



# PROPOSED RULE MAKING

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

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STATE OF WASHINGTON  
FILED

DATE: January 23, 2024  
TIME: 3:29 PM

WSR 24-03-151

**Agency:** Department of Social and Health Services, Economic Services Administration

Original Notice

Supplemental Notice to WSR 23-21-078

Continuance of WSR \_\_\_\_\_

Preproposal Statement of Inquiry was filed as WSR 23-16-126 ; 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 the following WAC sections: WAC 388-447-0001 "What are the incapacity requirements for referral to the housing and essential needs (HEN) program?" and 388-449-0001 "What are the disability requirements for the aged, blind, or disabled (ABD) program?"

**Hearing location(s):**

Date:	Time:	Location: (be specific)	Comment:
February 27, 2024	10:00 am	Or virtual or via Teams	Hearings are being held virtually. Please see the DSHS website for the most up to date information.

**Date of intended adoption:** Not earlier than February 28, 2024 (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) February 27, 2024, at 5:00 p.m.

**Assistance for persons with disabilities:**

Contact Shelley Tencza, DSHS 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) February 13, 2024, at 5:00 p.m.

**Purpose of the proposal and its anticipated effects, including any changes in existing rules:** These amendments clarify program rules regarding disability requirements for the ABD cash and incapacity requirements for the HEN Referral program. Formal comments were incorporated after the original CR-102 was filed.

**Reasons supporting proposal:** See above

**Statutory authority for adoption:** RCW 74.04.050 and 74.08.090

**Statute being implemented:** N/A

**Is rule necessary because of a:**

- Federal Law?  Yes  No
- Federal Court Decision?  Yes  No
- State Court Decision?  Yes  No

If yes, CITATION:

**Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:** None

**Type of proponent:**  Private  Public  Governmental

**Name of proponent:** (person or organization) Department of Social and Health Services

Name of agency personnel responsible for:			
	Name	Office Location	Phone
Drafting:	Sam Del Vecchio	PO Box 45470, Olympia WA 98504-5470	564-233-1647
Implementation:	Sam Del Vecchio	PO Box 45470, Olympia WA 98504-5470	564-233-1647
Enforcement:	Sam Del Vecchio	PO Box 45470, Olympia WA 98504-5470	564-233-1647

**Is a school district fiscal impact statement required under [RCW 28A.305.135](#)?**  Yes  No

If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:

Name:  
Address:  
Phone:  
Fax:  
TTY:  
Email:  
Other:

**Is a cost-benefit analysis required under [RCW 34.05.328](#)?**

Yes: A preliminary cost-benefit analysis may be obtained by contacting:

Name:  
Address:  
Phone:  
Fax:  
TTY:  
Email:  
Other:

No: Please explain: These rules are exempt as allowed under RCW 34.05.328(5)(b)(vii) which states in part, "[t]his section does not apply to...rules of the department of social and health services relating only to client medical or financial eligibility and rules concerning liability for care of dependents.

**Regulatory Fairness Act and Small Business Economic Impact Statement**  
Note: The [Governor's Office for Regulatory Innovation and Assistance \(ORIA\)](#) provides support in completing this part.

**(1) Identification of exemptions:**  
This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see [chapter 19.85 RCW](#)). For additional information on exemptions, consult the [exemption guide published by ORIA](#). 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:

<input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(b) (Internal government operations)	<input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(e) (Dictated by statute)
<input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(c) (Incorporation by reference)	<input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(f) (Set or adjust fees)
<input type="checkbox"/> <a href="#">RCW 34.05.310</a> (4)(d) (Correct or clarify language)	<input type="checkbox"/> <a href="#">RCW 34.05.310</a> (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) (does not affect small businesses).

This rule proposal, or portions of the proposal, is exempt under RCW 34.05.328(5)(b)(vii).

Explanation of how the above exemption(s) applies to the proposed rule: These amendments do not impact small businesses. They only impact DSHS customers.

**(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:

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

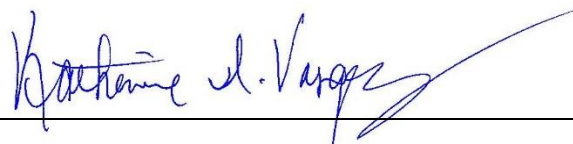
Name:  
Address:  
Phone:  
Fax:  
TTY:  
Email:  
Other:

**Date:** January 18, 2024

**Name:** Katherine I. Vasquez

**Title:** DSHS Rules Coordinator

**Signature:**



**WAC 388-447-0001 What are the incapacity requirements for referral to the housing and essential needs (HEN) program?** (1) For the purposes of this chapter, the following definitions apply:

(a) "We" and "us" mean the department of social and health services.

(b) "You" means the applicant or recipient.

(c) "Incapacitated" means you cannot be gainfully employed due to a physical or mental impairment that is expected to continue for at least ~~((ninety))~~ 90 days from the date you apply.

(d) "Mental impairment" means a diagnosable mental disorder.

(e) "Physical impairment" means a diagnosable physical illness.

(2) You must be incapacitated in order to receive a HEN referral.

(3) We determine if you are incapacitated when:

(a) You apply for a referral to the HEN program;

(b) You become gainfully employed; or

~~(c) ((You obtain work skills by completing a training program;~~

~~(d) We receive new information that indicates you may be able to work; or~~

~~(e))~~ Your incapacity authorization period ends.

(4) We deny your HEN referral if you are gainfully employed at the time of application for referral to the HEN program. "Gainfully employed" means you are performing, in a regular predictable manner, an activity usually done for pay or profit and earning more than the substantial gainful activity standard defined by the Social Security Administration (SSA).

(5) We do not consider you to be gainfully employed if you are working:

(a) Under special conditions that go beyond providing reasonable accommodation; or

(b) Occasionally or part-time because your impairment limits the hours you are able to work compared to unimpaired workers in the same job.

(6) We determine you are incapacitated if you are:

(a) Eligible for the aged, blind, or disabled (ABD) cash assistance program;

(b) Approved through the progressive evaluation process (PEP). The PEP is a sequence of eight steps described in WAC 388-447-0030 through 388-447-0100;

(c) Eligible for services from the developmental disabilities administration (DDA);

(d) Diagnosed as having an intellectual disability based on a full scale score of ~~((seventy))~~ 70 or lower on the Wechsler adult intelligence scale (WAIS);

(e) Eligible for long-term care services from the aging and long-term support administration (ALTSA);

(f) Released from a medical institution where you received services from ALTSA within the past 90 days; or

(g) Released from inpatient treatment for a mental impairment within the past 90 days if:

(i) The release from inpatient treatment was not against medical advice; and

(ii) You were discharged into outpatient mental health treatment.

(7) If you have a physical or mental impairment or are impaired due to a substance use disorder, and do not meet the other incapacity criteria in subsection (6)(c) through (g) of this section, we decide if you are incapacitated by applying the PEP.

(8) In determining incapacity, we consider only your ability to perform basic work-related activities. "Basic work-related activities" are activities that anyone would be required to perform in a work setting. They consist of: Sitting, standing, walking, lifting, carrying, handling; and other physical functions (including manipulative or postural functions such as pushing, pulling, reaching, handling, stooping, or crouching), seeing, hearing, communicating, remembering, understanding and following instructions, responding appropriately to supervisors, ~~((and))~~ co-workers, ~~((tolerating the pressures of a))~~ and usual work ((setting)) situations, maintaining appropriate behavior, using judgment, and adapting to changes in a routine work setting.

AMENDATORY SECTION (Amending WSR 23-01-057, filed 12/14/22, effective 1/14/23)

**WAC 388-449-0001 What are the disability requirements for the aged, blind, or disabled (ABD) program?** (1) For the purposes of this chapter, the following definitions apply:

(a) "We" and "us" ~~((refer to))~~ mean the department of social and health services.

(b) "You" means the applicant or recipient.

(c) "Disabled" means the inability to engage in any substantial gainful activity (SGA) by reason of any medically determinable physical or mental impairment(s) which has lasted or can be expected to last for a continuous period of not less than 12 months with available treatment or result in death.

(d) "Physical impairment" means a diagnosable physical illness.

(e) "Mental impairment" means a diagnosable mental disorder. We exclude any diagnosis of or related to a substance use disorder.

(2) We ~~((determine))~~ review if you ~~((are likely to be disabled))~~ meet disability requirements when:

(a) You apply for ABD cash benefits;

(b) You become employed; or

(c) ~~((You obtain work skills by completing a training program; or~~

~~((d) We receive new information that indicates you may be employable))~~ A disability review is required under WAC 388-449-0150.

(3) ~~((We determine you are likely to be disabled if:))~~ You are likely to meet disability requirements if:

(a) You are determined to meet SSA disability criteria by the Social Security Administration (SSA);

(b) You are determined to meet SSA disability criteria by disability determination services (DDDS) based on the most recent DDDS determination;

(c) ~~((The Social Security Administration ()))~~ SSA ~~((+))~~ stops your supplemental security income (SSI) payments solely because you are not a citizen;

(d) You are eligible for services through the developmental disabilities administration (DDA) for a medical condition that is expected to last 12 months or more or result in death;

(e) You are eligible for long-term care services from the aging and long-term support administration (ALTSA) for a medical condition that is expected to last 12 months or more or result in death;

(f) You have been civilly committed to eastern or western state hospital;

(g) You have been placed in eastern or western state hospital for an offense you have been found not guilty by reason of insanity; (~~(e)~~)

(h) You have been diagnosed as having an intellectual disability based on a full scale score of 70 or lower on the Wechsler adult intelligence scale (WAIS); or

(i) You are approved through the sequential evaluation process (SEP) defined in WAC 388-449-0005 through 388-449-0100. The SEP is the sequence of five steps. Step 1 considers whether you are currently working. Steps 2 and 3 consider medical evidence and whether you are likely to meet or equal a listed impairment under Social Security's rules. Steps 4 and 5 consider your residual functional capacity and vocational factors such as age, education, and work experience in order to determine your ability to do your past work or other work.

(4) If you have a physical or mental impairment and you are impaired by a substance use disorder and do not meet the other disability criteria in subsections (2)(a)-(~~(d)~~) (c) of this section, we decide if you are eligible for ABD cash by applying the sequential evaluation process described in WAC 388-449-0005 through 388-449-0100. You (~~aren't~~) are not eligible for ABD cash benefits if you are disabled primarily because of a substance use disorder.

(5) In determining disability, we consider only your ability to perform basic work-related activities. "Basic work-related activities" are activities that anyone would be required to perform in a work setting. They consist of: Sitting, standing, walking, lifting, carrying, handling, and other physical functions (including manipulative or postural functions such as pushing, pulling, reaching, handling, stooping, or crouching), seeing, hearing, communicating, remembering, understanding and following instructions, responding appropriately to supervisors, (~~and coworkers~~) co-workers, and usual work situations, (~~tolerating the pressures of a work setting,~~) maintaining appropriate behavior, and adapting to changes in a routine work setting.

(6) We determine you are not likely to meet (~~SSI~~) disability criteria if SSA denied your application for SSI or Social Security Disability Insurance (SSDI) based on disability in the last 12 months unless:

(a) You file a timely appeal with SSA;

(b) SSA decides you have good cause for a late appeal; or

(c) You give us medical evidence of a potentially disabling condition that SSA did not consider or medical evidence confirming your condition has deteriorated.