



EXPEDITED RULE MAKING

CR-105 (December 2017) (Implements RCW 34.05.353)

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STATE OF WASHINGTON
FILED

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WSR 19-15-082

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

Title of rule and other identifying information: (describe subject) The department is amending WAC 388-14A-3323 "What happens in a hearing on a notice of support owed served under WAC 388-14A-3311?".

Purpose of the proposal and its anticipated effects, including any changes in existing rules:

Background: The Division of Child Support (DCS) may serve a *Notice of Support Owed* under RCW 26.23.110 when a support order provides that a parent is required to pay a portion of certain costs incurred on behalf of a child or children covered by the support order but does not reduce the costs to a fixed dollar amount. The *Notice of Support Owed* does not modify the underlying support order, but results in an administrative order which establishes the amount owed by the parent as a sum certain, either as a lump sum reimbursement or as a sum certain amount to be paid each month (based on historical costs), or both. DCS uses the *Notice of Support Owed* process to determine sum certain amounts owed by the Noncustodial Parent (NCP) for childcare/daycare, and also to determine sum certain amounts owed by either the NCP or the Custodial Parent (CP) for medical support. This specific rule, WAC 388-14A-3323, deals with administrative hearings on a *Notice of Support Owed* served on the NCP to establish amounts owed by the NCP to the CP for daycare/childcare expenses.

Once an administrative order requiring ongoing monthly payments is established pursuant to a *Notice of Support Owed*, RCW 26.23.110(12)(a) provides that DCS must provide for an "annual review" of that order if one of the parties or DCS requests the review. The annual review may include a reconciliation based on the actual costs incurred over the preceding time period to determine if the amounts established by the administrative order were correctly estimated, or if they have been underpaid or overpaid. The subject rule (WAC 388-14A-3323) deals with administrative hearings concerning either an original *Notice of Support Owed* or an annual review of an administrative order based on a prior *Notice of Support Owed*.

Issue: The language of the rule dealing with hearings regarding a *Notice of Support Owed* (WAC 388-14A-3323) creates issues due to an inadvertent reversal of the terms "less" and "more" in subsections (4) and (5) of that rule. A literal (and, admittedly, correct) reading of these subsections frustrates DCS' ability to provide a meaningful reconciliation if the parties have an administrative hearing in front of an Administrative Law Judge (ALJ) employed by the Office of Administrative Hearings (OAH). The current language in subsections (4) and (5) of WAC 388-14A-3323 provides that:

"(4) If the ALJ determines that the NCP's obligation under a previous notice of support owed is more than his or her actual obligation under the order after actual expenses or income are considered, the ALJ may not set a payment schedule on the support debt.

(5) If the ALJ determines that the NCP's obligation under a previous notice of support owed is less than his or her actual obligation under the order after actual expenses or income are considered, and the parties cannot agree on how the overpayment may be credited or repaid, the ALJ must enter an order providing that any difference may be:

(a) Applied as an offset to any nonassistance child support arrears owed by the NCP to the CP.

(b) In the form of a credit against the NCP's future child support obligation:

(i) Spread equally over a twelve-month period starting the month after the administrative order becomes final; or

(ii) When the future support obligation will end under the terms of the order in less than twelve months, spread equally over the life of the order."

[Emphasis added.]

Under WAC 388-02-0220(1), an ALJ "must first apply the department rules adopted in the Washington Administrative Code." Thus, even if the ALJ can see that the rule as written does not make sense, many ALJs feel compelled to dismiss the *Notice of Support Owed*. This does not serve the interests of the department or parents.

In a hearing on a *Notice of Support Owed* associated to an annual review where the ALJ determines the NCP is overcharged or has overpaid, some ALJs feel they must dismiss the *Notice of Support Owed* because the ALJ can only specify how an

overpayment may be credited or repaid if they determine the NCP is underpaid, which is impossible.

Proposed solution: DCS proposes to amend WAC 388-14A-3323 to correct two typographical errors: We propose to amend subsection (4) to replace “more” with “less”; and to amend subsection (5) to replace “less” with “more.” We believe that this small change will avoid dismissals entered solely because the ALJ had no means under this WAC section to specify how an overpayment under a previous *Notice of Support Owed* may be credited or repaid unless the NCP was actually underpaid. DCS is using the expedited rulemaking process under RCW 34.05.353 because the proposed amendment corrects a typographical error; it clarifies procedures; it helps prevent unnecessary dismissal of notices; and it is not controversial. If objections are made during the expedited rulemaking process, DCS will withdraw the CR-105 and start the permanent rulemaking process under chapter 34.05 RCW.

Reasons supporting proposal: DCS has a strong interest in ensuring that a party to a *Notice of Support Owed* served as part of an annual review has the same remedies available, regardless of whether (1) it becomes an order by operation of law because nobody requests a hearing, (2) the parties and DCS reach a settlement, or (3) an ALJ conducts a hearing based on an objection by one of the parties.

The reversal of “less” and “more” in subparagraphs (4) and (5) was an inadvertent typographical error.

Statutory authority for adoption: RCW 26.09.105(20), RCW 26.18.170(21), RCW 26.23.050, RCW 26.23.110(14), RCW 43.20A.550, RCW 74.04.055, RCW 74.04.057, RCW 74.08.090, RCW 74.20A.310

Statute being implemented: RCW 26.23.110

Is rule necessary because of a:

- | | | |
|-------------------------|------------------------------|--|
| 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 type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |

If yes, CITATION:

Name of proponent: (person or organization) Department of Social and Health Services Private
 Public
 Governmental

Name of agency personnel responsible for:

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Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:

Expedited Adoption - Which of the following criteria was used by the agency to file this notice:

- Relates only to internal governmental operations that are not subject to violation by a person;
- Adopts or incorporates by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule;
- Corrects typographical errors, make address or name changes, or clarify language of a rule without changing its effect;
- Content is explicitly and specifically dictated by statute;
- Have been the subject of negotiated rule making, pilot rule making, or some other process that involved substantial participation by interested parties before the development of the proposed rule; or
- Is being amended after a review under RCW 34.05.328.

Expedited Repeal - Which of the following criteria was used by the agency to file notice:

- The statute on which the rule is based has been repealed and has not been replaced by another statute providing statutory authority for the rule;
- The statute on which the rule is based has been declared unconstitutional by a court with jurisdiction, there is a final judgment, and no statute has been enacted to replace the unconstitutional statute;
- The rule is no longer necessary because of changed circumstances; or
- Other rules of the agency or of another agency govern the same activity as the rule, making the rule redundant.

Explanation of the reason the agency believes the expedited rule-making process is appropriate pursuant to RCW 34.05.353(4): The proposed amendment corrects a typographical error; it clarifies procedures; it helps prevent unnecessary dismissal of notices; and it is not controversial.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO

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AND RECEIVED BY (date) September 23, 2019

Date: July 16, 2019

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WAC 388-14A-3323 What happens in a hearing on a notice of support owed served under WAC 388-14A-3311? (1) A hearing on a notice of support owed served under WAC 388-14A-3311 is subject to WAC 388-14A-3320 and this section.

(2) A hearing on a notice of support owed served under WAC 388-14A-3311 is only for the purpose of determining the amounts owed by the noncustodial parent (NCP) that are not stated as a fixed dollar amount in the underlying support order, either as part of the monthly support obligation or for nonmedical expenses of the children. See WAC 388-14A-3324 for the rules concerning a hearing on a notice of support owed for medical support.

(3) The administrative law judge (ALJ) must determine some or all of the following, depending on what was requested in the notice of support owed:

- (a) The amount of monthly support as a fixed dollar amount;
- (b) Any accrued arrears;
- (c) Any difference between the NCP's obligation under a previous notice of support owed and his or her actual obligation after actual income or expenses are considered; and
- (d) The amount of the NCP's share of nonmedical expenses for the children, including:
 - (i) The amount that the NCP must pay each month as his or her on-going share of daycare and child care expenses for the children; and
 - (ii) Whether the custodial parent (CP) has provided sufficient proof of payment of daycare and child care expenses for the children; and
 - (iii) The amount of NCP's accrued debt for daycare and child care expenses.

(4) If the ALJ determines that the NCP's obligation under a previous notice of support owed is (~~more~~) less than his or her actual obligation under the order after actual expenses or income are considered, the ALJ may not set a payment schedule on the support debt.

(5) If the ALJ determines that the NCP's obligation under a previous notice of support owed is (~~less~~) more than his or her actual obligation under the order after actual expenses or income are considered, and the parties cannot agree on how the overpayment may be credited or repaid, the ALJ must enter an order providing that any difference may be:

- (a) Applied as an offset to any nonassistance child support arrears owed by the NCP to the CP.
- (b) In the form of a credit against the NCP's future child support obligation:
 - (i) Spread equally over a twelve-month period starting the month after the administrative order becomes final; or
 - (ii) When the future support obligation will end under the terms of the order in less than twelve months, spread equally over the life of the order.
- (c) Paid in the form of a direct reimbursement by the CP to the NCP, but only with the consent of the CP, unless support has been assigned to the state.