



PROPOSED RULE MAKING

CR-102 (December 2017) (Implements RCW 34.05.320)

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FILED

DATE: June 29, 2022

TIME: 11:21 AM

WSR 22-14-059

Agency: Department of Social and Health Services, Aging and Long-Term Support Administration, Home & Comm Serv

☒ **Original Notice**

☐ **Supplemental Notice to WSR** _____

☐ **Continuance of WSR** _____

☒ **Preproposal Statement of Inquiry was filed as WSR 22-03-090 ; or**

☐ **Expedited Rule Making--Proposed notice was filed as WSR** _____; or

☐ **Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or**

☐ **Proposal is exempt under RCW** _____.

Title of rule and other identifying information: (describe subject) The department is proposing to amend WAC 388-106-1400, "What services may I receive under New Freedom consumer directed services (NFCDS)?"; 388-106-1405, "What services are not covered under New Freedom consumer directed services (NFCDS)?"; 388-106-1422, "What happens to my New Freedom service dollar budget if I am temporarily hospitalized, placed in a nursing facility, or intermediate facilities for the mentally retarded?"; 388-106-1455, "What happens to individual budget funds when I don't use them?"; 388-106-1458, "How do I create and use my spending plan?"; and 388-106-1475, "How do I end enrollment in New Freedom consumer directed services (NFCDS)?"

Hearing location(s):

Date:	Time:	Location: (be specific)	Comment:
August 9, 2022	10:00 a.m.	Office Building 2 DSHS Headquarters 1115 Washington Olympia, WA 98504	Public parking at 11 th and Jefferson. A map is available at: https://www.dshs.wa.gov/office-of-the-secretary/driving-directions-office-bldg-2
		Or Virtually	Due to the COVID-19 pandemic, hearings are held virtually, see the DSHS website for the most current information.

Date of intended adoption: Not earlier than August 10, 2022 (Note: This is **NOT** the effective date)

Submit written comments to:

Name: DSHS Rules Coordinator

Address: PO Box 45850

Olympia, WA 98504

Email: DSHSRPAURulesCoordinator@dshs.wa.gov

Fax: 360-664-6185

Other:

By (date) 5:00 p.m. on August 9, 2022

Assistance for persons with disabilities:

Contact DSHS Rules Consultant

Phone: 360-664-6036

Fax: 360-664-6185

TTY: 711 Relay Service

Email: tenczsa@dshs.wa.gov

Other:

By (date) 5:00 p.m. on July 26, 2022

Purpose of the proposal and its anticipated effects, including any changes in existing rules: The intent of this rule making is to amend New Freedom WACs that have not been updated since 2013. The department is proposing to update language that will enable participants to receive covered goods and services timelier, to clarify goods and services items that cannot be purchased under the New Freedom program, and other minor language updates.																			
Reasons supporting proposal: See purpose statement above																			
Statutory authority for adoption: RCW 74.08.090, RCW 74.09.520																			
Statute being implemented: RCW 74.08.090, RCW 74.09.520																			
Is rule necessary because of a: <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div> Federal Law? Federal Court Decision? State Court Decision? </div> <div> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No </div> </div> If yes, CITATION:																			
Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters: None																			
Name of proponent: (person or organization)			<input type="checkbox"/> Private <input type="checkbox"/> Public <input checked="" type="checkbox"/> Governmental																
Name of agency personnel responsible for: <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 10px;"> <thead> <tr> <th></th> <th style="text-align: center;">Name</th> <th style="text-align: center;">Office Location</th> <th style="text-align: center;">Phone</th> </tr> </thead> <tbody> <tr> <td>Drafting:</td> <td>Mark Towers</td> <td>P.O. Box 45600, Olympia, WA 98504-5600</td> <td>360-725-2366</td> </tr> <tr> <td>Implementation:</td> <td>Mark Towers</td> <td>P.O. Box 45600, Olympia, WA 98504-5600</td> <td>360-725-2366</td> </tr> <tr> <td>Enforcement:</td> <td>Mark Towers</td> <td>P.O. Box 45600, Olympia, WA 98504-5600</td> <td>360-725-2366</td> </tr> </tbody> </table>					Name	Office Location	Phone	Drafting:	Mark Towers	P.O. Box 45600, Olympia, WA 98504-5600	360-725-2366	Implementation:	Mark Towers	P.O. Box 45600, Olympia, WA 98504-5600	360-725-2366	Enforcement:	Mark Towers	P.O. Box 45600, Olympia, WA 98504-5600	360-725-2366
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Enforcement:	Mark Towers	P.O. Box 45600, Olympia, WA 98504-5600	360-725-2366																
Is a school district fiscal impact statement required under RCW 28A.305.135?			<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No																
If yes, insert statement here: <div style="margin-top: 20px;"> The public may obtain a copy of the school district fiscal impact statement by contacting: Name: Address: Phone: Fax: TTY: Email: Other: </div>																			
Is a cost-benefit analysis required under RCW 34.05.328? <div style="margin-top: 10px;"> <input type="checkbox"/> Yes: A preliminary cost-benefit analysis may be obtained by contacting: Name: I Address: Phone: Fax: </div>																			

TTY:

Email:

Other:

☒ No: Please explain: This rule is not a significant legislative rule pursuant to RCW 34.05.328 and is exempt as it relates to client eligibility for medical goods and services.

Regulatory Fairness Act Cost Considerations for a Small Business Economic Impact Statement:

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see chapter 19.85 RCW). Please check the box for any applicable exemption(s):

☐ This rule proposal, or portions of the proposal, is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.

Citation and description:

☐ This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by RCW 34.05.313 before filing the notice of this proposed rule.

☐ This rule proposal, or portions of the proposal, is exempt under the provisions of RCW 15.65.570(2) because it was adopted by a referendum.

☐ This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(3). Check all that apply:

☐ RCW 34.05.310 (4)(b)
(Internal government operations)

☐ RCW 34.05.310 (4)(c)
(Incorporation by reference)

☐ RCW 34.05.310 (4)(d)
(Correct or clarify language)

☐ RCW 34.05.310 (4)(e)
(Dictated by statute)

☐ RCW 34.05.310 (4)(f)
(Set or adjust fees)

☐ RCW 34.05.310 (4)(g)
((i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit)

☒ This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(4) because the proposed amendments do not impact small businesses and impose no new or disproportionate costs on small businesses so a small business economic impact statement is not required.

Explanation of exemptions, if necessary: The amendments relate to client eligibility for medical goods and services.

COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES

If the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

☐ No Briefly summarize the agency's analysis showing how costs were calculated.

☐ Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses, and a small business economic impact statement is required. Insert statement here:

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

Name:

Address:

Phone:

Fax:

TTY:

Email:

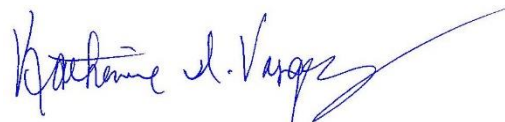
Other:

Date: June 29, 2022

Name: Katherine I. Vasquez

Title: DSHS Rules Coordinator

Signature:



WAC 388-106-1400 What services may I receive under New Freedom consumer directed services (NFCDS)? (1) In order for services, supports, ~~((and/))~~ or items to be purchased under New Freedom, they must:

- (a) Be for your sole benefit;
- (b) Be at a reasonable cost;
- (c) Meet your identified needs and outcomes in the CARE assessment and address your health, safety, and welfare; and
- (d) Be documented on your New Freedom spending plan defined in WAC 388-106-0010. The spending plan, which is established with the Care Consultant, documents how you will spend your service budget dollars.

(2) Your consultant may require a physician or other licensed professional, such as an occupational or physical therapist to recommend a specific purchase in writing. This recommendation is needed to ensure the service, support, ~~((and/))~~ or item will increase, maintain, or delay decline of functional abilities, and to ensure the purchase supports your health and welfare.

(3) Medicare or medicaid state plan benefits or other insurance must be used prior to using New Freedom funds if the goods or services are covered under these programs.

(4) You may use your individual budget to purchase services, supports, ~~((and/))~~ or items that fall into the following service categories:

(a) **Personal assistance services**, defined as supports involving the labor of another person to assist you to carry out activities you are unable to perform independently. Services may be provided in your home or in the community and may include:

(i) Direct personal care services defined as assistance with activities of daily living, as defined in WAC 388-106-0010. These must be provided by a qualified individual provider or AAA-contracted home-care agency as described in WAC 388-106-0040 (1) and (2);

(ii) Delegated nursing tasks, per WAC 246-841-405 and 388-71-05830. Providers of direct personal care services may be delegated by a registered nurse to provide nurse delegated tasks according to RCW 18.79.260 and WAC 246-840-910 through 246-840-970;

(iii) Other tasks or assistance with activities that support independent functioning, and are necessary due to your functional disability;

(iv) Personal assistance with transportation or assistance with instrumental activities of daily living (essential shopping, housework, and meal preparation).

(b) **Treatment and health maintenance**, defined as treatments or activities that are beyond the scope of the medicaid state plan that are necessary to promote your health and ability to live independently in the community and:

(i) Are provided for the purpose of preventing further deterioration of your level of functioning, or improving or maintaining your current level of functioning; and

(ii) Are performed or provided by people with specialized skill, registration, certification, or licenses as required by state law.

(c) **Individual directed goods, services and supports**, defined as services, equipment or supplies not otherwise provided through this waiver or through the medicaid state plan; and

(i) Will allow you to function more independently; or
(ii) Increase your safety and welfare; or
(iii) Allow you to perceive, control, or communicate with your environment; or

(iv) Assist you to transition from an institutional setting to your home. Transition services may include safety deposits, utility set-up fees or deposits, health and safety assurances such as pest eradication, allergen control or one-time cleaning prior to occupancy, moving fees, furniture, essential furnishings and basic items essential for basic living outside the institution. Transition services do not include rent, recreational or diverting items such as TV, cable or VCR/DVDs.

(d) **Environmental or vehicle modifications**, defined as alterations to your residence or vehicle that are necessary to accommodate your disability and promote your functional independence, health, safety, and ~~((or))~~ welfare.

(i) Environmental modifications cannot be adaptations or improvements that are of general utility or merely add to the total square footage of the home.

(ii) Vehicles subject to modification must be owned by you or a member of your family who resides with you; must be in good working condition, licensed, and insured according to Washington state law; and be cost effective when compared to available alternative transportation.

(e) **Training and educational supports**, defined as supports beyond the scope of medicaid state plan services that are necessary to promote your health and ability to live and participate in the community and maintains, slows decline, or improves functioning and adaptive skills. Examples include:

(i) Training or education on your health issues, or personal skill development;

(ii) Training or education to paid or unpaid caregivers related to your needs.

(5) You may receive comprehensive adult dental services as defined in WAC 388-106-0300(15) through December 31, 2013. The cost of the dental services will not be deducted from your individual budget.

AMENDATORY SECTION (Amending WSR 13-18-039 and 13-17-125, filed 8/29/13 and 8/21/13, effective 10/1/13)

WAC 388-106-1405 What services are not covered under New Freedom consumer directed services (NFCDS)? (1) Goods, services, and supports that are not consistent with the description in WAC 388-106-1400.

~~((Services, supports and/or items that cannot be purchased within New Freedom budgets, including, but not limited to:))~~

~~((1))~~ (2) Services, supports ~~((and/))~~ or items covered by the state plan, medicare, or other programs or services.

~~((2))~~ (3) Any fees related to health or long-term care incurred by you, including co-pays, waiver cost of care (participation), or insurance.

~~((3))~~ (4) Home modifications that merely add square footage to your home.

~~((4))~~ (5) Vacation or travel expenses other than the direct cost of provision of personal care services while on vacation ~~((but))~~

and you may not use New Freedom funds to pay travel expenses for your provider).

~~((5))~~ (6) Rent or room and board.

~~((6))~~ (7) Tobacco or alcohol products(~~(7)~~).

~~((7))~~ (8) Lottery tickets.

~~((8))~~ (9) Entertainment-related items such as televisions, cable, DVD players, stereos, radios, ~~((computers))~~ and other electronics, that are nonadaptive in nature.

~~((9))~~ (10) Vehicle purchases, maintenance, or upgrades that do not include maintenance to modifications related to disability.

~~((10))~~ (11) Tickets and related costs to attend sporting or other recreational events.

~~((11)) Standard household supplies, furnishings, equipment, and maintenance, such as cleaning supplies, beds/mattresses, chairs, vacuum cleaners, outside window cleaning, and major household appliances, such as washing machines or refrigerators (unless purchased while transitioning from an institution to home).)~~

(12) Pets, therapy animals and their related costs (including food and veterinary services).

(13) Postage outside of shipping costs related to approved spending plan items.

(14) Experimental or investigational services, procedures, treatments, devices, drugs, or application of associated services, except when the individual factors of an individual client's condition justify a determination of medical necessity under WAC 182-500-0070.

~~((15) Gym equipment or exercise equipment over one hundred dollars per year.)~~

~~((16))~~ (15) Monthly service fees for utilities.

~~((17))~~ (16) Warranties (for equipment, furnishings, or installations).

~~((18))~~ (17) Cosmetic services and treatments (i.e. manicures, pedicures, ~~((hair services,))~~ face lifts, etc).

~~((19))~~ (18) Basic groceries, clothing, and footwear.

~~((20) Travel-related expenses.)~~

~~((21))~~ (19) Any item previously purchased through medicaid funding that is within the health care authority replacement period.

(20) Any goods, services, or supports that are considered of general utility, meaning the service/good/support is not specific to the individuals' needs based on their disabilities or health conditions.

AMENDATORY SECTION (Amending WSR 13-18-039 and 13-17-125, filed 8/29/13 and 8/21/13, effective 10/1/13)

WAC 388-106-1422 What happens to my New Freedom service dollar budget if I am temporarily hospitalized, placed in a nursing facility, or intermediate care facilities for ~~((the mentally retarded))~~ Intellectual Disability ~~((ICF/MR))~~ (ICF/ID)? If you are admitted to a hospital, nursing home, or ~~((ICF/MR))~~ ICF/ID, you cannot access or accumulate funds to your New Freedom service budget during your stay.

If you are institutionalized for ~~((forty-five))~~ 30 days or less and you intend to return to New Freedom when discharged, your service budget will be temporarily suspended while you are temporarily hospitalized for up to 30 days. Upon discharge home, if within 30 days,

your service budget will be reinstated if you are still eligible for New Freedom services.

AMENDATORY SECTION (Amending WSR 13-18-039 and 13-17-125, filed 8/29/13 and 8/21/13, effective 10/1/13)

WAC 388-106-1455 What happens to individual budget funds when I don't use them? (1) The balance of individual budget funds that were not allocated for purchase of personal care may be used to purchase other goods and services in accordance with the approved New Freedom spending plan or saved for future purchase as described in (2) below.

(2) Up to ~~((three thousand five hundred dollars))~~ \$3,500 may be held in savings for future purchases documented in the New Freedom spending plan.

(3) Reserves in excess of ~~((three thousand five hundred dollars))~~ \$3,500 may only be maintained for exceptional, planned purchases with preapproval from the department.

(4) Unused funds will revert back to the department under the following circumstances:

(a) You have savings funds in excess of ~~((three thousand five hundred dollars))~~ \$3,500 that are not identified for exceptional, pre-approved purchases in your spending plan;

(b) You disenroll from New Freedom;

(c) You lose eligibility for New Freedom;

(d) You are hospitalized, ~~((and/or placed))~~ in a nursing home, or ~~((ICM/FR))~~ ICF/ID for over ~~((forty-five))~~ 30 days; or

(e) You have personal care funds not used in the month for which you allocated them.

AMENDATORY SECTION (Amending WSR 21-18-081, filed 8/30/21, effective 10/1/21)

WAC 388-106-1458 How do I create and use my spending plan? (1) You create your spending plan in collaboration with ~~((the assistance of the))~~ your care consultant using the ~~((new freedom self-assessment and the))~~ CARE ~~((assessment))~~ tool.

(2) The spending plan must be approved by both you and the care consultant.

(3) You, as the participant, ~~((and your care consultant))~~ must identify how many personal care service units you intend to purchase prior to the month you plan to use them (service month).

(4) The value of those units is deducted from your new freedom budget.

(5) The rest of the funds can be used for other covered goods and services or saved.

(6) Once a service month begins, the number of personal care units may not be altered during that month.

(7) The maximum number of personal care units that can be purchased from the monthly budget is calculated from the individual budget as described in WAC 388-106-1445, divided by the individual provider average wage including mileage.

(8) Prior to the service month, you may elect to use savings funds to buy additional personal care.

(9) You may choose to have your personal care provided by an individual provider (IP) or a home care agency.

(10) Each unit will be deducted from your new freedom budget at the average IP wage rate including mileage.

(11) The balance of your individual new freedom budget will be available in your NFSP to save or purchase other goods and services up to the limit described in WAC 388-106-1455(2).

(12) If you have a change of condition or situation and your new freedom budget increases due to a new assessment or exception to rule, you may purchase additional personal care from an IP or home care agency mid-month at the average IP rate, including mileage during the month your budget changed.

(13) You may assign your predetermined personal care units to a different provider during the month of service.

(14) Under chapter 388-114 WAC, individual providers for one or more department clients who work more than ~~((forty))~~ 40 hours in a work week, are entitled to overtime and the responsibility for paying the extra cost as follows:

(a) If the individual provider is contracted with the department and approved to work more than ~~((forty))~~ 40 hours per week as described in WAC 388-114-0080, the department will pay the extra cost for overtime up to the number of service hours the individual provider is approved to work and the payment for these extra costs will not be charged to your budget; and

(b) If you assign more overtime hours to your individual provider than the department approved, you must pay the extra costs for the unapproved overtime hours and the additional cost will impact your monthly budget and may reduce the number of service hours you are able to purchase from it.

AMENDATORY SECTION (Amending WSR 13-18-039 and 13-17-125, filed 8/29/13 and 8/21/13, effective 10/1/13)

WAC 388-106-1475 How do I end enrollment in New Freedom consumer directed services (NFCDS)? (1) You may choose to voluntarily end your enrollment from NFCDS without cause at any time. To do so, you must give notice to the department. If you give notice:

(a) Before the ~~((fifteenth))~~ 15th of the month, the department will end your enrollment at the end of the month; or

(b) After the ~~((fifteenth))~~ 15th, the department will end your enrollment the end of the following month.

(2) Your enrollment may also end involuntarily if you:

(a) Move out of the designated service area or are out of the service area for more than ~~((thirty))~~ 30 consecutive days, unless you have documented the purpose of the longer absence in the NFSP; or

(b) Do not meet the terms for consumer direction of services outlined in the ~~((NFCDS enrollment-a))~~ New Freedom Participant Responsibility Agreement when:

(i) Even with ~~((help from a representative))~~ coaching and collaboration, you are unable to develop a NFSP or self-direct services or manage your individual budget or NFSP;

(ii) Any one factor or several factors of such a magnitude jeopardize the health, welfare, and safety of you and others, requiring termination of services under WAC 388-106-0047;

(iii) You become financially ineligible for medicaid services;

(iv) You no longer meet the nursing facility level of care requirement as defined in WAC 388-106-0355; (~~(e)~~)

(v) You misuse program funds and services as determined by the department(~~(f)~~) ; or

(vi) You are unable to follow the responsibilities of a participant on the New Freedom program as determined by the department.