

Report From Agency

**STATE OF WISCONSIN
CHIROPRACTIC EXAMINING BOARD**

IN THE MATTER OF RULE-MAKING : REPORT TO THE LEGISLATURE
PROCEEDINGS BEFORE THE : ON CLEARINGHOUSE RULE 06-051
CHIROPRACTIC EXAMINING BOARD : [Wis. Stat. § 227.19 (3)]

I. THE PROPOSED RULE:

The proposed rule, including the analysis and text, is attached.

II. REFERENCE TO APPLICABLE FORMS:

Application forms are being developed.

III. FISCAL ESTIMATE:

The Department of Regulation and Licensing estimates that this rule will require staff time in the Division of Professional Credentialing, Division of Enforcement, and the Division of Management Services. The total staff salary and fringe is estimated at \$13,807.

IV. BASIS AND PURPOSE OF THE PROPOSED RULE:

2005 Wisconsin Act 25 created s 446.02 (2) (c) and (6m), Stats., requiring the Chiropractic Examining Board (board) to issue a certificate permitting a chiropractor to provide counsel, direction, guidance, advice, or a recommendation to a patient regarding the health effects of vitamins, herbs, or nutritional supplements. To receive a nutritional counseling certificate, a chiropractor must complete 48 hours of postgraduate study in nutrition approved by the board. The proposed rule advances relevant statutory goals or purposes by specifying the educational requirements for an approved postgraduate study in nutrition. The rules also incorporate changes to prohibited practices, professional conduct and continuing education which are necessary to make existing rules consistent with the addition of nutritional counseling as a chiropractic practice area.

V. SUMMARY OF PUBLIC COMMENTS TO THE PROPOSED RULE AND THE AGENCY'S RESPONSE

1. Susan Nitze appeared as the chairperson of the Wisconsin Dietitians Affiliated Credentialing Board. Dr. Nitze encouraged the use of the term “chiropractic nutrition advice” rather than “nutrition counseling” or “therapeutic” nutrition and requested changes in rules relating to the word “therapeutic.” She recommended that nutritional advice should focus on products that are not marketed as treatments or cures for a specific disease or condition. She also recommended that the board not approve course providers who endorse products or services for their gain.

Response:

- Proposed Wis. Adm. Code s. Chir 6.02 (31) was modified to change the word “therapy” to “counseling.”
- The board concluded that other changes requested to delete the term “therapeutic” were not appropriate for the reason that chiropractors should receive education in the areas identified in proposed s. Chir 12.03, including education in certain specific therapies. Receiving information about these therapies does not mean that the practitioners will utilize the therapies. Chiropractic practitioners are limited to practice within the scope of the practice of chiropractic.
- Wisconsin law in ch. 446, Stats. and rules of the Chiropractic Examining Board authorize practice in a defined and limited area. These rules, consistent with 2005 Wisconsin Act 25 §§ 2338 q. and r., expand practice to include nutritional counseling. No additional specific rule change is needed in order to prohibit chiropractors from utilizing treatments that are not within the scope of chiropractic. Existing law already does this.
- The board concurred in the recommendation regarding endorsements. The proposed rules provide for denial or revocation of program approval if the emphasis of the program is on the business, management, or insurance aspects of a chiropractic practice rather than on improving the clinical skills of the chiropractor or if there is a conflicting financial interest. See proposed ss. Chir 12.04 and 12.05.

2. Marla Hill appeared for the Wisconsin Dietetic Association. Ms. Hill emphasized that “nutritional counseling” is not “medical nutrition therapy” which is a second tier of nutrition services requiring more training. Ms. Hill specifically endorsed the continuing education provisions of the proposed rules and the requirement that a chiropractor cease selling and dispensing nutritional supplements if the chiropractor has not obtained a certificate for nutritional counseling within two years.

Response:

The board noted that this testimony was supportive of the proposed rules and also that neither 2005 Wisconsin Act 25 §§ 2338 q. and r. nor the proposed rules authorize medical nutritional counseling as described in Ms. Hill’s testimony. The proposed rules relate to

“nutritional counseling” defined in proposed s. Chir 12.03 as “. . . providing counsel, direction, guidance, advice or a recommendation to a patient regarding the health effects of vitamins, herbs or nutritional supplements.”

VI. LIST OF THE PERSONS WHO APPEARED OR REGISTERED FOR OR AGAINST THE PROPOSED RULE AT A PUBLIC HEARING.

A public hearing was held on June 22, 2006. Persons who appeared or registered for or against the proposed rule are listed below. See V., above, for a summary of comments by persons who presented comments at the hearing.

Steve Douglas, D.C. Janesville, Wisconsin
John E. Church, D.C, Janesville, Wisconsin
Russ Leonard, Madison, Wisconsin
Susan Nitzke, Cottage Grove, Wisconsin
Marla Hill, Menasha, Wisconsin

VII. RECOMMENDATIONS OF THE LEGISLATIVE COUNCIL STAFF AND THE AGENCY’S RESPONSE TO LEGISLATIVE COUNCIL STAFF RECOMMENDATIONS.

A copy of the Clearinghouse Report to the Agency for Clearinghouse Rule 06-051 is attached. All recommendations of the Clearinghouse were followed except as indicated in the responses, below.

Clearinghouse Comment	Response
<p>1. Statutory Authority Section. Chir 12.05 (3) establishes a limitation on “dispensing” by a chiropractic office and refers to a “sale.” However, neither the rule nor s. 446.02 (6m), Stats., as created by 2005 Wisconsin Act 25, explicitly grant authority for a chiropractor to “dispense” or sell any substance. Section Chir 12.05 (1) and s. 446.02 (6m), Stats., as created by 2005 Wisconsin Act 25, authorize a certified chiropractor to provide “counsel, direction, guidance or advice or a recommendation” but do not authorize a chiropractor to dispense or sell any item. Is there separate statutory authority for a chiropractor to dispense or sell a nutritional item or can any person engage in this activity without a license, permit, or registration?</p>	<p>Section Chir 12.05 (3) proposed in the draft originally submitted to the Clearinghouse is deleted from the final draft.</p> <p>A "seller's permit" is required by the Dept. of Revenue to sell nutritional items. No other special permit or other license is required. Of course, a nutritional item that is also a “prescription drug” is regulated by state and federal laws including Wis. Stat. ch. 450 and may only be sold or dispensed in compliance with these state and federal regulations.</p> <p>The proposed rules provide in s. Chir 12.06 (2) [s. 12.05(4) in original draft] that 24 months after the effective date of the rules, a chiropractor may not sell nutritional supplements unless the chiropractor holds a certificate for nutritional counseling. This restriction is established under the board’s general authority in s. 15.08, Stats., to promulgate rules to define and enforce professional conduct and foster the standards of professional education pertaining to the profession in relation to the general welfare. This prohibition on sales after 24 months is proposed to protect chiropractic patients: 2005 Wisconsin Act 25, in authorizing nutritional counseling and setting educational</p>

standards, has raised the standard for nutritional counseling competence in the profession which will be relied upon by the patients. Under the new law, patients who purchase nutritional supplements from their chiropractor will have a reasonable expectation that their chiropractor has the education in nutrition required under Act 25. The public will be confused and the public health may be threatened if a practitioner is able to sell nutritional supplements, but unable to provide advice on the products. Enforcement of the certificate requirement by the state would be nearly impossible if uncertified practitioners were able to sell supplements.

2.e. It is unclear why the material set forth in s. Chir 12.05 (1), (2), and (3), which all describe practices that a certified chiropractor is authorized to engage in, are located in a section of the rule entitled “Prohibited practices.”

Section Chir 12.05 (1), (2), and (3) proposed in the draft originally submitted to the Clearinghouse are deleted from the final draft.

4.b. In s. Chir 12.03 (1) (b) 9., it is unclear what is meant by “Codex Alimentarius recommendations.” It appears that the Codex Alimentarius consists of a set of standards, not recommendations. Also, since the Codex covers a very wide range of food-related topics, the rule should specify which Codex “recommendations” (or standards) must be included in the core curriculum of an approved program.

The board intended that the course core curriculum cover the Codex Alimentarius Commission itself, but not any particular standards or recommendations made by the Commission. As a result of the Clearinghouse recommendation, the subsection was modified to eliminate the reference to “recommendations.”

5.c. “Metabolic” is an adjective. It appears to be incorrectly used as a noun in s. Chir 12.01 (4). In addition, in that provision, it appears that the phrase “or is labeled as a nutritional or dietary supplement” is also incorrectly used as a noun. Also, it is unclear whether the item referred to as “or is labeled as a nutritional or dietary supplement” is meant to be an item included as a “nutritional supplement”

“Metabolics” refers to a class of nutritional supplements. The term is not used as an adjective in the rule.

The phrase “bears or” has been deleted from the definition.

or is a “dietary ingredient” that may be contained within a product that is a nutritional supplement. It appears that the use of a semicolon may be in order to clarify this point. Finally, what is the difference between the terms “bears” and “contains” used in that provision? Is it possible for a product to “bear” an ingredient but not “contain” that ingredient? If not, then “bears or” should be deleted.

5.d. In s. Chir 12.02 (1) (c) 3., to what does the phrase “stating that the applicant has graduated from a program that is substantially equivalent to a postgraduate or diplomate program under subd. 1. or 2.” refer? Who must make this statement? Must the statement be included in the application for certification? Also, what is meant by “another approved accrediting agency”? How is it determined if an agency is “approved”? Who grants approval? Should the rule provide a list of approved agencies or, if the board plans to make approval determinations on a case by case basis, should the rule set forth the criteria that will be used to grant or deny approval?

In proposed s. Chir 12.02 (1) (c) 3., the word “stating” has been changed to “indicating” and “another approved accrediting agency” to “another board approved accrediting agency.” The board will determine from the materials submitted whether the program is substantially equivalent to a postgraduate or diplomate program. The criteria for approval are identified in proposed s. Chir 12.02 (1) (c) 1. and 2. and in the accreditation standards set by the Council on Chiropractic Education and other accrediting bodies identified in the rule. Few applicants are likely to apply under this provision and will have unique qualifications that require individual review.

5.o. The topics listed in s. Chir 12.03 (1) (b) 12., 17., and 25. appear to be somewhat redundant. Could these be rewritten to be less repetitive?

With respect to Comment 5.o., the board received advice from educators on the program which included a recommendation that the items listed in s. Chir 12.03 (1) (b) 12., 17., and 25 be included in the rule. The redundancies were intended and had been recommended for inclusion by the experts in the field who made those comments during the course of the rulemaking process.

5.p. What is meant by the requirement that a program sponsor “validate” a program’s content in s. Chir 12.03 (1) (d)?

In response to Comment 5.p., the intention of the board is for the program sponsor to be responsible for comparing the course content with the rule requirements for course content,

in other words, the program sponsor needs to verify that the material provided to them is what will actually be presented at the course.

5.q. The requirements for instructors for nutritional counseling education programs in s. Chir 12.03 (1) (f) and (h) are unclear. Section Chir 12.03 (1) (f) specifies that instructors who are on the undergraduate or postgraduate faculty of a chiropractic college must meet certain requirements, but is silent as to what requirements must be met by an instructor who is not on the undergraduate or postgraduate faculty of a chiropractic college. It seems illogical to impose stricter requirements on a person who is already serving as a college faculty member than on a person who has no credentials or experience, as the rule appears to do. What requirements apply to an instructor who is not on the undergraduate or postgraduate faculty of a chiropractic college who wishes to serve as an instructor for a nutritional counseling education program? In addition, the requirement in s. Chir 12.03 (1) (h) that an instructor must be “qualified to present the course” is so vague as to be meaningless.

Regarding Comment 5.q., s. Chir 12.03 (1) (f) has been changed to omit the requirement that the program sponsor provide confirmation that the chiropractic college exercise supervision over the faculty member’s course content. The rule provision requiring verification of appointment according to accreditation standards is retained. This change clarifies the requirement and eliminates a difference in treatment of instructors identified by the Clearinghouse. The final draft retains the provision in s. Chir 12.03 (1) (f) that instructors be “qualified to present the course” because a qualified instructor is essential and the qualifications of instructors should be scrutinized.

5.r. Section Chir 12.03 (1) (i) states that a chiropractor may not be allowed to begin another educational session until the chiropractor has passed “an assessment.” It appears that the rule should specify that a chiropractor may not advance to the next educational session until he or she has passed the assessment for the previous educational session.

Section Chir 12.03 (1) (i) in the draft originally submitted to the Clearinghouse required that a chiropractor pass an assessment after each 12 hours before beginning another educational session. This requirement is eliminated in the final draft.

5.u. The rule should set forth the grounds and procedures for revocation of a program approval.

Grounds for revoking program approval are now in proposed s. Chir 12.05. The procedure to be used for revoking approval is established in Subchapter III of ch. 227,

	Stats., and in existing chs. RL 1 and 2. Additional procedural rules are unnecessary.
5.x. Section Chir 12.05 (2) should be rewritten to read: “The use of substances described in sub. (1) by a licensed chiropractor....”	Section Chir 12.05 (2) proposed in the draft originally submitted to the Clearinghouse is deleted from the final draft.

VIII.. FINAL REGULATORY FLEXIBILITY ANALYSIS.

The proposed rules will have no significant economic impact on small businesses, as defined in s. 227.114 (1), Stats.

Ch Chir 12 CR06-051 (Nutritional counseling) Report to Leg 8-4-06