

Title of Proposed Rule: Civil and Forensic Mental Health—Removal from Behavioral Health

CDHS Tracking #: 23-03-38-01

Office, Division, & Program:
OCFMH

Rule Author:
Samantha Garrett

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RULEMAKING PACKET

Type of Rule: *(complete a and b, below)*

- a. Board Executive Director
b. Regular Emergency

This package is submitted to State Board Administration as: *(check all that apply)*

- AG Initial Review Initial Board Reading AG 2nd Review Second Board Reading / Adoption

This package contains the following types of rules: *(check all that apply)*

Number
_____ Amended Rules
_____ New Rules
2 Repealed Rules
_____ Reviewed Rules

What month is being requested for this rule to first go before the State Board?	May 2023
What date is being requested for this rule to be effective?	July 30, 2023
Is this date legislatively required?	No

I hereby certify that I am aware of this rule-making and that any necessary consultation with the Executive Director's Office, Budget and Policy Unit, and Office of Information Technology has occurred.

Office Director Approval: _____ **Date:** _____

REVIEW TO BE COMPLETED BY STATE BOARD ADMINISTRATION

Comments:

Estimated Dates: 1st Board 5/5/2023 2nd Board 6/9/2023 Effective Date 7/30/2023

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STATEMENT OF BASIS AND PURPOSE

Summary of the basis and purpose for new rule or rule change.

*Explain why the rule or rule change is necessary and what the program hopes to accomplish through this rule. **1500 Char max***

Since the Behavioral Health Administration's (BHA) separation from the Office of Behavioral Health, now the Office of Civil and Forensic Mental Health (OCFMH), statute requires the BHA to promulgate a number of rules to codify their changing work. Rules that only affect OCFMH, and not the BHA, need to be separated out from other behavioral health regulations so that the BHA can effectively develop their new rules. This rule change will create a separate section of rule for Civil and Forensic Mental Health, separate from behavioral health regulations overseen by the BHA.

An emergency rule-making (which waives the initial Administrative Procedure Act noticing requirements) is necessary:

- to comply with state/federal law and/or
- to preserve public health, safety and welfare

Justification for emergency:

State Board Authority for Rule:

Code	Description
26-1-107(5)(b), C.R.S. (2022)	State Board to promulgate rules for programs administered and services provided by the state department as set forth in titles 26 and 27 of the C.R.S.
26-1-109(1), C.R.S. (2022)	State department rules to coordinate with federal programs
26-1-111, C.R.S. (2022)	State department to promulgate rules for public assistance and welfare activities.

Program Authority for Rule: *Give federal and/or state citations and a summary of the language authorizing the rule-making function AND authority.*

Code	Description
27-50-107(3)(a), C.R.S. (2022)	Promulgation of rules necessary to carry out the behavioral health program administered by the BHA
27-90-103, C.R.S. (2022)	State Board to promulgate rules as necessary to implement the programs administered and the services provided by the department as provided in Title 27.

- Does the rule incorporate material by reference? Yes No
- Does this rule repeat language found in statute? Yes No

If yes, please explain.

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REGULATORY ANALYSIS

1. List of groups impacted by this rule.

Which groups of persons will benefit, bear the burdens or be adversely impacted by this rule?

The BHA will benefit. No burden or adverse impact.

2. Describe the qualitative and quantitative impact.

How will this rule-making impact those groups listed above? How many people will be impacted? What are the short-term and long-term consequences of this rule?

The BHA will have the flexibility to promulgate necessary and statutorily required rules without rules for Civil and Forensic Mental Health appearing in the same section, which could be confusing.

3. Fiscal Impact

*For each of the categories listed below explain the distribution of dollars; please identify the costs, revenues, matches or any changes in the distribution of funds even if such change has a total zero effect for any entity that falls within the category. If this rule-making requires one of the categories listed below to devote resources without receiving additional funding, please explain why the rule-making is required and what consultation has occurred with those who will need to devote resources. **Answer should NEVER be just “no impact” answer should include “no impact because....”***

State Fiscal Impact (Identify all state agencies with a fiscal impact, including any Colorado Benefits Management System (CBMS) change request costs required to implement this rule change)

No impact, as this packet merely strikes rules in order to move them to a new section

County Fiscal Impact

No impact, as this packet merely strikes rules in order to move them to a new section

Federal Fiscal Impact

No impact, as this packet merely strikes rules in order to move them to a new section

Other Fiscal Impact (such as providers, local governments, etc.)

No impact, as this packet merely strikes rules in order to move them to a new section

4. Data Description

List and explain any data, such as studies, federal announcements, or questionnaires, which were relied upon when developing this rule?

N/A

5. Alternatives to this Rule-making

*Describe any alternatives that were seriously considered. Are there any less costly or less intrusive ways to accomplish the purpose(s) of this rule? Explain why the program chose this rule-making rather than taking no action or using another alternative. **Answer should NEVER be just “no alternative” answer should include “no alternative because...”***

No alternative because the rules must be maintained but separated from BHA rules.

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OVERVIEW OF PROPOSED RULE

Compare and/or contrast the content of the current regulation and the proposed change.

Rule section Number	Issue	Old Language	New Language or Response	Reason / Example / Best Practice	Public Comment No / Detail
21.800	Included with BHA rules	Removed	Moved to 2 CCR 505-1	Separation of BHA rules from OCFMH rules	
21.900	Included with BHA rules	Removed	Moved to 2 CCR 505-1	Separation of BHA rules from OCFMH rules	

STAKEHOLDER COMMENT SUMMARY

Development

The following individuals and/or entities were included in the development of these proposed rules (such as other Program Areas, Legislative Liaison, and Sub-PAC):

The BHA and CDHS legislative team were engaged in determining that it would be necessary to move these regulations to a new section of rule.

This Rule-Making Package

The following individuals and/or entities were contacted and informed that this rule-making was proposed for consideration by the State Board of Human Services:

The BHA and CDHS legislative team were informed that proposed rule changes were moving forward. A notification of the upcoming rule changes was included in the April 2023 OCFMH newsletter for stakeholders.

Other State Agencies

Are other State Agencies (such as HCPF or CDPHE) impacted by these rules? If so, have they been contacted and provided input on the proposed rules?

Yes No

If yes, who was contacted and what was their input?

Sub-PAC

Have these rules been reviewed by the appropriate Sub-PAC Committee?

Yes No

Name of Sub-PAC			
Date presented			
What issues were raised?			
Vote Count	<i>For</i>	<i>Against</i>	<i>Abstain</i>
If not presented, explain why.	No substantive change to existing rules		

PAC

Have these rules been approved by PAC?

Yes No

Date presented			
What issues were raised?			
Vote Count	<i>For</i>	<i>Against</i>	<i>Abstain</i>
If not presented, explain why.	No substantive change to existing rules		

Other Comments

Comments were received from stakeholders on the proposed rules:

Yes No

If "yes" to any of the above questions, summarize and/or attach the feedback received, including requests made by the State Board of Human Services, by specifying the section and including the Department/Office/Division response. Provide proof of agreement or ongoing issues with a letter or public testimony by the stakeholder.

**EXAMPLE OF RULES WITH
SECRETARY OF STATE'S STYLE CODING
REPLACE WITH YOUR OWN RULES**

(2 CCR 502-1, Behavioral Health)

~~**21.800 UNIFORM METHOD OF DETERMINING ABILITY TO PAY FOR ANY PERSON WHO RECEIVES SERVICES FROM ANY PUBLIC INSTITUTION SUPERVISED BY THE DEPARTMENT OF HUMAN SERVICES FOR THE CARE, SUPPORT, MAINTENANCE, EDUCATION OR TREATMENT OF THE MENTALLY ILL OR DEVELOPMENTALLY DISABLED**~~

~~**21.810 STATUTORY AUTHORITY**~~

~~The statutory authority for these rules and regulations is found at Sections 27-92-101 through 27-92-109, C.R.S.~~

~~**21.820 DEFINITIONS**~~

~~“Ability to Pay” is the amount of the legally responsible person's income and assets available to pay for the individual cost of care, support, maintenance, treatment, and education at the institution.~~

~~“Adjusted Assets” is the balance of the assets of the legally responsible person(s) after allowed asset deductions.~~

~~“Adjusted Charge” is the charge for hospital care, support, maintenance and treatment, up to but not exceeding the ability to pay of the responsible person(s).~~

~~“Adjusted Income” is the balance of the total gross monthly income of the legally responsible person(s) after allowed income deductions.~~

~~“Allowed Asset Deduction” includes liabilities; the value of the equity in the home; assets which are specifically targeted for retirement and which are not available for other purposes; and the Supplemental Security Income (SSI) asset allowance for each legally responsible parent, patient, spouse, and other dependent.~~

~~“Allowed Income Deduction” includes withholding taxes, employee union or association dues, mandatory retirement deductions, health insurance premiums, conservator fees, one twelfth of the federal personal exemption allowance for each dependent, and child support and/or alimony payments.~~

~~“Colorado Net Taxable Income” refers to the calculation on the State of Colorado Income Tax Form, and reportable under Colorado law, which is used as the base against which state tax liability is determined.~~

~~“Cost of Care” refers to the full rate multiplied by the number of days of care provided.~~

~~“Department” refers to the Colorado Department of Human Services.~~

~~“Dependent” is an individual who qualifies as a dependent under Internal Revenue Service (IRS) regulations for federal income tax purposes.~~

~~“Executive Director” refers to the Executive Director of the Department.~~

~~“Federal Personal Exemption Allowance” refers to the dollar amount allowed by the IRS for each dependent.~~

~~“Full Rate” refers to the institution's daily rate, which is determined periodically, based on the cost for care, support, maintenance, treatment and education of patients, as approved by the Executive Director.~~

~~“Institution” refers to any public institution of this state supervised by the Department of Human Services for the care, support, maintenance, education, or treatment of the mentally ill or developmentally disabled.~~

~~“Insurance and Other Benefits” includes all insurance, health maintenance organizations, Medicare, Medicaid, and any other resources covering the cost of care, support, maintenance, or treatment by the institution.~~

~~“Legally Responsible Person(s)” is the patient, fiduciary, spouse, and parent(s) of children under 18 years of age, as applicable.~~

~~“Patient” refers to any person admitted, committed or transferred to any public institution of this state supervised by the Department of Human Services for the care, support, maintenance, education or treatment of the mentally ill or developmentally disabled.~~

~~“Personal Needs Allowance” refers to the uniform dollar amount determined by the Department to be available to each patient receiving income from a benefit or employment, which may be used for items not provided by the institution.~~

~~“SSI Asset Allowance” refers to the maximum dollar amount of assets that an individual is allowed to retain and still qualify for the Supplemental Security Income (SSI) Program.~~

~~21.830 INTRODUCTION~~

~~These rules are intended to provide the method used to assess charges at the public institutions under the supervision of the Department of Human Services for the care, support, maintenance, education, or treatment of the mentally ill or developmentally disabled. No person shall be denied admission because of inability to pay. These rules and regulations do not apply to individuals at these institutions who are receiving services under federally funded programs whose rules conflict with these rules.~~

~~21.840 PROCESS OF DETERMINING ABILITY TO PAY AND ADJUSTED CHARGE~~

~~A. Insurance and Other Benefits~~

~~Insurance and other benefits shall be applied first to the cost of care. Insurance and other benefits for any patient shall be billed at the cost of care. A legally responsible person who fails to cooperate in making existing insurance and other benefits available for payment will nevertheless be considered as having benefits available for payment.~~

~~B. Calculation of Ability to Pay~~

~~The ability to pay shall be calculated taking into consideration the factors in Section 27-92-104, C.R.S., and using the schedule in Section 21.860 of these rules and regulations.~~

~~C. Determination of Adjusted Charge~~

~~The adjusted charge shall be the balance of the cost of care after insurance and other benefits have been deducted, or the ability to pay, whichever is less. If the legally responsible person(s) does not cooperate in making insurance and other benefits available, the legally responsible person(s) will be billed for the amount equal to the dollar value of the insurance or benefits in addition to the lesser of the balance of the cost of care or the ability to pay. If the dollar value of insurance and other benefits cannot be determined, the legally responsible person(s) will be billed the full cost of care.~~

~~D. Modifications~~

A legally responsible person whose income is substantially reduced as a result of changed financial circumstances after the ability to pay has been determined, may request a redetermination and provide the hospital with evidence of financial change so that a new ability to pay may be determined based on current income and assets. Should there be an increase in income, assets, insurance or other benefits, this information must be reported to the institution within sixty (60) calendar days of the changed financial circumstances so that an appropriate redetermination of the ability to pay can be made.

~~21.850 FACTORS AFFECTING THE DETERMINATION OF ABILITY TO PAY~~

The following factors are considered in the determination of ability to pay, in accord with Section 27-92-104, C.R.S.

A. ~~Length of a Patient's Care and Treatment~~

To avoid undue hardship on patients and/or their families, the ability to pay is reduced after the sixth calendar month of treatment.

B. ~~Medical and Physical Condition of Dependents~~

To avoid undue hardship on families, monthly payments for medical services for dependents with serious mental or physical conditions may be deducted from income when the adjusted income is determined, provided adequate supporting documentation is submitted to the institution.

~~21.860 SCHEDULE FOR DETERMINING THE ABILITY TO PAY~~

The ability to pay of the legally responsible person(s) is the sum of the monthly adjusted income and the monthly adjusted assets available to pay for the cost of care, support, maintenance, treatment, and education at the institution.

The monthly adjusted assets considered available to pay for care, support, maintenance and treatment is one (1) percent of adjusted assets.

The following table is used to calculate the monthly adjusted income considered available to pay for care, support, maintenance, treatment, and education.

~~MONTHLY ADJUSTED INCOME AVAILABLE TO PAY FOR CARE, SUPPORT, MAINTENANCE, TREATMENT AND EDUCATION~~

<u>Adjusted Income</u>	<u>1st - 6th Calendar Months</u>	<u>7th and Subsequent Calendar Months</u>
	—Percent of Adjusted Income Available	
\$0 - \$ 499	20%	15%
\$500 - \$ 999	30%	25%
\$1,000 - \$1,499	35%	30%
\$1,500 - \$1,999	40%	35%
\$2,000 and above	45%	40%

~~21.870 ADDITIONAL FACTORS AFFECTING THE ABILITY TO PAY AND THE ADJUSTED CHARGE~~

A. ~~For legally responsible parents of children under eighteen (18) years of age, the monthly adjusted income available in the seventh and subsequent calendar months shall be one percent of Colorado Net Taxable Income.~~

B. — For single patients receiving only fixed income benefits, or when a husband and wife both reside in an institution or other health care facility and receive only fixed income benefits, the monthly adjusted income available will be the amount of these benefits, less the personal needs allowance and any other applicable deductions.

21.900 COMPETENCY EVALUATIONS IN CRIMINAL CASES

These rules are established to create standards for psychologists and psychiatrists wishing to become approved as evaluators of competency to proceed.

21.910 DEFINITIONS

“Approved evaluator” means an evaluator who is currently employed by CDHS; or has completed the application process through the Colorado Mental Health Institute at Pueblo (CMHIP) Court Services Division and is providing services under an active purchase order or a personal services contract, or as a fellow in forensic psychology or psychiatry training.

“Board Certification” in forensic psychiatry or forensic psychology means recognition of specialized training and knowledge in the field of forensic psychiatry by the American Board of Psychiatry and Neurology (ABPN), or in the field of forensic psychology by the American Board of Forensic Psychology (ABFP); no amendments or editions are incorporated. These board certification requirements may be reviewed during regular business hours by contacting the Superintendent of the Colorado Mental Health Institute in Pueblo, 1600 W. 24th Street, Pueblo, Colorado; or a state publications library.

“Competency Evaluator” means a licensed physician who is a psychiatrist or a licensed psychologist, each of whom is trained in forensic competency assessments, or a psychiatrist who is in forensic training and practicing under the supervision of a psychiatrist with expertise in forensic psychiatry and who is an approved evaluator, or a psychologist who is in forensic training and is practicing under the supervision of a licensed psychologist with expertise in forensic psychology and who is an approved evaluator.

“Competent to Proceed” means that the defendant does not have a mental disability or developmental disability that prevents the defendant from having sufficient present ability to consult with the defendant's lawyer with a reasonable degree of rational understanding in order to assist in the defense, or prevents the defendant from having a rational and factual understanding of the criminal proceedings.

“Court-Ordered Competency Evaluation” means a court-ordered examination of a defendant either before, during, or after trial, directed to developing information relevant to a determination of the defendant's competency to proceed at a particular stage of the criminal proceeding, that is performed by a competency evaluator and includes evaluations concerning restoration to competency.

“Forensic” means relating to or dealing with the application of scientific knowledge to the legal issues of defendants in criminal proceedings.

“Incompetent to proceed” means that, as a result of a mental disability or developmental disability, the defendant does not have sufficient present ability to consult with the defendant's lawyer with a reasonable degree of rational understanding in order to assist in the defense, or that, as a result of a mental disability or developmental disability, the defendant does not have a rational and factual understanding of the criminal proceedings.

21.920 APPLICATION PROCESS

Individuals other than independent contractors or those providing services under an active purchase order or personal services contract wishing to become an approved evaluator shall contact the Director of Court Services at the Colorado Mental Health Institute at Pueblo (CMHIP) for application information, and the following shall be submitted to the CMHIP:

A. — A completed application form;

- B. ~~Verification of licensure as a psychiatrist or psychologist;~~
- C. ~~Verification of board certification in forensic psychiatry from the ABPN or board certification in forensic psychology from the ABFP, when relevant;~~
- D. ~~Proof of current malpractice insurance;~~
- E. ~~A minimum of two work samples, preferably forensic reports;~~
- F. ~~A minimum of three professional references.~~

~~21.930 TRAINING~~

~~21.931 APPROVED EVALUATORS~~

- A. ~~All approved evaluators shall have received training as specified in these rules, consisting of at least six hours of classroom instruction. This initial training shall, at a minimum, cover the following elements:~~
 - 1. ~~Legal background and legal standards for competency to proceed and competency to stand trial;~~
 - 2. ~~Forensic versus clinical evaluation, ethical issues and challenges in competency evaluations, dual relationships, constitutional protections for defendants, informed consent in defendants with severe mental illnesses, and communication with attorneys;~~
 - 3. ~~Interviewing for competency to proceed;~~
 - 4. ~~Assessment of malingering;~~
 - 5. ~~Use of third party (collateral) data and resources;~~
 - 6. ~~Working with the difficult defendant;~~
 - 7. ~~Evaluating developmentally delayed defendants;~~
 - 8. ~~Special issues in evaluating juveniles;~~
 - 9. ~~Writing the competency or restoration report;~~
 - 10. ~~Acting as an expert witness; and,~~
 - 11. ~~Unique requests from the court, such as for evaluations for competency to waive the right to counsel.~~
- B. ~~Exemptions to Initial Training~~
 - 1. ~~Evaluators who are board certified in forensic psychiatry by the ABPN or board certified in forensic psychology by the ABFP shall be considered exempt from this initial training requirement.~~
 - 2. ~~Evaluators who are in forensic training and practicing under the supervision of a licensed psychiatrist who is an approved evaluator and who has expertise in forensic psychiatry, or a licensed psychologist who is an approved evaluator and who has expertise in forensic psychology, may practice without the initial training; however, it is expected that these evaluators will receive equivalent education during the course of their training programs.~~

3. ~~Independent contractors or individuals providing services under an active purchase order or personal services contract are not subject to the training requirements in Section 21.931, A.~~

C. ~~Ongoing Training~~

~~Approved evaluators other than independent contractors or individuals providing services under an active purchase order or personal services contract shall participate in at least four hours of ongoing training annually. Training will be made available at least annually by staff of the Court Services Division; alternative training to fulfill this requirement may be substituted for that offered by the Court Services Division, with prior approval from the Director of Court Services.~~

~~21.932 MENTORING~~

~~Mentoring shall be made available to approved CDHS employed evaluators. Mentoring will be provided by senior clinical staff from the CMHIP Court Services Division whenever possible.~~

- A. ~~Approved CDHS employed evaluators wishing to participate in mentoring will be provided the opportunity to observe one or more evaluations being conducted by senior clinical staff of CMHIP Court Services, and to conduct one or more evaluations while being observed by senior clinical staff of the CMHIP Court Services Division.~~
- B. ~~Approved CDHS employed evaluators wishing to participate in mentoring shall be required to travel to CMHIP to receive this additional training.~~

~~21.940 STANDARDS FOR CONDUCTING EVALUATIONS AND ESTABLISHING A REPORT~~

~~Each report shall conform with the requirements for report content as set forth in Section 16-8.5-105(5), C.R.S., and in accordance with best practices for forensic assessment of competency to stand trial.~~

~~21.950 QUALITY ASSURANCE~~

~~All approved evaluators shall have one or more of their competency or restoration reports reviewed at least annually by a senior CMHIP Court Services Division evaluator or his or her designee.~~

- A. ~~All approved evaluators shall have their first two reports reviewed by the senior CMHIP Court Services Division evaluator, or his or her designee, with additional reports being reviewed as necessary.~~
- B. ~~Any and all reports submitted by approved evaluators are subject to review.~~

[Note: Changes to rule text are identified as follows: deletions are shown as “strikethrough”, additions are in “All Caps”, and changes made between initial review and final adoption are in [brackets] or highlighted yellow]

[Note: The entire section is new because the rules are new to the current section, but all caps and strikethrough in this section denote additions and deletions from the rules that previously appeared at 2 CCR 502-1]