

Dear Senators HEIDER, Nuxoll, Bock, and  
Representatives WOOD, Perry, Rusche:

The Legislative Services Office, Research and Legislation, has received the enclosed rules of the Department of Health and Welfare:

IDAPA 16.07.33 - Rules Pertaining To Adult Mental Health Services (Docket No. 16-0733-1301).

Pursuant to Section 67-454, Idaho Code, a meeting on the enclosed rules may be called by the cochairmen or by two (2) or more members of the subcommittee giving oral or written notice to Research and Legislation no later than fourteen (14) days after receipt of the rules analysis from Legislative Services. The final date to call a meeting on the enclosed rules is no later than 10/15/2013. If a meeting is called, the subcommittee must hold the meeting within forty-two (42) days of receipt of the rules analysis from Legislative Services. The final date to hold a meeting on the enclosed rules is 11/12/2013.

The germane joint subcommittee may request a statement of economic impact with respect to a proposed rule by notifying Research and Legislation. There is no time limit on requesting this statement, and it may be requested whether or not a meeting on the proposed rule is called or after a meeting has been held.

To notify Research and Legislation, call 334-4845, or send a written request to the address on the memorandum attached below.



Jeff Youtz  
Director

# Legislative Services Office Idaho State Legislature

*Serving Idaho's Citizen Legislature*

## MEMORANDUM

**TO:** Rules Review Subcommittee of the Senate Health & Welfare Committee and the House Health & Welfare Committee  
**FROM:** Senior Legislative Research Analyst - Ryan Bush  
**DATE:** September 25, 2013  
**SUBJECT:** Department of Health and Welfare - Adult Mental Health Services

IDAPA 16.07.33 - Rules Pertaining To Adult Mental Health Services (Docket No. 16-0733-1301)

The Department of Health and Welfare submits notice of proposed rulemaking at IDAPA 16.07.33 - Rules Pertaining To Adult Mental Health Services. The Department states that the proposed rule provides an administrative review on a case-by-case basis for those who do not receive a criminal history clearance to request a waiver and provides for this waiver to help establish a peer delivery system for providers of adult mental health services. The Department further states that it has received complaints from mental health service providers regarding the current rule as it negatively impacts their workforce and ability to provide mental services. The Department believes that this rule protects the client and acknowledges those who have been successful in their recovery by allowing them to work in mental health. Specifically, this rulemaking accomplishes the following:

- (1) Revises the list of those who must comply with criminal history and background checks;
- (2) Establishes new procedures and availability to work for those who submit to a criminal history and background check;
- (3) Provides for a waiver of criminal history and background check for an individual who receives a denial;
- (4) Designates crimes for which no waiver will be granted;
- (5) Provides for administrative review for a waiver and the process and factors to be considered for such review;
- (6) Provides for employer responsibility; and
- (7) Provides a definition for "Good Cause."

The Department states that negotiated rulemaking was conducted and that a Notice of Intent to Promulgate Rules was published in the April edition of the Idaho Administrative Bulletin, Vol. 13-4, pages 15-16. A public hearing was held in Boise on September 10 with videoconferencing available at each of the Department's regional offices. There is no fiscal impact associated with this rulemaking.

Mike Nugent, Manager  
Research & Legislation

Cathy Holland-Smith, Manager  
Budget & Policy Analysis

April Renfro, Manager  
Legislative Audits

Glenn Harris, Manager  
Information Technology

The proposed rule appears to be within the statutory authority granted to the Department in Sections 56-202(b) and 39-4605, Idaho Code.

cc: Department of Health and Welfare - Adult Mental Health Services  
Tamara Prisock  
Treena Clark

**IDAPA 16 - DEPARTMENT OF HEALTH AND WELFARE**

**16.07.33 - ADULT MENTAL HEALTH SERVICES**

**DOCKET NO. 16-0733-1301**

**NOTICE OF RULEMAKING - PROPOSED RULE**

**AUTHORITY:** In compliance with Section 67-5221(1), Idaho Code, notice is hereby given that this agency has initiated proposed rulemaking procedures. The action is authorized pursuant to Sections 39-4605, Idaho Code.

**PUBLIC HEARING SCHEDULE:** Public hearings concerning this rulemaking will be held as follows:

**\*ORIGINATING LOCATION -- LIVE MEETING\***

**Tuesday, September 10, 2013**

**12:30 - 2:30 pm (PDT) -- 1:30 - 3:30 pm (MDT)**

**Idaho Department of Health and Welfare, Central Office  
Conference Room 3A (3rd floor)  
450 West State Street  
Boise, ID 83702**

**\*VIDEOCONFERENCE LOCATIONS\***

<b>Region I Office – Coeur d’Alene Main Conference Room 2195 Ironwood Court Coeur d’Alene, ID 83814</b>	<b>Region II Office – Lewiston 1st Floor Conference Rm. 1118 “F” Street Lewiston, ID 83501</b>
<b>Region III Office – Caldwell Owyhee Conference Room (Rm. 226) 3402 Franklin Road Caldwell, ID 83605</b>	<b>Region IV Office – Boise Room 142 1720 Westgate Drive, Suite A Boise, ID 83704</b>
<b>Region V Office – Twin Falls Room 116 823 Harrison Twin Falls, ID 83301</b>	<b>Region VI Office – Pocatello Room 225 421 Memorial Drive Pocatello, ID 83201</b>
<b>Region VII Office – Idaho Falls Conference Room 240 150 Shoup Ave. Idaho Falls, ID 83402</b>	

The hearing site(s) will be accessible to persons with disabilities. Requests for accommodation must be made not later than five (5) days prior to the hearing, to the agency address below.

**DESCRIPTIVE SUMMARY:** The following is a nontechnical explanation of the substance and purpose of the proposed rulemaking:

The Division of Behavioral Health (DBH) is currently working on building a peer delivery system and one issue that has come up as a barrier in Idaho is the requirement around criminal history and background checks. The current requirement does not work for the services that are being provided nor does it fit the model of services that is being promoted. DBH has received complaints from mental health service providers regarding the current rule as it negatively impacts their workforce and ability to provide mental health services.

DBH has negotiated with providers and other interested parties to develop a criminal history and background check rule that both protects the client and acknowledges those who have been successful in their recovery by allowing them to work in the mental health field. The text of these proposed rule changes provides an administrative review on a case-by-case basis for individuals who do not receive a criminal history clearance to request a waiver. These rules provide for this waiver to help establish a peer delivery system for providers of adult mental health services.

**FEE SUMMARY:** The following is a specific description of the fee or charge imposed or increased: None.

**FISCAL IMPACT:** The following is a specific description, if applicable, of any fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year:

There is no anticipated fiscal impact to the state general fund due to this rulemaking.

**NEGOTIATED RULEMAKING:** Pursuant to Section 67-5220(1), Idaho Code, negotiated rulemaking was conducted. The Notice of Intent to Promulgate Rules - Negotiated Rulemaking was published in the April 3, 2013, Idaho Administrative Bulletin, [Vol. 13-4, pages 15 and 16](#), under Docket No. 16-0720-1301.

**INCORPORATION BY REFERENCE:** No materials are being incorporated by reference into these rules.

**ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS:** For assistance on technical questions concerning the proposed rule, contact Treena Clark at (208) 364-6611.

Anyone may submit written comments regarding this proposed rulemaking. All written comments must be directed to the undersigned and must be delivered on or before September 25, 2013.

DATED this 1st day of August, 2013.

Tamara Prisock  
DHW - Administrative Procedures Section  
450 W. State Street - 10th Floor  
P.O. Box 83720  
Boise, ID 83720-0036  
phone: (208) 334-5564; fax (208) 334-6558  
e-mail: [dhwrules@dhw.idaho.gov](mailto:dhwrules@dhw.idaho.gov)

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**THE FOLLOWING IS THE PROPOSED TEXT OF DOCKET NO. 16-0733-1301**

009. CRIMINAL HISTORY AND BACKGROUND CHECK REQUIREMENTS.

01. **Compliance With Department Criminal History and Background Check.** All ~~current Department owners, operators,~~ employees, ~~applicants,~~ transfers, reinstated former employees, student interns, ~~contractors, and employees,~~ volunteers, ~~and others assigned to programs that involve~~ who provide direct contact with children or vulnerable adults as described in Section 39-5302, Idaho Code, care or services, or whose position requires regular contact with clients, must comply with the provisions in IDAPA 16.05.06, "Criminal History and Background Checks." (5-8-09)( )

02. **Availability to Work or Provide Service.** ~~Certain individuals are allowed to provide services after the self-declaration is completed as provided in Section 56-1004A, Idaho Code, except when they have disclosed a designated crime listed in IDAPA 16.05.06, "Criminal History and Background Checks." The criminal history check requirements applicable to each provider type are found in the rules that state the qualifications or certification of those providers. An individual listed in Subsection 009.01 of these rules is available to work on a provisional basis at the discretion of the employer or agency once the individual has submitted his criminal history and background check application, it has been signed and notarized, reviewed by the employer or agency, and no disqualifying crimes or relevant records are disclosed on the application. An individual must be fingerprinted within twenty-one (21) days of submitting his criminal history and background check application.~~ (5-8-09)( )

a. An individual is allowed to work or have access to clients only under supervision until the criminal history and background check is completed. ( )

b. An individual, who does not receive a criminal history and background check clearance or a waiver granted under the provisions in this chapter, may not provide direct care or services, or serve in a position that requires regular contact with clients accessing adult mental health services through the Department. ( )

03. **Waiver of Criminal History and Background Check Denial.** An individual who receives a conditional or unconditional denial for a criminal history and background check, may apply for a waiver to provide direct care or services, or serve in a position that requires regular contact with clients accessing adult mental health services through the Department. A waiver may be granted on a case-by-case basis upon administrative review by the Department of any underlying facts and circumstances in each individual case. A waiver will not be granted for crimes listed in Subsection 009.04 of this rule. ( )

04. **No Waiver for Certain Designated Crimes.** No waiver will be granted by the Department for any of the following designated crimes or substantially conforming foreign criminal violations: ( )

a. Forcible sexual penetration by use of a foreign object, as defined in Section 18-6608, Idaho Code; ( )

b. Incest, as defined in Section 18-6602, Idaho Code; ( )

c. Lewd conduct with a minor, as defined in Section 18-1508, Idaho Code; ( )

d. Murder in any degree or assault with intent to commit murder, as defined in Sections 18-4001, 18-4003, and 18-4015, Idaho Code; ( )

e. Possession of sexually exploitative material, as defined in Section 18-1507A, Idaho Code; ( )

f. Rape, as defined in Section 18-6101, Idaho Code; ( )

g. Sale or barter of a child, as defined in Section 18-1511, Idaho Code; ( )

h. Sexual abuse or exploitation of a child, as defined in Sections 18-1506 and 18-1507, Idaho Code; ( )

i. Enticing of children, as defined in Sections 18-1509 and 18-1509A, Idaho Code; ( )

**i.** Inducing individuals under eighteen (18) years of age into prostitution or patronizing a prostitute, as defined in Sections 18-5609 and 18-5611, Idaho Code; ( )

**k.** Any felony punishable by death or life imprisonment; or ( )

**l.** Attempt, conspiracy, accessory after the fact, or aiding and abetting, as defined in Sections 18-205, 18-306, 18-1701, and 19-1430, Idaho Code, to commit any of the disqualifying designated crimes. ( )

**05. Administrative Review.** An administrative review for a waiver may consist of a review of documents and supplemental information provided by the individual, a telephone interview, an in-person interview, or any other review deemed necessary by the Department. The Department may appoint a subcommittee to conduct administrative reviews provided for under Subsections 009.03 through 009.12 of this rule. ( )

**06. Written Request for Administrative Review and Waiver.** A written request for a waiver must be sent to the Administrative Procedures Section, 450 W. State Street, P.O. Box 83720, Boise, Idaho 83720-0026 within fourteen (14) calendar days from the date of the issuance of a denial from the Department's Criminal History Unit. The fourteen (14) day period for submitting a request for a waiver may be extended by the Department for good cause. ( )

**07. Scheduling of Administrative Review.** Upon receipt of a written request for a waiver, the Department will determine the type of administrative review to be held, and conduct the review within thirty (30) business days from the date of receipt. When an in-person review is appropriate, the Department will provide the individual at least seven (7) days notice of the review date. ( )

**08. Factors Considered During Administrative Review.** During the administrative review, the following factors may be considered: ( )

**a.** The severity or nature of the crimes or other findings; ( )

**b.** The period of time since the incidents occurred; ( )

**c.** The number and pattern of incidents being reviewed; ( )

**d.** Circumstances surrounding the incidents that would help determine the risk of repetition; ( )

**e.** The relationship between the incidents and the position sought; ( )

**f.** Activities since the incidents, such as continuous employment, education, participation in treatment, completion of a problem-solving court or other formal offender rehabilitation, payment of restitution, or any other factors that may be evidence of rehabilitation. ( )

**g.** A pardon that was granted by the Governor or the President; ( )

**h.** The falsification or omission of information on the self-declaration form and other supplemental forms submitted; and ( )

**i.** Any other factor deemed relevant to the review. ( )

**09. Administrative Review Decision.** A notice of decision will be issued by the Department within fifteen (15) business days of completion of the administrative review. ( )

**10. Decision to Grant Waiver.** The Department's decision to grant a waiver does not set a precedent for subsequent requests by an individual for a waiver. A waiver granted under this chapter is not a criminal history and background check clearance, and is only applicable to services and programs governed under this chapter. It does not apply to other Department programs requiring clearance of a criminal history and background check. ( )

11. Revocation of Waiver. The Department may chose to revoke a waiver at its discretion for circumstances that it identifies as a risk to client health and safety, at any time. ( )

12. Waiver Decisions Are Not Subject to Review or Appeal. The decision or actions of the Department concerning a waiver is not subject to review or appeal, administratively or otherwise. ( )

13. Employer Responsibilities. A waiver granted by the Department is not a determination of suitability for employment. The employer is responsible for reviewing the results of a criminal history and background check even when a clearance is issued or a waiver is granted. Making a determination as to the ability or risk of the individual to provide direct care services or to serve in a position that requires regular contact with children and vulnerable adults is the responsibility of the employer. ( )

**010. DEFINITIONS.**

For the purposes of these rules, the following terms are used as defined below: (5-8-09)

**01. Adult.** An individual eighteen (18) years of age or older. (5-8-09)

**02. Adult Mental Health Services.** Adult mental health services include psychiatric clinical services, case management, individual therapy, group therapy, psychosocial rehabilitation (PSR), assertive community treatment (ACT), patient assistance program (PAP), benefit assistance, co-occurring disorders treatment, and pharmacological education. Mental health services do not include educational or vocational services related to traditional academic subjects or vocational training, experimental procedures, habilitation, or any other services which are primarily recreational or diversional in nature. (5-8-09)

**03. Applicant.** An adult individual who is seeking mental health services through the Department who has completed, or had completed on his behalf, an application for mental health services. (5-8-09)

**04. Client.** A person receiving mental health services through the Department. The term "client" is synonymous with the following terms: patient, participant, resident, consumer, or recipient of treatment or services. (5-8-09)

**05. Clinical Judgment.** Refers to observations and perceptions based upon education, experience, and clinical assessment. This may include psychometric, behavioral, and clinical interview assessments that are structured, integrated, and then used to reach decisions, individually or collectively, about an individual's functional, mental, and behavioral attributes and mental health service needs. (5-8-09)

**06. Clinical Necessity.** Adult mental health services are deemed clinically necessary when the Department, in the exercise of clinical judgment, recommends services to an applicant for the purpose of evaluating, diagnosing, or treating a mental illness and that are: (5-8-09)

**a.** Clinically appropriate, in terms of type, frequency, extent, site, and duration, and considered effective for treating the applicant's mental illness; and (5-8-09)

**b.** Not primarily for the convenience of the applicant or service provider, not more costly than an alternative service or sequence of services, and at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of the applicant's mental illness. (5-8-09)

**07. Clinical Team.** A proposed client's clinical team may include: qualified clinicians, behavioral health professionals, professionals other than behavioral health professionals, behavioral health technicians, and any other individual deemed appropriate and necessary to ensure that the treatment is comprehensive and meets the needs of the proposed client. (5-8-09)

**08. Department.** The Idaho Department of Health and Welfare or its designee. The Department is designated as the State Mental Health Authority under Section 39-3124, Idaho Code. (5-8-09)

**09. Emergency.** An emergency exists if an adult individual is gravely disabled due to mental illness or there is a substantial risk that physical harm will be inflicted by the proposed client: (5-8-09)



a. Upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on himself; or (5-8-09)

b. Upon another person, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm. (5-8-09)

**10. Federal Poverty Guidelines.** Guidelines issued annually by the Federal Department of Health and Human Services establishing the poverty income limits. The federal poverty guidelines for the current year may be found at: <http://aspe.hhs.gov/poverty/>. (5-8-09)

**11. Functional Impairment.** Difficulties that substantially impair or limit role functioning with an individual's basic daily living skills, or functioning in social, family, vocational, or educational contexts including psychiatric, health, medical, financial, and community or legal area, or both. (5-8-09)

**12. Good Cause.** A valid and sufficient reason for not complying with the time frame set for submitting a written request for a waiver by an individual who does not receive a criminal history and background check clearance. ( )

**123. Gravely Disabled.** An adult who, as a result of mental illness, is in danger of serious physical harm due to the person's inability to provide for any of his basic needs for nourishment, essential medical care, shelter, or safety. (5-8-09)

**134. Individualized Treatment Plan.** A written action plan based on an intake eligibility assessment, that identifies the applicant's clinical needs, the strategy for providing services to meet those needs, treatment goals and objectives, and the criteria for terminating the specified interventions. (5-8-09)

**145. Intake Eligibility Assessment.** The collection of data, analysis, and review that the Department uses to screen and determine whether an applicant is eligible for mental health services available through the Department. (5-8-09)

**156. Serious Mental Illness (SMI).** Means any of the following psychiatric illnesses as defined by the American Psychiatric Association in the Diagnostic and Statistical Manual of Mental Disorders, Text Revision (DSM-IV-TR): (5-8-09)

- a. Schizophrenia; (5-8-09)
- b. Paranoia and other psychotic disorders; (5-8-09)
- c. Bipolar disorders (mixed, manic and depressive); (5-8-09)
- d. Major depressive disorders (single episode or recurrent); (5-8-09)
- e. Schizoaffective disorders; and (5-8-09)
- f. Obsessive-compulsive disorders. (5-8-09)

**167. Serious and Persistent Mental Illness (SPMI).** A primary diagnosis under DSM-IV-TR of Schizophrenia, Schizoaffective Disorder, Bipolar I Disorder, Bipolar II Disorder, Major Depressive Disorder Recurrent Severe, Delusional Disorder, or Psychotic Disorder Not Otherwise Specified (NOS) for a maximum of one hundred twenty (120) days without a conclusive diagnosis. The psychiatric disorder must be of sufficient severity to cause a substantial disturbance in role performance or coping skills in at least two (2) of the following functional areas in the last six (6) months: (5-8-09)

- a. Vocational or educational, or both. (5-8-09)
- b. Financial. (5-8-09)

- c. Social relationships or support, or both. (5-8-09)
- d. Family. (5-8-09)
- e. Basic daily living skills. (5-8-09)
- f. Housing. (5-8-09)
- g. Community or legal, or both. (5-8-09)
- h. Health or medical, or both. (5-8-09)

**178. Sliding Fee Scale.** A scale used to determine an individual's financial obligation for services based on Federal Poverty Guidelines and found in IDAPA 16.07.01, "Behavioral Health Sliding Fee Schedules." (5-8-09)

**189. Substantial Material Change in Circumstances.** A substantial and material change in circumstances which renders the Department's decision denying mental health services arbitrary and capricious. (5-8-09)