

**Department of Children and Families
Hearing Summary**

**Proposed Rules Relating to Regulation of Rates Charged by Residential
Care Centers, Child-Placing Agencies, and Group Homes,**

**DCF 52, 54, and 57
CR 11-026**

A public hearing was held in Milwaukee on May 18 and comments were accepted through May 27, 2011. Comments were received from the following:

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| 1. WI Assn. of Family & Children's Agencies
Kathy Markeland, Associate Director
Madison | 2. Oconomowoc Developmental Training Center
Richard MacNally, Executive Director
Oconomowoc |
| 3. Chileda Institute, Inc.
Ruth Wiseman, President and CEO
La Crosse | 4. Lakeview Specialty Hospital
Jim Para-Cremer, Administrator
Waterford |

3 others observed for information only

Summary of Comments and Responses on Proposed Rules

Number designates commenter from list.

Rule Analysis and Supporting Documentation

Comment (1): We disagree with the department's finding that the rules will not have a significant economic effect on a substantial number of small businesses. The rules impose new annual administrative costs and restrict the ability of businesses to determine their own pricing for their service design. Given that the department's proposed maximum rate falls below, and in some instances well below, current daily rates we anticipate that the new rules as drafted will result in the loss of residential, group home, and treatment foster care resources.

Department response: The department agrees that the implementation of rate regulation under s. 49.343, Stats., may have a significant economic impact on small businesses that have been charging rates that are far in excess of their reasonable and necessary costs. The department does not agree that requirements in the rule that are not in the statute will have a significant economic impact on a substantial number of small businesses.

Comment (1): We do not agree with the department's assertion in the fiscal estimate that under previous rate-setting procedures costs were not aligned with the level of case complexity and the rate-setting system lacked transparency.

Department response: The department disagrees.

DCF 52.11 (6) (b), 54.06 (8) (b), and 57.07 (2) Financial Records-Accounting System

Comment (1): Suggested edits: Establish and maintain an accounting system that enables an agency to accurately identify report income and disbursements for each resident by the cost categories in the cost and service report in s. DCF 52.66 (1) (a).

Department response: **Department agrees.**

Rule change: DCF 52.11 (2) (b)/54.06 (8) (b)/57.07 (2) A licensee shall establish and maintain an accounting system that enables a [residential care center program/child-placing agency/group home] to accurately report income and disbursements by the cost categories in the cost and service report in [s. DCF 52.66 (1) (a)/54.09 (1) (a)/57.62 (1) (a)].

DCF 52.22 and 57.23 Assessment

Comment (1): DCF 52.22 and 57.23 require residential care centers and group homes to do an assessment of a child and develop a treatment plan within 30 days after a child is admitted to the residential care center or group home. These rules should require the residential care centers and group homes to use information gathered in the assessment done by the placing agency under s. DCF 56.22.

Department response: Section DCF 56.22 applies to the use of a standardized assessment tool to assess the needs of a child placed or to be placed in a foster home. The department is considering future implementation of levels of care for group homes and residential care centers, which may include assessment provisions similar to s. DCF 56.22 in the group home and residential care center rules.

DCF 52.42 and 57.27 Physical Restraint

Comment (1): We support the integration of DSP Memo Series 2009-05 (Prohibited Practices) into the rules, but we think ss. DCF 52.42 and 57.27 should be reviewed in light of the new provisions. Some language appears to be outdated. We think the term "crisis intervention" used throughout ch. DCF 52 and the title "physical restraint" for s. DCF 57.27 (3) should be replaced with "emergency safety intervention." Also, the prohibition on use of a "prone restraint" in s. DCF 57.27 (1) (k) should be removed.

Department response: **Department agrees** to make the language changes to use the term "emergency safety intervention." The department believes that the prohibition on use of a prone restraint in group homes is appropriate.

Rule change: Changes were made to use the term “emergency safety intervention” in ss. DCF 52.12 (5) (c), 52.41 (1) (a) 10., 52.42, and 57.27.

DCF 52.64 (2), 54.07 (2), 57.60 (2) Charge All Purchasers the Same Rate for the Same Services

Comment (1): We appreciate the clarification provided in DSP Information Memo 2011 - 05 that “the rate regulation rules affect only children placed through the Wisconsin public child welfare departments. The rules do not affect private pay placements or placements coming in from out-of-state.” However, we request that this clarification be added to the administrative rule.

Department response: **Department agrees** to add the term “Wisconsin public purchaser.”

Rule change: DCF 52.03 (28)/54.01 (4) (L)/57.04 (45) “Wisconsin public purchaser” means a county department, the department, or the Wisconsin department of corrections.

DCF 52.64 (2)/54.07 (2)/57.60 A [residential care center/child-placing agency/group home] shall charge all Wisconsin public purchasers the same rate for the same services.

DCF 52.64, 54.07, and 57.60 Definition of Services

Comment (1): Legislative intent was that rate regulation would only apply to ch. 48 out-of-home care placements. The rule should clarify that rate regulation will not apply to other services offered by child-placing agencies, residential care centers, and group homes, such as respite, shelter, assessment, and crisis stabilization.

Department response:

- Section 49.343 (1g), Stats., provides that “the department shall establish the per client rate that a residential care center or group home may charge *for its services*, and the per client administrative rate that a child welfare agency may charge for the administrative portion of its foster care services.” The statutory language does not limit rate regulation to placements.
- If only certain services were covered by rate regulation, providers might charge higher rates for services that were not covered to make up decreased revenue from services that were covered and the cost containment purpose could be lost.
- The department is not operationally ready to implement regulation of rates for services when there is not a placement at this time, but rates for these services will be included in rate regulation in the future.

DCF 52.65, 54.08, and 57.61 Allowable Costs

Comment (1, 2): The rule should incorporate the Allowable Cost Policy Manual by reference and not have references to the applicable federal regulations. The Allowable Cost Policy Manual allows reserves for nonprofit agencies and profit for proprietary agencies.

Department response: The department will add rule language on allowable profit and reserves.

Rule change: DCF 52.65/54.08/57.61 Allowable costs. In determining rates under this subchapter, the department may consider costs incurred for any purpose that is allowable under all of the following:

(1) Applicable federal regulations, including 2 CFR Part 225, 2 CFR Part 230, 45 CFR Part 74, 45 CFR Part 92, and 48 CFR Part 31, except as provided in sub. (2).

(2) Reserves or profit as allowed under the following:

(a) For nonprofit corporations, reserves allowed under s. 49.34 (5m) (b) 2., Stats.

(b) For proprietary [residential care centers/child-placing agencies/group homes], profit allowed on an annual basis is the smaller amount determined under the following 2 methods of calculating profit:

1. The equity method is the sum of 7.5 percent of allowable operating costs plus 15 percent of average net equity for the year. In this subdivision, “average net equity” means the average cost of equipment, buildings, land, and fixed equipment minus the average accumulated depreciation and average long term liabilities for the year.

2. The expenses method is 10 percent of allowable operating costs for the year.

Note: Further explanation is available in the department’s *Allowable Cost Policy Manual*, which is available in the Partner Resources/Grants and Contract Administration section of the department’s website at <http://dcf.wisconsin.gov>.

DCF 52.66 (2), 54.09 (2), and 57.62 (2) Maximum Allowable Rates

Comment (1, 2): Section 49.343, Stats., does not authorize the department to set a maximum rate.

Comment (1): The maximum rate language could be interpreted to prohibit the department from making adjustments for a provider whose primary population requires specialized services. To address the costs of serving specialized populations through the extraordinary payment process would be inefficient for both providers and the state and could result in the loss of critical placement resources.

Comment (1): The maximum rate also fails to account for restrictions that purchasers put on a provider that may inhibit operation at maximum capacity. For example, BMCW will not permit a group home to serve youth under CHIPS orders in the same group home as delinquent youth.

Comment (2): A maximum rate is not just another factor; it is a threshold that is either met or not met.

Comment (2): The department announced its maximum rate before it had received a single rate proposal. By setting a rate before receiving providers’ cost reports, the department cannot ensure that costs of caring for a child that are required under federal law will be covered. The rate should have been promulgated as a rule with opportunity for public comment.

Comment (1, 2): Section 115.81 (4) (b) 5., Stats., requires a county department or state agency, as appropriate, to pay all of the residential care center for children and youth related costs of educating a child while the child resides in the residential care center if the child has a disability. All children admitted to ODTC have an Individualized Education Plan as required under the Individuals with Disabilities Education Act. DCF

established maximum rates without regard for whether the rates are high enough to meet each child's IEP.

Comment (3): Our residential care center provides specialized services for children with extraordinary needs. The department's maximum rate is insufficient to maintain the necessary staff ratios to keep children and staff safe.

Comment (4): I'm concerned the most difficult children will not be served. If the rate is capped, we will need to reconsider what is included in our rate.

Comment (1): The department should set a benchmark rate. Suggested language: "Each year no later than August 15, the department shall notify licensees of the benchmark per client rate that the department will use for examining reasonable and necessary cost for services provided in the following calendar year."

Comment (1): The department should release the benchmark rates by 8/15. We recommend providing agencies at least 6 weeks to propose a rate following notification of the department's benchmark rate.

Department response:

- Section 49.343 (2), Stats., lists 11 factors that the department is required to consider in reviewing a proposed rate and directs the department to promulgate any other factor relevant to setting of a rate by rule. The rule adds 5 additional factors to be considered, including a maximum allowable rate.
- Section 227.11 (2) (a) (intro.) expressly confers rulemaking authority on each agency to interpret the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if it exceeds the bounds of correct interpretation. One of the purposes of rate regulation under s. 49.343, Stats., is cost containment. The department considers a maximum rate necessary to effectuate this purpose.
- The maximum rates are based on a sampling of financial information from providers. The department's authority to determine maximum rates was promulgated by Emergency Rule 1106.
- Chapters DCF 52, 54, and 57 each have a provision that authorizes the department to grant an exception to a nonstatutory requirement in the chapter if the department determines that the exception will not jeopardize the health, safety, or welfare of any child and the licensee justifies the exception by describing an alternative that meets the intent of the requirement. The department will be granting exceptions to allow per client rates above the department's maximum rate to 3 residential care centers that offer programs and serve populations that are not comparable to other residential care centers. The 3 residential care centers that will be granted these exceptions are the 3 providers that submitted the hearing comments on problems with the department's maximum rate: Chileda Institute, Oconomowoc Development Training Center, and Lakeview Specialty Hospital. Granting these exceptions supports the purpose of cost containment because many of the children in these 3 residential care centers would otherwise be in hospitals or other more restrictive and expensive settings.

- The date that the department releases the maximum rates will not be changed from September 1 to August 15. Providers' proposed rates should be based primarily on the information in their cost and service reports that must be submitted to the department by July 1. The time period from September 1 (department's maximum rates released) to October 1 (deadline for providers to submit proposed rates) is sufficient for providers to determine any adjustments to their proposed rates based on the department's maximum rates.

DCF 52.66 (4), 54.09 (4), 57.62 (4) Factors to Consider in Reviewing a Proposed

Rate

Comment (1): Should add factor: "Any catastrophic event that resulted in the agency incurring costs in excess of 25% of program budget."

Affording the department the latitude to consider catastrophic events of this magnitude provides a mechanism for protecting out of home care resources that may be lost as a result of major events beyond the control of the agency.

Department response: The department does not agree that it is appropriate for public child welfare dollars to subsidize a private business for costs not directly related to the care of children. Some expenses related to a catastrophic event would be covered by other funding sources; specifically a provider's insurance would cover some or all property damage and a county would cover some or all expenses related to evacuating children.

DCF 52.68, 54.11, 57.64 Extraordinary Payments

Comment (1, 2): It violates the Americans with Disabilities Act to establish a burdensome, administrative process for children with the most severe disabilities to gain access to the same services that other children enjoy.

Comment (2):

- Section 49.343, Stats., does not authorize extraordinary payments.
- By creating a process that applies for children who have service needs that are not accounted for in a provider's maximum rate, the department seeks to create a safety valve to ease the harsh effects of creating a maximum rate.
- We will have to submit individual applications for extraordinary payments for 46 children. This is an unreasonable burden that violates the ADA. Especially because there are no appeal rights for extraordinary payments.
- DCF will cause children with the greatest need to be diverted to state psychiatric facilities.

Department response:

- Section 227.11 (2) (a) (intro.) expressly confers rulemaking authority on each agency to interpret the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of

the statute, but a rule is not valid if it exceeds the bounds of correct interpretation.

- Other comments by the Oconomowoc Developmental Training Center were addressed by granting an exception to allow its per client rate to be higher than the department's maximum rather than requiring an extraordinary payment request for each eligible child.

Comment (1): DCF 52.68 (1) A licensee may request that a ~~county~~ Wisconsin public child welfare department or the department of corrections pay an extraordinary payment in addition to the rate established under ss. DCF 52.64 to 52.67 for a specific child in care. A request for a child-specific extraordinary payment may be approved by the ~~county~~ Wisconsin public child welfare department or the department of corrections and shall be reviewed by the department.

Department response: **Department agrees.**

Rule change: DCF 52.03 (28)/54.01 (4) (L)/57.04 (45) "Wisconsin public purchaser" means a county department, the department, or the Wisconsin department of corrections.

References to "county" were changed to "Wisconsin public purchaser" in ss. DCF 52.68, 54.11, and 57.64.

Comment (1): DCF 52.68 (2)(a) The child has service needs that are not accounted for in the ~~maximum allowable rate determined~~ per client rate for the residential care center's program approved by the department under s. DCF 52.66 ~~(2)~~ (5).

Department response: **Department agrees.**

Rule change: DCF 52.68 (2) (a) The child has service needs that are not accounted for in the maximum per client rate for the residential care center program as determined under s. DCF 52.66 (5) or 52.67, as applicable.

DCF 54.11 (2) (a) The child has service needs that are not accounted for in the maximum per client administrative rate for the child-placing agency as determined under s. DCF 54.09 (5) or 54.10, as applicable.

DCF 57.64 (2) (a) The child has service needs that are not accounted for in the maximum per client rate for the group home as determined by under s. DCF 57.62 (5) or 57.63, as applicable.