



# PROPOSED RULE MAKING

## CR-102 (July 2022) (Implements RCW 34.05.320) Do NOT use for expedited rule making

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FILED

DATE: August 25, 2022

TIME: 2:28 PM

WSR 22-18-010

**Agency:** Department of Social and Health Services, Developmental Disabilities Administration (DDA)

☐ Original Notice

☒ Supplemental Notice to WSR 22-05-014 and 22-07-077

☐ Continuance of WSR \_\_\_\_\_

☒ Preproposal Statement of Inquiry was filed as WSR 21-24-062 and 22-01-024 ; 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) WAC 388-101D-0030, Staffing requirements., 388-101D-0070, Background checks—National fingerprint background checks., 388-101D-0075, Background checks—Requirements for service providers, and 388-101D-0080, Background checks—Provisional hire—Pending results

### Hearing location(s):

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

**Date of intended adoption:** not earlier than October 12, 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](mailto:DSHSRPAURulesCoordinator@dshs.wa.gov)

Fax: 360-664-6185

Other:

By (date) 5:00 p.m. on October 11, 2022

### Assistance for persons with disabilities:

Contact Shelley Tencza, Rules Consultant

Phone: 360-664-6036

Fax: 360-664-6185

TTY: 711 Relay Service

Email: [tencza@dshs.wa.gov](mailto:tencza@dshs.wa.gov)

Other:

By (date) 5:00 p.m. on September 27, 2022

**Purpose of the proposal and its anticipated effects, including any changes in existing rules:** DDA is amending WAC 388-101D-0030 to allow providers to hire an employee without a high school diploma or GED. DDA is amending WAC 388-101D-0070 to remove subsection (3). DDA is amending WAC 388-101D-0075 and WAC 388-101D-0080 to correct broken cross-references.

**Reasons supporting proposal:** Amendments to WAC 388-101D-0030 align with the education qualifications for direct support professionals in Chapter 388-112A WAC and Chapter 74.39A RCW, which do not require a GED or high school diploma.

Amendments to WAC 388-101D-0070 align it with WAC 388-101D-0075 and 28 C.F.R. Section 20.33(d). WAC 388-101D-0070(3) was too broad in how long it allowed a fingerprint result to remain valid. Removing subsection (3) aligns this rule with federal regulations. Additionally, the FBI audit guide for noncriminal justice access to criminal history record information (CHRI), has determined that reuse of CHRI is permitted for the "same purpose" but only "within a relatively short period of time." Amendment to WAC 388-101D-0080 is to correct broken cross-references.

**Statutory authority for adoption:** RCW 71A.12.030

**Statute being implemented:** RCW 71A.12.040, 71A.12.110, and 74.39A.056

<b>Is rule necessary because of a:</b>			
Federal Law?		<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Federal Court Decision?		<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
State Court Decision?		<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If yes, CITATION: 28 C.F.R. Section 20.33(d)			
<b>Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:</b> None			
<b>Type of proponent:</b> <input type="checkbox"/> Private <input type="checkbox"/> Public <input checked="" type="checkbox"/> Governmental			
<b>Name of proponent:</b> (person or organization) Department of Social and Health Services, Developmental Disabilities Administration			
<b>Name of agency personnel responsible for:</b>			
	Name	Office Location	Phone
Drafting:	Chantelle Diaz	P.O. Box 45310, Olympia, WA 98504-5310	360-407-1500
Implementation:	Megan Kwak	P.O. Box 45310, Olympia, WA 98504-5310	360-764-9909
Enforcement:	Megan Kwak	P.O. Box 45310, Olympia, WA 98504-5310	360-764-9909
<b>Is a school district fiscal impact statement required under <a href="#">RCW 28A.305.135</a>?</b> <span style="float: right;"><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</span>			
If yes, insert statement here:			
<p>The public may obtain a copy of the school district fiscal impact statement by contacting:</p> <p>Name:</p> <p>Address:</p> <p>Phone:</p> <p>Fax:</p> <p>TTY:</p> <p>Email:</p> <p>Other:</p>			
<b>Is a cost-benefit analysis required under <a href="#">RCW 34.05.328</a>?</b>			
<input checked="" type="checkbox"/> Yes: A preliminary cost-benefit analysis may be obtained by contacting: Name: Chantelle Diaz Address: P.O. Box 45310, Olympia, WA 98504-5310 Phone: 360-407-1500 Fax: 360-407-0955 TTY: 1-800-833-6388 Email: <a href="mailto:chantelle.diaz@dshs.wa.gov">chantelle.diaz@dshs.wa.gov</a> Other:			
<input type="checkbox"/> No: Please explain:			
<b>Regulatory Fairness Act and Small Business Economic Impact Statement</b>			
Note: The <a href="#">Governor's Office for Regulatory Innovation and Assistance (ORIA)</a> provides support in completing this part.			
<b>(1) Identification of exemptions:</b>			
This rule proposal, or portions of the proposal, <b>may be exempt</b> from requirements of the Regulatory Fairness Act (see <a href="#">chapter 19.85 RCW</a> ). For additional information on exemptions, consult the <a href="#">exemption guide published by ORIA</a> . Please check the box for any applicable exemption(s):			
<input type="checkbox"/> This rule proposal, or portions of the proposal, is exempt under <a href="#">RCW 19.85.061</a> 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:			
<input type="checkbox"/> This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by <a href="#">RCW 34.05.313</a> before filing the notice of this proposed rule.			
<input type="checkbox"/> This rule proposal, or portions of the proposal, is exempt under the provisions of <a href="#">RCW 15.65.570</a> (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:
- |   |   |
|---|---|
| <input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(b)<br>(Internal government operations) | <input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(e)<br>(Dictated by statute)  |
| <input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(c)<br>(Incorporation by reference)     | <input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(f)<br>(Set or adjust fees)   |
| <input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(d)<br>(Correct or clarify language)    | <input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(g)<br>(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\(4\)](#) (does not affect small businesses).

☒ This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.025 \(5\)](#).

Explanation of how the above exemption(s) applies to the proposed rule: The proposed amendments impose no costs on small businesses.

**(2) Scope of exemptions:** *Check one.*

- ☐ The rule proposal is fully exempt (*skip section 3*). Exemptions identified above apply to all portions of the rule proposal.
- ☐ The rule proposal is partially exempt (*complete section 3*). The exemptions identified above apply to portions of the rule proposal, but less than the entire rule proposal. Provide details here (consider using [this template from ORIA](#)):
- ☐ The rule proposal is not exempt (*complete section 3*). No exemptions were identified above.

**(3) Small business economic impact statement:** *Complete this section if any portion is not exempt.*

If any portion of 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 minor cost analysis and how the agency determined the proposed rule did not impose more-than-minor costs. \_\_\_\_\_

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

**SMALL BUSINESS ECONOMIC IMPACT STATEMENT**

Chapter 19.85 RCW, The Regulatory Fairness Act, requires that the economic impact of proposed regulations be analyzed in relation to small businesses. This statute outlines information that must be included in a Small Business Economic Impact Statement (SBEIS). Preparation of a SBEIS is required when a proposed rule has the potential of placing more than a minor impact on a business.

RCW 19.85.020 defines a "small business" as "any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that is owned and operated independently from all other businesses, and that has fifty or fewer employees."

DDA analyzed these proposed rules and concludes that the proposed changes may impact providers who are small businesses, but do not impose costs to any providers.

**EVALUATION OF PROBABLE COSTS AND PROBABLE BENEFITS**

Since the proposed amendments "make significant amendments to a policy or regulatory program" under RCW 34.05.328(5)(c)(iii), DDA has determined the proposed rules to be "significant" as defined by the legislature.

As required by RCW 34.05.328(1)(d), DDA has analyzed the probable costs and probable benefits of the proposed amendments, taking into account both the qualitative and quantitative benefits and costs.

DDA has analyzed the proposed rule amendments and concludes that they will impose no new costs on small businesses because the Department pays for the fingerprinting required by the subsection proposed for removal (WAC 388-101D-0070(3)). The preparation of a comprehensive SBEIS is not required.

**Costs**

As described below, DDA's analysis revealed that there are no new costs imposed:

- It is optional for a provider to hire a person using the education exemption in WAC 388-101D-0030.
- DDA pays for the fingerprinting required by amendments to the background check sections.

## Benefits

Many benefits will result from the adoption of the proposed amendments. These benefits include:

- Helping providers to address staffing difficulties.
- Enable providers to meet client health and safety needs with increased staffing.
- Alignment with federal regulations and guidance from the Federal Bureau of Investigation.
- Simplified language for easier compliance.

## CONCLUSION

DDA concludes that the benefits of these regulations exceed any possible cost.

DDA has complied with the appropriate sections of the Administrative Procedure Act and is prepared to proceed with the rule filing.

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

Name: Chantelle Diaz

Address: P.O. Box 45310, Olympia, WA 98504-5310

Phone: 360-407-1500

Fax: 360-407-0955

TTY: 1-800-833-6388

Email: [chantelle.diaz@dshs.wa.gov](mailto:chantelle.diaz@dshs.wa.gov)

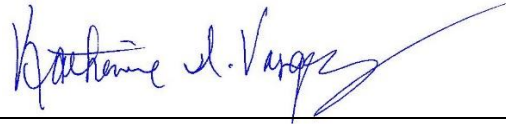
Other:

**Date:** August 24, 2022

**Name:** Katherine I. Vasquez

**Title:** DSHS Rules Coordinator

**Signature:**



AMENDATORY SECTION (Amending WSR 16-14-058, filed 6/30/16, effective 8/1/16)

**WAC 388-101D-0030 Staffing requirements.** (1) The ((service)) provider must ensure each ((staff meets the following minimum requirements)) of its employees:

((~~(1) Have~~)) (a) Has a high school diploma or GED equivalent, unless the ((employees were)) employee was hired before September 1, 1991 or is exempt under subsection (2) of this section;

((~~(2) Be at least eighteen years of~~)) (b) Is age 18 or older when employed as a direct ((care staff, or at least twenty-one years of age or older when employed as an administrator)) support professional who provides support services to a client;

(c) Is age 21 or older when employed as an administrator;

((~~(3) Have~~)) (d) Has a clear understanding of job responsibilities and knowledge of individual support plans and client needs; and

((~~(4) Passed the department background check as required by WAC 388-101-3250~~)) (e) Satisfies department background check requirements under chapter 388-825-WAC.

(2) The provider may hire a person without a high school diploma or GED if while working directly with clients the employee has access to another employee or a volunteer who:

(a) Has a high school diploma or GED; or

(b) Was hired before September 1, 1991.

(3) If the provider hires a person under subsection (2) of this section, the provider must have a written plan that states when and how the person must contact another employee for assistance.

AMENDATORY SECTION (Amending WSR 17-03-062, filed 1/10/17, effective 2/1/17)

**WAC 388-101D-0070 Background checks—National fingerprint background checks.** (1) ((Administrators and all caregivers who are)) An applicant as defined in WAC 388-113-0010 hired on or after January 1, 2016, ((and are)) who is not disqualified by the Washington state name and date of birth background check, must complete a national fingerprint background check and follow department procedures.

(2) After receiving the results of the national fingerprint background check the ((service)) provider must ((not employ, directly or by contract,)) prevent an administrator, employee, volunteer, student, or subcontractor ((who has a disqualifying criminal conviction or pending charge for a disqualifying crime under chapter 388-113, or that is a disqualifying negative action under WAC 388-78A-2470 or WAC 388-76-10180.)) from having unsupervised access to a client if the person has a:

(a) Disqualifying criminal conviction or pending charge for a disqualifying crime under chapter 388-113 WAC; or

(b) Disqualifying negative action under WAC 388-78A-2470 or WAC 388-76-10180.

((~~(3) The service provider may accept a copy of the national fingerprint background check results letter and any additional information from the department's background check central unit from an indi-~~

~~vidual who previously completed a national fingerprint check through the department's background check central unit, provided the national fingerprint background check was completed after January 7, 2012.))~~

AMENDATORY SECTION (Amending WSR 17-03-062, filed 1/10/17, effective 2/1/17)

**WAC 388-101D-0075 Background checks—Requirements for service providers.** (1) Service providers must follow the background check requirements described in chapter 388-113 WAC and in this chapter. In the event of an inconsistency, this chapter applies.

(2) The service provider must obtain background checks from the department for all administrators, employees, volunteers, students, and subcontractors who may have unsupervised access to clients.

(3) The service provider must not allow the following persons to have unsupervised access to clients until the service provider receives the department's background check results:

- (a) Administrators;
- (b) Employees;
- (c) Volunteers or students; and
- (d) Subcontractors.

(4) If the department's background check results show that an administrator, employee, volunteer, student, or subcontractor has any of the following, then the service provider must prevent that person from having unsupervised access to clients:

(a) A disqualifying conviction or pending criminal charge under chapter 388-113 WAC; or

(b) A disqualifying negative action under chapter 388-113 WAC (~~((388-101-3090))~~).

(5) If the background check results show any of the following, then the service provider must conduct a character, suitability, and competence review before allowing the person unsupervised access to clients:

(a) The person has a conviction or pending criminal charge, but the conviction or criminal charge is not disqualifying under chapter 388-113 WAC (~~((388-113-0020))~~);

(b) The person has a conviction or pending criminal charge that meets one of the exceptions listed in WAC (~~((388-113-0040))~~) 388-113-0025; or

(c) Any of the circumstances described in WAC 388-101-3080 apply to the individual.

(6) When a service provider receives the results of a person's background check, the service provider must:

(a) Inform the person of the results of the background check;

(b) Inform the person that they may request a copy in writing of the results of the background check. If requested, a copy of the background check results must be provided within (~~((ten))~~) 10 working days of the request; and

(c) Notify the department and other appropriate licensing or certification agency of any person resigning or terminated as a result of having a conviction record.

(7) The service provider must renew the Washington state background check for each administrator, employee, volunteer, student, or

subcontractor of a service provider. The service provider must at least every ~~((thirty-six))~~ 36 months keep current background check results for each administrator, employee, volunteer, student, or subcontractor of a service provider.

(8) Licensed assisted living facilities or adult family homes must adhere to the current regulations in this chapter and in the applicable licensing laws.

(9) All applicants for certification must have a background check.

AMENDATORY SECTION (Amending WSR 17-03-062, filed 1/10/17, effective 2/1/17)

**WAC 388-101D-0080 Background checks—Provisional hire—Pending results.** ~~((Persons identified in WAC 388-101-3250 and who have))~~ Each provider applicant or employee who has lived in Washington state less than three years, or who ~~((are))~~ is otherwise required to complete a national fingerprint-based background check, may be hired for a ~~((one hundred twenty))~~ 120-day provisional period when:

(1) The person is not disqualified based on the initial results of the background check from the department; and

(2) A national fingerprint-based background check is pending.