OFFICE of the INSURANCE COMMISSIONER
WASHINGTON STATE

Mike Kreidler- Insurance Commissioner

As required by

The Washington State Administrative Procedures Act

Chapter 34.05 RCW

Matter No. **R 2020-13**

CONCISE EXPANATORY STATEMENT; RESPONSIVENESS SUMMARY; RULE DEVELOPMENT PROCESS; AND IMPLEMENTATION PLAN

Relating to Consolidated Health Care Rulemaking

November 23, 2020

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Section 1: Introduction

Revised Code of Washington (RCW) 34.05.325 (6) requires the Office of Insurance Commissioner (OIC) to prepare a "concise explanatory statement" (CES) prior to filing a rule for permanent adoption. The CES shall:

1. Identify the Commissioner's reasons for adopting the rule;
2. Describe differences between the proposed rule and the final rule (other than editing changes) and the reasons for the differences; and
3. Summarize and respond to all comments received regarding the proposed rule during the official public comment period, indicating whether or not the comment resulted in a change to the final rule, or the Commissioner's reasoning in not incorporating the change requested by the comment; and
4. Be distributed to all persons who commented on the rule during the official public comment period and to any person who requests it.

Section 2: Reasons for Adopting the Rule

In 2019 and 2020, the legislature enacted several new laws including SHB 2338, ESHB 2642, ESHB 1879 and SSB 5889 that relate to accessing and receiving health care services and benefits through health plans, short term limited duration medical plans and student health plans. Multiple provisions of OIC rules in chapter 284-43 WAC must be amended to be consistent with the new laws. This consolidated rulemaking proceeding is necessary to ensure that rules are adopted by OIC prior to January 1, 2021. These rules will facilitate implementation of the laws by ensuring that all affected health care entities understand their rights and obligations under the new laws.

Section 3: Rule Development Process

The CR-101 for this rulemaking was filed in the Washington State Register on August 3, 2020 (WSR 20-16-131). The comment period for the CR-101 closed on August 17, 2020.

Prior to the initiation of this Consolidated Health Care rulemaking, OIC had initiated rulemaking to implement SHB 2338 (Chap. 228, Laws of 2020)(R 2020-06) and ESHB 2642 (Chap. 345, Laws of 2020)(R 2020-10). Because implementation of several pieces of legislation enacted in 2019 and 2020, including SHB 2338 and ESHB 2642, required amendments to the same provisions of the Washington Administrative Code, on August 3, 2020, OIC withdrew R2020-06 and R2020-10 and moved forward with this consolidated health care rulemaking (R2020-13), which addresses SHB 2338 and ESHB 2642, as well as the other laws noted above.

- For the SHB 2338 rulemaking (R2020-06), the Commissioner issued a CR-101 on May 27, 2020. One comment was received. The Commissioner issued a

stakeholder draft for comment on July 24, 2020. Comments to the stakeholder draft were due on August 7, 2020. Three comments were received.

- For the ESHB 2642 rulemaking (R 2020-10), the Commissioner issued a CR-101 on June 11, 2020. Two comments were received.

- For this consolidated health care rulemaking (R 2020-13):

    - The Commissioner issued a CR-101 on August 3, 2020. Two comments were received.
    - The Commissioner issued a stakeholder draft for comment on August 26, 2020, with an open comment period until September 9, 2020. The Commissioner's staff facilitated a stakeholder meeting on September 3, 2020 via a virtual meeting, due to the COVID-19 pandemic, to discuss the stakeholder draft. The meeting was attended by representatives of consumers, health care providers and carriers. Sixteen written comments were received.
    - The CR-102 for this rulemaking was published in the Washington State Register (WSR 20-20-116) on October 6, 2020. The Commissioner accepted comments through November 9, 2020. Four written comments were received.
    - The Commissioner held a public hearing on the proposed rule text on November 12, 2020; the hearing was administered by Jane Beyer, as a virtual meeting due to the COVID-19 pandemic. No testimony was presented at the hearing.
    - The CR-103 was submitted to the Code Reviser for adoption on November 23, 2020.

The comments received on the CR-101 and stakeholder draft for R 2020-06, and the CR-101 for R 2020-10, as well as those received for this consolidated health care rulemaking (R 2020-13) have been incorporated into the responsiveness summary for this consolidated health care rulemaking to ensure that all relevant comments were considered.

Section 4: Differences between Proposed and Final Rule

The proposal included rules determined by OIC, after receiving extensive stakeholder input, to be necessary to implement several new laws enacted in 2019 and 2020, including SHB 2338, ESHB 2642, ESHB 1879 and SSB 5889, that relate to accessing and receiving health care services and benefits through health plans, short term limited duration medical plans and student health plans. Multiple provisions of OIC rules in chapter 284-43 WAC were amended to be consistent with the new laws. Rulemaking is necessary to ensure that rules are adopted by OIC prior to January 1, 2021. These rules will facilitate implementation

of the laws by ensuring that all affected health care entities understand their rights and obligations under the new laws.

The final rule differs from the proposed rule in the following respects:

- The final rule makes a clarifying change to language related to coverage of hormone therapy in WAC 284-43-5940(1)(b)(iv).
- The final rule makes a technical correction to replace the term "covered entity" with "issuer" in WAC 284-43-5965(3) and WAC 284-43-5980(9).
- The final rule makes a technical correction to WAC sections referenced in WAC 284-43-7100. The reference to WAC 284-43-3070 is corrected to read WAC 284-43-3170.
- The final rule modifies WAC 284-43-5940(5) to clarify how the Commissioner assesses an issuer's actions to comply with WAC 284-43-5940.

For the reasons described in the responses to the comments below, no other changes were made to the proposed rule in the final rule.

Section 5: Responsiveness Summary

The OIC received a total of twenty-seven written comments and suggestions regarding R 2020-06 and R 2020-10 prior to their withdrawal, and to this rule (2020-13), inclusive of the CR-101's, stakeholder drafts and the CR-102. The following information contains a description of the comments, the OIC's assessment of the comments, and information about whether the OIC included or rejected the comments.

The OIC received comments from:

- Allergy & Asthma Network
- Alliance for Patient Access
- America's Health Insurance Plans
- American Diabetes Association
- Association of Alcoholism and Addiction Programs in Washington State
- Cambia
- Caregiver Action Network
- Chronic Disease Coalition
- Coalition of State Rheumatology Organizations
- Coordinated Care Corporation
- Crohn's and Colitis Foundation
- Jodie DeLay
- Epilepsy Foundation of Washington
- Jonah Essers
- Hawai'I Parkinson Association

- Health Alliance Northwest
- Hero House Northwest
- Huntington Disease Society of America
- Kaiser Foundation Health Plan of the Northwest
- King County
- Legal Voice
- James Lloyd
- Lupus and Allied Diseases Association
- Lupus Foundation of America
- Gordon MacDonald
- Movement Disorders Policy Coalition
- Multiple Sclerosis Association of America
- National Eczema Association
- National Infusion Center
- National Multiple Sclerosis Society
- National Organization for Tardive Dyskinesia
- National Organization of Rare Diseases
- National Psoriasis Foundation
- Northwest Health Law Advocates
- Northwest Justice Project
- Planned Parenthood Votes Northwest and Hawai'i
- Planned Parenthood of the Great Northwest and Hawaiian Islands
- Premera Blue Cross
- Sirianni Youtz Spoonemore Hamburger
- The Alliance for Patient Access
- The Michael J. Fox Foundation for Parkinson's Reseaerch
- The National Ataxia Foundation
- Upstream USA
- Washington Rheumatology Alliance
- Washington State Coalition for Language Access

Stakeholder Comments to the CR-101, stakeholder drafts and CR-102

Comment	*OIC Response*
General comments	
The proposed effective date of the rule does not provide carriers an adequate amount of time to make internal changes to comply with the proposed regulation.	The statutes that are the basis for this rulemaking have a January 1, 2021 effective date. The rules related to nondiscrimination are drafted to reflect the substance of federal rules that were repealed by the federal government in June 2020, with a few minor differences necessary to adapt to Washington state law. Carriers in Washington state have been complying with the repealed federal rules since their adoption in 2016. OIC acknowledges the effort associated with a revision to the standard nondiscrimination notice in WAC 284-43-5980. That revision adds notification to consumers that discrimination complaints can be submitted to OIC as well as the federal government. The final rule sets a January 1, 2022 effective date for these revisions to the notice.
WAC 284-43-0160: Definitions	
Rather than updating the references from the DSM IV to the DSM V, we recommend OIC only refer to "the most current version of the Diagnostic and Statistical Manual (DSM)".	The Commissioner appreciates this comment. The final rule incorporates the recommended approach.
Include intensive outpatient programs in the definition of "mental health services".	The Commissioner appreciates this comment. The rule revises the definition of "mental health services" to reference intensive outpatient, residential treatment, emergency services and prescription drugs specifically.
Recommend adding a reference to ASAM in the definition of withdrawal management services, since the rule uses the ASAM 4.0 and 3.7 level of care language.	The rule was not changed. ASAM level of care criteria are updated periodically. To avoid the potential need to amend the rule language to maintain consistency with specific ASAM language, the rule uses the definition included in ESHB 2642.

Comment	***OIC Response***
Definition of "substitute drug" is limited in reference to therapeutically equivalent drug product. Rather, the definition should be consistent with the requirements of RCW 69.41.100 through .180 for substitution of drugs.	The rule was not changed. OIC considered the other terms and language proposed, but due to the need to ensure that the definition and term aligned with other existing rules, OIC decided to use the term "substitute drug." This also avoids using the definition in the term.
Proposed revision to the definition of "substitute drug" expands the definition beyond the current clinical meaning of a therapeutically equivalent substance. Recommend not revising the definition.	The rule was not changed. OIC considered the other terms and language proposed, but due to the need to ensure that the definition and term aligned with other existing rules, OIC decided to use the term "substitute drug." This also avoids using the definition in the term.
WAC 284-43-2000: Health care services utilization review	
OIC should consider the administrative burden placed on SUD treatment providers of having to complete assessments for incoming patients within the 2 or 3 day period in ESHB 2642.	ESHB 2642, codified at RCW 48.43.761, establishes the time frames within which behavioral health agencies must conduct an assessment of an enrollee. OIC does not have statutory authority to modify that requirement in rule.
Proposed guiding principles for utilization management addressing disclosure of formularies, information needed for exception requests, use of valid clinical guidelines by carriers in establishing prescription drug utilization management programs and maintaining the exception process detailed in ESHB 1879.	The commissioner appreciates this comment. The bulk of the rulemaking related to implementation of ESHB 1879 has been undertaken through OIC R2019-11. The provisions related to that legislation in this rulemaking are limited to amendments to WAC 284-43-0160 and WAC 284-43-2000. Implementation of the remaining provisions of ESHB 1879 is proceeding through R2019-11.
Time frames in the proposed rule could lead to delays in care that ESHB 1879 sought to remedy. OIC should ensure that the timelines are adhered to as written in ESHB 1879 so that patients	The comment is specific to implementation of ESHB 1879. The amendments to WAC 284-43-2000 in this rulemaking explicitly state that this section does not apply to utilization review of prescription drugs when other rules explicitly address such processes. The rules specific to

Comment	*OIC Response*
can access the treatments they need when they need them.	prescription drug utilization review under ESHB 1879 are being adopted under R2019-11.
WAC 284-43-5642: Essential health benefit categories	
Revise *WAC 284-43-5642(4)(a)(vii)* termination of pregnancy to reflect the requirements of RCW 48.43.073.	The rule makes this requested revision.
WAC 284-43-5642 Essential Health Benefit Categories, subparagraph (5) (i) refers to "residential" treatment, but does not refer to the range of treatment referenced above in WAC 284-43-0160(23), such as partial hospitalization, intensive outpatient etc. Since the definition of "mental health services" is broad, this language should simply state that a health benefit plan must include coverage of "mental health services." The limitation in subparagraph (5)(i) could be used to infer that the coverage requirement is more limited than it is.	WAC 284-43-5642(5)(e) includes state benefit requirements for coverage of mental health and substance use disorder services. Those requirements include the Washington state mental health parity statute, which defines mental health services as medically necessary outpatient and inpatient services provided to treat mental health and substance use disorders covered by the diagnostic categories listed in the most current version of the diagnostic and statistical manual of mental disorders. The limitations in subparagraph (5)(i) cannot be used to infer that the coverage requirement is more limited than it is.
Subsection (3)(b) should be revised to note that a service cannot be excluded if it is otherwise required by state or federal law.	Subsection (12) of WAC 284-43-5642 provides that each category of essential health benefits must at a minimum cover services required by current state law and be consistent with federal rules and guidance implementing section 1557 of the ACA in effect as of January 1, 2017. When a federal court in Washington state issues a final decision in *Schmitt v. Kaiser Foundation Health Plan of Washington*, OIC will review the decision and determine whether additional rule or policy changes are needed.
Subsection (4) should clarify that a health benefit plan may not use medical management techniques that delay or	Subsection (12) of WAC 284-43-5642 provides that each category of essential health benefits must at a minimum cover services required by

Comment	*OIC Response*
restrict coverage required under RCW 48.43.072.	current state law. RCW 48.43.072 is current state law.
Nondiscrimination rules generally	
Request that the non-discrimination rules simply mirror, and the OIC interpret them to mirror, what was required of carriers under the prior Section 1557 rule.	The rules related to nondiscrimination are drafted to reflect the substance of recently repealed §1557 federal rules that implemented §1557 of the Affordable Care Act, with a few relatively minor differences to adapt to Washington state law. Carriers in Washington state have been complying with the repealed federal rules since their adoption in 2016.
WAC 284-43-5935: Definitions	
Add definition of Qualified interpreter for an individual with a disability.	The Commissioner appreciates this comment. The definition was added at WAC 284-43-5935(7).
Amend the language of (8) to read," "Taglines mean short statements, written in non-English languages, indicating that language assistance services are available free of charge and how to obtain them."	The Commissioner appreciates this comment. The definition of "taglines" in WAC 284-43-5935(8) includes these elements in the language.
WAC 284-43-5940: Nondiscrimination in health plans, short-term limited duration medical plans and student-only health plans	
We appreciate the OIC's inclusion of nondelegation language in the more general non-discrimination regulations in WAC 284-43-5940(4) as well as in WAC 284-43-7000**.**	The Commissioner appreciates this comment.

Comment	***OIC Response***
Thank you for making changes to this WAC to make it more consistent with Ch. 399, Laws of 2019, SB 5602, and to ensure coverage in a nondiscriminatory manner is available to all residents of Washington, regardless of their gender identity.	The Commissioner appreciates this comment.
OIC should revise the rule language to explicitly address automatic denials of coverage; and not limit prohibitions of discrimination to transgender individuals to the exclusion of others, including nonbinary, intersex and gender nonconforming people.	The Commissioner appreciates the comment. WAC 284-43-5940(1)(b)(iv) includes automatic denials of coverage in the gender related protections. The rule includes discrimination protections for persons who are transgender, nonbinary, gender nonconforming or intersex, consistent with RCW 48.43.0128, which prohibits discrimination based upon sex, gender identity or sexual orientation.
OIC's current language in 284-43-5940(1) referring to "health services related to a person's gender identity or sexual orientation" is confusing and does not create clarity about what services must be covered. We instead request that OIC use the more appropriate and inclusive terminology "gender affirming care."	The rule was not changed. The term "gender affirming care" is not referenced in statute. The rule instead references "medical, surgical or behavioral health services related to a person's gender identity or sexual orientation" to clarify the scope of services that are encompassed in the prohibition on denial or limitation of services based upon gender identity or sexual orientation.
Additional changes need to be made to meet the needs of and ensure adequate care is provided to transgender, nonbinary, gender nonconforming, or intersex individuals and that criteria used for cisgender people is not applied in situations where it may not be appropriate.	WAC 284-43-5940(1)(b)(iv) includes as an example of prohibited conduct, denial of coverage for hormone prescriptions when the dosage would exceed that typically prescribed for cisgender people.
The rule should explicitly prohibit denial or limitation of benefits for treatment related to a disabling condition based	The rule was not changed. OIC is aware of the *Schmitt v. Kaiser Foundation Health Plan of Washington* litigation and is following

Comment	***OIC Response***
solely on the disabling condition, to reflect the holding in *Schmitt v. Kaiser Foundation Health Plan of Washington,* 2020 U.S. App. LEXIS 21902, *26 (9th Cir. July 14, 2020. This issue should be addressed with respect to both plan design and administration.	developments in the case. The case has been remanded to the federal district court for further proceedings. When a final decision is issued, OIC will review the decision and determine whether additional rule or policy changes are needed.
The OIC's addition of language regarding the non-delegation of responsibility for mental health parity is significant and to be commended. *See* proposed 284- 43-7000. Similar language should be included in the more general non-discrimination regulations in WAC 284-43-5940**.**	The Commissioner appreciates this comment. Similar language has been added at WAC 284-43-5940(4).
Subsection (4) (appearing as subsection (5) in the CR-102) should be modified from "The commissioner will determine…" to the "Commissioner may determine…" so that it is clear that the Commissioner has not approved plans as "non-discriminatory" if he does not take action. This is also consistent with RCW 48.43.715.	The Commissioner appreciates this comment. The language was revised to clarify how the commissioner assesses an issuer's actions to comply with WAC 284-43-5940.
If OIC's intent is to ensure individuals receive a dosage of a hormone prescription appropriate for them without regard to their gender status, as written the provision appears to mandate coverage of all hormone prescription dosages that exceed those typically prescribed for cisgender people. Would suggest alternative language: "For example, a denial of coverage for **medically necessary** hormone prescriptions **for transgender, non-**	The Commissioner appreciates this comment. It is an accurate reflection of the intent behind the provision. The final rule was revised as suggested.

Comment	*OIC Response*
binary, gender non-conforming, or intersex individuals because ~~that exceed~~ the dosages **exceed those** typically prescribed for cisgender people would be discriminatory against transgender, non-binary, gender nonconforming, or intersex individuals."	
WAC 284-43-5950: Access to individuals with limited English proficiency and individuals with disabilities	
Add individuals "eligible to be served or likely to be encountered" to be consistent with federal rule as in effect on January 1, 2017. It is important to include these phrases to capture not only those already accessing (or likely to access) services but also those in the service area who should have access to all health programs or activities, but may be experiencing barriers. Use of "with respect to enrollment" is too narrow because it restricts language access protections to activities related to enrollment.	The federal §1557 rules address a broad range of health services and activities, including health care providers. OIC's jurisdiction is limited to regulation of issuers. The final rule does not include the phrase "with respect to enrollment" that had been used in a stakeholder draft. Rather, it uses the term "individual likely to be encountered". This language is broader than that used in the stakeholder draft. OIC believes that the concept of "eligible to be served" is relevant with respect to health care providers or health benefit programs, but not with respect to issuers.
Add to the end of -5950 the "effective communication" requirements of 45 CFR § 92.202(a) (2017)	The final rule was not changed. The requested language appears in WAC 284-43-5965.
WAC 284-43-5960: Meaningful access for individuals with limited English proficiency	
Use of "with respect to enrollment" in subsection (1) is too narrow because it restricts language access protections to activities related to enrollment.	The federal §1557 rules address a broad range of health services and activities, including health care providers. OIC's jurisdiction is limited to regulation of issuers. The final rule does not include the phrase "with respect to

Comment	*OIC Response*
	enrollment" that had been used in a stakeholder draft. Rather, it uses the term "individual likely to be encountered". This language is broader than that used in the stakeholder draft. OIC believes that the concept of "eligible to be served" is relevant with respect to health care providers or health benefit programs, but not with respect to issuers.
In WAC 284-43-5960 (3), we applaud the inclusion of the use of telemedicine and the need for accessibility features through this medium of healthcare services delivery	The Commissioner appreciates this comment. During the COVID-19 public health emergency, utilization of telehealth services has been a critical means for consumers to access needed health services. OIC anticipates that use of telehealth services will continue, albeit at a lower rate, after the COVID-19 public health emergency ends.
The telemedicine section in WAC 284-43-5965(3) includes a more direct statement that issuers must ensure that their benefits and services provided through electronic and information technology, including telemedicine, are accessible to individuals with disabilities. We encourage you to add a similar directive to WAC 284-43-5960, for limited English proficient persons.	RCW 48.43.0128 directs the Commissioner to adopt rules consistent with federal rules and guidance in effect on January 1, 2017, implementing the patient protection and affordable care act. 42 CFR §92.201 did not include the additional language that the comment suggests. To remain consistent with RCW 48.43.0128, and therefore, the federal rules and guidance in effect on January 1, 2017, the final rule was not changed.
Remove the language in (5)(b) and replace it with the following: "The issuer is required to provide the services of a qualified interpreter as a communication facilitator to assure the accuracy, integrity, and confidentiality of information shared between clients, potential clients, and issuers. This responsibility for issuers remains, regardless if an individual with limited English proficiency requests to decline the services of an interpreter provided by the issuer and/or requests that an	RCW 48.43.0128 directs the Commissioner to adopt rules consistent with federal rules and guidance in effect on January 1, 2017, implementing the patient protection and affordable care act. 42 CFR §92.201 did not include the additional language that the comment suggests. To remain consistent with RCW 48.43.0128, and therefore, the federal rules and guidance in effect on January 1, 2017, the final rule was not changed.

Comment	*OIC Response*
accompanying person serve as their interpreter. An adult support person accompanying the client/potential client is welcome to remain in the session and to participate in the discussion."	
WAC 284-43-5965: Effective communication for people with disabilities	
Modify title of this section to "effective communication for people with disabilities"	The Commissioner appreciates this comment. The title of the section was modified as requested.
WAC 284-43-5960 contains specific meaningful access requirements related to delivery of language services to LEP individuals, but there is no comparable section regarding complying with the disability access provisions in 45 CFR § 92.204(2017) (similar language in 45 CFR § 92.104(2020)) and 28 CFR § 35.160 through 35.164. Because the standards are different, we recommend adding a new section, similar to WAC 284-43-5960, specific to disability.	The Commissioner appreciates this comment. WAC 284-43-5965 was added into the CR-102 and remains in the final rule.
To fully address the requirements under Section 1557 of the Affordable Care Act, this section should be expanded because, as written, this section leaves out many of the specific considerations that are critical to ensuring access for persons with disabilities. In comparing sections 5960 and 5965, we note that the information contained in WAC 284-43-5960 sections (4) – (6) are missing from WAC 284-43-5965 and should be added.	RCW 48.43.0128 directs the Commissioner to adopt rules consistent with federal rules and guidance in effect on January 1, 2017, implementing the patient protection and affordable care act. 42 CFR §92.202, .204 and .205 did not include the additional language that the comment suggests. To remain consistent with RCW 48.43.0128, and therefore, the federal rules and guidance in effect on January 1, 2017, the final rule was not changed.
While Section -5965(1) does include reference to issuer's obligations to comply with 28 CFR 35.160 – 35.164, we believe it will lead to greater access and	RCW 48.43.0128 directs the Commissioner to adopt rules consistent with federal rules and guidance in effect on January 1, 2017, implementing the patient protection and

Comment	*OIC Response*
compliance by issuers if the WAC is amended to include the specific information contained within these sections. A new subsection (5) should be added to explicitly address some of the provisions in the referenced federal rules, i.e. expressly include companions with disabilities, restrictions on types of interpreters, VRI requirements.	affordable care act. 42 CFR §92.202, .204 and .205 did not include the additional language that the comment suggests. To remain consistent with RCW 48.43.0128, and therefore, the federal rules and guidance in effect on January 1, 2017, the final rule was not changed.
WAC 284-43-5970: Equal program access on the basis of sex	
The WAC should not limit prohibitions on discrimination to transgender individuals to the exclusion of others, including nonbinary, intersex, and gender nonconforming people.	The Commissioner appreciates this comment. Because RCW 48.43.0128 prohibits discrimination based upon sex, gender identity or sexual orientation, the rule includes prohibitions on discrimination against nonbinary, intersex, and gender nonconforming people.
Thank you for making changes in the CR-102 to ensure these nondiscrimination provisions are not limited to transgender individuals to the exclusion of others including non-binary, intersex, and gender nonconforming individuals.	The Commissioner appreciates this comment.
WAC 284-43-5975: Designation of responsible employee and adoption of grievance procedures	
Appreciate the addition of this provision requiring adoption of grievance procedures.	The Commissioner appreciates this comment.

Comment	*OIC Response*
WAC 284-43-5980: Notice requirement	
We recommend adding a new section to comprehensively include the notice requirements of 45 CFR § 92.8 (2017). This section includes important requirements, for example, appropriate initial and continuing steps to notify beneficiaries, enrollees, applicants, and members of the public of essential information for LEP individuals to access services.	The Commissioner appreciates this comment. WAC 284-43-5980 was added to the CR-102 and remains in the final rule.
It is necessary to retain the requirement in (4)(a) that taglines be posted in "at least the top fifteen languages," for the publications and communications described in (7) because it is consistent with the ACA regulations 45 CFR 92.8 (2017) and it sets a minimum threshold for issuers to plan to.	RCW 48.43.0128 directs the Commissioner to adopt rules consistent with federal rules and guidance in effect on January 1, 2017, implementing the patient protection and affordable care act. 42 CFR §92.8 did not include the language that the comment suggests. To remain consistent with RCW 48.43.0128, and therefore, the federal rules and guidance in effect on January 1, 2017, the final rule was not changed.
Recommend that the criteria for identifying the languages for which taglines are required be refined to accurately reflect the actual needs of our state population, with LEP, and not limited to statewide numbers of bilingual individuals, as did the Federal HHS guidelines. The federal methodology does not accurately reflect localized language assistance needs.	RCW 48.43.0128 directs the Commissioner to adopt rules consistent with federal rules and guidance in effect on January 1, 2017, implementing the patient protection and affordable care act. Using an alternative source to identify the top fifteen languages spoken than that used when the federal rule was adopted would be inconsistent with the federal rule, as implemented in 2017. To remain consistent with RCW 48.43.0128, and therefore, the federal rules and guidance in effect on January 1, 2017, the final rule was not changed.
Request reconsideration of the effective date of the printed notice requirements. Significant updates to printed notices	The final rule provides issuers until January 1, 2021 to modify the printed notice to identify OIC as a designated entity with which

Comment	*OIC Response*
require a significant lead time for implementation. Please consider a delayed effective date, i.e. January 1, 2022, to comply with the notice and tagline requirements of the rule. Alternatively, consider allowing digital notices and taglines online, on a temporary basis for 2021, or permanently. Ask that OIC provide carriers with the specific language to include in these notices.	consumers can file a complaint. The Commissioner will consider the request to provide standard language for the notice. Such language would be distributed through guidance to carriers.
Subsection (3) of the rule appears to suggest the nondiscrimination notice needs to be posted in the top 15 languages. This is not consistent with the federal nondiscrimination rule in effect on January 1, 2017.	The Commissioner appreciates this comment. The final rule is revised to be consistent with 42 CFR §92.8 as in effect on January 1, 2017.
Strongly recommend OIC consider the financial impact and consumer abrasion of the Section 1557 notice and tagline requirements from the 2016 rule and create language in this section of the draft regulation allowing carriers more flexibility to comply. Suggest OIC clarify that the nondiscrimination notice and language taglines are only required in booklets and policies and in all new member and annually required notices. We also support retaining the notice and taglines on carrier websites and providing them upon request.	RCW 48.43.0128 requires the Commissioner to adopt any rules necessary to implement that section, consistent with federal rules and guidance in effect on January 1, 2017, implementing the patient protection and affordable care act. The rule reflects the substance of recently repealed federal rules, as they were in effect on January 1, 2017, with differences necessary to adapt to Washington state law. Carriers in Washington state have been complying with the repealed federal rules, including 42 CFR §92.8 since their adoption in 2016. The language of the rule is retained.
The requirement for notices to add references to a state specific grievance procedure and the opportunity to submit a complaint to OIC will require modification to the notice and tagline templates implemented in compliance with the federal §1557 rule. More clarity	The final rule limits modification of the notice to notifying consumers that a complaint regarding compliance with RCW 48.43.0128 and rules adopted to implement it can be submitted to the Office of the Insurance Commissioner. The final rule also delays the required use of the modified notice to January

Comment	*OIC Response*
is needed, and OIC should not create new notice and tagline requirements that require carriers to re-work the notices.	1, 2022 in order to give issuers time necessary to modify and begin use of the modified notice.
RCW 48.43.0128, as amended by SHB 2338, extends nondiscrimination provisions to short term limited duration (STLD) medical plans and student only health plans. As this is a new requirement, request that these plans be given at least 90 days to implement these provisions beyond the effective date for the rule.	The final rule in WAC 284-43-5980(5) sets an April 1, 2021 effective date for STLD medical plans to come into compliance with the language assistance notice and tagline requirements in that section.
WAC 284-43-7010: Parity in mental health and substance use disorder benefits -- Definitions	
WAC 284-43-7010: OIC should retain the definition of "medically necessary", which provides that with respect to substance use disorder treatment, medically necessity is defined by the most recent version of the ASAM criteria.	The Commissioner appreciates this comment. The reference to ASAM is retained.
The definition of "medically necessary" should not reference specific criteria for making medical necessity determinations for substance use disorder. Instead defer to the standard criteria determined by the work group established under ESHB 2642.	OIC and the Health Care Authority determined, after receiving input from providers and carriers through the ESHB 2642 workgroup process, that ASAM criteria are the appropriate standard for review of medical necessity for substance use disorder treatment.
"Mental health benefits" should be defined consistent with the most current version of the DSM, rather than a specific edition of the DSM.	The Commissioner appreciates this comment. The definition of "mental health benefits" in WAC 284-43-7010 refers to the most current version of the DSM.
Requesting clarity on some of the former exceptions from the definition of	Yes, RCW 48.46.291 provides that for health plan, STLD medical plans and student only

Comment	***OIC Response***
"mental health services" amended in SHB 2338. Would like to confirm that HMO's are now required to cover all services used to treat any diagnosis in the most current DSM as a mental health service.	health plans issued on or after January 1, 2021, "mental health services" means medically necessary outpatient and inpatient services provided to treat mental health and substance use disorders covered by the diagnostic categories listed in the most current version of the diagnostic and statistical manual of mental disorders.
The definition of "treatment limitation" WAC 284-43-7010 excludes blanket exclusions of mental health services which have been found to violate the Washington Mental Health Parity Act. *See O.S.T. v. Regence Blueshield,* 181 Wn.2d 691, 704 (2014). Although the rulemaking appears to separate "treatment limitations" from "prohibited exclusions" (*see* WAC 284-43- 7080 (2)), the definition of "treatment limitation" implies that a "permanent exclusion of all coverage to treat a condition" is permissible. A notation should be included to refer to WAC 284-43-7080, so that it is clear that under the Washington Mental Health Parity Act, unlike the federal Parity Act, such permanent exclusions of a mental health condition are improper.	The final rule was not changed. WAC 284-43-7080(2) clearly addresses prohibited exclusions. The mental health parity rules at WAC 284-43-7000 to -7120 are read together.
WAC 284-43-7000 & 7020 to -7120: Parity in mental health and substance use disorder benefits	
In WAC 284-43-7000, while the OIC took the language directly from the statute, please consider listing out the entities/plans that the regulation applies to instead of using a long sentence format.	The Commissioner appreciates this comment. The rule lists the plans or entities to which the mental health parity rule applies in separate subsections.
WAC 284-43-7020(4) should address the requirement that NQTL evaluations	The rule was not changed. WAC 284-43-7020(4) relates specifically to financial

Comment	***OIC Response***
must occur on a "classification by classification basis." By omitting a discussion of NQTLs in this section and eliminating the "classification by classification" language, the NQTL evaluation is improperly overlooked.	requirements and quantitative treatment limitations. WAC 284-43-7060 addresses requirements related to NQTL's. Subsection (1) of that section provides that evaluation of NQTL's occurs by service classification.
Amended WAC 284-43-7100 should require disclosures consistent with RCW 48.43.071, RCW 70.02.080 (15 working days after receipt of request) and/or ERISA, 29 C.F.R. § 2560.503-1 (30 days). Leaving the rules as "within a reasonable time" is insufficient to protect consumers and ensure that they receive this information. Health carriers frequently refuse to produce NQTL criteria in a timely manner.	The Commissioner appreciates this comment. The final rule amends WAC 284-43-7100(1) to provide that any other disclosures related to an individual's claim must be provided within 30 days.
In WAC 284-43-7100(1)(a), the reference to WAC 284-43-3070 should be to -3170.	The Commissioner appreciates this comment. The final rule replaces the reference to WAC 284-43-3070 with a reference to WAC 284-43-3170. WAC 284-43-2000, -4040, -3110 and -3170 include explicit timeframes for actions by issuers. WAC 284-43-3070 does not. Timing for disclosures by an issuer cannot be made "consistent with" a regulatory provision that does not include a timeframe for taking action.
WAC 284-43-7120. Plans should be required to demonstrate and report their compliance with NQTL requirements, just as they do for financial and quantitative treatment limitations.	Since 2018 OIC has been engaged in an extensive project related to access to behavioral health services. That project includes two market scans of carrier policies and practices as well as claims data analysis. The second market scan is focused on NQTL compliance and is requiring carriers to provide the necessary MHPAEA NQTL compliance analysis. Thus, the OIC is accomplishing through its Market Conduct activities what the commenter is requesting as a part of form review.

Section 6: Implementation Plan

A. Implementation and enforcement of the rule.

As described below, implementation of the rule will occur through numerous activities at OIC. The Rates & Forms division will rely on this rule when reviewing health plan filings. Questions related to compliance with this rule can be raised and addressed through the form review process. The Consumer Affairs Division will respond to consumer complaints. Through these complaints, OIC will monitor implementation of the rule. This monitoring will identify any need to conduct further stakeholder education regarding the rule. Enforcement will occur when a carrier is determined by OIC to have violated the requirements of these rules.

B. How the Agency intends to inform and educate affected persons about the rule.

OIC Policy staff will distribute the final rule and the Concise Explanatory Statement (CES) to all interested parties by posting and sharing the documents through the OIC's standard rule making listserv and emailing the documents to stakeholder participants. The OIC Rules Coordinator will post the CR-103 documents on the OIC's website.

Type of Inquiry	Division
Consumer assistance	Consumer Advocacy Program
Rule content	Policy Division
Authority for rules	Legal Division
Enforcement of rule	Company Supervision, Rates & Forms
Market Compliance	Rates & Forms, Company Supervision

C. How the Agency intends to promote and assist voluntary compliance for this rule.

OIC will assess compliance with this rule in its annual review of health plan filings, which will provide an opportunity for carriers to fully understand and comply with these rules prior to approval of their health plans.

D. How the Agency intends to evaluate whether the rule achieves the purpose for which it was adopted.

The goal of the laws implemented through this rulemaking is to ensure that consumers are able to access and receive the health care services and benefits addressed in the laws encompassed in this rulemaking. OIC will monitor for consumer complaints

related to this rule and carriers' compliance with the rule through their health plan filings.

Appendix A

CR-102 Hearing Summary

Summarizing Memorandum

To: Mike Kreidler
Insurance Commissioner

From: Jane Beyer
Presiding Official, Hearing on Rulemaking

Matter No. R2020-13

Topic of Rulemaking: Consolidated health care rulemaking

This memorandum summarizes the hearing on the above-named rule-making, held on November 12, 2020, via a virtual meeting over which I presided in your stead.

The following agency personnel were present: Ellen Range, Ned Gaines, Karen Huber, Wendy Conway, Stephanie Marquis, Donna Null, Dan Halpin. AAG Marta DeLeon also attended.

In attendance and not testifying:

- Janet Bliss, Children's Therapy Center
- Kim Clark, Legal Voice
- Merlene Converse, Kaiser Fdn. Health Plan of the Northwest
- Jane Douthit, Regence Blue Shield
- Jeff Gingold, Gingold Law
- Katerina LaMarche, Washington State Medical Assn.
- Samuel Morones, Coordinated Care Health
- Hillary Preston, Premera
- Amber Rivera, Molina HealthCare
- Steve Robino, UnitedHealthCare
- Kevin Smith, Health Alliance
- Veronica Vanslyke, Sound Government Solutions
- Simon Vismantis, Kaiser Fdn Health Plan of Washington
- Rochelle Westlund, BrightHealthPlan
- Huma Zarif, Northwest Health Law Advocates

Contents of the presentations made at hearing: No presentations were made at the hearing.

The hearing was adjourned.

SIGNED this 12th day of November 2020

s/
Jane Beyer, Presiding Official