

**Department of Children and Families  
Summary of Public Hearing Comments and Agency Response**

**DCF 105  
Clearinghouse Rule 15-091**

**Proposed Rules Relating to Substance Abuse Screening, Testing, and Treatment for  
Certain Department Work Experience Programs**

**Public Hearing Summary**

The Department began accepting comments via the Wisconsin Administrative Rules Website on November 23, 2015. The Department held one public hearing in Madison on December 15, 2015. Comments were accepted through December 16, 2015.

**List of Public Hearing Attendees and Commenters**

The following is a complete list of the persons who attended the public hearing or submitted comments on the proposed rule, the position taken by the commenter and whether or not the individual provided written or oral comments.

	<b>Name and Address</b>	<b>Position Taken (Support or Opposed)</b>	<b>Action (Oral or Written)</b>
1	Rev. Scott Anderson Executive Director Wisconsin Council of Churches 750 Windsor Street, Suite 301 Sun Prairie, WI 53590	None Taken	Written
2	Mike Bare Research and Program Coordinator Community Advocates Public Policy Institute 728 N. James Lovell Street Milwaukee, WI 53203	Opposed	Oral and Written

**Summary of Comments and Responses on Proposed Rules**

Number designates commenter from the list of public hearing attendees and commenters.

**DCF 105.01 Purpose**

*Comment (1):* The WCC believes that the rule should conform to the purported aim of the legislation to provide treatment and to facilitate employment, not to deprive people of benefits.

Department response: The Department agrees that the rule should align with the goal to provide treatment to facilitate employment for individuals in need of treatment for controlled substance abuse.

### **DCF 105.04 (1) Who must complete a questionnaire**

Comment (1): “How were questionnaires selected for the programs (specified in the fiscal impact statement)? How accurate (in terms of false positives) are they? Is there any bias in the testing relative to particular groups?”

Department response: The rule does not provide criteria for selecting the screening questionnaire. The two questionnaires referenced in the Economic Impact Analysis were used solely to construct an estimated annual cost of administering the questionnaire. Only the DAST-10© questionnaire has been approved for use by a single administering agency currently operating a program subject to the emergency rule. The other questionnaire used currently in the W-2 program helped inform the economic impact analysis but has not been approved for any programs under the proposed rule.

The department reviewed validity studies relating to the DAST-10© before approving it for use and is unaware of any studies identifying false positives or racial bias as a problem in using this questionnaire as a screening tool. This questionnaire is only designed to determine a reasonable suspicion of abuse of a controlled substance, not to determine an individual actually is currently abusing controlled substances. Current substance abuse is never assumed; no one is denied participation in a work program based only on suspicion of abuse. Even if an individual tests positive for current use of a controlled substance as determined by a laboratory test, the treatment provider is ultimately responsible for the clinical determination whether or not an individual needs treatment. At all stages of the process, the individual may continue to participate in the work experience program so long as the individual cooperates in testing and treatment.

Comment (2): The WCC inquired about the option for programs to select the screening questionnaire independently and noted that the use of different questionnaires may prevent the opportunity to share results across programs.

Department response: The proposed rule does not provide that responses to screening questionnaires can be shared across programs.

Comment (3): “Would someone have to re-apply and complete the questionnaire to renew participation, re-enter if needing to drop out for health or other reasons, or to participate in a different training under the same program?”

Department response: The rule provides that an individual who passes the questionnaire is eligible to participate in a work program “without further screening, testing, or treatment.” There is no requirement for re-administering the questionnaire once an individual has passed the questionnaire.

Comment (4): “Would the screening and test results be accepted by other programs or benefits that require drug testing?”

Department response: The rule does not provide that responses to screening questionnaires can be shared across programs. Laboratory test results may be accepted if performed by another state program as stated at DCF 105.04 (7).

### **DCF 105.04 (2) Effect of failing to complete questionnaire**

Comment (1): The WCC expressed support for the opportunity for an individual denied eligibility for failing to complete the screening questionnaire to reapply at any time.

Department response: Support noted.

Comment (2): The WCC provided examples of potential reasons why an individual may fail to complete a questionnaire. The WCC also raised the question, “What safeguards are needed to ensure that screening and testing procedures overcome rather than fuel mistrust between clients and agencies?”

Department response: The informational notice required at DCF 105.03 will ensure any person who expresses interest in or requests to apply to a work experience program is aware of the statutory requirements surrounding screening, testing, and treatment for abuse of controlled substances. The requirements to complete a questionnaire before participating in a work experience program and to complete a test if that individual’s answers to the questionnaire indicate a reasonable suspicion of abuse are statutory under s. 49.162(2), Stats. Since administering agencies have no discretion to waive the statutory requirements, it is hoped that the informational materials will served to mitigate any mistrust between clients and agencies.

### **DCF 105.04 (3) Decision on eligibility**

Comment (1): The WCC supports completion of the screening questionnaire as a condition of eligibility as an “important safeguard” for ensuring that the screening requirement is fulfilled.

Department response: Support noted.

### **DCF 105.05 (1) Who may be required to be tested**

Comment (1): Standards for “reasonable suspicion” are not spelled out in rule.

Department response: DCF 105.02 (8) defines “reasonable suspicion.” Score thresholds requiring a referral to a test are specific to the individual questionnaires and are not defined in rule.

### **DCF 105.05 (2) Nature of testing required**

*Comment (1):* The WCC questioned whether pre-employment drug testing practices of Wisconsin employers is the best source of information for determining the controlled substances or metabolites that must be included in the laboratory test.

*Department response:* The Department believes that mirroring the pre-employment drug testing practices of Wisconsin employers aligns most closely with the overarching goal of work experience programs to ensure that individuals are prepared to obtain and maintain employment.

*Comment (2):* “How will the reliability of the testing be ensured, and how will it be ensured that there is no bias implicit in the substances tested for?”

*Department response:* DCF 105.05 (3) provides that subject to the Department’s approval, the administering agency may contract with any qualified drug testing vendor. The Department is not aware of research regarding potential biases in controlled substances included in test panels. To the extent any theoretical bias might be shown, it is important to recognize that a positive test qualifies an individual for referral to necessary treatment for substance abuse; a positive test does not preclude any service or benefit of the work experience program.

*Comment (3):* The WCC asked, “What is the expected time frame between making the application, evaluating the screening questionnaire, scheduling the testing, taking the test, receiving results, scheduling/taking/getting results from a confirmation test?”

*Department response:* The rule does not provide for an expected timeframe between each step in the screening, testing, and treatment process. Establishing standard timeframes is not feasible due to the potential for differences in practices and timeframes across work experience programs, drug-testing vendors, and treatment providers in different areas of the state.

### **DCF 105.05 (3) Contract for testing services**

*Comment (1):* The WCC noted that although the rule does not contain a specific requirement for competitive bidding among qualified vendors, this may be inconsequential given the low costs identified in the fiscal estimate and economic impact analysis.

*Department response:* The Department agrees. If the volume of testing is high enough on a statewide basis for competitive bidding to be needed, the rule allows the department to require administering agencies to use a drug testing vendor procured in compliance with state procurement laws and policies apply to all general purchasing of goods and services by state agencies.

*Comment (2):* “How will quality control be assured?”

*Department response:* The administering agencies may only contract with qualified drug testing vendors approved by the Department.

#### **DCF 105.05 (4) Refusal to submit to a test**

*Comment (1):* The WCC expressed concern that potential obstacles frequently encountered by individuals experiencing poverty may result in a refusal or failure for reasons other than “unwillingness.”

*Department response:* The requirement to test for the use of a controlled substance is mandated by statute and cannot be modified by rule. Individuals may appeal adverse decisions as provided at DCF 105.09.

*Comment (2):* “What if the person refuses to provide confidential personal health information, e.g. prescriptions, for fear that disclosing chronic health problems might endanger job prospects or other reasons?”

*Department response:* An individual who refuses to submit to a test under sub. (4), which includes a failure or refusal to cooperate with the medical review officer, is ineligible to participate in the work experience program until the individual submits to a test.

#### **DCF 105.05 (5) Effect of refusal**

*Comment (1):* The WCC pointed out that there may be “more innocent reasons” or “challenges” that explain why an individual may not attend their test appointment as scheduled.

*Department response:* The requirement to test for the use of a controlled substance is mandated by statute and cannot be modified by rule.

*Comment (2):* The WCC expressed confusion surrounding which tests are subject to the provision that the individual is ineligible to participate in the work experience program until the individual submits to a test.

*Department response:* An individual is only prohibited from participating if they demonstrate the failure refusal behaviors identified in rule at sub. (4). The randomly administered tests during treatment as well as the test at the conclusion are not referenced under this section.

#### **DCF 105.05 (6) Requirement for a confirmation test**

*Comment (1):* The WCC described the requirement for a confirmation test as an “important procedural safeguard.”

*Department response:* Support noted.

Comment (2): “Who pays for the re-test if it was in error?”

Department response: The rule does not provide for a re-test option beyond what may occur as part of the appeal process.

Comment (3): “How does this guard against corrupted samples, since the same sample is retested? Or are there other possible errors that wouldn’t be caught by re-testing the same sample?”

Department response: The medical review officer is responsible for reviewing for laboratory error. The original sample must be used for any confirmation test or confirmatory retest in order to verify the accuracy of the original test result reported to the MRO.

### **DCF 105.05 (7) Accepting test results from another program**

Comment (1): The WCC questioned whether the opportunity to submit test results from another program if the test occurred within the previous 90 days would serve to mitigate any potential burden, or “severely limit” the possibility of the other test results being accepted.

Department response: The Department believes that the 90 day time period provides a reasonable timeframe from which individuals may submit test results. The proposed rule has been modified to identify additional state programs from which an individual can submit a test result, which will expand options for submitting results from a previous test.

Comment (2): This section details test results that can be used to satisfy the requirement for these programs. We suggest these programs include other drug tests that may be submitted to the state now or in future policy implementation, including screening and testing for FoodShare and Medicaid benefits. The Department should also consider a program that would allow drug tests submitted to employers to satisfy the requirement. The effect of these two changes would be to limit the burden and frequency of tests on the individual.

Department response: The rule does not provide that responses to screening questionnaires can be shared across programs. Test results may be accepted if performed by another state program and the proposed rule at DCF 105.04 (7). The proposed rule has been modified to identify additional state programs from which an individual can submit a test result, including BadgerCare Plus. The Department has refrained from expanding options for information sharing beyond state programs due to potential risks surrounding information sharing.

### **DCF 105.05 (9) Effect of a positive test**

*Comment (1):* “How would the participant be notified, and how would confidentiality be protected? Would or could the results be shared with any other benefits programs or Departments under existing or possible future law?”

*Department response:* The rule does not provide procedures or requirements for participant notification. Confidentiality of records relating to drug testing and treatment is governed by regulations specific to drug testing and treatment programs that are federally assisted under 42 CFR Part 2 and by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 CFR Parts 160 and 164, Subparts A and E.

### **DCF 105.06 (3) Evaluation and assessment**

*Comment (1):* The WCC cautioned that the Department may experience resistance to the provision that an individual who has been determined to not to need substance abuse treatment after assessment will have fully satisfied the treatment requirements.

*Department response:* The Department defers to the clinical judgment of the treatment program provider for the determination that an individual requires treatment because it does not expect the administering agency or the drug testing vendor to have the knowledge and expertise required to make that determination.

### **DCF 105.06 (4) Eligibility for program when treatment not needed or person on waiting list**

*Comment (1):* The WCC expressed support for the provision that allows an individual who is on a waiting list for enrollment in a treatment program to participate in a work experience program during the waiting list period.

*Department response:* Support noted.

### **DCF 105.06 (5) Satisfying requirement through another program**

*Comment (1):* The WCC supports the provision that allows individuals to satisfy the treatment requirement through participation in another program.

*Department response:* Support noted. The proposed rule has been modified to allow participation in any certified treatment program to satisfy the treatment requirement. The intent is to avoid concurrent participation in multiple treatment programs.

#### **DCF 105.06 (6) Refusal to participate**

*Comment (1):* The WCC suggested that there may be obstacles to participation beyond “unwillingness” that should be taken into account by administrators. The WCC also asked, “Can they be trusted to do so?”

*Department response:* The requirement to participate in treatment is mandated by statute and cannot be modified by rule.

*Comment (2):* The fiscal estimate assumes most or all participants could be covered by BadgerCare for their treatment, “Would any changes to BadgerCare possibly obstruct that for some people? But if random drug testing is required by the agency but not the provider, would insurance still pay? If not, who would?”

*Department response:* The Department cannot speculate on changes that might be made to the BadgerCare program. In the event that neither insurance nor other programs such as BadgerCare are options for payment, Act 55 created an annual appropriation for drug screening, testing, and treatment costs.

#### **DCF 105.06 (7) Effect of refusal**

*Comment (1):* The WCC expressed uncertainty surrounding the effect of refusal. In addition, the WCC inquired if the second chance limit recognizes the difficulties of recovery.

*Department response:* The Department believes that the proposed rule surrounding the effect of refusal is reasonable. The one-time restart limit is mandated by statute and cannot be modified by rule.

#### **DCF 105.06 (8) Testing during treatment**

*Comment (1):* The WCC supports the minimum of one randomly administered test established in rule.

*Department response:* Support noted.

*Comment (2):* The WCC inquired if there is an opportunity to mitigate the treatment restart limit or allow additional discretion.

*Department response:* The one-time restart limit is mandated by statute and cannot be modified by rule to allow additional discretion.

### **DCF 105.06 (9) Testing at conclusion**

*Comment (1):* The WCC remarked that the effect for failure to test at the conclusion of treatment is the same as the effect for treatment refusal, but mentioned the opportunity to reapply before the end of the 12 month ineligibility period.

*Department response:* The option to reapply before the end of the 12 month ineligibility period has been removed from the proposed rule.

### **DCF 105.08 Confidentiality of records**

*Comment (1):* The WCC remarked that this section of the proposed rule appears to prevent potentially negative consequences to individuals such as reports to law enforcement or child protective services. The WCC also suggested adding language to specify who may have access to the test results.

*Department response:* Support noted. In addition to the federal regulations mentioned previously, Wis. Stat. 51.30 (4) (d), ch. DHS 92.03 (3), and ch. DHS 92.06 also provide privacy and confidentiality protections. Confidential information may only be communicated among personnel who have a need for the information in direct connection with their duties.

### **DCF 105.09 Appeals**

*Comment (1):* The WCC provided the comment, “important procedural safeguard” under this section.

*Department response:* Support noted.

*Comment (2):* “But what legal costs, if any, would be incurred, and who would pay for them? If the appeal is successful, would there be any restitution or compensation for loss of benefits or other harm?”

*Department response:* The appeals process will follow program-specific procedures and guidelines in currently effect for each program. The rule does not create any new provisions for appeal, and the authorizing statute, s. 49.162, Stats., does not authorize the department to create new appeal provisions to address the commenter’s concerns.