSHS) website at <https://www.dshs.wa.gov/sesa/rpau/proposed-rules-and-public-hearings> for the most current information.

Date of Intended Adoption: No earlier than September 11, 2024.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504, email DSHSRPAURulesCoordinator@dshs.wa.gov, fax 360-664-6185, beginning noon on August 7, 2024, by 5:00 p.m. on September 10, 2024.

Assistance for Persons with Disabilities: Contact Shelley Tencza, rules consultant, phone 360-664-6036, fax 360-664-6185, TTY 711 relay service, email shelley.tencza@dshs.wa.gov, by 5:00 p.m. on August 27, 2024.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: In the 2022 legislative session, the legislature passed 2SSB 5664 concerning forensic competency restoration programs. This legislation made changes to the outpatient competency restoration program (OCRCP) procedures and requirements. These rules are necessary to implement the legislation. This proposal will update definitions related to OCRCP, reflect addition of recommended service plans, clarify intake process and conditions of participation, add a new section of WAC to outline a leave of absence for individuals in OCRCP, update process for OCRCP provider reporting, clarify early competency evaluation process, and add clarity and direction for program termination, removal, and program end. This will add clarity to the processes for providers and individuals in OCRCP.

Reasons Supporting Proposal: See above.

Statutory Authority for Adoption: RCW 10.77.086 and 10.77.088.

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

Name of Proponent: DSHS, health care authority, governmental.

Name of Agency Personnel Responsible for Drafting: Emma Palumbo, P.O. Box 45050, Olympia, WA 98504-5050, 360-972-6214.

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

A cost-benefit analysis is not required under RCW 34.05.328. Under RCW 34.05.328 (5)(b)(iii), rules adopting Washington state statutes do not require a cost-benefit analysis. This rule making is adopting Washington state statute codified by SSSB [2SSB] 5664.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 34.05.328 (5) (b) (iii).

Explanation of exemptions: This rule making is adopting Washington state statute codified by SSSB [2SSB] 5664.

Scope of exemption for rule proposal:

Is fully exempt.

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 rule making is adopting Washington state statute codified by SSSB [2SSB] 5664, chapter 288, Laws of 2022. Exempt under RCW 19.85.020(2), does not impose costs on small business.

July 25, 2024

Katherine I. Vasquez

Rules Coordinator

SHS-5047.3

AMENDATORY SECTION (Amending WSR 21-20-037, filed 9/27/21, effective 10/28/21)

WAC 388-878-0010 Introduction and overview. (1) Outpatient competency restoration program (OCRCP) is one of the elements of the Trueblood Settlement managed by the health care authority in collaboration with the department of social and health services office of forensic mental health services.

(2) The OCRCP provides an option for courts to order competency restoration services in the community for persons who the court determines are not competent to stand trial and are appropriate for community-based treatment.

AMENDATORY SECTION (Amending WSR 21-20-037, filed 9/27/21, effective 10/28/21)

WAC 388-878-0020 Outpatient competency restoration program (OCRCP)—Definitions. "Active treatment" means the time period of engagement where an individual court ordered to clinical outpatient competency restoration is adhering to conditions of participation and other services as directed by the program or treatment providers.

"Behavior concern report" or "BCR" means a report created by the provider regarding behavioral concerns that may compromise ((program progress)) an individual's active treatment in OCRCP. This report must include any noncompliance with the conditions of participation and conditions of release, even if such noncompliance does not rise to the level of termination or removal from the program.

"Competency evaluation" means an evaluation performed to determine whether an individual is competent to stand trial.

"Department" or "DSHS" means the Washington state department of social and health services.

"Enrollment" or "Enrolled" means an individual with a court order for outpatient competency restoration services who has completed an intake assessment with the provider and is scheduled to begin outpatient competency restoration services.

"Forensic evaluator" means an appropriately licensed and approved department staff member or contractor who completes competency to stand trial evaluations.

"Forensic navigator" means department staff who are officers of the court ((who)) that assist ((the individual to access)) individuals in accessing services related to diversion or facilitate services and connections for people in the outpatient competency restoration program.

"Health care authority", "Authority", or "HCA" means the Washington state health care authority, any division, section, office, unit, or other entity of HCA, or any of the officers or other officials lawfully representing HCA.

"Inpatient competency restoration" means competency restoration services performed in an inpatient setting, including a state psychiatric hospital or residential treatment facility.

"Leave of absence" or "LOA" means that an individual who is court ordered and enrolled in outpatient competency restoration services is not receiving services; however, the individual has not been removed from and may be returning to the program.

"Outpatient competency restoration program" or "OCRP" means competency restoration services that are provided on an outpatient basis to ((clients)) individuals who are on conditional release from custody.

"OCRP Director" means the individual who oversees a specific OCR program. This individual works for the provider and is not a program manager from the authority. The OCRP director may also include a designee identified by the OCRP director for times when the OCRP director is unavailable.

"Provider" means the HCA-contracted provider of outpatient competency restoration program services, its employees, and agents.

"Recommended services plan" or "RSP" means a plan provided to the courts by a forensic navigator, which indicates if an individual is suitable for outpatient restoration and what services the individual would be eligible for should they be released from custody.

"Removal from the outpatient competency restoration program" means that the individual has been placed and admitted into the appropriately identified inpatient facility to resume competency restoration.

"Termination from the outpatient competency restoration program" means an individual fails to comply with the restrictions of the outpatient competency restoration program (OCRP) such that restoration is no longer appropriate in the outpatient setting or the individual is no longer clinically appropriate for outpatient competency restoration. Termination from OCRP is a decision and function of the provider, which then begins the process for the removal of the individual from outpatient competency restoration to inpatient competency restoration by the department.

"Weekly status update" or "WSU" means a document completed by the provider and submitted to the assigned forensic navigator.

AMENDATORY SECTION (Amending WSR 21-20-037, filed 9/27/21, effective 10/28/21)

WAC 388-878-0030 Clinically appropriate for outpatient competency restoration services. (1) A forensic navigator will complete and submit a recommended services plan to the court for review. The recommended services plan will include a determination of the individual's suitability for OCRP, diversion options for the individual, and other services/supports for the individual.

(2) The court may order ~~((a-client))~~ an individual into OCRP when it determines the ~~((client))~~ individual is clinically appropriate to receive outpatient competency restoration services ~~((Clinical appropriateness for OCRP means a likelihood of being restored to competency in an outpatient setting))~~ and when the department certifies there is an available appropriate outpatient competency restoration program that has adequate space for the person.

~~((2))~~ (3) An individual may not be clinically appropriate for outpatient competency restoration services if the ~~((client))~~ individual exhibits any of the following:

(a) Is not medically stable;
(b) Has current suicidal ideation with intent;
(c) Is at heightened risk of harming others;
(d) ~~((Psychiatric))~~ Is experiencing psychiatric symptoms at a severity that suggests that the ~~((client))~~ individual will not be able to care for their basic needs or health and safety in the community even with clinically appropriate housing and case management services;
or

(e) ~~((Other))~~ Is exhibiting other concerning behavior or factors which indicates the ~~((client))~~ individual is not appropriate for outpatient competency restoration services.

AMENDATORY SECTION (Amending WSR 21-20-037, filed 9/27/21, effective 10/28/21)

WAC 388-878-0040 Assignment of ~~((clients))~~ individuals and initial intake. (1) The forensic navigator will inquire into ~~((a-provider's capacity))~~ an OCR program's adequate space before informing the court that the provider is able to accept a ~~((case assignment))~~ new individual. Subject to ~~((capacity limitations))~~ adequate space, the designated provider will accept all ~~((clients))~~ individuals ordered by the court.

(2) ~~((Immediately following))~~ Once the ~~((case assignment))~~ signed court order for outpatient competency restoration is received by the department, the forensic navigator and provider will make arrangements for the ~~((client))~~ individual to attend an initial intake appointment to be conducted by the provider. The date of this appointment is the program start date.

~~((a))~~ The date of this appointment is the program start date.

~~((b))~~ The provider will develop an initial treatment plan based on the clinical barriers to competency assessed upon intake, and plan for commencing support or clinical services.

~~((c))~~ The provider will commence OCRP services for the client as soon as practicable after the initial intake appointment, even if the assessment and initial treatment plan are still being completed.)

AMENDATORY SECTION (Amending WSR 21-20-037, filed 9/27/21, effective 10/28/21)

WAC 388-878-0050 Conditions of participation. Every ((client)) individual in receipt of modified conditions of release from the criminal court and ordered for outpatient competency restoration must remain clinically appropriate for outpatient competency restoration services, and must remain ~~((substantially compliant with the following conditions of participation))~~ in active treatment to include the following:

(1) Taking prescribed medications or receiving prescribed intramuscular medication, if applicable;

(2) Abstaining from alcohol and unprescribed drugs;

(3) Participating in regular urinalysis or other drug testing ~~((for clients who have a current substance use disorder diagnosis))~~ , if applicable; and

(4) ~~((Engaging))~~ Actively participating in ~~((their care and treatment))~~ competency restoration.

NEW SECTION

WAC 388-878-0051 Leave of absence. (1) Every individual with a court order for outpatient competency restoration services who has been enrolled in the OCRP may be placed on a leave of absence (LOA) by the provider under the circumstances described in this section. An individual is placed on an LOA when they are not actively participating in the OCRP and efforts are being made to return the individual to active treatment and circumstances do not call for immediate removal to an inpatient setting. An individual is placed on an LOA at the discretion of the provider when there is a likelihood for the individual to return to OCRP, however if that changes, they may be terminated from the program and removed to inpatient restoration.

(2) Prior to the provider placing an individual on an LOA the provider will inform the forensic navigator and will provide leave of absence details in the weekly status update. The court will be informed by the forensic navigator. An LOA pauses the individual's restoration period and extends the end date of legal authority.

(3) If an individual does not actively engage in competency restoration and other services as directed by the program or treatment providers, they will be placed on a leave of absence.

(4) The following reasons effectively pause the individual's restoration period and extend the end date of legal authority:

(a) Conditional release review-treatment suspended meaning outpatient restoration treatment is suspended while conditional release order is under review as an individual has returned to custody, or is in the community, or in a medical/civil psychiatric facility, but there is a likelihood they may be eligible to return to OCRP. Leave continues until the individual returns to the program, or the court revokes conditional release order.

(b) Other inpatient treatment meaning an individual has been admitted for temporary inpatient treatment (e.g., a medical, civil psychiatric, SUD treatment, inpatient community behavioral health, or crisis stabilization facility) but the provider deems there is a likelihood the individual will discharge back to OCRP and conditional release is not under review.

(c) Unexcused program absence meaning an individual has missed three consecutive treatment days. An individual has missed three consecutive active treatment days, but the provider deems there is a likelihood that they can be reengaged in OCRP; and

(d) "Other" meaning an excused absence by the OCRP provider not captured in other LOA reasons including when the individual has an extenuating circumstance that does not allow them to attend three consecutive active treatment days, and the court is made aware of the absence.

(5) The following reasons do not pause the individual's restoration period and do not extend the end date of legal authority:

(a) The period following an individual's end of legal authority expiration meaning an individual's legal authority expires and competency hearing for additional court order is needed to determine whether the individual will return to the program; or

(b) Conditional release review-inpatient restoration meaning an individual is admitted to inpatient restoration while conditional release order is under review; leave continues until the individual returns to the program, or the court revokes the conditional release order.

Reviser's note: The unnecessary underscoring in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

AMENDATORY SECTION (Amending WSR 21-20-037, filed 9/27/21, effective 10/28/21)

WAC 388-878-0060 OCRP provider reporting. (1) The provider will submit a weekly status update to the assigned forensic navigator (~~via secure email~~).

(2) The provider will submit a behavior concern report (~~when there is concern about a client's behavior. The report must be submitted~~) to the forensic navigator (~~via direct notification~~) either by way of in person contact or by phone. The communication will take place on the same day that the behavior arose((7)) and ((additionally by)) the provider shall follow up with notification of completion via secure email within ((twenty-four)) 24 hours of ((concern)) the concern(s).

AMENDATORY SECTION (Amending WSR 21-20-037, filed 9/27/21, effective 10/28/21)

WAC 388-878-0070 Early competency evaluation. The provider will promptly request an early competency evaluation when the provider (~~determines~~) believes the (~~client~~) individual may meet one of the following criteria:

(1) (~~Client exhibits barriers to competency~~) The individual may be competent to stand trial ((that are minimal or not present)); or

(2) (~~Client determined to be not restorable to competency to stand trial~~) The individual is unlikely to be restored to competence.

AMENDATORY SECTION (Amending WSR 21-20-037, filed 9/27/21, effective 10/28/21)

WAC 388-878-0080 Program termination and removal. ~~((1))~~ If ~~((a client))~~ an individual fails to comply with the conditions of the outpatient competency restoration program such that restoration is no longer appropriate in ~~((that))~~ an outpatient setting or the ~~((client))~~ individual is no longer clinically appropriate as determined by the OCRP director, then the department ~~((r))~~ will work with law enforcement, if appropriate, to assist with removal and admission to inpatient restoration. ~~((the))~~ The department will remove the client from the program and place the client in an appropriate facility for inpatient competency restoration.

~~((2) If the provider determines that the client may no longer meet the conditions of participation, the provider will promptly contact the forensic navigator to consider removal from the program.))~~

AMENDATORY SECTION (Amending WSR 21-20-037, filed 9/27/21, effective 10/28/21)

WAC 388-878-0090 Program end. (1) The provider will no longer ~~((serve the client in the program upon expiration of the order for))~~ provide outpatient competency restoration services to the individual upon expiration of the outpatient competency restoration order. Competency restoration services include teaching competency restoration curriculum and providing weekly status updates or monitoring for the courts. The provider may continue to provide residential supports for up to 14 days after termination or successful completion and discharge from OCRP services. Additionally, the provider, at its discretion, may continue to provide care coordination services for a person who has been terminated or successfully discharged from OCRP services to ensure coordination of care occurs.

(2) When a forensic navigator confirms with the court that the individual will not be returning to the OCRP, ((The)) the provider must ((contact the forensic navigator to make a plan for coordinated transition or continuing outpatient behavioral health services)) complete a discharge summary document.