

WSR 23-21-078
PROPOSED RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
(Economic Services Administration)
[Filed October 13, 2023, 5:42 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 23-16-126.

Title of Rule and Other Identifying Information: The department of social and health services (DSHS) is proposing to amend 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): On November 21, 2023, at 10:00 a.m., virtual via Microsoft Teams or call in. Please see the DSHS website for the most up-to-date information.

Date of Intended Adoption: Not earlier than November 22, 2023.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504, email DSHSRPAURulesCoordinator@dshs.wa.gov, fax 360-664-6185, by November 21, 2023, 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, by November 7, 2023, 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 program and incapacity requirements for the HEN referral program.

Reasons Supporting Proposal: See above.

Statutory Authority for Adoption: RCW 74.04.050 and 74.08.090.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: DSHS, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Sam Del Vecchio, P.O. Box 45470, Olympia, WA 98504-5470, 564-233-1647.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. 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.["]

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 34.05.328 (5) (b) (vii).

Explanation of exemptions: These amendments do not impact small businesses. They only impact DSHS customers.

Scope of exemption for rule proposal:

Is fully exempt.

October 12, 2023
Katherine I. Vasquez
Rules Coordinator

SHS-5004.2

AMENDATORY SECTION (Amending WSR 18-18-007, filed 8/23/18, effective 9/23/18)

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) "Gainfully employed" means you are performing, in a regular predictable manner, an activity usually done for pay or profit.
- ~~((d))~~ (e) "Mental impairment" means a diagnosable mental disorder.
- ~~((e))~~ (f) "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.

[Statutory Authority: RCW 74.04.050, 74.040.055 [74.04.055], 74.04.057, 74.08.090, and 2018 c 48. WSR 18-18-007, § 388-447-0001, filed 8/23/18, effective 9/23/18. Statutory Authority: RCW 74.04.005, 74.04.050, 74.04.055, 74.04.057, 74.08.090, 74.08A.100, 74.04.770, 74.08.025, 74.62.030, and 2013 2nd sp.s. c 10. WSR 13-24-044, § 388-447-0001, filed 11/26/13, effective 1/1/14.]

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) "Gainfully employed" means you are performing, in a regular predictable manner, an activity usually done for pay or profit.

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

~~((e))~~ (f) "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 gainfully 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 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.~~

~~((We determine you are likely to be disabled if:))~~ (4) 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 (AL TSA) 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;~~

~~((+))~~

~~(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))~~ (5) 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) - ((+4)) (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))~~ (6) 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)) ((eoworkers)) 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))~~ (7) 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.

[Statutory Authority: RCW 74.04.005, 74.04.0052, 74.04.050, 74.04.055, 74.04.057, 74.04.510, 74.04.655, 74.04.770, 74.04.805, 74.08.025, 74.08.043, 74.08.090, 74.08.335, 74.08A.100, 74.62.030, and 2022 c 297 § 205(22). WSR 23-01-057, § 388-449-0001, filed 12/14/22, effective 1/14/23. Statutory Authority: RCW 74.04.005, 74.04.050, 74.04.0052, 74.04.055, 74.04.057, 74.04.510, 74.04.655, 74.04.770, 74.08.043, 74.08.090, 74.08.335, 74.08A.100, 74.09.035, 74.09.530, 74.62.030, and 41.05.021. WSR 22-07-020, § 388-449-0001, filed 3/8/22, effective 4/8/22. Statutory Authority: 2014 c 218, 2011 1st sp.s. c 15, RCW 74.04.005, 74.04.050, 74.04.055, 74.04.057, 74.08.090, 74.08A.100, 74.04.770, 74.62.030, 41.05.021, 74.09.035, and 74.09.530. WSR 15-03-031, § 388-449-0001, filed 1/12/15, effective 2/12/15. Statutory Authority: RCW 74.04.005, 74.04.050, 74.04.055, 74.04.057, 74.08.090, 74.08A.100, 74.04.770, 74.62.030, and 2013 2nd sp.s. c 10. WSR 13-24-040, § 388-449-0001, filed 11/26/13, effective 1/1/14. Statutory Authority: RCW 74.04.005, 74.04.050, 74.04.055, 74.04.057, 74.04.510, 74.08.090, 74.08A.100, 74.04.770, 74.04.0052, 74.04.655, 74.08.043, 74.08.335, and 2011 1st sp.s. c 36. WSR 12-10-042, § 388-449-0001, filed 4/27/12, effective 6/1/12.]