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CLEARINGHOUSE RULE 96-026

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

Section HSS 34.03 (8) provides, in pertinent part, that the Department of Health and Social Services (DHSS) may bar or suspend a *practitioner* from practice in a certified program under certain circumstances “after providing the *program* with prior written notice of the proposed action and notice of the opportunity for a hearing under sub. (12)...” (emphasis added). Section HSS 34.03 (12) provides an applicant or program the right to request a hearing.

Under the constitutional right to due process, it appears that notice and the right to request a hearing should also be provided to a practitioner whom DHSS proposes to bar or suspend from practice in any certified program. See also s. 227.42, Stats., which provides the right to a hearing if a substantial interest of a person is injured in fact or threatened with injury by an agency action.

2. Form, Style and Placement in Administrative Code

a. Two of the titles in the table of contents for ch. HSS 34 do not accurately reflect the titles in the text of the rule. First, the table of contents indicates that the title of subch. III is “Standards for Emergency Service Programs Eligible for Medical Assistance Program Reimbursement,” whereas the text indicates that the title is “Standards for Emergency Service Programs Eligible for Medical Assistance Program or Other Third Party Reimbursement.” Second, the table of contents indicates that the title of s. HSS 34.24 is “Program records,” whereas the text indicates that the title is “CLIENT SERVICE RECORDS.” These titles should be made consistent.

- b. The subchapter titles should be in solid capital letters. [See s. 1.05 (2) (a), Manual.]

4. Adequacy of References to Related Statutes, Rules and Forms

- a. In the fifth paragraph of the analysis, the reference to s. HSS 61.96 (4) should be to s. HSS 61.94 (6).

b. Section 49.45 (41), Stats., as created by 1995 Wisconsin Act 27, provides Medical Assistance (MA) coverage for mental health crisis intervention services provided by a program operated by, or under contract with, a county *or municipality* [defined as a city, village or town in s. 49.45 (41) (a) 2., Stats.], if the county or municipality is certified as an MA provider.

The analysis indicates that the rule sets standards for emergency mental health service programs that seek reimbursement under the MA program and the title to subch. III indicates that it does the same. However, s. HSS 34.01 (2) indicates that ch. HSS 34 applies to DHSS, counties and county-contracted agencies that request certification or are certified to provide emergency mental health services. This does not include municipalities or municipality-contracted providers.

It may be appropriate to change the analysis [and perhaps the title of ch. HSS 34 and subch. III] to indicate that the scope is more limited than is reflected in the current analysis and titles. It would also be helpful to include a reference in the analysis to the applicable rules for a municipality or municipality-contracted program or, if rules have not been created, to indicate that such rules will be created in the future.

- c. In s. HSS 34.02 (16), it is unclear why the methods of adjudicating paternity refer only to “s. 767.51, Stats., or by final order or judgment of a court of competent jurisdiction in another state” as this does not include a judgment of an Indian tribal court in Wisconsin--which s. 806.245, Stats., requires be given full faith and credit if certain conditions are met.

Unless there is a reason why paternity adjudications under subch. VIII of ch. 48, Stats. [see s. 48.422 (6) (c), Stats.], are intended to be excluded, it may be possible to resolve this issue by referring to a person who “has been adjudicated the child’s father by final order or judgment of a court of competent jurisdiction in this state or another state....”

- d. In s. HSS 34.03 (11) (a) 4., it appears that a reference to s. 940.295, Stats., abuse of patients, should be included. Was this omission intentional?

- e. In s. HSS 34.21 (2) (c), the reference to s. 111.355, Stats., should be changed to s. 111.335, Stats.

- f. In s. HSS 34.21 (3) (a), the term “supervised clinical experience” is defined only for purposes of s. HSS 34.21 (3). However, the term also appears in s. HSS 34.21 (7). It appears that the definition should not be limited to s. HSS 34.21 (3) and could be placed at the beginning of s. HSS 34.21. [It could also be placed in s. HSS 34.02, unless the term has a different meaning elsewhere in ch. HSS 34.] Also, in s. HSS 34.21 (3) (a), “subds. 1 to 9” should be replaced by “par. (b) 1. to 9.”

- g. In s. HSS 34.22 (3) (f) 4., “(3)” should be inserted before “(b).”

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. It is noted that “program” is defined in s. HSS 34.02 (18) as an emergency mental health services program certified under ch. HSS 34. While the defined term “program” is used in many places in ch. HSS 34, there are also references to “emergency mental health services program,” “basic emergency service program,” “basic emergency mental health services program” and “emergency service programs.” All of these terms appear to refer to the same concept.

In general, a defined term should be used. In rare cases, it may be appropriate to refer to the full term which is being defined. However, the use of multiple terms creates ambiguity and should be avoided. The entire rule should be reviewed for this problem.

Also, sub. (18) should be reversed with sub. (17) so that the terms appear in alphabetical order.

- b. In s. HSS 34.03 (1), a period should be inserted following the title.

c. In s. HSS 34.03 (2) (c) 1., it is unclear what is meant by the word “authorized” in the term “authorized administrative personnel.” By whom are they authorized? This suggests that statements made by certain administrative personnel may not be used to determine if there has been compliance with standards.

d. Several phrases in the rule should be hyphenated. For example, see “face to face” in s. HSS 34.02 (22), 34.21 (4) (e) and 34.22 (3) (c) (intro.); “side by side” in s. HSS 34.21 (4) (g) 2; and “out of home” in s. HSS 34.22 (3) (f) 1. a.

e. Section HSS 34.03 (3) (d) specifies that an initial certification may be limited to one year. Section HSS 34.03 (6) (a) provides that a recertification may be for a period of up to three years. However, the rule does not specify how long an initial certification may be valid for under ordinary circumstances. Was this omission intentional?

f. Throughout ch. HSS 34, different terms are used to refer to what may be the same concept; namely, “program staff member” [see, e.g., s. HSS 34.03 (8) (a)], “staff member of the program” [see, e.g., s. HSS 34.03 (8) (b)], “practitioner” [see, e.g., s. HSS 34.03 (8) (g)], “professional staff member” [see, e.g., s. HSS 34.03 (11)], “staff member” [see, e.g., s. HSS 34.03 (11) (a) 4.], “regular staff member” [see, e.g., s. HSS 34.11 (2) (c)], “individual program staff” [see, e.g., s. HSS 34.21 (7) (c)], “staff person” [see, e.g., s. HSS 34.21 (7) (c)], “staff” [see, e.g., s. HSS 34.21 (7) (d)], “program staff” [see, e.g., s. HSS 34.22 (1) (a) 8. a.] and “staff of the program” [see, e.g., s. HSS 34.23 (2) (b)].

If these terms have the same meaning, one term should be selected and used consistently. If they have different meanings, for example, if “practitioner” is not the same as a “program staff member,” the terms should be defined and used appropriately.

Also, it is not clear if a “mental health professional” under s. HSS 34.21 (7) (k) is the same as “professional staff” under s. 34.21 (3) (b). If they are, this could be clarified by a cross-reference or by using one term consistently.

g. Section HSS 34.03 (8) (intro.) indicates that *whenever* DHSS finds any of the conditions specified in s. HSS 34.03 (8) (a) to (h), DHSS *may* terminate, suspend or refuse to renew a program's certification. However, s. HSS 34.03 (9) (c) specifies that if any of the conditions in s. HSS 34.03 (8) are determined to exist during an inspection, DHSS *shall* suspend or terminate the program's certification. This ambiguity with respect to DHSS's duty should be clarified. For example, if s. HSS 34.03 (9) was intended to override s. HSS 34.03 (8) (intro.), then the phrase "except as provided in s. HSS 34.03 (9)," could be added to s. HSS 34.03 (8).

h. For purposes of s. HSS 34.03 (9) (c) and (d) and (10) (a), it is unclear what "major deficiency," as opposed to a "minor deficiency," means.

i. Section HSS 34.04 provides for waivers to requirements in ch. HSS 34. It appears that certain waivers may be applicable to an individual rather than a program, for example, an individual who would be barred from providing services in a certified program under s. HSS 34.03 (14). Therefore, it appears that s. HSS 34.04 (3) should indicate that DHSS may require additional information from the applicant for a waiver rather than indicating only that DHSS may require additional information from the "program."

j. In s. HSS 34.11, a period should be inserted following the title.

k. In s. HSS 34.11 (1) (b), the reference to "the other 2 programs" is unclear.

l. Section HSS 34.11 (2) (b) refers to "inservice training approved by the department." However, s. HSS 34.21 (8), which relates to training, does not specify any approval process for training. Section HSS 34.11 (2) (b) should explain how approval for this training is to be requested.

m. In ss. HSS 34.11 (2) (a) and 34.21 (3) (a) and (b) 10., a period should be inserted following the reference to each subdivision number.

n. In s. HSS 34.21 (1) (a), the word "The" should be changed to "An".

o. In s. HSS 34.21 (2) (d), the word "The" should be changed to "A".

p. While there is a reason to distinguish persons described by s. HSS 34.21 (3) (b) 2. from those described by s. HSS 34.21 (3) (b) 3., the wording of s. HSS 34.21 (3) (b) 2. is inappropriate. Section HSS 34.21 (3) (b) 2. specifies that "[l]icensed psychologists shall be licensed under ch. 455, Stats., and shall be listed or meet the requirements for listing with the national register of health service providers in psychology." This does not permit any other description of the term "licensed psychologist." However, s. HSS 34.21 (3) (b) 3. specifies that "[o]ther licensed psychologists shall be licensed under ch. 455, Stats., and have a minimum of..."

This inconsistency should be remedied. A qualifier could be added to s. HSS 34.21 (3) (b) 2., such as "Except as provided in subd. 3., licensed psychologists shall be..."

q. In s. HSS 34.21 (3) (b) 9., it appears that the term "supervised post graduate clinical experience" should be changed to the defined term "supervised clinical experience." [See s. HSS 34.21 (3) (a).]

r. In s. HSS 34.22 (1) (a) 5., the term “process to be used which address” should be changed to “process to be used which addresses.”

s. In s. HSS 34.22 (1) (a) 8. (intro.), the term “county, and the county corporation counsel” should be changed to “county, or the county corporation counsel.”

t. Section HSS 34.22 (1) (a) and (b), as well as other subsections in s. HSS 34.22, refer to the “coordinated emergency mental health services plan,” whereas s. HSS 34.22 (1) (c) refers to the “coordinated community services plan.” One term should be selected and used consistently.

u. Several sections include lists which are introduced by a lead-in phrase that does not make clear whether all or some of the entries which follow apply. These should be clarified as follows:

- (1) In s. HSS 34.03 (8) (intro.) and (11) (intro.), “any of the following have occurred” should be inserted before the colon.
- (2) At the end of s. HSS 34.22 (1) (a) 8. (intro.), a lead-in phrase should be used to connect subd. pars. a. to c. For example, the word “which” could be changed to “which do any of the following:”. Also, since the noun modified in s. HSS 34.22 (1) (a) 8. (intro.) is “agreements,” then the verbs in s. HSS 34.22 (1) (a) 8. a. to c. should be pluralized.
- (3) In s. HSS 34.22 (2) (intro.), the phrase “have the following” should be changed to “have all of the following.”
- (4) In s. HSS 34.22 (3) (intro.), the phrase “of the following” should be changed to “of all of the following.”
- (5) In s. HSS 34.22 (3) (a) (intro.), the phrase “shall:” should be changed to “shall do all of the following:”.
- (6) In s. HSS 34.22 (3) (a) 1. (intro.) and (c) 1. (intro.), the phrase “achieving the following” should be changed to “achieving [all] [one or more] of the following.” [It is noted that s. HSS 34.22 (3) (b) 1. (intro.) refers to “achieving one or more of the following outcomes:”.] This comment also applies to s. HSS 34.22 (3) (d) 1. (intro.), (e) 1. (intro.) and (f) 1. (intro.) and (4) (a) 1. (intro.)]
- (7) In s. HSS 34.22 (3) (b) (intro.), the phrase “service shall:” should be changed to “service shall do all of the following:”.
- (8) In s. HSS 34.22 (3) (c) (intro.), the term “shall:” should be changed to “shall do all of the following:”. This comment also applies to s. HSS 34.22 (3) (d) (intro.), (e) (intro.) and (f) (intro.)
- (9) In s. HSS 34.22 (4) (a) (intro.), a qualifying phrase should be used to connect subds. 1. to 4., such as “shall do all of the following:”.

- (10) In s. HSS 34.23 (2) (k) (intro.), a lead-in phrase should be used, such as “for doing all of the following:”.
 - (11) In s. HSS 34.23 (8) (intro.), a lead-in phrase should be used, such as “describe all of the following:”.
 - (12) In s. HSS 34.26 (1) (intro.), a lead-in phrase should be used, such as “may include any of the following:”. [However, if it was intended that at least one of the items should be included, then the phrase should be “shall include one or more of the following:”.]
 - (13) In s. HSS 34.26 (4) (intro.), a lead-in phrase should be used, such as “indicating all of the following:”.
- v. In s. HSS 34.22 (3) (c) (intro.), the phrase “a unscheduled” should be changed to “an unscheduled.”
- w. In s. HSS 34.22 (3) (f), it is unclear what is meant by the word “adolescents.” In the statutes, the term “child” or “children” is typically defined as persons under age 18. Therefore, it does not appear to be necessary to use the term “adolescents.”
- x. In s. HSS 34.22 (4) (a) 4., a space should be inserted so that “1.to 9.” reads “1. to 9.”
- y. In s. HSS 34.23 (1), a comma should be inserted following the word “services.”
- z. In s. HSS 34.23 (5) (b), the word “holidays” should be “legal holidays.”