



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 18-041

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated December 2014.]

1. Statutory Authority

As currently drafted, the proposed rule could be interpreted to make changes that extend beyond the standard that is required to submit a petition under s. 227.26 (4), Stats., for the expedited repeal of an unauthorized rule. An “unauthorized rule” is a rule for which an agency lacks the authority to promulgate due to the repeal or amendment of the law that previously authorized its promulgation.

The department’s petition does not adequately explain why s. DHS 35.18 (2) is an “unauthorized rule”, as that term is defined in s. 227.26 (4) (a), Stats. The petition should specify under which law the rule was previously authorized, and how that law was modified such that it no longer authorizes the rule’s promulgation. The department cites only to s. 51.138, Stats., which is not the basis for its rulemaking authority. It appears that s. DHS 35.18 (2) was previously authorized under ss. 51.42 (7) (b) 11. and 227.14 (11), Stats., and interpreted s. 51.61 (6), Stats.

Further, 2017 Wisconsin Act 204 creates a limited exception to the requirement that an outpatient mental health treatment provider obtain informed consent before providing emergency treatment to minors for up to 30 days, if certain criteria are met. As stated in the department’s petition, s. DHS 35.18 (2) conflicts with this new exception, as it currently requires informed consent in all circumstances.

Because the proposed change to s. DHS 35.18 (2) would apply to all patients, regardless of age, it may be interpreted to modify consent requirements in other circumstances as well, beyond the circumstances affected by Act 204. The department should explain whether it intends

for the proposed repeal to modify consent requirements for any individuals other than minors, who are treated under the limited exception in s. 51.138, Stats. If it does, the proposed repeal is not appropriate for the expedited process in s. 227.26 (4), Stats., and should be handled through the regular rulemaking process. Conversely, if the department intends for the changes to apply only to minors, the department should consider whether the nature of its proposed changes create unnecessary confusion regarding applicability to minors versus adults, and whether additional clarifications under the regular rulemaking process are necessary to achieve the department's intent.

2. Form, Style and Placement in Administrative Code

a. An introductory clause should be inserted to specifically enumerate the rule provisions treated and to state the subject matter of the proposed rule. [s. 1.02 (1), Manual.]

b. The rule summary's listing of statutes interpreted should be revised to cite the specific statutory provision that was interpreted for administration and enforcement in the department's original rule. [s. 1.02 (2m) (a) and (b), Manual.]

c. The rule summary's listing of statutory authority should be revised to cite the specific statutory provision that granted rulemaking authority for the original rule. The statutory provision for the expedited rulemaking process, s. 227.26 (4), Stats., should not be cited, as that provision establishes the process and does not remove or confer rulemaking authority for the subject matter addressed in the proposed rule. [s. 1.02 (2m) (a), Manual.]

d. The rule summary's explanation of agency authority should be updated to reflect any revisions made in accordance with the previous comment.

e. The rule summary's listing of related statutes or rules should be revised to identify any statutes or rules that relate to the subject matter addressed in the proposed rule.