

Clearinghouse Rule 15-058

STATE OF WISCONSIN
Department of Justice

PROPOSED ORDER ADOPTING PERMANENT RULES

INTRODUCTORY CLAUSE

The State of Wisconsin Department of Justice (“DOJ”) proposes to create a new subchapter in Jus 11 relating to awards made to health care providers from the Sexual Assault Forensic Exam (“SAFE”) Fund for the costs in performing sexual assault forensic examinations. Currently, DOJ pays awards from the SAFE Fund on a case-by-case basis without regulations that determine the services which are eligible for an award, requirements for billing in order to receive an award, or setting a maximum amount for an award. The proposed subchapter would delineate the services which are eligible for an award, establish procedures under which health care providers seek an award from the SAFE Fund, and set a maximum amount of an award for an examination. The proposed subchapter would also serve to notify victims of sexual assault the specific services that will be covered by the SAFE Fund.

ANALYSIS BY THE DEPARTMENT OF JUSTICE

The scope of the proposed rules was described in a scope statement that was approved by the Governor on September 25, 2014, published in the Administrative Register on October 15, 2014, and approved by the Attorney General on October 27, 2014.

Statutes interpreted: ss. 949.20 to 949.39, Stats.

Statutory authority: s. 949.22, Stats.

Explanation of Statutory Authority: Section 949.22, Stats., provides that DOJ “shall promulgate rules for the implementation and operation of this subchapter. The rules shall include procedures to ensure that any limitation of an award is calculated in a fair and equitable manner.”

Related statutes or rules: None.

Plain language analysis: The proposed rule adds a new subchapter II to Jus 11, titled Sexual Assault Forensic Examination Compensation. The existing Jus 11 will become subchapter I, titled Crime Victim Compensation. The proposed rule therefore changes all references to “this chapter” in the existing sections of Jus 11 to “this subchapter.” Otherwise, the existing Jus 11 remains unchanged.

The new rules establish the services that are “examination costs” eligible for payments from the SAFE Fund, set billing requirements for health care providers seeking an award of examination costs from the SAFE Fund, and set a maximum amount of an award for each examination. The new subchapter II contains three sections.

Proposed s. Jus 11.14 contains the statutory authority for the rules, the scope of the rules’ applicability, details regarding the administration of the subchapter, and definitions of terms used in the subchapter.

Proposed s. Jus 11.15 specifies that health care providers are to follow the statutory requirements contained in Subchapter II of chapter 949, Stats., and Section 50.375, Stats.

Proposed s. Jus 11.15 also lists the specific procedures that qualify as “examination costs” eligible for an award from the SAFE Fund. The proposed rule’s intent is to limit awards to services that meet the definition of “examination costs” in Section 949.20(3), Stats, defined as “the costs of an examination that is done to gather evidence regarding a sex offense” as well as procedures that test for sexually transmitted diseases and medications that treat or prevent

sexually transmitted diseases. The proposed rule lists seven services for which an award is available: collection of the victim's medical history; collection of a forensic history of the events of the assault; physical examination of the victim for evidence of the assault; photographs of the physical evidence of the sex offense, if the health care provider conducting the examination has been trained to take photographs for use as evidence; evaluation, testing, and prophylaxis for sexually transmitted diseases; evaluation of the risk of pregnancy; and collection of blood and urine using the collection kit provided by law enforcement. The department determined that these services would be eligible for an award by consulting the National Protocol for Sexual Assault Forensic Examinations (SAFE Protocol, 2d Edition) issued by the United States Department of Justice's Office on Violence Against Women, which is a best practices guide for conducting sexual assault medical forensic examinations.

Proposed s. Jus 11.16 specifies procedures for health care providers to follow when seeking an award from the SAFE Fund and limits the total amount that can be awarded for an examination. The proposed rule requires an itemized bill listing each charge for which an award is sought and provides that payments will be made directly to the health care provider. The proposed rule limits awards to two-thirds of the amount billed, up to \$1200 per examination. The \$1200 amount is an aggregate limit that applies even if multiple health care providers seek awards for the same examination. The \$1200 limit may be exceeded in exceptional circumstances if the limit would be unfair and unreasonable in that particular instance. Beginning in 2017, the maximum amount will be increased annually for inflation.

Summary of, and comparison with, existing or proposed federal regulation: There are no federal regulations that define the precise scope of services that must be paid for a sexual assault forensic examination or set a maximum amount for an award. Federal law requires that

victims receive examinations free of charge, that victims not be required to seek reimbursement from their insurers for the cost of the examination, and that payment not be contingent on the victim participating in the criminal justice system or cooperating with law enforcement. *See* 42 U.S.C. § 3796gg-4. Subchapter II of Chapter 949, Stats., complies with these requirements of federal law and the proposed regulations likewise comply by incorporating the requirements of Subchapter II of Chapter 949, Stats., into the proposed rule.

In addition, DOJ has relied on the National Protocol for Sexual Assault Forensic Examinations (SAFE Protocol, 2d Edition) issued by the United States Department of Justice's Office on Violence Against Women in drafting the proposed rules. While not a binding federal regulation, the SAFE Protocol is a best practices guide to conducting sexual assault medical forensic examinations produced by the U.S. Department of Justice. The proposed rules were drafted to follow the best practices outlined by the SAFE Protocol.

Comparison with rules in adjacent states:

A. Illinois

Illinois provides a list of minimum requirements for hospitals providing emergency and forensic services to sexual assault survivors, Ill. Code 410 § 70/5, and for follow-up health care provided to sexual assault survivors, Ill. Code 410 § 70/5.5.

With respect to reimbursement rates, as of July 1, 2012, Illinois “reduce[d] any rate of reimbursement for services or other payments in accordance with Section 5-5e of the Illinois Public Aid Code,” Illinois’s reimbursement rate for Medicaid. Ill. Code 410 § 70/7.

B. Iowa

Iowa will pay an examiner’s fee for collection of patient’s medical history, physical examination, collection of laboratory specimens, return visits to test for sexually transmitted

diseases, and treatment for prevention of sexually transmitted diseases. Iowa Admin. Code. r. 61-9.83(1). Iowa also pays a fee for the examination facility, including emergency room, clinic room or office room fee and pelvic tray and medically required supplies. *Id.* In addition, Iowa pays for laboratory collection and processing of specimens for criminal evidence, sexually transmitted diseases, and pregnancy testing. *Id.*

With respect to reimbursement rates, Iowa pays only charges determined by the department to be reasonable and fair. Iowa Admin. Code r. 61-9.82(2). Health care providers must submit an itemized bill listing the fee for each service. 61-9.82(2). Iowa limits payment to \$300 for the examination facility, \$200 for the examiner fee, and also pays the reasonable cost of laboratory collecting and processing for criminal evidence, sexually transmitted diseases, and pregnancy testing. *Id.* Any amounts in excess of the limits require additional documentation. *Id.*

C. Michigan

For each forensic examination, Michigan law requires the collection of a medical history, a general medical examination including use of laboratory services and dispensing prescribed pharmaceutical items, and a detailed examination of the bodily area where the assault occurred. Mich. Comp. Laws § 18.355a(1).

Michigan limits reimbursement for examination costs to \$600 total, including a limit of \$400 for facilities, \$125 for laboratory services, and \$75 for pharmaceuticals. Mich. Comp. Laws § 18.355a(7).

D. Minnesota

Minnesota law provides that the costs incurred by a health care provider in “the examination of a victim of criminal sexual conduct when the examination is performed for the purpose of gathering evidence shall be paid by the county in which the criminal sexual conduct

occurred.” Minn. Stat. § 609.35(a). It provides that “[t]hese costs include, but are not limited to, full cost of the rape kit examination, associated tests relating to the complainant’s sexually transmitted disease status, and pregnancy status.” *Id.* Thus, there is no state-wide rule in Minnesota and examination costs are handled on a county-by-county basis.

Summary of factual data and analytical methodologies: With respect to the scope of services eligible for an award, the proposed rules are based on (1) analysis by DOJ crime victim services unit staff of the best practices for conducting sexual assault forensic examinations and (2) analysis by DOJ legal staff of the definition of “examination costs” in s. 949.20(3), Stats.

With respect to the services that are covered, DOJ consulted the federal SAFE Protocol discussed above in determining the services that would be eligible for an award.

With respect to the level of reimbursement, the proposed rules are based on analysis by DOJ crime victim services staff of the amounts health care providers are currently billing the SAFE Fund for sexual assault forensic examinations as well as an analysis of the limits approved by other states. In fiscal year 2012, the SAFE Fund paid \$321,506 in examination costs for 340 exams (an average of \$945.61 per exam). In fiscal year 2013, the SAFE Fund paid \$433,567 in examination costs for 460 exams (an average of \$942.54 per exam). In fiscal year 2014, the SAFE Fund paid \$686,878 in examination costs for 720 exams (an average of \$954.00 per exam). DOJ chose the \$1200 maximum because it should allow all SAFE examination centers to be able to continue to provide services for the victims of sexual assault.

In determining the appropriate maximum amount of reimbursement, DOJ also examined the levels of reimbursement used by other states, including the neighboring states discussed above.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report: DOJ does not anticipate any economic or fiscal impact on specific businesses, business sectors, public utility ratepayers, local governments, or the State's economy as a whole. The regulations will only affect health care providers that perform sexual assault forensic examinations. Those providers which are small businesses should be able to comply with the regulation without the need for special accommodation. The costs of compliance should be minimal because the rules only require submitting an itemized bill, something which small businesses already do in the ordinary course of business to secure payment for their services.

The economic impact on the economy as a whole and the health care sector in particular will be minimal. The SAFE Fund paid \$686,878 in awards of examination costs in fiscal year 2014, which is not enough to impact the economy of the entire state or a particular sector of business. Further, the regulations would have no economic impact effect in many instances. Only health care providers that submit claims in excess of \$1200 will be affected negatively and these providers will have their awards reduced rather than eliminated completely. The regulation should not affect a substantial amount of claims, however, because the current average award is \$954.00. Health care providers also will not be paid for services which are not "examination costs" as defined in the statute, but these providers will be able to seek payment of these costs from other sources..

Effect on small business: Based on agency staff analysis and the comment and review process discussed above and in the economic impact report that is being simultaneously submitted by DOJ, pursuant to s. 227.137, Stats., DOJ has concluded that the proposed rules will not have a significant effect on small businesses.

Agency contact person: Assistant Attorney General Brian P. Keenan, Wisconsin Department of Justice, 17 West Main Street, P.O. Box 7857, Madison, Wisconsin 53707-7857; phone (608) 266-0020; email: keenanbp@doj.state.wi.us.

Place where comments are to be submitted and deadline for submission: Comments may be submitted to the contact person shown above no later than one week after the public hearing on the proposed rule is conducted. Information as to the time, date, and location of the public hearing will be published in the Wisconsin Administrative Register.

TEXT OF THE PROPOSED PERMANENT RULES

SECTION 1. Jus 11 Subchapter I (title) (precedes Jus 11.01) is created to read:

SUBCHAPTER I

CRIME VICTIM COMPENSATION

SECTION 2. Jus 11.01 (1) to (4) and (5) (intro.) are amended to read:

Jus 11.01 Description of the program. (1) **AUTHORITY AND PURPOSE.** This chapter subchapter is promulgated pursuant to s. 949.02, Stats., for the purpose of administering the awards for the victims of crimes program in Wisconsin which provides assistance to innocent victims of crimes and their families in order to ease their financial burdens.

(2) **APPLICABILITY.** This chapter subchapter applies to all persons who apply for financial assistance from the awards for the victims of crimes program and to all related matters, proceedings and hearings.

(3) **ADMINISTRATION.** Chapter 949, Stats., and this chapter subchapter shall be administered by a director appointed by the attorney general.

(4) **SERVICE AND FILING.** Papers and petitions required to be served upon, or filed with the department of justice, by this chapter subchapter shall be served either in person or by mail and shall be addressed: Wisconsin Department of Justice, Office of Crime Victim Services, 123 West Washington Avenue, Post Office Box 7951, Madison, WI 53707-7951. The papers and petitions are deemed served or filed when received by the department.

(5) **DEFINITIONS.** In this chapter subchapter:

SECTION 3: Jus 11.05 (4) (a) (intro.) and (7) are amended to read:

(4) **COLLATERAL SOURCES.** (a) Any award made under this chapter subchapter shall be reduced by the amount of any payment received, or to be received, as a result of the injury or death:

(7) AWARDS NOT SUBJECT TO ATTACHMENT. No award made under this chapter subchapter may be subject to execution, attachment, garnishment or other process, except that an award for economic loss is not exempt from a claim of a creditor to the extent that the creditor provided products, services or accommodations, the costs of which are included in the award.

SECTION 4: Jus 11.06 (1) (intro.) and (2) (intro.) are amended to read:

Jus 11.06 Mental health treatment. (1) ELIGIBLE PROVIDERS. Eligible providers of mental health treatment under this chapter subchapter include:

(2) ELIGIBLE SERVICES. Eligible types of mental health treatment under this chapter subchapter include:

SECTION 5: Jus 11.07 (2) (a) is amended to read:

Jus 11.07 (2) (a) Lack of knowledge of the provisions of ch. 949, Stats., and of this chapter subchapter does not extend the time in which an incident must be reported to a law enforcement agency.

SECTION 6: Jus 11.09 (2) (intro.), (3) (b), (c), and (h) are amended to read:

Jus 11.09 (2) PREHEARING CONFERENCE. In any action to be set for hearing, the hearing examiner may conduct a prehearing conference in person or by telephone in all proceedings for hearings under this chapter subchapter.

(3) (b) Chapter HA 1 rules of procedures and practice shall apply in all contested case hearings held under this chapter subchapter, except as specifically provided otherwise.

(c) All hearings held under this chapter subchapter shall be class 1 proceedings as defined in s. 227.01 (3) (a), Stats.

(h) The department or any of its authorized agents may issue subpoenas for persons or records for any investigation or hearing conducted under this chapter subchapter and may enforce compliance with such subpoenas as provided in s. 885.12, Stats.

SECTION 7: Jus 11.11 (1) and (2) are amended to read:

Jus 11.11 Duties of a law enforcement agency. (1) PROVIDE FORMS. The department shall prescribe application forms for awards under this chapter subchapter and shall furnish law enforcement agencies with the forms. The law enforcement agency investigating a crime shall provide forms to each person who may be eligible to file a claim.

(2) PROVIDE INFORMATION. Upon request by the department, any state or local agency, including a district attorney or law enforcement agency, shall make available all reports, files and other appropriate information which the department requests in order to make a determination that a person is eligible for an award under this chapter subchapter.

SECTION 8: Jus 11.13 (1), (4), and (5) (intro.) are amended to read:

Jus 11.13 Recovery. (1) DEPARTMENT SUBROGATION. Whenever an order for the payment of an award for personal injury or death is or has been made under this chapter subchapter, the department is subrogated to the cause of action of the claimant against the person responsible for the injury or death and may bring an action against the person for the amount of the damages sustained by the claimant. The department is also subrogated to the cause of action of the claimant against one or more 3rd parties liable for the acts of the person responsible for the injury or death. If an amount greater than that paid under the award order is recovered and collected in any such action, the department shall pay the balance to the claimant. If the person responsible for the injury or death has previously made restitution payments to the general fund under s. 973.20, Stats., any

judgment obtained by the department under this section shall be reduced by the amount of the restitution payments to the general fund.

(4) CIVIL ACTION NOT NECESSARY. In order to receive compensation under ch. 949, Stats., it is not necessary that an applicant first bring an action against the offender. If such an action is brought, and the applicant is successful, the proceeds of the action are subject to the provisions of this chapter subchapter. The department shall notify the claimant of the requirements of this paragraph at the time the department makes an award to the claimant.

(5) APPLICANT RESPONSIBILITY. If a claimant receives from any source or third party any payment for damages, injuries or economic loss for which the applicant has been previously compensated under ch. 949, Stats., and this chapter subchapter the applicant shall:

SECTION 9. Jus 11 Subchapter II is created to read:

SUBCHAPTER II

SEXUAL ASSAULT FORENSIC EXAMINATION COMPENSATION

Jus 11.14 Description of the program. (1) AUTHORITY AND PURPOSE. This subchapter is promulgated under s. 949.22, Stats., for the purpose of administering the awards of compensation to health care providers who perform sexual assault forensic examinations and providing procedures to ensure any limitation of an award is calculated in a fair and equitable manner.

(2) APPLICABILITY. This subchapter applies to all applications for an award to cover the costs of performing a sexual assault forensic examination.

(3) ADMINISTRATION. This subchapter shall be administered by the director appointed by the attorney general to administer ch. 949, Stats.

(4) SERVICE AND FILING. Papers and petitions required to be served upon, or filed with, the department of justice, shall be served either in person or by mail and shall be addressed: Wisconsin Department of Justice, Office of Crime Victim Services, 123 West Washington Avenue, Post Office Box 7951, Madison, WI 53707-7951. The papers and petitions are deemed served or filed when received by the department.

(5) DEFINITIONS. In this subchapter

(a) "Department" has the meaning specified in s. 949.20 (2), Stats.

(b) "Sex offense" has the meaning specified in s. 949.20 (7), Stats.

Jus 11.15 Eligibility for an award. (1) INCORPORATION OF SUBCHAPTER II OF CH. 949, STATS. The health care provider must follow all requirements of subch. II of ch. 949, Stats.

(2) EXAMINATION SERVICES FOR WHICH COSTS ARE COVERED. A health care provider is eligible to be paid an award for all of the following services:

(a) Collection of the victim's medical history.

(b) Collection of a forensic history of the events of the assault.

(c) Physical examination of the victim for evidence of the assault.

(d) Photographs of the physical evidence of the sex offense, if the health care provider conducting the examination has been trained to take photographs for use as evidence.

(e) Evaluation, testing, and prophylaxis for sexually transmitted diseases.

(f) Evaluation of the risk of pregnancy.

(g) Collection of blood and urine using the collection kit provided by law enforcement.

(3) RELATIONSHIP WITHS. 50.375, STATS. Nothing in this subchapter affects a health care provider's duties under s. 50.375, Stats.

Jus 11.16 Procedures for payment of awards of examination costs. (1) ITEMIZED BILL.

A health care provider seeking an award for examination costs shall provide an itemized bill to the department with individual charges listed for each service for which reimbursement is sought. The health care provider shall also indicate the amount sought for all of the following categories of examination costs:

- (a) Services of the provider.
- (b) Facilities used for the examination.
- (c) Other expenses.

(2) NO BILLING OF VICTIM. A health care provider seeking an award under this subchapter may not seek payment for any examination costs from the victim or any guardian of the victim.

(3) PAYMENT DIRECTLY TO HEALTH CARE PROVIDER. The department will pay the award directly to the health care provider that performed the examination.

(4) MAXIMUM AMOUNT OF AWARD. The department will pay two-thirds of the amount billed for eligible services, up to a maximum aggregate amount of \$1200 for each examination. The department calculated the \$1200 maximum by considering the maximum amounts of other states and the amounts health care providers billed for examination costs prior to the implementation of these rules. In exceptional cases, the director may approve an award in excess of the maximum amount if the health care provider submits evidence that it would be unfair and inequitable to limit the award to the maximum amount. Beginning January 1, 2017, the maximum amount of an award shall be adjusted annually by the “inflation factor” as defined in s. 79.05(1)(am), Stats., and certified by the department of revenue under s. 79.05(2m), Stats.

Dated this _____ day of _____, 2015.

WISCONSIN DEPARTMENT OF JUSTICE

By: _____
Brad D. Schimel, Attorney General

These permanent rules were approved in writing by the Governor on _____, 2015,
pursuant to Wis. Stat. § 227.135(2).