WSR 17-17-018

PROPOSED RULES

DEPARTMENT OF LICENSING

[Filed August 7, 2017, 3:58 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 16-08-011.

Title of Rule and Other Identifying Information: Chapter 308-100 WAC, Drivers' licenses—Special provisions.

Hearing Location(s): On October 26, 2017, at 10:00 a.m., at the Highways-Licenses Building, Conference Room 413, 1125 Washington Street S.E., Olympia, WA 98507 (check in at counter on first floor).

Date of Intended Adoption: October 27, 2017.

Submit Written Comments to: Stephanie Sams, P.O. Box 9030, Olympia, WA 98507-9030, email ssams@dol.wa.gov, fax 360-570-7048, by October 25, 2017.

Assistance for Persons with Disabilities: Contact Stephanie Sams, phone 360-902-0131, TTY 360-664-0116, email ssams@dol.wa.gov, by October 25, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Update the amount charged for commercial driver's license (CDL) examination fees and third-party testing fees. Existing rules need to be updated to conform to the statute.

Reasons Supporting Proposal: Recent legislation has changed the amount charged for CDL examinations.

Statutory Authority for Adoption: RCW 46.25.140 and 46.01.110.

Statute Being Implemented: Not applicable.

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

Name of Proponent: Department of licensing, governmental.

Name of Agency Personnel Responsible for Drafting: Damon Monroe, Highways-Licenses Building, Olympia, Washington, 360-902-3843; Implementation and Enforcement: Tandy Alexander, Highways-Licenses Building, Olympia, Washington, 360-902-3893.

A cost-benefit analysis is not required under RCW 34.05.328. RCW 34.05.328 does not apply to this proposed rule under the provisions of RCW 34.05.328 (5)(a)(i).

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

Is exempt under RCW 19.85.025(3) as the rule content is explicitly and specifically dictated by statute; and rules set or adjust fees under the authority of RCW 19.02.075 or that set or adjust fees or rates pursuant to legislative standards, including fees set or adjusted under the authority of RCW 19.80.045.

August 7, 2017
Damon Monroe
Rules Coordinator

AMENDATORY SECTION (Amending WSR 13-03-018, filed 1/7/13, effective 2/7/13)

WAC 308-100-050 Examination fees. (1) The examination fee for each commercial driver's license knowledge examination, commercial driver's license endorsement knowledge examination, or any combination of commercial driver's license and endorsement knowledge examinations, shall be ((~~ten~~)) thirty-five dollars.

(2)(a) Except as provided in subsection (2)(b) of this section, the examination fee for each commercial driver's license skill examination conducted by the department shall be ((~~one~~)) two hundred fifty dollars and entitles the applicant to take the examination up to two times in order to pass.

(b) If the applicant's primary use of a commercial driver's license is for any of the following, then the examination fee for each commercial driver's license skill examination conducted by the department shall be ((~~seventy-five~~)) two hundred twenty-five dollars and entitles the applicant to take the examination up to two times in order to pass:

(i) Public benefit not-for-profit corporations that are federally supported head start programs; or

(ii) Public benefit not-for-profit corporations that support early childhood education and assistance programs as described in RCW 43.215.405.

((~~(3) An applicant who has failed the skill examination must retest and pay the full fee required under subsection (2) of this section.~~

~~(4)~~)) (c) If the applicant's primary use of a commercial driver's license is to drive a school bus, the applicant shall pay a fee of no more than one hundred dollars for the classified skill examination or combination of classified skill examinations conducted by the department and entitles the applicant to take the examination up to two times in order to pass.

(3) Drivers selected for reexamination by the department may be subject to costs associated with the testing.

((~~(5)~~)) (4) The fees in this section are in addition to the regular drivers' licensing fees.

AMENDATORY SECTION (Amending WSR 15-03-048, filed 1/14/15, effective 2/14/15)

WAC 308-100-180 Third-party testing fee. (1)(a) Except as provided in WAC 308-100-190 or subsection (1)(b) of this section, the base fee for each classified skill examination or combination of skill examinations conducted by a third-party tester shall not be more than ((~~one~~)) two hundred fifty dollars and entitles the applicant to take the examination up to two times in order to pass.

(b) If the applicant's primary use of a commercial driver's license is for any of the following, then the examination fee for each commercial driver's license skill examination conducted by a third-party tester shall not be more than ((~~seventy-five~~)) two hundred twenty-five dollars and entitles the applicant to take the examination up to two times in order to pass:

(i) Public benefit not-for-profit corporations that are federally supported head start programs; or

(ii) Public benefit not-for-profit corporations that support early childhood education and assistance programs as described in RCW 43.215.405(4).

(c) If the applicant's primary use of a commercial driver's license is to drive a school bus, the applicant shall pay a fee of no more than one hundred dollars for the classified skill examination or combination of classified skill examinations conducted by the department and entitles the applicant to take the examination up to two times in order to pass.

(2) ((~~An applicant who has failed the skill examination must retest and pay the full fee required under subsection (1) of this section.~~

~~(3)~~)) The base fee shall apply only to the conducting of the examination, and is separate from any additional fees, such as vehicle use fees, which may be charged by the third-party tester. Any additional fees to be charged shall be reported to the department.

(((~~(4)~~))) (3) Fees owed to a third-party tester under this section must be paid by the applicant as provided in the third-party tester agreement entered into under WAC 308-100-140.

(((~~(5)~~))) (4) The fees in this section are in addition to the regular drivers' licensing fees.

WSR 17-17-028
PROPOSED RULES
DEPARTMENT OF LICENSING

[Filed August 8, 2017, 3:33 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 17-11-134.

Title of Rule and Other Identifying Information: WAC 308-125-095 (1)(h)(i), Responsibilities of the appraiser supervisor.

Hearing Location(s): On September 27, 2017, at 9:00 a.m. - 11:00 a.m., at the Department of Licensing, 2000 4th Avenue West, 2nd Floor, Room 3204, Olympia, WA 98502.

Date of Intended Adoption: September 28, 2017.

Submit Written Comments to: Dee Sharp, Department of Licensing, Appraisal Program, P.O. Box 48053, Olympia, WA 98502-8053, email dsharp@dol.wa.gov, fax 360-570-4981, by September 26, 2017.

Assistance for Persons with Disabilities: Contact Dee Sharp, phone 360-664-6504, fax 360-570-4981, TTY 711, email dsharp@dol.wa.gov, by September 26, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Modify rule to allow more flexibility in the training and supervision of appraiser trainees by giving supervisory appraisers more latitude to determine when a trainee is competent to inspect subject properties in accordance with the national standards. Rule change suggested by the real estate appraiser commission appraisal subcommittee.

Reasons Supporting Proposal: To allow more flexibility in the training and supervision of appraiser trainees.

Statutory Authority for Adoption: RCW 18.140.030.

Statute Being Implemented: RCW 18.140.280.

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

Name of Proponent: Department of licensing, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Dee Sharp, 2000 4th Avenue West, Olympia, WA 98502, 360-664-6504.

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. The department of licensing is exempt under RCW 34.05.328 (5)(a)(i).

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

Is exempt under RCW 19.85.020(3). This rule affects only individual applicants or licensees.

August 8, 2017
Damon Monroe
Rules Coordinator

AMENDATORY SECTION (Amending WSR 16-02-008, filed 12/28/15, effective 1/28/16)

WAC 308-125-095 Responsibilities of the appraiser supervisor. (1) A certified real estate appraiser licensed by the state of Washington may supervise trainees in accordance with the following provisions:

(a) The certified real estate appraiser is in good standing and not subject to any disciplinary action which affects their legal eligibility to engage in appraisal practice within the three years preceding registration to become a supervisory appraiser.

(b) The certified real estate appraiser shall have been certified for a minimum of three years prior to becoming a supervisory appraiser.

(c) The certified real estate appraiser shall have completed a course that, at a minimum, complies with the specification for course content established by the appraiser qualifications board. This course must be completed prior to supervising a registered appraiser trainee.

(d) Not more than three real estate appraiser trainees may be supervised in accordance with the appraiser qualifications board standards unless written authorization by the department is granted to exceed that number of trainees at any one time.

(e) Supervision of trainees in the process of appraising real property shall occur within the boundaries of the state of Washington and comply with jurisdictional and established agreements with other states. If a trainee is supervised by a certified appraiser who is licensed in both the state of Washington and with another state or has a temporary license in another state; and the trainee is registered as a trainee in that other state by either temporary permit, license, or registration, then the appraisal assignments shall qualify as work experience on the experience log.

(f) Authorization to exceed supervision of three trainees may be granted by the director upon approval of a written request and under the provisions of subsection (2) of this section.

(g) A registered real estate appraiser trainee may assist in the completion of an appraisal report, including determination of an opinion of value and may sign the appraisal report, provided that he/she is actively and personally supervised by

a state-certified real estate appraiser, and provided that the appraisal report is reviewed and signed by the state-certified real estate appraiser; and provided the state-certified appraiser accepts total responsibility for the appraisal report.

(h) The certified appraiser shall:

(i) Personally inspect each appraised property with the trainee appraiser, ((~~at a minimum, the interior of twenty-five subject properties, or~~)) until the supervisory appraiser ((~~considers~~)) determines the trainee is competent to inspect the property, in accordance with the Competency Rule of USPAP for the property type.

(ii) Personally review and verify each appraisal report prepared by the trainee as entered on the trainee experience log as qualifying work experience prior to the log being submitted to the department by the supervised trainee. The trainee shall be entitled to obtain copies of the appraisal reports in which the trainee provided appraisal assistance.

(iii) Personally review and verify each appraisal report prepared by a state licensed or certified residential appraiser as entered on the qualifying work experience log prior to the log being submitted to the department by the licensee. The state licensed or certified residential appraiser shall be entitled to obtain copies of the appraisal reports in which the state licensed and certified residential appraiser provided appraisal assistance.

(iv) Comply with all USPAP requirements.

(v) Maintain a separate "properties inspected with trainee" log for each supervised trainee. This log must be made available to the department upon request and is to be submitted with trainee's application for license or certification.

(vi) Register with the department as a supervisory appraiser and include the names of the registered real estate appraiser trainees being supervised. Registration must be five business days prior to the start of supervision. The supervisory appraiser shall notify the department when they are no longer a supervisory appraiser of a trainee, with such notice including the name, address, and registration number of the registered trainee.

(2) Authorization may be granted by the director to a certified appraiser to exceed the number of trainees allowed to be supervised providing:

(a) The certified appraiser has more than five years certified experience.

(b) The certified appraiser shall make a written application to the department requesting to supervise not more than three trainees with less than one year experience; and three trainees with more than one year experience; and five trainees with greater than two years experience. The total number of supervised trainees shall not exceed eight for all experience levels at any one time.

(c) The certified appraiser shall prepare and maintain trainee progress reports and make them available to the department until such time as the trainee becomes certified or licensed or after two years has lapsed since supervising the trainee.

(d) The certified appraiser shall provide to the department a mentoring plan for consideration prior to the department authorizing supervision of more than three trainees.

WSR 17-17-041
WITHDRAWL OF PROPOSED RULES
LIQUOR AND CANNABIS BOARD

[Filed August 9, 2017, 5:02 p.m.]

The Washington state liquor and cannabis board voted today, August 9, 2017, to withdraw the CR-102 for producers licenses and tiers rule changes, filed as WSR 17-12-116 on June 7, 2017. This notice of withdrawal is being provided pursuant to WAC 1-21-060 and RCW 34.05.335.

Jane Rushford
Chair

WSR 17-17-059
PROPOSED RULES
DEPARTMENT OF REVENUE

[Filed August 11, 2017, 3:38 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 17-04-075.

Title of Rule and Other Identifying Information: WAC 458-16-266 Homeownership development, is a new rule that explains the requirements of a new property tax exemption for nonprofit organizations that develop or redevelop on real property, one or more residences to be sold to low-income households.

Hearing Location(s): On September 27, 2017, at 10:00 a.m., at the Conference Room 252, 6400 Linderson Way S.W., Tumwater, WA 98501.

Date of Intended Adoption: October 3, 2017.

Submit Written Comments to: Leslie Mullin, Interpretations and Technical Advice Division, P.O. Box 47453, Olympia, WA 98504-7453, email LeslieMu@dor.wa.gov, fax 360-534-1606, by September 27, 2017.

Assistance for Persons with Disabilities: Contact Julie King or Renee Cosare, phone 360-704-5717 or 360-725-7514, TTY 800-833-6384.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The proposed new rule is needed to incorporate new legislation from SSB 6211, 2016 regular session (chapter 217, Laws of 2016); provide guidance to nonprofit organizations on the application and qualification requirements for the exemption; and explain the actions that could disqualify a nonprofit organization from continuing to receive the exemption.

Reasons Supporting Proposal: This proposed rule is necessary to reflect new legislation passed in 2016 and will explain the requirements of the new property tax exemption for nonprofit organizations that develop or redevelop residences that will be sold to low-income households.

Statutory Authority for Adoption: RCW 84.36.865.

Statute Being Implemented: RCW 84.36.049.

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

Name of Proponent: Department of revenue, governmental.

Name of Agency Personnel Responsible for Drafting: Leslie Mullin, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1589; Implementation and Enforcement: Marcus Glasper, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1615.

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. This rule is not a significant legislative rule as defined by RCW 34.05.328.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. Proposed rule language for this new property tax exemption only clarifies the application of RCW 84.36.049 and 84.36.825. The proposed rule does not impose more than minor costs on businesses, as it does not propose any new requirements not already provided for in statute. The proposed rule does not impose fees, filing requirements, or recordkeeping guidelines that are not already established in chapter 84.36 RCW for the administration of property tax exemptions.

August 11, 2017
Kevin Dixon
Rules Coordinator

NEW SECTION

WAC 458-16-266 Homeownership development. (1) **Introduction.** RCW 84.36.049 explains that real property owned by a nonprofit entity for the purpose of developing or redeveloping on the real property one or more residences to be sold to low-income households is exempt from state and local property taxes, subject to certain limitations.

(2) **Definitions.**

(a) "Financial statements" means an audited annual financial statement and a completed United States treasury internal revenue service return form 990 for organizations exempt from income tax.

(b) "Low-income household" means a single person, family, or unrelated persons living together whose adjusted income is less than eighty percent of the median family income, adjusted for family size as most recently determined by the federal Department of Housing and Urban Development for the county in which the property is located.

(c) "Nonprofit entity" means a nonprofit as defined in RCW 84.36.800 that is exempt from federal income taxation under 26 U.S.C. Sec. 501 (c)(3) of the federal Internal Revenue Code of 1986, as amended.

(d) "Property tax year" means the year in which property taxes are due.

(e) "Real property" has the same meaning as contained in RCW 84.04.090.

(f) "Residence" means a single-family dwelling unit whether such unit is separate or part of a multiunit dwelling, including the land on which such dwelling stands. If the residence is part of a multiunit dwelling, such as a condominium complex, the purchaser must also receive a fractional interest in the land for the nonprofit entity to qualify for the exemption.

(3) **Examples**. This rule includes examples that identify a number of facts and then state a conclusion. These examples should only be used as a general guide. The tax results of other situations must be determined after a review of all the facts and circumstances.

(4) **Exemption application.** The exemption is effective June 9, 2016. Nonprofit entities may qualify for this exemption for up to a maximum of ten consecutive property tax years. The initial exemption is for a period of up to seven consecutive property tax years and the exemption extension, as described in subsection (5) of this rule, is for an additional period of up to three consecutive property tax years.

(a) Initial application. Initial applications will not be accepted after December 31, 2026. To apply for this exemption, the nonprofit entity must submit a completed application to the department:

(i) On or before July 1, 2016, for the 2017 property tax year;

(ii) On or before March 31st of each year, thereafter, for taxes to be collected in the following property tax year; or

(iii) Within sixty days of either acquiring the property or converting the property to an exempt use, whichever is later.

(b) Retroactive applications. Retroactive applications for this exemption for previous years are accepted, up to a maximum of three years from the date taxes were due on the property. The applicant must provide the department with acceptable proof that the property qualified for exemption during the pertinent assessment years and pay the late filing penalties. Retroactive applications will not be approved for taxes due prior to the 2017 property tax year and will not be accepted after December 31, 2026.

(c) Renewal application. Once a nonprofit entity is approved by the department for this exemption, no annual renewal application is required.

(d) Late filing. Late filing fees apply to retroactive applications, as described in (b) of this subsection, and to late applications filed under (a) of this subsection. Late filing fees of ten dollars per month or portion of a month will accrue beginning the date following the application deadline and continues through the application's actual postmark or email date.

(e) Reporting requirements. To measure the effectiveness of this exemption:

(i) All nonprofit entities receiving this exemption must provide, upon request by the joint legislative and audit review committee, annual financial statements for each year the exemption was claimed. The nonprofit entity must clearly identify the line or lines on the financial statements that represent the percentage of revenues dedicated to the development of affordable housing; and

(ii) The department must provide, upon request, approved initial applications for this exemption and owner occupancy notices reported by the nonprofit entity receiving this exemption, to the joint legislative audit and review committee.

(5) **Extensions.**

(a) If the nonprofit entity believes that title to the real property will not be transferred by the end of the sixth consecutive property tax year, it may file a notice of extension with the department. The extension:

(i) Is for a period of up to three property tax years;

(ii) Must be filed with the department on or before March 31st of the sixth consecutive property tax year. If the sixth consecutive property tax year occurs on or after January 1, 2027, the nonprofit entity must file an extension application no later than December 31, 2026; and

(iii) Requires a filing fee equal to the greater of two hundred dollars or one-tenth of one percent of the real market value of the property as of the most recent assessment date.

(b) **Example 1**. ABC Homes, a nonprofit entity, purchases vacant land on December 1, 2017, and begins building a single family residence that will subsequently be sold to a low-income household. ABC Homes must submit an initial application to the department within sixty days of acquiring the property to qualify for the exemption beginning in the 2018 property tax year. If approved, the exemption will continue until the residence is sold or transferred to a low-income household or through the 2024 property tax year, whichever is earlier. If ABC Homes believes the residence will not be sold or transferred to a low-income household by December 31, 2023 (the sixth consecutive property tax year), it may apply for a three-year extension no later than March 31, 2023. If the extension is approved, the exemption will be effective for taxes payable through the 2027 property tax year.

(c) **Example 2.** DEF Development, a nonprofit entity, purchases a residence on August 1, 2021. The residence will be remodeled and then sold to a low-income household. DEF Development must submit an initial application to the department within sixty days of acquiring the property to qualify for the exemption beginning in the 2022 property tax year. If approved, the exemption will continue until the residence is sold or transferred to a low-income household or through the 2028 property tax year, whichever is earlier. If DEF Development believes the residence will not be sold or transferred to a low-income household by December 31, 2027 (the sixth consecutive property tax year), it may apply for a three-year extension no later than December 31, 2026 (the last day to apply for a three-year extension). If the extension is approved, the exemption will be effective for taxes payable through the 2031 property tax year.

(6) **Expiration.** This exemption expires on or at the earlier of:

(a) The date on which the nonprofit entity transfers title of the real property;

(b) The end of the seventh consecutive property tax year without an extension;

(c) The end of the tenth consecutive property tax year with an extension; or

(d) The date the real property and residence is no longer held for the purpose for which the exemption was granted. The lease or rental of the property is not considered a qualifying exempt purpose.

(7) **Disqualification and additional tax.**

(a) If the nonprofit entity has not transferred title of the real property to a low-income household within the applicable periods described in subsection (6)(b) or (c) of this rule, or if the real property is no longer held for the purpose for which the exemption was granted as described in subsection (6)(d) of this rule, then the real property is disqualified from the exemption. When real property is disqualified, additional tax and interest are due.

(b) Additional tax and interest. When real property is disqualified from this exemption, the county treasurer must:

(i) Collect additional tax. The additional tax is equal to all taxes that would have been paid on the real property had the exemption not been granted, along with interest at the same rate and calculated in the same manner as interest on delinquent property taxes. The additional tax and interest are due in full thirty days from the issue date on the treasurer's statement; and

(ii) Distribute the additional taxes in the same manner that current property taxes on the real property are distributed. The additional tax and interest are a lien on the real property. If the nonprofit entity sells or transfers the property, any unpaid additional tax and interest must be paid by the nonprofit entity selling the property prior to conveyance of the property. The nonprofit entity or the new owner may appeal the assessed value on which the additional tax was calculated to the county board of equalization (see RCW 84.40.038).

(c) **Example 3**. Homes Unlimited, a nonprofit entity, owns a residence that it will improve and then sell to a low-income household. Homes Unlimited applies to the department and is approved for the exemption. Upon completion of the improvements, Homes Unlimited leases the residence to a low-income household until it can find a low-income household to purchase the residence. Because the lease of the property is not a qualifying exempt purpose, the residence is disqualified from the exemption and is subject to additional tax and interest.

(d) **Example 4**. Dream Home, Inc., a nonprofit entity, is building a duplex on land it owns and intends on selling each unit, along with the land, to low-income households. Dream Home, Inc., applies to the department and is approved for the exemption. Upon completion of the duplex, Dream Home, Inc., sells one of the two units to a low-income household. The second unit goes unsold so Dream Home, Inc., applies to the department for a three-year extension and is approved. Upon expiration of the three-year extension, the second unit has still not been sold to a low-income household. The second unit of the duplex is disqualified from the exemption and is subject to additional tax and interest.

(8) **Sale or transfer of real property to a low-income household**. A nonprofit entity must immediately notify the department when the exempt real property is sold or transferred to a low-income household. This notice must include:

(a) Certification by the nonprofit entity that the occupants are a low-income household. Low-income verification forms can be found on the department's web site at dor.wa.gov; and

(b) The date when the title to the real property was transferred.

(9) **Cessation of exemption**. Upon expiration or disqualification of the exemption, the value of new construction and improvements to the property, if not previously considered as new construction, must be considered as new construction for the purposes of calculating levies under chapter 84.55 RCW. If the value of new construction and improvements to property were previously considered as new construction when

calculating levies under chapter 84.55 RCW, then it may not be considered as new construction upon expiration or disqualification of the exemption.

August 15, 2017
Ronda Laughlin
Executive Assistant
to the President

WSR 17-17-076
PROPOSED RULES
BELLINGHAM TECHNICAL COLLEGE

[Filed August 15, 2017, 1:13 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 15-21-099.

Title of Rule and Other Identifying Information: Amended sections to chapter 495B-140 WAC, Use of college facilities.

Hearing Location(s): On October 31, 2017, at 11:30 a.m., at the Bellingham Technical College, College Services, Room 215, 3028 Lindbergh Avenue, Bellingham, WA 98225.

Date of Intended Adoption: November 16, 2017.

Submit Written Comments to: Ronda Laughlin, 3028 Lindbergh Avenue, Bellingham, WA 98225, email rlaughlin@btc.edu, fax 360-752-7134, by October 19, 2017.

Assistance for Persons with Disabilities: Contact Mary Gerard, phone 360-752-8576, fax 360-752-7376, email ar@btc.edu, by October 19, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Amendments to WAC 495B-140-020, 495B-140-040, 495B-140-045, 495B-140-060, 495B-140-070 and 495B-140-080, to address free speech on campus; to align with recent changes made to student code of conduct.

Reasons Supporting Proposal: See Purpose above.

Statutory Authority for Adoption: RCW 28B.50.140; chapter 34.05 RCW.

Statute Being Implemented: RCW 28B.50.130.

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

Name of Proponent: Bellingham Technical College, public and governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Chad Stiteler, CS 209, 360-752-8313.

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. There are no costs imposed with the amendments to these rules.

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

Is exempt under RCW 19.85.025(3) as the rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect.

Explanation of exemptions: Language was previously removed from chapter 495B-120 WAC and moved to chapter 495B-140 WAC.

AMENDATORY SECTION (Amending WSR 12-21-061, filed 10/17/12, effective 11/17/12)

WAC 495B-140-020 Limitation of use to college activities. (1) When allocating use of college facilities, the highest priority is always given to activities specifically related to the college's mission. No arrangements will be made that may interfere with or operate to the detriment of, the college's own teaching, research, or public service programs. In particular, college buildings, properties, and facilities, including those assigned to student programs, are used primarily for:

(a) The regularly established teaching, research, or public service activities of the college and its departments;

(b) Cultural, educational, or recreational activities of the students, faculty, or staff;

(c) Short courses, conferences, seminars, or similar events, conducted either in the public service or for the advancement of specific departmental professional interests, when arranged under the sponsorship of the college or its departments.

(d) Public events of a cultural or professional nature brought to the campus at the request of college departments or committees and presented with their active sponsorship and active participation;

(e) Activities or programs sponsored by educational institutions, by state or federal agencies, by charitable agencies or civic or community organizations whose activities are of widespread public service and of a character appropriate to the college.

(2) College facilities shall be assigned to student organizations for regular business meetings, social functions and for programs open to the public. Any recognized campus student organization may invite speakers from outside the college community. The appearance of an invited speaker on campus does not represent an endorsement by the college, its students, faculty, administration, or the board of trustees, implicitly or explicitly, of the speaker's views.

(a) Student organizations officially recognized by the college may invite speakers to the campus to address their own membership and other interested students and faculty if suitable space is available and there is no interference with the regularly scheduled program of the college. Although properly allowed by the college, the appearance of such speakers on the campus implies neither approval nor disapproval of them or their viewpoints. In case of speakers who are candidates for political office, equal opportunities shall be available to opposing candidates if desired by them. Speakers are subject to the normal consideration for law and order and to the specific limitations imposed by the state constitution regarding religious worship, exercise, or instruction on state property.

(b) In order to ensure an atmosphere or open exchange and to ensure that the educational objectives of the college are not obscured, the president, in a case attended by strong

emotional feeling, may prescribe conditions for the conduct of the meeting including, but not limited to, the time, the manner, and the place for the conduct of such a meeting. Likewise, the president may require permission for comments and questions from the floor and/or may encourage the appearance of one or more additional speakers at a meeting or at a subsequent meeting so that other points of view may be expressed.

(3) Reasonable conditions may be imposed to regulate the timeliness of requests, to determine the appropriateness of space assigned, time of use, and to ensure the proper maintenance of the facilities. Subject to the same limitations, college facilities shall be made available for assignment to individuals or groups within the college community. Arrangements by both organizations and individuals must be made through the designated administrative officer. Allocation of space shall be made in accordance with college rules and on the basis of time, space, priority of request and the demonstrated needs of the applicant.

(4) The college may restrict an individual's or a group's use of college facilities if that person or group has, in the past, physically abused college facilities. Monetary charges may be imposed for damage or for any unusual costs for the use of facilities. The individual, group or organization requesting space will be required to state in advance the general purpose of any meeting.

(5) Commercial activities. College facilities will not be used for any commercial solicitation, advertising or promotional activities, except when such activities clearly serve an educational objective including, but not limited to, the display of books of interest to the academic community or the display or demonstration of technical or research equipment and when such commercial activities relate to educational objectives and are conducted under the sponsorship or at the request of the college or the student association if such solicitation does not interfere with or operate to the detriment of the conduct of college affairs or the free flow of vehicular or pedestrian traffic. For the purpose of this regulation, the term "commercial activities" does not include handbills, leaflets, newspapers, and similarly related materials as regulated in WAC 495B-140-045.

AMENDATORY SECTION (Amending WSR 12-21-061, filed 10/17/12, effective 11/17/12)

WAC 495B-140-040 General policies limiting use. (1) College facilities may not be used for purposes of political campaigning by or for candidates who have filed for public office except for student-sponsored activities or forums as provided for in WAC 495B-140-020.

(2) Religious groups shall not, under any circumstances, use the college facilities as a permanent meeting place. Use may be intermittent only.

(3) The college reserves the right to prohibit the use of college facilities by groups which restrict membership or participation in a manner inconsistent with the college's commitment to nondiscrimination as set forth in its written policies and rules.

(4) Activities of a political or commercial nature will not be approved if they involve the use of promotional signs or posters on buildings, trees, walls, or bulletin boards, or the distribution of samples outside the rooms or facilities to which access has been granted.

(5) These rules shall apply to college and noncollege groups using college facilities.

(6) Use of audio amplifying equipment such as bullhorns, microphones, or loud speakers is not permitted. Exceptions can be made by college administration in locations and at times which will not interfere with the normal conduct of college affairs as determined by the appropriate administrative officer.

(7) No person or group may use or enter onto college facilities having in their possession firearms or weapons, except as prescribed by law. Possession, holding, wearing, transporting, storage or presence of any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, explosive devices, or any other weapon apparently capable of producing bodily harm is prohibited on the college campus, subject to the following exceptions:

(a) Commissioned law enforcement personnel or legally authorized military personnel while in performance of their duties;

(b) A student with a valid concealed weapons permit may store a pistol in his or her vehicle parked on campus in accordance with RCW 9.41.050 (2) or (3), provided the vehicle is locked and the weapon is concealed from view; or

(c) The president may grant permission to bring a weapon on campus upon a determination that the weapon is reasonably related to a legitimate pedagogical purpose. Such permission shall be in writing and shall be subject to such terms or conditions incorporated in the written permission.

This policy does not apply to the possession and/or use of disabling chemical sprays when possessed and/or used for self defense.

(8) The right of peaceful dissent within the college community will be preserved. The college retains the right to take steps to insure the safety of individuals, the continuity of the educational process, and the protection of property. While peaceful dissent is acceptable, violence or disruptive behavior is not a legitimate means of dissent. Should any person, group or organization attempt to resolve differences by means of violence, the college and its officials need not negotiate while such methods are employed.

(9) Interference with free passage of vehicles, cyclists, pedestrians, or other traffic through areas where members of the college community have a right to be, interference with ingress and egress to college facilities, interruption of classes, injury to persons, or damage to property exceeds permissible limits and is not permitted. The event must not create safety hazards or pose unreasonable safety risks to college students, employees, or invitees of the college.

(10) Groups must obey and comply with directions of the designated college administrator or individual in charge of the meeting.

(11) If a college facility abuts a public area or street, and if group activity, although on public property, unreasonably interferes with ingress and egress to college buildings, or creates a disruption for the neighbors bordering the college, the college may choose to impose its own sanctions although

remedies might also be available through local law enforcement agencies.

(12) Signs shall be no larger than three feet by five feet and no individual may carry more than one sign.

(13) College groups are asked to obtain authorization from the designated administrator no later than twenty-four hours in advance of an event.

(14) College group events shall not last longer than eight hours from beginning to end. Noncollege group events shall not last longer than five hours from beginning to end.

(15) The college has designated an area as the sole limited public forum area for first amendment activities on campus. This area is identified in the college facilities use policy and may change from time to time as decided by the college president.

(16) All sites must be cleaned up and left in their original condition and may be subject to inspection by a representative of the college after the event. Reasonable charges may be assessed against the sponsoring organization for extraordinary costs including, but not limited to, clean-up, security, or for the repair or replacement of damaged property.

(17) All fire, safety, sanitation, or special regulations specified for the event are to be obeyed. The college cannot and will not provide utility connections or hook-ups.

(18) Subject to the regulations of this policy, both college and noncollege groups may use the campus limited forums for first amendment activities between the hours of 7:00 a.m. and 10:00 p.m. throughout the year except during the following days of the year:

(a) The first week and the final exam week of each term;

(b) Advising day;

(c) Kickoff and convocation weeks, or in other words, the two weeks immediately preceding each quarter;

(d) Campus events.

(19) There shall be no overnight camping on college facilities or grounds, including off-campus facilities owned or leased by the college. Camping is defined to include sleeping outside, sleeping in vehicles, carrying on cooking activities, or storing personal belongings for personal habitation, or the erection of tents or other shelters or structures used for purposes of personal habitation. However, the college president or designee is authorized to make exceptions in the case of college sponsored events and/or instructional activities.

(20) College facilities may not be used for commercial sales, solicitations, advertising or promotional activities, unless:

(a) Such activities serve educational purposes of the college; and

(b) Such activities are under the sponsorship of a college department or office or officially chartered student club.

(21) The event must also be conducted in accordance with any other applicable college policies and regulations, college, local ordinances, and state or federal laws.

(22) The college president or designee is authorized to make exceptions to the policies limiting use in the case of college sponsored events and/or instructional activities.

(23) Free movement on campus. The president is authorized to prohibit the entry of or to withdraw the privileges of any person or group of persons to enter onto or remain upon any portion of the college campus if he/she deems that an individual or group of individuals disrupts the ingress or egress of others from the college facilities. The president may act through the vice president of administrative services or any other person he/she may designate.

AMENDATORY SECTION (Amending WSR 12-21-061, filed 10/17/12, effective 11/17/12)

WAC 495B-140-045 Distribution of materials. Information may be distributed as long as it is not obscene or libelous or does not advocate or incite imminent unlawful conduct. The sponsoring organization is encouraged, but not required, to include its name and address on the distributed information. College groups may post information on bulletin boards, kiosks and other display areas designated for that purpose, and may distribute materials throughout the open areas of campus. Noncollege groups may distribute materials only at the site designated for noncollege groups and as authorized by the college. Any distribution of materials as authorized by the designated administrative officer shall not be construed as support or approval of the content by the college community or the board of trustees.

(1) Handbills, leaflets, newspapers and similar materials may be distributed free of charge by any student or students, or by members of recognized student organizations at locations specifically designated by the vice president of student services, provided such distribution does not interfere with the ingress or egress of persons or interfere with the instructional process or the free flow of vehicular or pedestrian traffic.

(2) Such handbills, leaflets, newspapers and related matter must bear identification as to the publishing agency and distributing organization or individual.

(3) All nonstudents shall register with the vice president of student services prior to the distribution of any handbill, leaflet, newspaper or related matter. Such distribution must not interfere with the instructional process or the free flow of vehicular or pedestrian traffic.

(4) Any person or persons who violate provisions of subsections (1) and (2) or (3) of this section will be subject to disciplinary action.

AMENDATORY SECTION (Amending WSR 12-21-061, filed 10/17/12, effective 11/17/12)

WAC 495B-140-060 Trespass. (1) Individuals who are not students or members of the faculty or staff and who violate these rules will be advised of the specific nature of the violation, and if they persist in the violation, they will be requested by the president, or his or her designee, to leave the college property. Such a request prohibits the entry of and withdraws the license or privilege to enter onto or remain upon any portion of the college facilities by the person or group of persons requested to leave. Such persons shall be subject to arrest under the provisions of chapter 9A.52 RCW.

(2) Students who violate proscriptions within these regulations (chapter 495B-140 WAC) will be disciplined in accordance with the campus code of conduct (chapter 495B-120 WAC).

(3) Faculty and staff who violate proscriptions within these regulations (chapter 495B-140 WAC) will be disciplined in accordance with established college policies.

(4) Members of the college community (students, faculty, and staff) who do not comply with these regulations will be reported to the appropriate college office or agency for action in accordance with these rules.

(5) Persons or groups who violate the law, a college policy or rule may have their license or privilege to be on school property revoked and be ordered to withdraw from and refrain from entering upon any college property. Remaining on or reentering college property after one's license or privilege to be on college property has been revoked shall constitute trespass and such individual shall be subject to arrest for criminal trespass.

((~~(6) There shall be no overnight camping on college facilities or grounds, including off campus facilities owned or leased by the college. Camping is defined to include sleeping, sleeping in a vehicle, carrying on cooking activities, or storing personal belongings for personal habitation, or the erection of tents or other shelters or structures used for the purpose of personal habitation. However, the college president or designee is authorized to make exceptions in the case of college sponsored events and/or instructional activities.~~))

AMENDATORY SECTION (Amending WSR 93-05-018, filed 2/10/93, effective 3/13/93)

WAC 495B-140-070 Prohibited conduct at college facilities. (1) The use or possession of unlawful drugs or narcotics, not medically prescribed, or of intoxicants on college property or at college functions, is prohibited. Students obviously under the influence of intoxicants, unlawful drugs or narcotics while in college facilities are subject to disciplinary action.

(2) The use of tobacco is prohibited in accordance with health regulations. Tobacco, electronic cigarettes, and related products. The use of tobacco, electronic cigarettes, and related products in any building owned, leased, or operated by the college or in any location where such use is prohibited including, twenty-five feet from entrances, exits, windows that open, and ventilation intakes of any building owned, leased, or operated by the college, except in designated areas. "Related products" include, but are not limited to, cigarettes, cigars, pipes, bidi, clove cigarettes, water pipes, hookahs, chewing tobacco, personal vaporizers, vape pens, electronic nicotine delivery systems and snuff.

(3) Destruction of property is also prohibited by state law in reference to public institutions.

AMENDATORY SECTION (Amending WSR 93-05-018, filed 2/10/93, effective 3/13/93)

WAC 495B-140-080 Control of pets in college facilities. Pets are not permitted in campus buildings or on the grounds except guide or service ((~~dogs for the visually or hearing impaired~~)) animals.

WSR 17-17-082
PROPOSED RULES
DEPARTMENT OF HEALTH

[Filed August 16, 2017, 2:58 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 13-24-104.

Title of Rule and Other Identifying Information: Chapter 246-849 WAC, Ocularists, the department of health is proposing updates to the chapter and establishing new requirements for tracking apprenticeship hours and setting passing score for examination.

Hearing Location(s): On October 4, 2017, at 1:00 p.m., at the Department of Health, 111 Israel Road S.E., Town Center 2, Room 158, Tumwater, WA 98501-5570.

Date of Intended Adoption: October 11, 2017.

Submit Written Comments to: Tommy Simpson III, Washington State Department of Health, P.O. Box 47850, Olympia, WA 98504-7850, email https://fortress.wa.gov/doh/policyreview, fax 360-236-2901, by October 4, 2017.

Assistance for Persons with Disabilities: Contact Tommy Simpson III, phone 360-236-4910, fax 360-236-2901, TTY 360-833-6388 or 711, email tommy.simpson@doh.wa.gov, by September 27, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The proposed rules update definitions, clarify license application requirements, and repeal mandatory reporting sections that duplicate applicable rules in chapter 246-16 WAC. The rules also establish a passing score for the ocularist examination and set standards for tracking apprenticeship hours.

Reasons Supporting Proposal: The proposal follows a comprehensive review of the chapter under RCW 43.70.41 [43.70.041] in coordination with stakeholders. The proposed rules set clearer standards for ocularist apprentices and licensees.

Statutory Authority for Adoption: RCW 18.55.095.

Statute Being Implemented: Chapter 18.55 RCW.

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

Name of Proponent: Department of health, governmental.

Name of Agency Personnel Responsible for Drafting: Tommy Simpson III, 111 Israel Road S.E., Tumwater, WA 98501-5570, 360-236-4910; Implementation: Kathy Schmitt, 111 Israel Road S.E., Tumwater, WA 98501-5570, 360-236-2985; and Enforcement: Lisa Hodgson, 111 Israel Road S.E., Tumwater, WA 98501-5570, 360-236-2927.

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

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Tommy Simpson III, P.O. Box 47850, phone 360-236-4910, fax 360-236-2910, TTY 360-833-6388 or 711, email tommy.simpson@doh.wa.gov.

The proposed rule does impose more-than-minor costs on businesses. The proposed rule does not impact businesses in the industry.

August 14, 2017
John Wiesman, DrPH, MPH
Secretary

AMENDATORY SECTION (Amending WSR 92-02-018, filed 12/23/91, effective 1/23/92)

WAC 246-849-020 ((~~General provisions.~~)) Definitions. (((~~(1) "Unprofessional conduct" as used in this chapter shall mean the conduct described in RCW 18.130.180.~~

~~(2) "Hospital" means any health care institution licensed pursuant to chapter 70.41 RCW.~~

~~(3) "Nursing home" means any health care institution which comes under chapter 18.51 RCW.~~

~~(4)~~))) The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Department" means the Washington state department of health((~~, whose address is:~~

~~Department of Health~~
~~Professional Licensing Division~~
~~1300 S.E. Quince St., P.O. Box 47869~~
~~Olympia, Washington~~
~~98504-7869~~

~~(5)~~)).

(2) "Direct supervision" means that the supervising ocularist inspects all of the apprentice's work and is physically present on the premises where the apprentice is working at all times.

(3) "Ocularist" means a person licensed under chapter 18.55 RCW.

(((~~(6) "Mentally or physically disabled ocularist" means an ocularist who is currently mentally incompetent or mentally ill as determined by a court, or who is unable to practice ocular prosthetic services with reasonable skill and safety to patients by reason of any mental or physical condition and who continues to practice while so impaired.~~)) (4) "Primary supervisor" means an ocularist licensed under chapter 18.55 RCW who is:

(a) Responsible for the acts of the apprentice; and

(b) Provides the majority of the training and direct supervision received by the apprentice.

AMENDATORY SECTION (Amending WSR 91-02-049, filed 12/27/90, effective 1/31/91)

WAC 246-849-030 Mandatory reporting. (((~~(1) All reports required by this chapter shall be submitted to the department as soon as possible, but no later than twenty days after a determination is made.~~

~~(2) A report should contain the following information if known:~~

~~(a) The name, address, and telephone number of the person making the report.~~

~~(b) The name and address and telephone numbers of the ocularist being reported.~~

~~(c) The case number of any client whose treatment is a subject of the report.~~

~~(d) A brief description or summary of the facts which gave rise to the issuance of the report, including dates of occurrences.~~

~~(e) If court action is involved, the name of the court in which the action is filed along with the date of filing and docket number.~~

~~(f) Any further information which would aid in the evaluation of the report.~~

~~(3) Mandatory reports shall be exempt from public inspection and copying to the extent permitted under RCW 42.17.310 or to the extent that public inspection or copying of the report or any portion of the report would invade or violate a person's right to privacy as set forth in RCW 42.17.255.~~

~~(4) A person is immune from civil liability, whether direct or derivative, for providing information to the department pursuant to RCW 18.130.070.~~)) An ocularist is a mandatory reporter under RCW 18.130 070. Mandatory reporting requirements are in WAC 246-16-200 through 246-16-270.

AMENDATORY SECTION (Amending WSR 98-05-060, filed 2/13/98, effective 3/16/98)

WAC 246-849-210 ((~~Registration of~~)) Ocularist apprentices. A person seeking an initial ocularist license must complete a ten thousand hour ocularist apprenticeship to sit for the ocularist examination. An apprentice must register with the department before starting ocularist training. Training hours completed prior to registration will not count toward the required ten thousand hours necessary to sit for the examination. The maximum number of hours an apprentice can accumulate per year is two thousand hours.

(1) To apply for registration an applicant ((~~for apprenticeship may request registration as an apprentice by submitting~~)) must submit to the department:

(a) An application on a form provided by the secretary;

(b) ((~~A~~)) The registration fee ((~~as~~)) specified in WAC 246-849-990.

(2) ((~~Training received~~)) Separate registration forms are required if the apprentice receives training from more than one supervisor ((~~shall require separate applications~~)).

(3) ((~~Only the apprenticeship training received subsequent to the date that the apprentice was formally registered with the secretary will be considered towards the required ten thousand hours necessary to sit for the examination.~~)) The primary supervisor and registered apprentice shall maintain a record of all apprenticeship hours. This record shall be verified by initial of both the primary supervisor and apprentice and shall be available upon request by the secretary, or the secretary's designee.

(4) A registered apprentice ((~~shall~~)) must notify the department in writing ((~~whenever~~)) if the apprenticeship training is terminated, unless ((~~such~~)) the termination is ((~~concluded by reason of the~~)) due to apprentice ((~~becoming licensed as an ocularist in this state~~)) licensure.

(5) ((~~In order to facilitate comments on the apprentice's performance, the apprentice registration card along with the name, business address, and business telephone number of the apprentice's supervisor shall be posted in public view on the premises where the apprentice works.~~)) The apprentice registration along with the name, business address, and busi-

ness telephone number of the apprentice's primary supervisor shall be posted in public view on the premises where the apprentice works.

(6) Once registered, the apprentice may receive training and accumulate training hours under the direct supervision of a licensed ocularist.

AMENDATORY SECTION (Amending WSR 98-05-060, filed 2/13/98, effective 3/16/98)

WAC 246-849-220 Application for examination. (((~~(1) An individual shall make application for examination, in accordance with RCW 18.55.040, on an application form prepared by and provided by the secretary.~~

~~(2) The apprenticeship training requirement shall be supported with certification by the licensed individual (or individuals) who provided such training.~~

~~(3) If an applicant is unable to attend his or her scheduled examination, and so notifies the department in writing at least seven days prior to the scheduled examination date, the applicant will be rescheduled at no additional charge. A written request received less than seven days before the test shall be reviewed by the department to determine if the test may be rescheduled or the fee forfeited.~~

~~(4) If an applicant takes the examination and fails to obtain a satisfactory grade, he or she may be scheduled to retake the examination by submitting an application and paying the statutory examination fee.~~

~~(5) Applications and fees for examination and all documents required in support of the application must be submitted to the division of professional licensing, department of health, at least sixty days prior to the scheduled examination. Failure to meet the deadline will result in the applicant not being scheduled until the next scheduled examination.~~

~~(6) Apprenticeship training shall be completed prior to the application deadline.~~)) (1) A completed examination application, examination fee, and proof of completion of apprenticeship hours must be submitted to the department at least sixty days prior to the scheduled examination.

(2) Applicants must notify the department in writing seven days prior to the examination date to be rescheduled for the examination. The department will review written requests less than seven days before the examination to determine if the test will be rescheduled or if the fee will be forfeited.

(3) Every qualified applicant shall pass an examination with a score of at least seventy percent.

(4) Applicants who fail may sit for the examination if he or she submits an additional application and examination fee.

NEW SECTION

WAC 246-849-225 Initial application requirements for licensure as an ocularist. An applicant for an initial ocularist license shall submit the following to the department:

(1) A completed licensure application on forms provided by the department;

(2) Licensing fees required in WAC 246-849-990;

(3) Proof of high school graduation, or its equivalent;

(4) Proof of age eighteen or older;

(5) Successful completion of passing the ocularist examination.

AMENDATORY SECTION (Amending WSR 93-10-008, filed 4/22/93, effective 5/23/93)

WAC 246-849-230 Temporary practice permits((~~— Scope and purpose~~)). ((~~The temporary practice permit is established to enable safe, qualified, and trained ocularists who are currently licensed in another state as defined in WAC 246-849-250 to work in the state of Washington prior to completing the licensing examination in this state. All licensing requirements established for the purpose of obtaining an ocularist license will need to be completed as part of the application for a temporary practice permit.~~)) An ocularist may obtain a temporary practice permit. Refer to the requirements of WAC 246-12-050.

AMENDATORY SECTION (Amending WSR 93-10-008, filed 4/22/93, effective 5/23/93)

WAC 246-849-270 Service disclosure. The ocularist shall provide a written explanation of services to customers or patients. This explanation shall include at a minimum the type of prosthesis or service ((~~they are~~)) the customer or patient is receiving or purchasing. This explanation shall be signed by the customer or patient and maintained in the customer or patient records for a minimum of three years. This documentation shall be available and furnished to the department upon request.

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 246-849-040	Health care institutions.
WAC 246-849-050	Ocularist associations or societies.
WAC 246-849-060	Health care service contractors and disability insurance carriers.
WAC 246-849-070	Professional liability carriers.
WAC 246-849-080	Courts.
WAC 246-849-090	State and federal agencies.
WAC 246-849-100	Cooperation with investigation.
WAC 246-849-200	Apprenticeship training—Definitions.
WAC 246-849-240	Definitions.
WAC 246-849-250	Issuance and duration of temporary practice permits.

WSR 17-17-105
PROPOSED RULES
HEALTH CARE AUTHORITY
(Washington Apple Health)
[Filed August 18, 2017, 4:15 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 17-08-008.

Title of Rule and Other Identifying Information: Amending WAC 182-551-3000 Private duty nursing services for clients seventeen years of age and younger; and new WAC 182-551-3100 Private duty nursing services for clients age seventeen and younger—Client eligibility, 182-551-3200 Private duty nursing services for clients age seventeen and younger—Client requirements, 182-551-3300 Private duty nursing services for clients age seventeen and younger—Application requirements, and 182-551-3400 Private duty nursing services for clients age seventeen and younger—Authorization.

Hearing Location(s): On September 26, 2017, at 10:00 a.m., at the Cherry Street Plaza, Sue Crystal Room 106A, 626 8th Avenue, Olympia, WA 98504. Metered public parking is available street side around building. A map is available at www.hca.wa.gov/documents/directions_to_csp.pdf or directions can be obtained by calling 360-725-1000.

Date of Intended Adoption: Not sooner than September 27, 2017.

Submit Written Comments to: HCA Rules Coordinator, P.O. Box 42716, Olympia, WA 98504-2716, email arc@hca.wa.gov, fax 360-589-9727, by September 26, 2017.

Assistance for Persons with Disabilities: Contact Amber Lougheed, phone 360-725-1349, fax 360-586-9727, TTY 800-848-5429 or 711, email amber.lougheed@hca.wa.gov, by September 22, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The agency is amending WAC 182-551-3000 Private duty nursing services for clients age seventeen and younger—General, as follows: (1) Renaming the title to reflect that it contains general information about private duty nursing for clients age seventeen and younger; (2) removing the definition of "private duty nursing" and moving it to a new section for definitions; (3) adding information about receiving services through a managed care organization (MCO); (4) adding information about coverage for services when the client has third-party liability (TPL) coverage; (5) removing and moving to new sections all information regarding client eligibility, provider requirements, application requirements, and authorization; and (6) housekeeping changes. Changes to WAC 182-551-3000 explain that private duty nursing services are provided to fee-for-service clients through the medically intensive children's program (MICP) and further clarify how services are provided through MCOs and when clients have TPL coverage. The agency is creating new WAC 182-551-3050 Private duty nursing services for clients age seventeen and younger—Definitions, to define terms not previously found in WAC regarding private duty nursing services. The agency is creating new sections for client eligibility, provider requirements, application requirements, and authorization (new WAC 182-551-3100 through 182-551-3400). These sections are being added to make information easier to find. Additionally, the language in the new WAC sections contains some changes (from the original language in WAC 182-551-3000) to clarify information and update policy.

Reasons Supporting Proposal: See Purpose above.

Statutory Authority for Adoption: RCW 41.05.021, 41.05.160.

Statute Being Implemented: RCW 41.05.021, 41.05.160.

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

Name of Proponent: Health care authority, governmental.

Name of Agency Personnel Responsible for Drafting: Katie Pounds, P.O. Box 42716, Olympia, WA 98504-2716, 360-725-1346; Implementation and Enforcement: Nancy Hite, P.O. Box 45530, Olympia, WA 98504-5530, 360-725-1611.

A cost-benefit analysis is not required under RCW 34.05.328. RCW 34.05.328 does not apply to health care authority rules unless requested by the joint administrative rules review committee or applied voluntarily.

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

Is exempt under RCW 19.85.025(4).

Explanation of exemptions: The agency has determined that the proposed filing does not impose a disproportionate cost impact on small businesses or nonprofits.

August 18, 2017
Wendy Barcus
Rules Coordinator

AMENDATORY SECTION (Amending WSR 11-14-075, filed 6/30/11, effective 7/1/11)

WAC 182-551-3000 Private duty nursing services for clients age seventeen ((~~years of age~~)) and younger—General. ((~~This section applies to private duty nursing services for eligible clients on fee-for-service programs.~~)) (1) Private duty nursing services are provided to fee-for-service clients through the medically intensive children's program (MICP). The MICP provides private duty nursing services to clients age seventeen and younger, whose complex medical needs cannot be managed within the scope of intermittent home health services.

(2) Managed care clients receive private duty nursing services through their ((~~plans~~)) managed care organization (MCO) (see chapter ((~~388-538~~)) 182-538 WAC). (((~~(1) **"Private duty nursing"** means four hours or more of continuous skilled nursing services provided in the home to eligible clients with complex medical needs that cannot be managed within the scope of intermittent home health services. Skilled nursing service is the management and administration of the treatment and care of the client, and may include, but is not limited to:~~

~~(a) Assessments (e.g., respiratory assessment, patency of airway, vital signs, feeding assessment, seizure activity, hydration, level of consciousness, constant observation for comfort and pain management);~~

~~(b) Administration of treatment related to technological dependence (e.g., ventilator, tracheotomy, bilevel positive airway pressure, intravenous (IV) administration of medications and fluids, feeding pumps, nasal stints, central lines);~~

~~(c) Monitoring and maintaining parameters/machinery (e.g., oximetry, blood pressure, lab draws, end tidal CO_2s, ventilator settings, humidification systems, fluid balance, etc.); and~~

~~(d) Interventions (e.g., medications, suctioning, IV's, hyperalimentation, enteral feeds, ostomy care, and tracheostomy care).~~

~~(2) To be eligible for private duty nursing services, a client must meet all the following:~~

~~(a) Be seventeen years of age or younger (see chapter 388-71 WAC for information about private duty nursing services for clients eighteen years of age and older);~~

~~(b) Be eligible for categorically needy (CN) or medically needy (MN) scope of care (see WAC 388-501-0060 and 388-501-0065);~~

~~(c) Need continuous skilled nursing care that can be provided safely outside an institution; and~~

~~(d) Have prior authorization from the department.~~

~~(3) The department contracts only with home health agencies licensed by Washington state to provide private duty nursing services and pays a rate established by the department according to current funding levels.~~

~~(4) A provider must coordinate with a division of developmental disabilities case manager and request prior authorization by submitting a complete referral to the department, which includes all of the following:~~

~~(a) The client's age, medical history, diagnosis, and current prescribed treatment plan, as developed by the individual's physician;~~

~~(b) Current nursing care plan that may include copies of current daily nursing notes that describe nursing care activities;~~

~~(c) An emergency medical plan which includes notification of electric, gas and telephone companies as well as local fire department;~~

~~(d) Psycho-social history/summary which provides the following information:~~

~~(i) Family constellation and current situation;~~

~~(ii) Available personal support systems;~~

~~(iii) Presence of other stresses within and upon the family; and~~

~~(iv) Projected number of nursing hours needed in the home, after discussion with the family or guardian.~~

~~(e) A written request from the client or the client's legally authorized representative for home care.~~

~~(5) The department approves requests for private duty nursing services for eligible clients on a case-by-case basis when:~~

~~(a) The information submitted by the provider is complete;~~

~~(b) The care provided will be based in the client's home;~~

~~(c) Private duty nursing will be provided in the most cost-effective setting;~~

~~(d) An adult family member, guardian, or other designated adult has been trained and is capable of providing the skilled nursing care;~~

~~(e) A registered or licensed practical nurse will provide the care under the direction of a physician; and~~

~~(f) Based on the referral submitted by the provider, the department determines:~~

~~(i) The services are medically necessary for the client because of a complex medical need that requires continuous skilled nursing care which can be provided safely in the client's home;~~

~~(ii) The client requires more nursing care than is available through the home health services program; and~~

~~(iii) The home care plan is safe for the client.~~

~~(6) Upon approval, the department will authorize private duty nursing services up to a maximum of sixteen hours per day except as provided in subsection (7) of this section, restricted to the least costly equally effective amount of care.~~

~~(7) The department may authorize additional hours:~~

~~(a) For a maximum of thirty days if any of the following apply:~~

~~(i) The family or guardian is being trained in care and procedures;~~

~~(ii) There is an acute episode that would otherwise require hospitalization, and the treating physician determines that noninstitutionalized care is still safe for the client;~~

~~(iii) The family or guardian caregiver is ill or temporarily unable to provide care;~~

~~(iv) There is a family emergency; or~~

~~(v) The department determines it is medically necessary.~~

~~(b) After the department evaluates the request according to the provisions of WAC 388-501-0165 and 388-501-0169.~~

~~(8) The department adjusts the number of authorized hours when the client's condition or situation changes.~~

~~(9) Any hours of nursing care in excess of those authorized by the department are the responsibility of the client, family or guardian.~~)) Providers must follow the policies and procedures of the client's MCO.

(3) For clients with third-party liability (TPL) coverage (see WAC 182-500-0105) that includes private duty nursing, the procedures and policies in this section apply when determining coverage of additional hours under MICP.

NEW SECTION

WAC 182-551-3050 Private duty nursing services for clients age seventeen and younger—Definitions. The following definitions and those found in chapter 182-500 WAC apply to this subchapter.

"Continuous skilled nursing" means skilled nursing services considered medically necessary and requires four or more hours of consecutive skilled nursing care.

"Nursing care consultant" means a registered nurse employed by the department of social and health services (DSHS) to provide and evaluate clinical eligibility for the medically intensive children's program (MICP).

"Private duty nursing" means four hours or more of continuous skilled nursing services that are actively spent providing skilled nursing care. Skilled nursing care is provided in the home to eligible clients with complex medical needs that cannot be managed within the scope of intermittent home health services. Skilled nursing services are the management and administration of the treatment and care of the client.

"Skilled nursing care" means the medical care provided by a licensed nurse or delegate working under the direction of a physician as described in RCW 18.79.260.

"Skilled nursing services" means the specialized judgment, knowledge, and skills of a registered nurse or licensed practical nurse as described in RCW 18.79.040 and 18.79.060.

NEW SECTION

WAC 182-551-3100 Private duty nursing services for clients age seventeen and younger—Client eligibility. (1) To be eligible for private duty nursing services under the medically intensive children's program (MICP), clients must:

(a) Be age seventeen or younger;

(b) Have informal support by a person who has been trained to provide designated skilled nursing care and is able to perform the care as required;

(c) Require four hours of continuous skilled nursing care at a level that cannot be delegated at the time of the initial assessment and can be provided safely outside of a hospital in a less restrictive setting;

(d) Have prior authorization from the department of social and health services/developmental disabilities administration (DSHS/DDA);

(e) Have exhausted all other funding sources for private duty nursing services, according to RCW 74.09.185, prior to accessing these services through the medically intensive children's program (MICP);

(f) Meet financial eligibility under subsection (2) of this section; and

(g) Meet medical eligibility under subsection (3) of this section.

(2) To be financially eligible for private duty nursing services, clients must meet medicaid eligibility requirements under the categorically needy program, the medically needy program, or alternative medical program (see WAC 182-501-0060).

(3) To be medically eligible for private duty nursing services, clients must:

(a) Be assessed by a DSHS/DDA nursing care consultant and determined medically eligible for MICP; and

(b) Require two or more tasks of complex skilled nursing care such as:

(i) System assessments, including multistep approaches of systems (e.g., respiratory assessment, airway assessment, vital signs, nutritional and hydration assessment, complex gastrointestinal assessment and management, seizure management requiring intervention, or level of consciousness);

(ii) Administration of treatment for complex respiratory issues related to technological dependence requiring multistep approaches on a day-to-day basis (e.g., ventilator tracheostomy);

(iii) Assessment of complex respiratory issues and interventions with use of oximetry, titration of oxygen, ventilator settings, humidification systems, fluid balance, or any other cardiopulmonary critical indicators based on medical necessity;

(iv) Skilled nursing interventions of intravenous/parenteral administration of multiple medications and nutritional substances on a continuing or intermittent basis with frequent interventions; or

(v) Skilled nursing interventions of enteral nutrition and medications requiring multistep approaches daily.

NEW SECTION

WAC 182-551-3200 Private duty nursing services for clients age seventeen and younger—Provider requirements. Providers qualified to deliver private duty nursing under the medically intensive children's program must have the following:

(1) A home health agency license with the state of Washington to provide private duty nursing services;

(2) A contract with the department of social and health services/developmental disabilities administration (DSHS/DDA) to provide private duty nursing services; and

(3) A signed core provider agreement with the medicaid agency.

NEW SECTION

WAC 182-551-3300 Private duty nursing services for clients age seventeen and younger—Application requirements. Clients requiring private duty nursing services must submit a complete signed medically intensive children's program (MICP) application (DSHS form 15-398). The MICP application must include the following:

(1) DSHS 14-012 consent form;

(2) DSHS 14-151 request for DDA eligibility determination form for clients not already determined DDA eligible;

(3) DSHS 03-387 notice of practices for client medical information;

(4) Appropriate and current medical documentation including medical plan of treatment or plan of care (WAC 246-335-080) with the client's age, medical history, diagnoses, and the parent/guardian contact information including address and phone number;

(5) A list of current treatments or treatment records;

(6) Information about ventilator, bilevel positive airway pressure (BiPAP), or continuous positive airway pressure (CPAP) hours per day or frequency of use;

(7) History and physical from current hospital admission, recent discharge summary, or recent primary physician exam;

(8) A recent interim summary, discharge summary, or clinical summary;

(9) Recent nursing charting within the past five to seven days of hospitalization or in-home nursing documentation;

(10) Current nursing care plan that may include copies of current daily nursing notes that describe nursing care activities;

(11) An emergency medical plan that includes strategies to address loss of power and environmental disasters such as methods to maintain life-saving medical equipment supporting the client. The plan may include notification of electric and gas companies and the local fire department;

(12) A psycho-social history/summary with the following information, as available:

(a) Family arrangement and current situation;

(b) Available personal support systems; and

(c) Presence of other stresses within and upon the family.

(13) Statement that the home care plan is safe for the child and is agreed to by the child's parent or legal guardian;

(14) Information about other family supports such as medicaid, school hours, or hours paid by a third-party insurance or trust; and

(15) For a client with third-party insurance or a managed care organization (MCO), a denial letter from the third-party

insurance or MCO that states the private duty nursing services will not be covered.

NEW SECTION

WAC 182-551-3400 Private duty nursing services for clients age seventeen and younger—Authorization. (1) The department of social and health services/developmental disabilities administration (DSHS/DDA) authorizes requests for private duty nursing services for eligible clients on a case-by-case basis when:

(a) The application requirements under WAC 182-551-3300 are met; and

(b) The nursing care consultant's review determines the services are medically necessary based on WAC 182-500-0070 and 182-501-0165.

(2) DSHS/DDA only authorizes medically necessary private duty nursing hours. The program manager may authorize up to sixteen hours per day.

(a) DSHS/DDA may adjust the number of authorized hours when the client's condition or situation changes.

(b) Any hours of private duty nursing provided to the client that are more than the number of hours authorized by DSHS/DDA are the financial responsibility of the client, the client's family, or the client's guardian.

WSR 17-17-106
PROPOSED RULES
DEPARTMENT OF FISH AND WILDLIFE

[Filed August 18, 2017, 4:51 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 17-13-085 on June 17, 2017.

Title of Rule and Other Identifying Information: WAC 220-340-070 needs clarification regarding the application process for geoduck diver licenses. Specifically, the department is advancing the due date for applications to renew licenses to November 30 on an annual basis and clarifying the process for how the department would issue any remaining geoduck divers licenses for any of the seventy-seven licenses that are not renewed by November 30 on an annual basis.

Hearing Location(s): On October 27, 2017, at 10:30 a.m., at the Natural Resources Building, 630, 1111 Washington Street S.E., Olympia, WA 98504.

Date of Intended Adoption: On or after October 27, 2017.

Submit Written Comments to: Scott Bird, Washington Department of Fish and Wildlife (WDFW), Rules Coordinator, 600 Capitol Way North, email Rules.Coordinator@dfw.wa.gov, fax 360-902-2155, by October 27, 2017.

Assistance for Persons with Disabilities: Contact Dolores Noyes, phone 360-902-2349, TTY 360-902-2207, by October 26, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of the proposal is to update the process described in WAC 220-340-070 for new geoduck divers licenses. Specifically, the department is advancing the due date for applications to renew licenses to November 30 each year and clarifying the process for how the department issues new geoduck divers licenses for any of the seventy-seven licenses that are not renewed by November 30.

This update would affect both new geoduck divers license applicants and department staff by clarifying the process and alleviating uncertainty related to the process.

This update would specifically alter WAC 220-340-070 (1), (3), and (4). Subsection (1) updates include: (1) That new applicants are not required to submit the license fee unless selected to receive a geoduck divers license; and (2) a department email for inquiries on incomplete applications to be used prior to the November 30 deadline. Subsection (3) includes updates to department contact information. Subsection (4) updates include: (1) The specific application submittal dates of October 1 to November 30 each year for new geoduck divers license applicants; (2) the process of holding a drawing for all new applications received between October 1 to November 30 each year in the event that any of the seventy-seven licenses are available to be issued; and (3) the process of receiving new applications after November 30 each year and issuing licenses in the event that any of the seventy-seven licenses still are available to be issued.

Reasons Supporting Proposal: The current process described in WAC 220-340-070 for new geoduck divers licenses is ambiguous. The proposed update will clarify the application process and how the department issues new geoduck divers licenses for any of the seventy-seven licenses that are not renewed by November 30 each year. The department changed the deadline from December 31 to November 30 each year to give the agency time to process licenses before January 1.

Statutory Authority for Adoption: RCW 77.04.090 and 77.04.130.

Statute Being Implemented: RCW 77.65.410.

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

Name of Proponent: [WDFW], governmental.

Name of Agency Personnel Responsible for Drafting: Trisha Anderson, 1111 Washington Street, Olympia, WA 98501, 360-902-2211; Implementation: Peter Vernie, 1111 Washington Street, Olympia, WA 98501, 360-902-2302; and Enforcement: Chief Chris Anderson, 1111 Washington Street, Olympia, WA 98501, 360-902-2936.

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. The proposed rule does not affect hydraulics. Further, the proposed rule clarifies the current process used by the department, and there are no substantive changes that impact the costs or benefits associated to the process.

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, subsection (5)(b)(iv).

August 18, 2017
Scott Bird
Rules Coordinator

AMENDATORY SECTION (Amending WSR 17-05-112, filed 2/15/17, effective 3/18/17)

WAC 220-340-070 Commercial geoduck harvest—Geoduck diver license application and issuance process. (1) The department will not consider incomplete applications for a geoduck diver license. The following information is required to apply for or renew a geoduck diver license:

(a) A complete, legible, and signed application form;

(b) The application and license fees as provided in RCW 77.65.440;

(i) Applicants renewing a geoduck diver license must submit the completed application, application fee and license fee during the renewal time frame of October 1st to 11:59 p.m. on November 30th;

(ii) New geoduck diver license applicants must submit the completed application and only the application fee during the open enrollment time frame of October 1st to 11:59 p.m. on November 30th. The license fee will only be required if the individual is selected, through the drawing process outlined in subsection (4)(b) of this section to receive a geoduck diver license.

(c) ((~~Proof of~~)) Completion of the department of natural resources (DNR) geoduck diver safety program to be verified by the department of fish and wildlife (DFW) with DNR; and

(d) For applications ((~~to renew only, a copy of a~~)) who are only renewing, completion of the DNR geoduck harvest agreement plan of operation that lists the applicant on the agreement during the applicable current calendar year. This is to be verified by DFW with DNR.

(2) No more than 77 geoduck diver licenses may be issued per calendar year.

(3) Applicants may submit applications to the department during the renewal or open enrollment time frame of October 1st to 11:59 p.m. on November 30th:

(a) By mailing to ((~~600 Capitol Way N., Olympia, WA 98501-1091~~)) P.O. Box 43200, Olympia, WA 98504-3200;

(b) By faxing to 360-902-2945; or

(c) In person at the ((~~WDFW~~)) DFW licensing front desk, first floor, natural resources building at 1111 Washington St. S.E., Olympia, WA 98501 during normal business hours.

(4) The department ((~~must receive applications to renew a geoduck diver license by December 31st of the year the licensee's current geoduck diver license expires~~)) will renew any geoduck diver license if all requirements listed in subsection (1) of this section are met prior to 11:59 p.m. on November 30th. If less than 77 geoduck diver licenses have been issued after the department approves all qualifying applications to renew a geoduck diver license, then the department will issue additional licenses, up to the 77 geoduck diver license limit, to ((~~qualified~~)) new geoduck diver license applicants ((~~in the order they are received. If the department receives more than one application for a geoduck diver license in a calendar day, and issuing licenses to all applicants received in that calendar day would exceed 77 geoduck diver licenses, the department will conduct a random drawing among the applications received that calendar day to determine which of the applications received in that calendar day will be issued a geoduck diver license~~)). The department will complete the following process for issuing nonrenewed licenses to new geoduck diver license qualified applicants:

(a) New geoduck diver license applications must be received between October 1st and November 30th. If the department receives more new applications by November 30th than there are available geoduck licenses to issue, then the department will conduct a random drawing among the applications received by November 30th to determine which of the applicants will be issued a geoduck diver license.

(b) After the initial deadline of November 30th, if there are remaining licenses available up to the 77 geoduck diver license limit, then the department will issue licenses to new geoduck diver applicants based on the calendar date the application is received on a first-come first-serve basis. In the event there are multiple applications received on the same calendar day that exceed the quantity of remaining licenses, a drawing will be held to issue the remaining licenses.

WSR 17-17-107
PROPOSED RULES
DEPARTMENT OF TRANSPORTATION

[Filed August 21, 2017, 7:21 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 17-07-100.

Title of Rule and Other Identifying Information: Minor revisions to WAC 468-95-302 Flagger stations.

Hearing Location(s): On October 31, 2017, at 9:00 a.m., at the Washington State Department of Transportation (WSDOT), 310 Maple Park, Room 1D2. Please sign in at the reception desk.

Date of Intended Adoption: October 31, 2017.

Submit Written Comments to: Rick Mowlds, P.O. Box 47344, Olympia, WA 98504-7355 [98504-7344], email mowldsr@wsdot.wa.gov, fax 360-705-6826, other 360-705-7988, by October 30, 2017.

Assistance for Persons with Disabilities: Contact Grant Heap, phone 360-705-7760, TTY 711, email heapg@wsdot.wa.gov, by October 30, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of the proposal is to allow flaggers within an intersection at each intersecting leg. Currently, the rule does not allow a flagger to be within the intersection, except for emergencies.

Reasons Supporting Proposal: The change will provide greater control of vehicles and pedestrians at work zone locations at intersections.

Statutory Authority for Adoption: RCW 47.36.030.

Statute Being Implemented: None.

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

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: The rule clarifies where the position of a flagger [is] within an intersection.

Name of Proponent: WSDOT, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Rick Mowlds, Olympia, Washington, 360-705-7988.

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. The rule does not change federal regulations or Washington state law. The rule clarifies where the position of a flagger [is] within an intersection.

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

Is exempt under RCW 19.85.025(3) as the rules are adopting or incorporating 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.

August 21, 2017
Kara Larsen, Director
Risk Management and Legal Services

AMENDATORY SECTION (Amending WSR 11-23-101, filed 11/18/11, effective 12/19/11)

WAC 468-95-302 Flagger stations. Add a new Standard to MUTCD Section 6E.08 to read:

Standard:

A single flagger shall not flag ((~~traffic within~~)) from the center of an intersection, except ((~~for~~)) when there is an emergency or when law enforcement is flagging. When flagging at an intersection there shall be a flagger controlling each intersection leg.

WSR 17-17-108
PROPOSED RULES
DEPARTMENT OF TRANSPORTATION
[Filed August 21, 2017, 7:23 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 17-07-099.

Title of Rule and Other Identifying Information: Minor revisions to chapter 468-70 WAC, Motorist information signs.

Hearing Location(s): On October 31, 2017, at 9:00 a.m., at the Washington State Department of Transportation (WSDOT), 310 Maple Park, Room 1D2. Please sign in at the reception desk.

Date of Intended Adoption: October 31, 2017.

Submit Written Comments to: Rick Mowlds, P.O. Box 47344, Olympia, WA 98504-7355 [98504-7344], email mowldsr@wsdot.wa.gov, fax 360-705-6826, other 360-705-7988, by October 30, 2017.

Assistance for Persons with Disabilities: Contact Grant Heap, phone 360-705-7760, TTY 711, email heapg@wsdot.wa.gov, by October 30, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of the proposal is [to] reduce the required hours of operation for a gas station on conventional highways in order to be eligible for signage.

Reasons Supporting Proposal: The proposal updates the hours of operation to be consistent with current national guidelines for gas stations on conventional highways.

Statutory Authority for Adoption: RCW 47.36.030 and 47.36.320.

Statute Being Implemented: None.

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

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: The rule reduces the required hours of operation for gas stations on conventional highways in order to be eligible for placement of a business sign on a motorist information sign panel.

Name of Proponent: WSDOT, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Rick Mowlds, Olympia, Washington, 360-705-7988.

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. The rule does not change federal regulations or Washington state law. The rule reduces the required hours of operation for gas stations on conventional highways are being reduced.

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

Is exempt under RCW 19.85.025(3) as the rules are adopting or incorporating 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.

August 21, 2017
Kara Larsen, Director
Risk Management and Legal Services

AMENDATORY SECTION (Amending WSR 10-12-053, filed 5/27/10, effective 6/27/10)

WAC 468-70-050 Business eligibility. (1) To be eligible for placement of a business sign on a motorist information

sign panel a motorist service activity must conform to the following standards:

(a) Gas activity:

(i) Provide vehicle services including fuel, oil, tire repair and water; and

(ii) Be in continuous operation at least sixteen hours a day, seven days a week for freeways and expressways; and be in continuous operation at least twelve hours a day, seven days a week; and

(iii) Provide restroom facilities, drinking water and a telephone access;

(iv) Motorist information sign panels may be installed and existing signing will not be removed when the motorist service activity is closed for a short period of time or when its hours of operation have been reduced as a result of a shortage of gasoline;

(v) Activities not meeting the tire repair requirement of (i) of this subsection but have gas, oil, and water may qualify for signing provided that the motorist information sign panel displays fewer than the full complement of business signs. A telephone must also be available at no cost for a person to use to acquire tire repair;

(vi) Business signs for card-lock gas activities may be installed, provided that the activities serve the general motoring public, without membership, and accept a variety of credit cards available to the general public. Card-lock gas activities must also meet the applicable requirements of (a)(i) through (v) of this subsection.

(b) Food activity:

(i) Be licensed or approved by the county health office; and

(ii) Food activities in fee zones 1 and 2 shall be in continuous operation to serve meals for a minimum of ten hours a day six days a week, and food activities in fee zone 3 shall be in continuous operation to serve meals for a minimum of eight hours a day six days a week; and

(iii) Have inside seating for a minimum of twenty patrons and parking facilities for a minimum of ten vehicles; and

(iv) If curb service is provided, have a minimum of ten drive-in service stalls; and

(v) Provide telephone and restroom facilities.

(c) Lodging activity:

(i) Be licensed or approved by the Washington department of health; and

(ii) Provide adequate sleeping and bathroom accommodations available without reservations for rental on a daily basis; and

(iii) Provide public telephone facilities.

(d) Camping activity (applicable only for activities available from interstate highways):

(i) Have a valid business license;

(ii) Consist of at least twenty camping spaces and have adequate parking, modern sanitary and drinking water facilities for such spaces; and

(iii) Have an attendant on duty to manage and maintain the facility twenty-four hours a day while in operation.

(e) Recreation activity (applicable only for activities available from noninterstate highways):

(i) Consist of activities and sports of interest to family groups and the public generally in which people participate for purposes of active physical exercise, collective amusement or enjoyment of nature; e.g., hiking, golfing, skiing, boating, swimming, picnicking, camping, fishing, tennis, horseback riding, ice skating and gun clubs; and

(ii) Be licensed or approved by the state or local agency regulating the particular type of business; and

(iii) When the recreational activity is a campground, it must meet the criteria specified in WAC 468-70-050 (1)(d)(i) ((~~thru~~)) through (iii).

(iv) Activities must be open to the motoring public without appointment, at least six hours a day, five days a week including Saturday and/or Sunday.

(f) Tourist-oriented business activity:

(i) A natural, recreational, historical, cultural, educational, or entertainment activity, or a unique or unusual commercial or nonprofit activity, the major portion of whose income or visitors are derived during its normal business seasons from motorists not residing in the immediate area of the activity.

(ii) Be listed as a historic district on the National Register of Historic Places, on the Washington Heritage Register, or as a National Historic Landmark with the state's office of archaeology and historic preservation. Signs on private property that mark the entrance to the historic district and a letter of support by the jurisdictional local agency are required.

(iii) Be a commercial district as adopted by a city ordinance or resolution with a minimum of one million square feet of leasable commercial space located within one square mile. The commercial district must provide a unique commercial activity where the majority of the district's customers do not reside in the city where the commercial district is located. The commercial district shall be located within one mile of the nearest state highway. Only the name of the commercial district will be displayed on the business sign. Corporate logos may not be displayed.

(iv) Activities must be open to the motoring public without appointment, at least six hours a day, five days a week including Saturday and/or Sunday.

(g) Twenty-four-hour pharmacy:

(i) Be open twenty-four hours a day, seven days a week.

(ii) Have a state-licensed pharmacist present and on duty at all times.

(2) To be eligible for a RV symbol on its business sign, the business or destination shall have amenities, designed to accommodate recreational and other large vehicles, including:

(a) A hard-surfaced access to and from the business, that is free of potholes and is at least twelve feet wide with minimum turning radii of fifty feet.

(b) The roadway access and parking facilities must be free of utility wires, tree branches, or other obstructions up to fourteen feet above the surfacing.

(c) Facilities having short-term parking, such as restaurants and tourist attractions, must have a minimum of two parking spaces that are at least twelve feet wide and sixty-five feet long with a minimum turning radius of fifty feet for entering and exiting.

(d) Fueling islands must be located to allow for pull-through with a minimum entering and exiting turning radius of fifty feet.

(e) Canopied fueling islands must have a fourteen-foot minimum overhead clearance.

(f) Fueling facilities selling diesel are required to have pumps with noncommercial nozzles.

(g) For campgrounds, a minimum of two parking spaces at least eighteen feet wide and forty-five feet long are required.

(h) Business activities must also post directional signing on the premises as needed to indicate RV-friendly parking spaces and other on-site RV-friendly services, so that the motorist is given additional guidance upon leaving the public highway and entering the property.

(3) Distances prescribed herein will be measured from the center of the interchange or intersection along the centerline of the most direct public road to the facility access.

(4) The maximum distance that gas, food, lodging, camping, recreational, or tourist-oriented activities can be located on either side of an interchange or intersection to qualify for a business sign shall be as follows:

(a) From an interstate highway, gas, food, and lodging activities shall be located within three miles in either direction. Camping or tourist-oriented activities shall be located within five miles in either direction;

(b) From a noninterstate highway, gas, food, lodging, recreation, or tourist-oriented activities shall be located within five miles in either direction.

(c) A twenty-four-hour pharmacy must be located within three miles of an interstate or noninterstate highway.

(d) Where there are fewer than the maximum number, as specified in WAC 468-70-060 (3)(a), of eligible services within the distance limits prescribed in (a) and (b) of this subsection, the distance limits may be increased up to a maximum of fifteen miles to complete the balance of allowable signs.

(i) In reference to WAC 468-70-040(3), the department may erect and maintain signs on an alternate route that is longer than fifteen miles if it is safer and still provides reasonable and convenient travel to an eligible activity.

(ii) The department may erect and maintain signs on a route up to a maximum of twenty miles if an activity qualifies as eligible and is located within a distressed area under the criteria set forth in chapter 43.168 RCW.

(5) Within cities and towns having a population greater than twenty-five thousand, the department shall obtain concurrence from the municipality of locations for installing panels, and may request that the municipality install the panels.

(6) A gas, food, lodging, camping/recreational, tourist-oriented, or twenty-four-hour pharmacy activity visible from the mainline at least three hundred feet prior to an intersection shall not qualify for a business sign on such highway. The activity's on-premise sign is considered part of that activity in determining the three hundred foot visibility.

(7) When a multiple business activity qualifies for business sign placement on more than one type of motorist information sign panel, placement will be made on that type of panel which, as determined by the department, best describes the main product or service. Additional business signs for a qualifying multiple business activity may only be placed on more than one type of motorist information sign panel where the applicable panels display fewer than a full complement of business signs. Where these additional business signs complete the full complement of business signs on a motorist information sign panel, the most recently installed of such additional business signs shall be substituted for in the event that a qualifying single business activity applies to receive business signs.

(8) Motorist information sign panels will not be erected and maintained by the department until adequate follow-through signing, as specified by the department, is erected on local roads and/or streets. Written assurance that the follow-through signs will be maintained is required.

(9) Where operations are seasonal, business signs for each specific location shall be removed or covered during the appropriate period as determined by the department.

WSR 17-17-112
PROPOSED RULES
BUILDING CODE COUNCIL

[Filed August 21, 2017, 2:15 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 17-14-092.

Title of Rule and Other Identifying Information: Chapter 51-50 WAC, State building code. Section 1101 accessibility provisions for parking, vehicle space size, access aisle width and parking space identification.

Hearing Location(s): On October 13, 2017, at 10 a.m., at the DES Building 1st Floor, Presentation Room, 1500 Jefferson Street, Olympia, WA 98504.

Date of Intended Adoption: November 17, 2017.

Submit Written Comments to: Steve Simpson, Chair, State Building Code Council, P.O. Box 41449, Olympia, WA 98504-1449, email sbcc@des.wa.gov, fax 360-586-9088, by October 13, 2017.

Assistance for Persons with Disabilities: Contact Tim Nogler, phone 360-407-9277, fax 360-586-9088, email sbcc@des.wa.gov, by October 6, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The 2017 legislature passed and the governor signed HB 1262, chapter 132, Laws of 2017, requiring a minimum width for accessible van parking access aisles, and that the access aisles be marked with no parking signs. The law requires the state building code council to adopt rules to implement in the building code the amended provisions for accessible van parking by January 1, 2018.

Reasons Supporting Proposal: People often park in the access aisles where persons with wheelchairs need to get in and out of their vehicle. People with wheelchairs are often trapped either in their vehicle or out of their vehicle until the car parked in the access aisle can be moved. The access aisles also need to be big enough to allow wheelchair ramps to be lowered and for the wheelchairs to roll down the ramp. The

typical narrow access aisle does not provide enough room for a person to get a wheelchair out of their vehicle.

Statutory Authority for Adoption: RCW 19.27.074.

Statute Being Implemented: RCW 70.92.140, chapter 132, Laws of 2017, amending chapter 19.27 RCW.

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

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: The council seeks comments on the amendatory language in the proposed rule shown below.

Name of Proponent: Washington state building code council, governmental.

Name of Agency Personnel Responsible for Drafting and Implementation: Tim Nogler, 1500 Jefferson Street, P.O. Box 41449, Olympia, WA, 360-407-9277; and Enforcement: State Building Code Council, 1500 Jefferson Street, P.O. Box 41449, Olympia, WA, 360-407-9277.

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. The state building code council is not one of the agencies identified as required to prepare an analysis. This rule adopts without material change Washington state statute.

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

Is exempt under RCW 19.85.025(3) as the rule content is explicitly and specifically dictated by statute.

August 17, 2017
Steve Simpson
Chair

AMENDATORY SECTION (Amending WSR 16-03-064, filed 1/19/16, effective 7/1/16)

WAC 51-50-1101 Section 1101—General.

1101.2 Design. Buildings and facilities shall be designed and constructed to be accessible in accordance with this code and ICC A117.1, except those portions of ICC A117.1 amended by this section.

1101.2.1 (ICC A117.1 Section 403.5) Clear width of accessible route. Clear width of an accessible route shall comply with ICC A117.1 Section 403.5. For exterior routes of travel, the minimum clear width shall be 44 inches (1118 mm).

1101.2.2 (ICC A117.1 Section 404.2.8) Door-opening force. Fire doors shall have the minimum opening force allowable by the appropriate administrative authority. The force for pushing or pulling open doors other than fire doors shall be as follows:

1. Interior hinged door: 5.0 pounds (22.2 N) maximum
2. Interior sliding or folding doors: 5.0 pounds (22.2 N) maximum
3. Exterior hinged, sliding or folding door: 10 pounds (44.4 N) maximum.

EXCEPTION: Interior or exterior automatic doors complying with Section 404.3 of ICC ANSI A117.1.

These forces do not apply to the force required to retract latch bolts or disengage other devices that hold the door in a closed position.

1101.2.3 (ICC A117.1 Section 407.4.6.2.2) Arrangement of elevator car buttons. Buttons shall be arranged with numbers in ascending order. When two or more columns of buttons are provided they shall read from left to right.

1101.2.4 (ICC ANSI A117.1 606.7) Operable parts. Operable parts on drying equipment, towel or cleansing product dispensers, and disposal fixtures shall comply with Table 603.6.

1101.2.5 (ICC A117.1 Section 604.6) Flush controls. Flush controls shall be hand operated or automatic. Hand operated flush controls shall comply with Section 309, except the maximum height above the floor shall be 44 inches. Flush controls shall be located on the open side of the water closet.

EXCEPTION: In ambulatory accessible compartments complying with Section 604.10, flush controls shall be permitted to be located on either side of the water closet.

1101.2.6 (ICC A117.1 Section 703.6.3.1) International Symbol of Accessibility. Where the International Symbol of Accessibility is required, it shall be proportioned complying with ICC A117.1 Figure 703.6.3.1. All interior and exterior signs depicting the International Symbol of Accessibility shall be white on a blue background.

1101.2.7 (ICC A117.1 Section 502.2) Vehicle space size. Car and van parking spaces shall be 96 inches (2440 mm) minimum in width.

1101.2.8 (ICC A117.1 Section 502.4.2) Access aisle width. Access aisles serving car parking spaces shall be 60 inches (1525 mm) minimum in width. Access aisles serving van parking spaces shall be 96 inches (2440 mm) minimum in width.

1101.2.9 (ICC A117.1 Section 502.7) Identification. Accessible parking spaces shall be indicated by a vertical sign. The signs shall include the International Symbol of Accessibility complying with section 703.6.3.1. Such symbol shall be white on a blue background. Signs identifying van parking spaces shall contain the designation "van accessible." The sign may include additional language such as, but not limited to, an indication of the amount of the monetary penalty defined in RCW 46.19.050 for parking in the space without a valid permit. A vertical "no parking" sign shall be erected at the head of each access aisle located adjacent to an accessible parking space. The sign may include additional language such as, but not limited to, an indication of any penalty for parking in an access aisle. Such signs shall be 60 inches (1525 mm) minimum above the floor of the parking space, measured to the bottom of the sign.

WSR 17-17-118
PROPOSED RULES
DEPARTMENT OF
RETIREMENT SYSTEMS
[Filed August 21, 2017, 3:59 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 17-11-133.

Title of Rule and Other Identifying Information: Washington state patrol retirement system, WAC 415-103-100 Are payments I receive reportable compensation?

Hearing Location(s): On September 26, 2017, at 11:00 a.m., at the Department of Retirement Systems (DRS), Conference Room 115, 6835 Capitol Boulevard S.E., Tumwater, WA 98502.

Date of Intended Adoption: September 26, 2017.

Submit Written Comments to: Jilene Siegel, DRS, P.O. Box 48380, Olympia, WA 98504-8380, email Rules@drs.wa.gov, by September 25, 2017.

Assistance for Persons with Disabilities: Contact Jilene Siegel, phone 360-664-7291, TTY 711, email Rules@drs.wa.gov, by September 22, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Implementing chapter 181, Laws of 2017 (SB 5274) which amends the definition of "salary" for Washington state patrol retirement system, to include up to seventy hours per year of overtime related to RCW 47.46.040 or voluntary overtime, earned on or after July 1, 2017.

Statutory Authority for Adoption: RCW 41.50.050(5).

Statute Being Implemented: Chapter 181, Laws of 2017.

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

Name of Agency Personnel Responsible for Implementation: Seth Miller, DRS, P.O. Box 48380, Olympia, WA 98504, 360-664-7304.

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. RCW 34.05.328 (5)(a)(1)[(i)] does not apply to this rule making. The rule impacts only public employers and members or beneficiaries of the state retirement systems.

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

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party.

August 21, 2017
Jilene Siegel
Rules Coordinator

AMENDATORY SECTION (Amending WSR 02-23-037, filed 11/13/02, effective 1/1/03)

WAC 415-103-100 Are payments I receive reportable compensation? The following table will help you determine whether certain types of payments are reportable compensation. The department determines reportable compensation based upon the nature of the payment, not the name applied. See "salary" as defined in RCW 43.43.120((~~(23)~~)).

Type of Payment	Commission Date: Prior to ((~~7/1/01~~)) 7/1/2001	Commission Date: On or after ((~~7/1/01~~)) 7/1/2001
Overtime related to RCW 47.46.040((~~(4)~~)) or voluntary overtime, earned prior to ((~~7/1/01~~)) 7/1/2001	Yes	No
Overtime related to RCW 47.46.040((~~(4)~~)) or voluntary overtime, earned on or after ((~~7/1/01~~)) 7/1/2001 and before 7/1/2017	No	No
((~~Voluntary overtime earned prior to 7/1/01~~	~~Yes~~	~~No~~
~~Voluntary overtime earned on or after 7/1/01~~	~~No~~	~~No~~))
Overtime up to 70 hours per year[1] in total related to either RCW 47.46.040 or voluntary overtime, earned on or after 7/1/2017[2]	Yes	Yes
Overtime in excess of 70 hours per year[1] in total related to either RCW 47.46.040 or voluntary overtime, earned on or after 7/1/2017	No	No
Fringe benefits((~~,~~)) including, but not limited to, any type of insurance, or contributions for insurance, such as medical, dental, or life insurance, for members and/or their dependents	No	No
Lump sum payments for:		
Deferred annual sick leave((~~[1]~~)) [3]	No	No
Unused accumulated annual leave - 240 hour maximum((~~[2]~~)) [4]	Yes	No
Holiday pay - 80 hour maximum	Yes	No

[1]"Year" means "state fiscal year," which is the twelve-month period that begins on July 1st and ends on June 30th of the next calendar year.

[2]The combined total of overtime included in the average final salary, related to either RCW 47.46.040 or voluntary overtime, may not exceed one hundred forty hours for WSPRS Plan 1, or three hundred fifty hours for WSPRS Plan 2.

[3]See also RCW 41.04.340(4).

((~~[2]~~)) [4]See also RCW 43.43.263, 43.01.040 and 43.01.044.

WSR 17-17-132
PROPOSED RULES
DEPARTMENT OF LABOR AND INDUSTRIES

[Filed August 22, 2017, 10:08 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 17-13-106.

Title of Rule and Other Identifying Information: Amendments to the factory assembled structures (FAS) rules, chapter 296-150I WAC, Manufactured home installer training and certification program.

Hearing Location(s): On October 16, 2017, at 9:00 a.m., at the Department of Labor and Industries (L&I), 7273 Linderson Way S.W., Tumwater, WA 98501. For directions to the L&I office http://www.lni.wa.gov/Main/ContactInfo/OfficeLocations.

Date of Intended Adoption: November 21, 2017.

Submit Written Comments to: Alicia Curry, Management Analyst, P.O. Box 44400, Olympia, WA 98504-4400, email Alicia.Curry@lni.wa.gov, fax 360-902-5292, by 5:00 p.m. on October 16, 2017.

Assistance for Persons with Disabilities: Contact Alicia Curry, management analyst, phone 360-902-6244, fax 360-902-5292, email Alicia.Curry@lni.wa.gov, by October 1, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of this rule making is to propose amendments to FAS, chapter 296-150I WAC, Manufactured home installer training and certification program, as a result of HB 1329 (chapter 10, Laws of 2017) which passed the legislature in 2017. This bill replaces the mandatory penalty of $1,000 for each infraction of manufactured home installation requirements with discretionary authority to issue warnings, and a monetary penalty of no more than $250 for a first infraction and no more than $1,000 for a second or subsequent infraction. The proposed amendments to this chapter will establish a penalty schedule for infractions for manufactured home installations as required by the bill and modify the existing rules to comply with the new statutory requirements.

Reasons Supporting Proposal: Rule changes are required to implement chapter 10, Laws of 2017 (HB 1329).

Statutory Authority for Adoption: Chapter 43.22A RCW, Mobile and manufactured home installation.

Statute Being Implemented: Chapter 43.22A RCW, Mobile and manufactured home installation, and chapter 10, Laws of 2017 (HB 1329).

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

Name of Proponent: L&I, governmental.

Name of Agency Personnel Responsible for Drafting: Craig Sedlacek, Program Manager, Tumwater, Washington, 360-902-5218; Implementation and Enforcement: José Rodriguez, Assistant Director, Tumwater, Washington, 360-902-6348.

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. This rule is exempt pursuant to RCW 34.05.328 (5)(b)(v). Additionally, this rule does not impose new requirements or costs. The rule reduces all existing penalties as authorized by HB 1329 (chapter 10, Laws of 2017).

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

Is exempt under RCW 19.85.025(3) as the rule content is explicitly and specifically dictated by statute.

August 22, 2017
Joel Sacks
Director

AMENDATORY SECTION (Amending WSR 08-12-040, filed 5/30/08, effective 6/30/08)

WAC 296-150I-0210 What violations of RCW 43.22A.130 can result in the issuance of a notice of infraction? (1) Under RCW 43.22A.130, the department can issue a notice of infraction to a person, contractor, manufactured/mobile home dealer, manufacturer, or home dealer's or manufacturer's agent for:

(a) Failure to have a certified installer on the installation site whenever installation work is being performed;

(b) Failure to correct all nonconforming aspects of the installation identified by the local enforcement agency or by an authorized representative of the department within thirty days of issuance of notice of the same;

(c) Failure by a certified installer to affix a certification tag to an installed manufactured/mobile home;

(d) Transfer of certification tag(s) from a certified installer to another certified installer without prior written approval of the department;

(e) Transfer of certification tag(s) from a certified installer to a noncertified installer;

(f) Transfer of unused installer certification tags by a manufactured home retailer to a new ownership without prior written approval of the department.

(2) Each worksite and day at which a violation occurs constitutes a separate infraction.

(3) Once a violation of chapter 43.22A RCW or this chapter becomes final, any additional violations within three years become a "second," "third," or "additional" violation subject to an increased penalty as set forth in WAC 296-150I-3000.

(4) See WAC 296-150I-3000 for the specific monetary penalties associated with each of the violations discussed in this section.

AMENDATORY SECTION (Amending WSR 10-06-043, filed 2/23/10, effective 4/1/10)

WAC 296-150I-3000 Penalties, fees, and refunds.

Penalties

(1) Monetary penalties for ((~~an~~)) infractions listed in WAC 296-150I-0210 shall be assessed for each violation of chapter 43.22A RCW in the following amount ((~~of $1,000.00.~~)):

(a) **Failure to have a certified installer on the installation site whenever installation work is being performed:**	
First Final Violation	$250.00
Each Additional Final Violation	$1,000.00
(b) **Failure to correct all nonconforming aspects of the installation identified by the local enforcement agency or by an authorized representative of the department within thirty days of issuance of notice of the same:**	
First Final Violation	Warning
Second Final Violation	$250.00
Third Final Violation	$500.00
Each Additional Final Violation	$1,000.00
(c) **Failure by a certified installer to affix a certification tag to an installed manufactured/mobile home:**	
First Final Violation	Warning
Second Final Violation	$250.00
Third Final Violation	$500.00
Each Additional Final Violation	$1,000.00
(d) **Transfer of certification tag(s) from a certified installer to another certified installer without prior written approval of the department:**	
First Final Violation	Warning
Each Additional Final Violation	$250.00
(e) **Transfer of certification tag(s) from a certified installer to a noncertified installer:**	
First Final Violation to Each Contractor in Violation	$250.00
Each Additional Final Violation to Each Contractor in Violation	$1,000.00
(f) **Transfer of unused installer certification tags by a manufactured home retailer to a new ownership without prior written approval of the department:**	
First Final Violation	Warning
Each Additional Final Violation	$250.00

Fees and Refunds

The following fees are payable to the department in advance:

Training and certification	$260.00
Training only 10 hours	$130.00
Manufactured/mobile home installation inspector training	$130.00
Refund	$26.00
Certification renewal	$130.00
Continuing education class	$52.00
Retake failed examination and training	$39.00
Manufactured home installer training manual	$13.00
Installer certification tag	$9.10

((~~(1)~~)) (2) The department shall refund fees paid for training and certification or certification renewal as a manufactured home installer if the application is denied for failure of the applicant to comply with the requirements of chapter 43.22A RCW or these rules.

((~~(2)~~)) (3) If an applicant has paid fees to attend training or to take an examination and is unable to attend the scheduled training or examination, the applicant may:

(a) Change to another scheduled training and examination; or

(b) Request a refund.

((~~(3)~~)) (4) An applicant who fails the examination shall not be entitled to a refund.

WSR 17-17-143
PROPOSED RULES
DEPARTMENT OF HEALTH

[Filed August 22, 2017, 3:31 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 16-20-069.

Title of Rule and Other Identifying Information: Chapter 246-570 WAC, the department of health (department) is proposing epinephrine autoinjectors and anaphylaxis training and reporting for authorized entities.

Hearing Location(s): On October 12, 2017, at 10:30 a.m., at the Department of Health, Town Center 2, Room 145, 111 Israel Road S.E., Tumwater, WA 98501.

Date of Intended Adoption: October 24, 2017.

Submit Written Comments to: Brett Lorentson, Washington State Department of Health, P.O. Box 47852, Olympia, WA 98504-7852, email https://fortress.wa.gov/doh/policyreview, fax 360-236-2901, by October 12, 2017.

Assistance for Persons with Disabilities: Contact Brett Lorentson, phone 360-236-4611, fax 360-236-2901, TTY 360-833-6388 or 711, email Brett.Lorentson@doh.wa.gov, by October 6, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The proposed rules will implement RCW 70.54.440 and will establish new rules and standards for epinephrine autoinjectors and anaphylaxis training and reporting for authorized entities. The proposed rules set standards for training providers, training content, and providing proof of training.

Reasons Supporting Proposal: Prescribing health care practitioners may prescribe epinephrine autoinjectors to authorized entities as defined in the statute. These entities or organizations may acquire, stock and administer epinephrine autoinjectors. The statute requires the department to establish standards for training of employees and other certification requirements to implement this law.

Statutory Authority for Adoption: RCW 70.54.440 and 43.70.040.

Statute Being Implemented: RCW 70.54.440.

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

Name of Proponent: Department of health, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Brett Lorentson, 111 Israel Road S.E., Tumwater, WA 98504-7852, 360-236-4611.

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

A cost-benefit analysis is required under RCW 34.05.-328. A preliminary cost-benefit analysis may be obtained by contacting Brett Lorentson, Department of Health, P.O. Box 7852 [47852], Olympia, WA 98504-7852, phone 360-236-4611, fax 360-236-2901, TTY 360-833-6388 or 711, email Brett.Lorentson@doh.wa.gov.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. The probably [probable] costs of the proposed rules are minimal administrative costs. The minor cost threshold is calculated below. The department estimates that the proposed rule does not impose more than minor costs on businesses. NAICS code/description: 611430, Professional and Management Development Training Total Establishments: 202 Paid Employees: 1,297 Annual Payroll ($1,000): 73,580 Threshold calculation: (73,580*1,000/202)*(0.01) = 3,642 NAICS code/description: 611699, All other Miscellaneous Schools and Instruction Total Establishments: 250 Paid Employees: 1,598 Annual Payroll ($1,000): 53,279 Threshold calculation: (53,279*1,000/250)*(0.01) = 2,131.

August 22, 2017
John Wiesman, DrPH, MPH
Secretary

Chapter 246-570 WAC

EPINEPHRINE AUTOINJECTORS AND ANAPHYLAXIS TRAINING AND REPORTING FOR AUTHORIZED ENTITIES

NEW SECTION

WAC 246-570-001 Purpose. The purpose of this chapter is to establish the requirements for epinephrine autoinjectors and anaphylaxis training for employees and representatives of authorized entities under RCW 70.54.440.

NEW SECTION

WAC 246-570-010 Definitions. The definitions in this section apply throughout this chapter unless the context clearly indicates otherwise.

(1) "Administer" or "administration" means the direct application of an epinephrine autoinjector to the body of an individual.

(2) "Authorized entity" means any entity or organization at or in connection with which allergens capable of causing anaphylaxis may be present including, but not limited to, restaurants, recreation camps, youth sports leagues, amusement parks, colleges, universities, and sports arenas.

(3) "Department" means the Washington state department of health.

(4) "Dispenser" means a health care provider who may dispense epinephrine autoinjectors pursuant to a prescription issued in the name of an authorized entity.

(5) "Epinephrine autoinjector" means a single-use device used for the automatic injection of a premeasured dose of epinephrine into the human body.

(6) "Prescriber" means an authorized health care provider allowed by law to prescribe an epinephrine autoinjector in the course of professional practice.

(7) "Training provider" means an organization, entity, business, or individual who provides epinephrine autoinjector and anaphylaxis training.

(8) "Self-administration" means a person's discretionary use of an epinephrine autoinjector on themselves.

NEW SECTION

WAC 246-570-020 Proof of epinephrine autoinjector and anaphylaxis training to obtain an epinephrine autoinjector for an authorized entity. Prior to prescribing or dispensing an epinephrine autoinjector to an authorized entity, a prescriber or dispenser may require proof of epinephrine autoinjector and anaphylaxis training.

NEW SECTION

WAC 246-570-030 Epinephrine autoinjector and anaphylaxis training certification. An employee or representative of an authorized entity must complete an epinephrine autoinjector and anaphylaxis training program prior to providing or administering an epinephrine autoinjector made available by an authorized entity.

NEW SECTION

WAC 246-570-040 Approved epinephrine autoinjector and anaphylaxis training provider. (1) Epinephrine autoinjector and anaphylaxis training must be conducted by:

(a) A nationally recognized organization experienced in training laypersons in emergency health treatment. For the purposes of this section, the American Red Cross anaphylaxis and epinephrine autoinjector training course is an approved training provider; or

(b) A training provider approved by the department must meet the following requirements:

(i) Training content must meet the requirements in WAC 246-570-050;

(ii) Each individual providing training must have:

(A) Knowledge of epinephrine autoinjector and anaphylaxis; and

(B) Experience delivering training in epinephrine autoinjector administration, and anaphylaxis causes and symptoms.

(2) A training provider shall issue a certificate to each person who successfully completes training. The certificate must include:

(a) The training provider's name, address and other contact information;

(b) Name of the training participant;

(c) Date the training was completed;

(d) Expiration date, if any; and

(e) The name of the training or other information indicating that the training was in anaphylaxis and epinephrine autoinjector storage, maintenance, and administration.

NEW SECTION

WAC 246-570-050 Epinephrine autoinjector and anaphylaxis training content. (1) Epinephrine autoinjector and anaphylaxis training may be conducted online or in person and at a minimum, must include:

(a) Techniques on how to recognize symptoms of severe allergic reactions, including anaphylaxis;

(b) Standards and procedures for the storage and administration of an epinephrine autoinjector;

(c) Emergency follow-up procedures;

(d) The use and administration of an epinephrine autoinjector with adults and children; and

(e) An assessment to ensure the participant gained competency in anaphylaxis and epinephrine autoinjector administration.

(2) Training must be based on current best practices.

NEW SECTION

WAC 246-570-060 Epinephrine autoinjector incident reporting. (1) Each authorized entity must report to the department each incident when an employee or representative who holds a training certificate under WAC 246-570-030 administers or provides an epinephrine autoinjector to a person believed to be suffering from anaphylaxis.

(2) The incident report must be reported within five days of the incident.

(3) The incident report must be on a form or format provided by the department.

NEW SECTION

WAC 246-570-070 Training approval process. The secretary will consider for approval any training program which meets the requirements as outlined in this chapter.

(1) An authorized representative of the training program shall request approval on a form provided by the department.

(2) The training program must submit documentation that its training content meets the requirements of WAC 246-570-050.

(3) Upon the evaluation of a complete application, the secretary will grant or deny approval.

(4) If the department notifies a training provider of the department's intent to deny or revoke approval, the training provider may request an adjudicative proceeding under chapter 246-10 WAC. A request for an adjudicative proceeding must be in writing, state the basis for contesting the adverse action, include a copy of the adverse notice and be served on and received by the department within twenty-eight days of the date the department mailed the adverse notice.

WSR 17-17-150
PROPOSED RULES
DEPARTMENT OF ECOLOGY

[Order 06-12—Filed August 23, 2017, 7:03 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 14-13-004.

Title of Rule and Other Identifying Information: The department of ecology is proposing a new rule, chapter 173-219 WAC, Reclaimed water.

Hearing Location(s): On September 27, 2017 (presentation, question and answer session followed by the formal public hearing), at 10:30 a.m., webinar only: **Webinar**: Ecology is offering this hearing via webinar. Webinars are an online meeting forum that you can attend from any computer using internet access. **Comments**: Ecology will accept comments through the webinar via phone at 1-877-668-4490. **To join** the webinar click on the following link for more information and instructions https://wadis.webex.com/wadis/j.php?RGID=rbd0797bd548684e77fc2a25be297f58f; on September 27, 2017 (presentation, question and answer session followed by the formal public hearing), at 6:00 p.m., webinar only: **Webinar**: Ecology is offering this hearing via webinar. Webinars are an online meeting forum that you can attend from any computer using internet access. **Comments**: Ecology will accept comments through the webinar via phone at 1-877-668-4490. **To join** the webinar click on the following link for more information and instructions https://wadis.webex.com/wadis/j.php?RGID=rd9282ec53ec0933b45827da06cab44e8; on October 3, 2017 (presentation, question and answer session followed by the formal public hearing), at 10:30 a.m., at the Department of Ecology, Eastern Regional Office, 4601 North Monroe Street, Spokane, WA 99205; and on October 5, 2017 (presentation, question and answer session followed by the formal public hearing), at 1:30 p.m., at the Department of Ecology, Headquarters, 300 Desmond Drive S.E., Lacey, WA 98504.

Date of Intended Adoption: January 17, 2018.

Submit Written Comments to: Jocelyn W. Jones, Department of Ecology, P.O. Box 47600, Olympia, WA 98504-7600, email please comment by mail or online, http://ws.ecology.commentinput.com/?id=iTbD5, by October 13, 2017.

Assistance for Persons with Disabilities: Contact Hanna Waterstrat, phone 360-407-7668, TTY 877-833-6341, email hanna.waterstrat@ecy.wa.govj [gov], by September 20, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Ecology is proposing a new chapter for generation, distribution, and use of reclaimed water, chapter 173-219 WAC, Reclaimed water. This chapter clarifies regulatory authorities and requirements, streamlines permit application and permitting process, and provides clarity for permittees. The rule will codify existing practices, clarify statutory requirements, and replace 1997 Water reclamation and reuse standards.

Also available for review and comment is the proposed guidance document Reclaimed Water Treatment Facilities Manual: The Purple Book.

This and other rule-making documents can be found at www.ecy.wa.gov/programs/wq/ruledev/wac173219/0612/0612timedocs.html.

Reasons Supporting Proposal: The state legislature amended chapter 90.46 RCW in 2006 directing ecology to coordinate with department of health to implement a rule to encourage reclaimed water use and address all aspects of reclaimed water use.

Statutory Authority for Adoption: RCW 90.46.015.

Statute Being Implemented: Chapter 90.46 RCW.

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

Name of Proponent: Department of ecology, governmental.

Name of Agency Personnel Responsible for Drafting: Staff in the department of ecology's water quality program and water resources program, Lacey and Bellingham, 360-407-6600; Implementation and Enforcement: Heather Bartlett, Lacey, 360-407-6600.

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

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Jocelyn W. Jones, Department of Ecology, P.O. Box 47600, Olympia, WA 98504-47600 [98504-7600], phone 360-407-6321, TTY 844-833-6341, email jocelyn.jones@ecy.wa.gov.

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

Is exempt under RCW 19.85.025(4).

Explanation of exemptions: Chapter 53, Laws of 2017, amended RCW 19.85.025 "(4) The chapter does not apply to the adoption of a rule if an agency is able to demonstrate that the proposed rule does not affect small business." After looking at employment security data for number of employees we have determined that the one business regulated by this chapter does not meet the definition of small business in RCW 19.85.020(3).

August 23, 2017
Polly Zehm
Deputy Director

Chapter 173-219 WAC

RECLAIMED WATER

NEW SECTION

WAC 173-219-010 Definitions, abbreviations, and acronyms. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

"Agricultural water use" means the use of water for irrigation and other uses related to the production of agricultural products. These uses include, but are not limited to, construction, operation, and maintenance of agricultural facilities and livestock operations at farms, ranches, dairies, and nurseries. Examples of these uses include, but are not limited to, dust control, temperature control, and fire control.

"Alarm" means an integrated system of sensor instruments or devices that continuously monitors a specific function or process and automatically alerts operators to abnormal conditions by means of visual or audible signals, or both.

"Approved air gap" means the physical separation between the free-flowing end of a water supply pipeline and the overflow rim of an open or nonpressurized receiving vessel that has the following minimum separations:

• Twice the diameter of the supply piping measured vertically from the overflow rim of the receiving vessel, and in no case be less than one inch, when unaffected by vertical surfaces (vertical sidewalls); and

• Three times the diameter of the supply piping, if the horizontal distance between the supply pipe and the vertical surface (sidewall) is less than or equal to three times the diameter of the supply pipe, or if the horizontal distance between the supply pipe and the intersecting vertical surfaces (sidewalls) is less than or equal to four times the diameter of the supply pipe and in no case less than one and one-half inches.

"Approved backflow prevention assembly" means an RPBA, RPDA, DCVA, DCDA, PVBA, or SVBA used for protecting a potable or reclaimed water supply.

"Aquifer" means a geologic formation, group of formations, or part of a formation capable of yielding a significant amount of groundwater to wells or springs.

"ART" means adequate and reliable treatment as provided for in chapter 90.46 RCW.

"Augmentation" means the intentional addition of water to rivers and streams of the state or other surface water bodies through the zone of saturation or to the surface water.

"Backflow assembly tester" or **"BAT"** means a person meeting the requirements of chapter 246-292 WAC and certified under chapter 70.119 RCW to inspect, field test, maintain, and repair backflow prevention assemblies, devices, and air gaps that protect public water systems.

"Beneficial purpose" or **"beneficial use"** means the uses of reclaimed water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and for preservation of environmental and aesthetic values, and for all other uses compatible with the enjoyment of the waters of the state. Beneficial purpose or beneficial use

of reclaimed water includes all uses authorized under chapter 90.46 RCW, and contained within WAC 173-219-390.

"BOD_5" means five-day biochemical oxygen demand.

"$CBOD_5$" means five-day carbonaceous biochemical oxygen demand.

"Certified operator" means a person who meets the requirements of WAC 173-219-250.

"Class A reclaimed water" means a water resource that meets the treatment requirements of this chapter, including, at a minimum, oxidation, coagulation, filtration, and disinfection.

"Class A+ reclaimed water" means a water resource that meets the treatment requirements of this chapter for Class A reclaimed water and any additional criteria determined necessary on a case-by-case basis by health for direct potable reuse.

"Class B reclaimed water" means a water resource that meets the treatment requirements of this chapter, including, at a minimum, oxidation and disinfection.

"Commercial, industrial, and institutional use" means nonpotable uses of water to produce products, provide goods and services, or for associated sanitary uses such as toilet flushing. The term does not include land application or reclaimed irrigation uses.

"Constructed beneficial wetlands" means those wetlands intentionally constructed on nonwetland sites to produce or create natural wetland functions and values.

"Cross-connection control specialist" or **"CCS"** means an individual meeting the requirements of chapter 246-292 WAC and certified under chapter 70.119 RCW to develop and implement a cross-connection control program.

"DCDA" means double check detector assembly.

"DCVA" means double check valve assembly.

"Depressional wetland" means a wetland that occurs in topographic depressions where the elevation of the surface within the wetland is lower than in the surrounding landscape, and the lowest point of elevation is within the boundary of the wetland.

"Direct potable reuse" means the process in which Class A+ reclaimed water is introduced into an existing water distribution, storage, or treatment system without an environmental buffer.

"Distributor" means the person authorized through a use agreement with a reclaimed water generator to distribute or supply reclaimed water to users. Users that distribute reclaimed water to use areas through a gravity conveyance system for agricultural water uses are not distributors.

"DO" means dissolved oxygen.

"Domestic wastewater" means urine, feces, and the water carrying human wastes, including kitchen, bath, and laundry wastes from residences, nonresidential buildings such as churches and schools, commercial establishments, or other buildings, excluding industrial wastewater and stormwater.

"Ecology" means the Washington state department of ecology.

"Engineering report" means a document that examines the engineering and administrative aspects of a reclaimed water facility, as required under this chapter.

"Food crops" means any crops intended for human consumption.

"Generator" means any person that generates any type of reclaimed water for a use regulated under this chapter.

"Groundwater" means water in a saturated zone or stratum beneath the surface of land or below a surface water body.

"Groundwater recharge" means introduction of reclaimed water to groundwater aquifers and includes the following:

• **Indirect recharge:** Where reclaimed water is introduced to groundwater through surface or subsurface infiltration or percolation, where the introduced water travels through an unsaturated vadose zone and the commingling with groundwater of the state is not immediate.

• **Direct recharge:** Where reclaimed water is released directly and immediately into groundwater of the state through direct injection or other means.

"Health" means the Washington state department of health.

"Inadequately treated water" means water treated by a reclaimed water treatment process that does not meet reclaimed water permit limits and standards.

"Land application" means use of reclaimed water as permitted under this chapter for the purpose of irrigation or watering of landscape vegetation. Land application in this chapter is **not** synonymous with land treatment or reference to a biosolids land application.

"Lead agency" means either the department of health or the department of ecology that has been designated by this chapter as the agency that will coordinate, review, issue, and enforce a reclaimed water permit issued under this chapter.

"Most recent edition" means that version of a specific guidance or reference document in effect at the time lead agency begins the feasibility and design review process.

"Net environmental benefit" means that the environmental benefits of the reclaimed water generation project are greater than the environmental impacts associated with the project.

"Nonlead agency" means health or ecology when they are not the lead agency as defined in this chapter.

"Nonpotable" means water that is not approved by health or a local health jurisdiction as being safe for human consumption.

"Nonpotable reuse systems" means on-site treated nonpotable water systems as defined by WAC 51-56-1500.

"NPDES" means the National Pollutant Discharge Elimination System.

"Operator" means a person who operates a reclaimed water facility and/or distribution system, and if applicable, who meets the operator certification requirements in the permit.

"Owner" means a person with a security interest in a reclaimed water facility regulated under this chapter.

"**Permittee"** means any entity issued a reclaimed water permit under this chapter.

"Person" means any state, individual, public or private corporation, political subdivision, governmental subdivision, governmental agency, municipality, copartnership, association, firm, trust estate, or any other legal entity whatever.

"pH" means the negative logarithm of the hydrogen ion concentration, measured in standard units or s.u.

"Plans and specifications" means the detailed engineering drawings and specifications prepared by a licensed professional engineer, used in the construction or modification of reclaimed water facilities, and other related facilities.

"Potable water" or **"drinking water"** means water safe for human consumption and approved under chapter 246-290 or 246-291 WAC.

"Potable water supply intake" means the works or structures at the head of a conduit through which water is diverted from a source (e.g., river or lake) into a treatment plant producing potable water. With or without treatment, it may also include a groundwater well and appurtenances, and any physical structures used for collecting spring and groundwater that is under the influence of surface water sources for potable supply.

"Private utility" means all utilities, both public and private, which provide sewerage and/or water service and that are not municipal corporations as defined by RCW 36.94.010. The ownership of a private utility may be in a corporation, nonprofit or for profit, in a cooperative association, in a mutual organization, or in individuals.

"PVBA" means pressure vacuum breaker assembly.

"Reclaimed water" means water derived in any part from a wastewater with a domestic wastewater component that has been adequately and reliably treated to meet the requirements of this chapter, so that it can be used for beneficial purposes. Reclaimed water is not considered a wastewater.

"Reclaimed water facility" or **"facility"** means the treatment plant, equipment, storage, conveyance devices, and dedicated sites for reclaimed water generation.

"Reclaimed water permit" or **"permit"** means an operating permit identifying the terms and conditions, the required level of treatment, operating conditions, and use-based standards, issued to a generator of reclaimed water by the lead agency.

"Recovery of reclaimed water stored in an aquifer" means the recovery of reclaimed water artificially stored in an underground geological formation for beneficial use.

"Reliability" means the ability of a system or component(s) thereof to perform a required function under permit stated conditions for a permit stated period.

"Reliability assessment" means both an evaluation performed and a report by a professional engineer on the reliability of facility components, equipment, and certified operators that are used or proposed to be used to generate and manage reclaimed water.

"RPBA" means reduced pressure backflow assembly.

"RPDA" means reduced pressure detector assembly.

"Source water" means raw or treated wastewater with a domestic component that supplies a reclaimed water facility.

"Streamflow" or **"surface water augmentation"** means the intentional use of reclaimed water for rivers and streams of the state or other surface water bodies, for the purpose of increasing volumes.

"Surface percolation" means the controlled application of water to the ground surface or to unsaturated soil for replenishing groundwater.

"SVBA" means spill resistant vacuum breaker assembly.

"Third-party guarantor" means an entity approved by the lead agency to provide standby management services if a generator fails to operate a reclaimed water facility in compliance with this chapter.

"TSS" means total suspended solids.

"Unit process" means one or more defined grouped processes that perform an identified step in a process.

"Use" means an application of reclaimed water in a manner and for a purpose, as designated in a permit or use agreement, and in compliance with all applicable lead agency and permit requirements.

"Use agreement" means an agreement or contract between the generator and the distributor or user, or between the distributor and user, that identifies terms and conditions for reclaimed water distribution and use to ensure compliance with the reclaimed water permit conditions.

"Use area" means any facility, building, or land area, surface water, or groundwater identified in the use agreement.

"USEPA" means the United States Environmental Protection Agency.

"User" means any person who uses reclaimed water.

"Waters of the state" means lakes, rivers, ponds, streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington, as defined in RCW 90.48.020.

"Water table" means the upper surface of groundwater saturation.

"Wetland" or **"wetlands"** means areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted to life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands regulated under chapter 90.46 RCW shall be delineated in accordance with the manual adopted by the department of ecology pursuant to RCW 90.58.380.

"Wetland enhancement" means intentional actions taken to improve the functions, processes, and values of existing wetlands.

"Wetland mitigation" means a sequence of intentional steps or actions taken to reduce impacts to wetlands. Unless the context refers to the entire mitigation sequence, or clearly indicates other steps, the term "wetland mitigation" means compensatory mitigation or the compensation stage of the wetland mitigation sequence, where impacts to wetland functions are offset through the creation, restoration, enhancement, or preservation of other wetlands.

"Wetland restoration" means intentional actions taken to return historic functions and processes to a former or degraded wetland site.

NEW SECTION

WAC 173-219-020 Purpose and scope. (1) Purpose. The purpose of this chapter is to encourage the use of reclaimed water to help meet the growing need for clean

water across the state by establishing a regulatory framework for the generation, distribution, and use of reclaimed water for the beneficial uses established in chapter 90.46 RCW and this chapter.

Nothing in this chapter shall supersede or diminish the provisions of chapters 173-200, 173-201A, 173-500, 246-290, 246-292, 246-272, 246-272A, 246-272B, and 246-274 WAC.

(2) Scope. This chapter implements chapter 90.46 RCW and establishes requirements for production, distribution, and use of reclaimed water as authorized by ecology and health. This chapter also establishes lead and nonlead agency designations, roles, and responsibilities over particular aspects of reclaimed water, as well as requirements for:

(a) Planning, designing, constructing, operating, and maintaining reclaimed water facilities.

(b) Permitting of reclaimed water facilities.

(c) Technology-based treatment, operational storage and distribution, treatment reliability, and use-based requirements.

(d) Compliance with RCW 90.46.130, preventing impairment of existing water rights.

NEW SECTION

WAC 173-219-030 Applicability. (1) Applicability. The requirements of this chapter apply to all existing and proposed facilities that are or will be designed, constructed, operated, and maintained in the state of Washington to generate, distribute, and/or use reclaimed water, and to the persons involved in these activities.

(2) Exceptions to applicability.

(a) Nonpotable reuse systems meeting the requirements of WAC 51-56-1500.

(b) Greywater or treated greywater as defined in RCW 90.46.140 and chapter 246-274 WAC.

(c) Agricultural industrial process water as defined in RCW 90.46.010.

(d) Industrial reuse water as defined in RCW 90.46.010.

(e) Land treatment systems of wastewater regulated under chapter 90.48 RCW.

(f) On-site sewage treatment systems, with no reclaimed water generation, under chapters 70.118 and 70.118B RCW and 246-272, 246-272A, and 246-272B WAC.

(g) Reclaimed water facility maintenance. The capture and redirection of wastewater effluent or reclaimed water for facility and internal purposes provided those uses are:

(i) In restricted areas.

(ii) Not subject to public exposure.

(iii) Under the direct control of the generator's or user's authorized maintenance personnel.

(iv) Described within an approved operations and maintenance manual.

(3) Relationship to other applicable regulations. Nothing in this chapter shall be construed to exempt entities from complying with all other applicable local, state, or federal ordinances, codes, or statutes.

(4) Severability. The provisions of this chapter are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in full force and effect.

NEW SECTION

WAC 173-219-040 Direct enforceability. All persons subject to the requirements of this chapter must comply on the effective date of this chapter, except as allowed under subsection (1) of this section.

(1) Exceptions. Persons issued a permit before the effective date of this chapter are subject to this chapter except as follows:

(a) The lead agency may issue an extension for compliance to persons issued a permit before the effective date of this chapter to provide a reasonable timeline for compliance with this chapter.

(b) Persons issued a permit before the effective date of this chapter:

(i) Must request the extension for compliance in writing and provide good cause for the request.

(ii) Are not required to obtain a modification of the existing reclaimed water permit until the application for the permit renewal is due under WAC 173-219-070.

(2) Waiver request.

(a) A generator may request in writing a waiver from specific requirements of this chapter. Waiver requests must:

(i) Identify the requirement requested to be waived.

(ii) State the reason for the waiver.

(iii) Provide information supporting the request and any additional information identified by the lead agency needed to make the waiver determination.

(b) The lead agency may grant a waiver, in consultation with the nonlead agency, if it:

(i) Is consistent with the purpose and intent of this chapter.

(ii) Does not lower the level of public health and environmental protection required within this chapter.

(c) The lead agency must provide:

(i) Twenty-one calendar days for the nonlead agency to review and comment on the waiver request before granting or denying a waiver.

(ii) Written notice to the generator within ninety calendar days granting or denying a waiver request, requesting additional information, or explaining any delay and stating an expected date for issuing a decision.

(d) The requirements of WAC 173-219-090 cannot be waived.

NEW SECTION

WAC 173-219-050 Lead agency designation. When either health or ecology is the lead agency under this section, the other agency will be the nonlead agency. On a case-by-case basis, ecology and health may agree to change the lead agency designation. If the lead agency changes, the new lead agency must notify the generator within ten calendar days of the change.

(1) Ecology as lead agency. Ecology is the lead agency and will issue permits when:

(a) The reclaimed water facility source water is wastewater effluent from a water pollution control facility permitted by, or requiring a permit from, ecology.

(b) Reclaimed water or inadequately treated water, is released to:

(i) Water bodies regulated under chapter 90.48 RCW and, if applicable, the Federal Water Pollution Control Act.

(ii) A water pollution control facility permitted by ecology.

(2) Health as lead agency. Health is the lead agency and will issue permits when:

(a) The reclaimed water facility source water is wastewater effluent from an on-site sewage system with a design flow less than or equal to one hundred thousand gallons per day, regulated under chapter 246-272A or 246-272B WAC and there is no direct release of reclaimed water to the waters of the state.

(b) The reclaimed water permit is dependent on or supplemental to an on-site sewage treatment system operating permit issued for required treatment and reliability.

(c) The only release of inadequately treated water, surplus source water, or surplus reclaimed water is to an on-site sewage system.

NEW SECTION

WAC 173-219-060 Agency requirements and responsibilities. (1) Lead agency responsibilities.

(a) Coordinate with the nonlead agency, including:

(i) Preplanning meeting and scoping of project.

(ii) Review of required documents including, but not limited to, all project or permit applications, reports, plans, specifications, and draft and final permits and fact sheets.

(iii) Incorporation of nonlead agency permit requirements as directed in this chapter.

(b) Monitor reclaimed water permit compliance, including conducting inspections of a permitted reclaimed water facility.

(c) Enforce reclaimed water permit terms and conditions as provided for in WAC 173-219-270.

(d) Notify nonlead agency of violations, compliance, and enforcement actions.

(e) Assess and collect fees as authorized.

(f) Respond to appeals brought pursuant to this chapter.

(2) Nonlead agency responsibilities.

(a) Participate in meetings convened by the lead agency.

(b) Determine scope for review of project or permit applications, reports, documents, and permit monitoring and renewal.

(c) Submit and review comments and provide any reclaimed water permit conditions to the lead agency within thirty days of receipt of documents.

(d) Assess and collect fees as authorized.

(e) Assist the lead agency with appeals brought pursuant to this chapter.

(3) Ecology responsibilities. As the lead agency or nonlead agency, ecology will:

(a) Develop reclaimed water permit requirements necessary to protect waters of the state and to regulate facility upgrades, modifications, and operation of all sewer systems and associated water pollution control facilities that collect or treat wastewater to generate reclaimed water, except as exempted under RCW 90.48.110.

(b) Issue all regulatory decisions related to compliance with RCW 90.46.130.

(c) Incorporate health conditions required by health into the reclaimed water permits.

Ecology may issue a wastewater discharge permit that incorporates terms and conditions for the generation of reclaimed water into a permit issued under chapter 90.48 RCW, and if applicable, the Federal Water Pollution Control Act, or issue these permits concurrently with a reclaimed water permit.

(4) Health responsibilities. As the lead agency or the nonlead agency, health will:

(a) Develop reclaimed water permit requirements as necessary to ensure adequate public health protection in the generation, storage, delivery, and use of reclaimed water and to regulate facility upgrades, modifications, and operation of all sewer systems and associated on-site sewage system facilities that collect or treat wastewater, generate, and, if applicable, deliver reclaimed water.

(b) Incorporate ecology permit conditions required by ecology for environmental protection of waters of the state into permits.

Health may issue a large on-site sewage system permit that incorporates terms and conditions for generation of reclaimed water or issue the permit concurrently with a reclaimed water permit.

NEW SECTION

WAC 173-219-070 Permit required. No reclaimed water may be distributed or used without a reclaimed water permit issued pursuant to this chapter and chapter 90.46 RCW. Nothing in a reclaimed water permit excuses a person from complying with all applicable federal, state, or local statutes, ordinances, or regulations.

(1) Eligibility to apply for a reclaimed water permit. Any person proposing to generate any type of reclaimed water for a use regulated under this chapter shall obtain a permit from the lead agency prior to distribution or use of that water. A permit under this chapter may only be issued to:

(a) A municipal, quasi-municipal, or other governmental entity.

(b) A private utility, if the lead agency determines that the private utility meets the requirements in WAC 173-219-180.

(c) The holder of an active on-site sewage treatment permit under chapter 70.118B RCW or a permit or approval under chapter 70.118A RCW.

(d) The holder of an active waste discharge permit issued under chapter 90.48 RCW.

(2) Duration of reclaimed water permit. A reclaimed water permit shall be issued for a fixed term, not to exceed five years from the effective date.

(3) Reclaimed water permit transfer. A permittee may, subject to the lead agency's approval, transfer a reclaimed water permit if the permittee:

(a) Makes the request to the lead agency in writing at least thirty calendar days before the proposed date of transfer.

(b) Provides to the lead agency a written agreement between the existing permittee and the new permittee that demonstrates the feasibility of the new permittee as provided in WAC 173-219-180.

(c) Specifies the date for transfer of reclaimed water permit responsibility, coverage, and liability.

A transfer is effective on the date specified in the written agreement unless the lead agency notifies the parties of their intent to modify or revoke and reissue the reclaimed water permit.

(4) Reclaimed water permit renewal.

(a) At least one hundred eighty days before expiration of the reclaimed water permit, a permittee must submit a renewal application provided by the lead agency.

(b) As long as the permittee meets the renewal application requirements and deadlines for renewal, an expiring reclaimed water permit remains in effect and enforceable until the lead agency either denies the application or issues a renewed permit.

(c) If a permittee fails to meet the deadline or application requirements for renewal, the permit expires on the expiration date provided for in the permit.

NEW SECTION

WAC 173-219-080 Applying for a reclaimed water permit. (1) Reclaimed water permit application.

(a) Applications for reclaimed water permits shall be submitted to the lead agency no later than one hundred eighty calendar days before planned distribution of reclaimed water for use.

(b) Upon receipt of the application or renewal application for a permit, the lead agency must assess the application for completeness within ninety calendar days.

(c) Prior to submitting an application, the permit applicant must receive lead agency approval on a feasibility analysis under WAC 173-219-180.

(d) Prior to, or in conjunction with, submitting an application, the permit applicant must complete the required engineering report and submit it to lead agency for approval.

(2) Changes requiring new or supplemental reclaimed water permit application.

(a) Any person permitted for Class B reclaimed water generation proposing to generate Class A reclaimed water must file a new or supplemental application for any Class A use of reclaimed water not specifically authorized in the existing or active reclaimed water permit.

(b) Prior to, or in conjunction with, submitting the new or supplemental application, the permit applicant must:

(i) Submit new or revised planning and construction documents required in this chapter as necessary to describe any modifications of the existing reclaimed water facility.

(ii) Submit a copy of the new use agreements per WAC 173-219-290, unless the agreement for the new use is consistent with a standard use agreement that the lead agency has previously approved.

NEW SECTION

WAC 173-219-090 Water rights protection. (1) Compliance with RCW 90.46.130. Any person applying to ecology or health for a reclaimed water permit, permit renewal, or permit modification under this chapter must demonstrate compliance with RCW 90.46.130.

(2) Determining compliance. Ecology is responsible for determining whether a proposed reclaimed water facility would comply with RCW 90.46.130. Ecology's determination must be consistent with the provisions of chapter 90.03 RCW, the state water code, chapter 90.44 RCW, regulation of public groundwaters, RCW 90.46.130, and applicable case law.

(3) Existing water rights. Existing water rights include any permits, claims, certificates, instream flows established by rule pursuant to chapters 90.22 and 90.54 RCW, and all federally reserved water rights in existence when ecology accepts a submitted water rights impairment analysis.

(4) Impairment analysis. The applicant must prepare and submit an impairment analysis of potentially impaired water rights as part of the feasibility analysis under WAC 173-219-180. The impairment analysis must be stamped by an engineer or hydrogeologist licensed in Washington. A preliminary proposal for compensation or mitigation as allowed under RCW 90.46.130 may be included with the feasibility analysis. The generator must submit a detailed description of the compensation or mitigation plan as part of the engineering report submitted under WAC 173-219-210, if necessary to demonstrate compliance with RCW 90.46.130.

(5) Permit renewals or modifications. Permit renewals and modifications must demonstrate compliance with RCW 90.46.130.

(6) Notification and consultation. Ecology and the applicant will jointly notify and consult with affected tribes and the Washington state department of fish and wildlife (WDFW) before ecology makes its final determination of compliance with RCW 90.46.130.

(7) Final determination. Ecology will make the final determination of compliance with RCW 90.46.130 as part of the decision to issue or deny the reclaimed water permit.

(8) Cost reimbursement. The applicant may request assistance from ecology through a cost reimbursement agreement, based on resource availability, during any stage of scoping or conducting an analysis to demonstrate compliance with RCW 90.46.130. Cost reimbursement agreements must meet the requirements of RCW 43.21A.690.

NEW SECTION

WAC 173-219-100 Public access to information. The lead agency must make available for inspection and copying records relating to reclaimed water permits, in accordance with chapter 42.56 RCW. The lead agency may require a reasonable fee for copying of documents. Claims of confidentiality must be handled in accordance with the appropriate provisions of chapters 42.56 RCW and 173-03 WAC, and RCW 43.21A.160. For reclaimed water permits that are also subject

to NPDES permit requirements, ecology must disclose any information accorded confidential to the USEPA regional administrator if the USEPA requests this information.

NEW SECTION

WAC 173-219-110 Public notice. (1) Public notice of permit application when ecology is the lead agency. Ecology will provide notice of a complete reclaimed water permit application via electronic mail, posting on ecology's web site, press release, or other appropriate means.

(2) Public notice of draft permitting decision when ecology is the lead agency. Ecology will publish via electronic mail, posting to ecology's web site, press release, or other appropriate means, any draft decision to issue a permit, including ecology's findings on compliance with RCW 90.46.130. This public notice must state that a draft reclaimed water permit is available for review and comment and at a minimum, include the following:

(a) The name, address, email, and phone number of the lead agency.

(b) The procedure for obtaining a copy of the fact sheet and the draft permit(s).

(c) The type and location of the reclaimed water facility.

(d) The procedures for finalizing the draft reclaimed water permit and the means by which interested persons may comment on the draft reclaimed water permit, including:

(i) The length of the public comment period.

(ii) How and by when to request a public hearing.

(3) Public notice when health is the lead agency. Health must require the applicant to provide the public notice details described in this section consistent with the requirements of WAC 246-272B-02200, 246-272B-02300, and 246-272B-02250, regardless of the size of the reclaimed water and on-site sewage system(s).

(4) Public notice of final permitting decision. The lead agency will publicize, at least as broadly as required for the draft permitting decision under subsections (2) and (3) of this section, their final reclaimed water permitting decision per RCW 90.46.220. This notice must include:

(a) If issued, the lead agency must provide:

(i) The procedure for obtaining a copy of the final reclaimed water permit and fact sheet.

(ii) Effective date of the reclaimed water permit.

(iii) Expiration date of the reclaimed water permit.

(iv) Appeal procedures under WAC 173-219-160.

(b) If denied, the lead agency must provide:

(i) Basis for permit issuance denial.

(ii) Appeal procedures under WAC 173-219-160.

NEW SECTION

WAC 173-219-120 Public comment period. Public comment period required. A minimum of thirty calendar days from the beginning of the public comment period must be provided for public input and comment on a draft permit. The lead agency must retain, consider, and respond to all comments received during the public comment period.

NEW SECTION

WAC 173-219-130 Public meeting and hearing request. During the public comment period, any person may request a public meeting and/or hearing to review the draft reclaimed water permit and fact sheet and for the lead agency to accept verbal comments on the drafts. Any such request for a public meeting or hearing must be filed with the lead agency before the end of the public comment period. The lead agency will hold a public meeting and/or hearing if it determines there is sufficient public interest.

(1) Notice of a public meeting or hearing. Notice must be published at least thirty calendar days in advance of the meeting or hearing.

(a) When ecology is lead agency, it must publish notice of the event at least as widely as the notice of the draft permitting decision.

(b) When health is the lead agency, the generator must publish the notice and provide proof of publication to health.

(2) Content of public meeting or hearing notice. This notice must include the:

(a) Name, address, and phone number of the lead agency contact person.

(b) Date, time, and location for the meeting or hearing.

(c) Nature and purpose of the meeting or hearing.

(d) A reference to the public notice provided under this section including the method of notice and date of issuance.

(e) Contacts and locations where interested persons may obtain more information.

NEW SECTION

WAC 173-219-140 Relationship with other ecology and health permits. Ecology will streamline permit requirements under this chapter and chapters 173-216 and 173-220 WAC, and NPDES permit requirements under the Federal Water Pollution Control Act into a single permit document issued by ecology.

Health will streamline permit requirements under this chapter and chapter 173-216 WAC, and on-site sewage system permit requirements under RCW 70.118B.020 and 43.20.050 into a single permit document issued by health.

The lead agency may issue a separate reclaimed water permit with an associated wastewater permit on a case-by-case basis when determined by the lead agency to improve implementation of chapter 90.46 RCW and this chapter.

NEW SECTION

WAC 173-219-150 Regulatory action for noncompliance. The generation, distribution, and/or use of reclaimed water without a permit, or in a manner that violates the terms and conditions of a permit, order, or directive issued under this chapter, is prohibited.

(1) Immediate protection of public health or the environment. When it appears to the lead agency that immediate action is required to protect human health and safety or the environment, the lead agency may issue a written order or directive to the person or persons responsible without first issuing a notice of determination of violation pursuant to subsection (2) of this section. An order or directive issued pursu-

ant to this subsection shall be served by registered mail or personally upon any person to whom it is directed, and shall inform the person or persons responsible of the process for requesting an adjudicative hearing.

(2) Notice of determination of violation. The notice of determination of violation is not an appealable order or directive. Upon determination of a violation or substantial potential to violate this chapter or chapter 90.46 RCW, and except as provided for in subsection (1) of this section, the lead agency must:

(a) Provide notice of the violation by registered mail to the responsible person or persons.

(b) Provide thirty calendar days from receipt of the notice for the responsible party to submit a full report containing the steps taken or to be taken to comply with the determination of violation.

If the violation is not corrected or proposed actions or schedule are not sufficient, the lead agency may issue an order, directive, or other enforcement action to the responsible party after the expiration of thirty calendar days, or after the full report is filed in response to the notice of determination of violation, whichever is sooner.

(c) The lead agency must send the order, directive, or enforcement action by registered mail and shall inform the responsible party of the process for requesting an adjudicative hearing.

(3) Compliance schedules and conditions. The lead agency may establish schedules and conditions to achieve compliance through an administrative order or terms of a permit. If the schedule has more than one year between interim requirement completion dates, the reclaimed water permit or administrative order must require and specify due dates for progress reports towards completion. A compliance schedule must:

(a) Set the shortest, most reasonable time, to achieve the specified requirements.

(b) Contain interim requirements and establish dates for completion.

(c) The responsible person or persons must submit written notice to the lead agency within fourteen calendar days of:

(i) Completion of each compliance item.

(ii) Missed compliance requirements, including the following:

(A) Reason for missed compliance.

(B) Plan to achieve compliance.

(d) Should the responsible person or persons fail to comply with conditions or interim requirements in the compliance schedule of this subsection, the noncompliance is considered a continuing violation and the lead agency may modify or revoke the reclaimed water permit or take other direct enforcement actions as provided for in this section.

(4) Enforcement authority. The lead agency may:

(a) Modify, suspend, or revoke a reclaimed water permit in whole or in part during its term for cause.

(b) Assess penalties and other civil relief as may be appropriate against any entity who:

(i) Generates any reclaimed water for a use regulated under this chapter and distributes or uses that water without a permit.

(ii) Violates any term or condition of a permit issued under this chapter.

(iii) Violates any of the provisions or requirements of this chapter.

(c) With the assistance of the attorney general, bring any appropriate action at law or in equity, including action for injunctive relief, as may be necessary to enforce the provisions of this chapter. The lead agency may bring the action in the superior court of the county in which the violation occurred, or in the superior court of Thurston County. The court may award reasonable attorneys' fees for the cost of the attorney general's office in representing the lead agency.

(d) Seek criminal sanctions against any person or entity who knowingly makes any false statement, representation, or certification in any notice, report, monitoring device, methodology, or data required by the terms and conditions of a reclaimed water permit.

(5) Penalties.

(a) Any entity who is found guilty of willfully violating chapter 90.46 RCW, or any written orders or directives of the lead agency or a court, is guilty of a gross misdemeanor, and upon conviction may be punished by a fine of up to ten thousand dollars and costs of prosecution, or by imprisonment, or both, at the discretion of the court. Each day upon which a willful violation occurs may be deemed a separate and additional violation.

(b) Any entity who violates the terms and conditions of a reclaimed water permit incurs, in addition to any other penalty as provided by law, a civil penalty in the amount of up to ten thousand dollars for every such violation.

Each such violation is a separate and distinct offense, and in case of a continuing violation, every day's continuance is considered a separate and distinct violation.

NEW SECTION

WAC 173-219-160 Appeals. (1) Appealable actions. Any person aggrieved by a permitting decision, made in accordance with provisions of this chapter, may appeal that decision as provided by law applicable to the agency issuing the decision. This includes, but is not limited to, chapters 34.05, 43.21B, 43.70 RCW, and RCW 90.46.220(7), 90.46.-250, and 90.46.270.

(2) Adjudicative proceedings. The request for an adjudicative proceeding must be made in the form and manner set forth in the lead agency's laws and regulations, where consistent with chapter 90.46 RCW.

(a) Health's procedural rules are set forth in chapter 246-10 WAC and Part 8 of chapter 246-272B WAC.

(b) Ecology's final agency actions are appealable through the pollution control hearings board (PCHB) in accordance with the PCHB's procedural rules.

NEW SECTION

WAC 173-219-170 Preplanning and project application. (1) Early consultation with lead and nonlead agencies. Potential generators must arrange and attend a preplanning meeting with the lead and nonlead agency to determine the scope of the feasibility analysis, as well as other planning,

permitting, or technical matters related to their intention to generate and distribute reclaimed water for use.

(2) Project application. When health is the lead agency, the generator must submit a project application and fee prior to health reviewing any document submittals required under this chapter, consistent with chapters 246-272B and 246-272 WAC.

NEW SECTION

WAC 173-219-180 Feasibility analysis. (1) Long-term feasibility of reclaimed water generation, distribution, and use. A feasibility analysis must demonstrate that the generator has the long-term technical, management, legal, and financial capacity to design, construct, operate, and maintain the reclaimed water facility, and that distribution and end uses are feasible. The feasibility analysis, including any of the relevant planning documents, must be submitted to the lead agency for review and approval. The purpose of the feasibility analysis is to ensure that resources are sufficient to provide public health and environmental protection for a planning period of twenty years. Guidance on developing the feasibility analysis is available in the *Reclaimed Water Facility Manual* (purple book).

(a) Entities proposing new reclaimed water projects must contact the lead agency early in the planning process to determine the scope of the required feasibility analysis.

(b) Entities with existing reclaimed water permits, proposing to modify their facilities or operations, must consult with the lead agency to determine what, if any, additional feasibility information needs to be submitted and approved.

(c) The feasibility analysis must include the following content along with any other relevant data required to fully demonstrate the feasibility of the proposed project and as may be required by the rules of the lead or nonlead agency:

(i) Explanation of who will own, operate, and maintain the reclaimed water facility.

(ii) For a planning period of twenty years, projected capital and operational costs, in terms of total annual cost and present worth, and projected revenues from user fees and other sources, if applicable.

(iii) Estimate of the annual or seasonal volumes of wastewater required and available and proposed production rate of reclaimed water.

(iv) Description of the proposed level of reclaimed water quality the project will generate, along with general descriptions of the treatment systems and reliability features used by the proposed facility. The project proponent must demonstrate that the proposed facility concept is capable of meeting and ensuring the minimum requirements for water quality, treatment, and reliability for the proposed uses.

(v) Description of plans for alternative use, storage, or release of any reclaimed water or inadequately treated water.

(vi) Initial assessment of potential water quality and quantity impairments and potential strategies to prevent, compensate, and/or mitigate for such impairments.

(vii) List of all potable water suppliers, potable water sources, storage, and distribution facilities within one thousand feet of all potential reclaimed water generation, reclaimed water storage, and inadequately treated water storage facility areas, as well as any proposed use areas. At a minimum, water source protection and cross-connection control actions and concerns must be identified.

(viii) Description of the contingency plan for both temporary and permanent reversion to domestic wastewater facilities and alternative water supply systems where applicable, if reclaimed water production is discontinued. Include the impact of increased demand to water purveyors.

(ix) A brief description of the community outreach and public involvement conducted or planned to be conducted, as feasibility is determined, to demonstrate awareness of and community support for the reclaimed water project.

(x) Identification of existing or proposed interlocal or interagency agreements, if any, with local governments or local potable water suppliers within the area of existing or proposed distribution and use of reclaimed water.

(xi) Statement of compliance with the State Environmental Policy Act (SEPA) and the National Environmental Policy Act (NEPA), when applicable.

(2) Coordination under other state and local planning. The use of reclaimed water must be considered and coordinated under other planning requirements in state law, including RCW 90.46.120, as well as local codes and ordinances. Relevant planning documents produced under other planning requirements may be submitted to meet all or part of the submittal requirements of this section; however, documents approved for other purposes may require amendments, or the lead agency may require supplemental information to fulfill the requirements of this section. Relevant planning documents include, but are not limited to, the following:

(a) General sewer plans and engineering reports/facility plans for domestic wastewater facilities under RCW 90.48.110 and 90.48.112, or WAC 173-240-050 and 173-240-060.

(b) Coordinated water system plans, small water system management plans, sewage and sewage treatment works system plans or predesign reports under chapter 43.20, 70.116, or 70.118B RCW or 246-290, 246-291, 246-272A, or 246-272B WAC.

(c) Water supply plans under chapter 90.44 or 90.82 RCW.

(d) A regional water supply plan or plans addressing water supply service by multiple water purveyors under RCW 90.46.120.

(e) Groundwater and aquifer protection plans, under WAC 246-290-130, chapter 36.70A RCW, and WAC 365-190-100.

(f) Comprehensive reclaimed water plans under RCW 57.16.010.

(g) A stand-alone or supplemental reclaimed water plan.

(3) Demonstration of private utility capacity. In addition to subsections (1) and (2) of this section, the lead agency may require a private utility to submit adequate information to demonstrate that the private utility has capacity to design, construct, operate, and maintain the reclaimed water facility and that distribution and end uses are feasible. Such information includes, but is not limited to:

(a) A description of the proposed reclaimed water facility and its proposed customers similar to that required in subsection (2)(d) of this section.

(b) A description of the technical, managerial, administrative, operational, legal, and financial capacity of the entity to comply with chapter 90.46 RCW and this chapter.

(c) A description of other requirements, if a private utility is considered a private wastewater company under chapter 80.04 or 36.94 RCW.

(d) Demonstration of ability of the entity to hire and retain certified operators who will be directly responsible for achieving effective and reliable routine operations.

(e) A list of all subcontracted services such as engineering, legal, and accounting.

(f) With the consent of the lead agency, a private utility may establish adequate management capacity by entering into a management agreement with a municipal, quasi-municipal, or other governmental entity acceptable to the lead agency to serve as the primary management entity or as a third-party guarantor. The management agreement must be binding on both parties and remain in force until the lead agency determines that the private utility has the technical, managerial, and financial capacity to act as the generator, or until the private utility enters into a management agreement with another municipal, quasi-municipal, or other governmental entity.

NEW SECTION

WAC 173-219-190 Timing and signature requirements. (1) Timing. The generator is responsible for ensuring that there is sufficient time to meet funding, contractual, and other project deadlines.

(a) The lead agency may require an update to an approved engineering document to address changes in conditions, regulatory requirements, or engineering technology when three or more years have elapsed between agency approval of the documents and the construction of the reclaimed water facility.

(b) The lead agency must receive the required submittals by the deadline established in the permit or compliance schedule.

(2) Reclaimed water project and permit application signature requirements. All reclaimed water project or permit applications, application renewals, and transfers must be signed as follows:

(a) Public agency: By either the principal executive officer or ranking elected official.

(b) Corporations: By a responsible corporate officer.

(c) Partnership: By a general partner.

(d) Sole proprietorship: By the proprietor.

(e) Private utility: By a responsible officer.

(3) Signature requirements on other required submittals. All other required submittals must be signed either by the person in subsection (2) of this section or by their duly authorized representative.

(a) A person, for the purposes of this subsection, is a duly authorized representative only if the person described in subsection (2) of this section submits written authorization to the lead agency and specifies an individual or a position with responsibility for the overall operation of the regulated facility or activity.

(b) If an authorization under (a) of this subsection is no longer accurate, the person in subsection (2) of this section must submit a new authorization before or with the signed submittal.

(c) Any person signing a document under this chapter must make the following certification, unless a different certification is applicable under another related section of this chapter:

> "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a facility designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the facility, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for violations."

(d) Engineering submittals must be prepared, stamped, signed, and dated by a professional engineer who is licensed in Washington state, as directed in chapter 18.43 RCW.

(e) Geology and hydrogeology submittals must be prepared, stamped/sealed, signed, and dated by a geologist or hydrogeologist licensed in Washington state, as directed in chapter 18.220 RCW.

NEW SECTION

WAC 173-219-200 Plan review and review standards. (1) Plan review required. All feasibility, planning, design, and construction documents and, if applicable, associated fees, must be submitted to the lead agency for review and approval before constructing or significantly modifying reclaimed water facilities.

The lead agency will comment on, approve, or reject documents submitted for planning, design, and/or construction within ninety calendar days of receipt. If circumstances prevent adequate review within a period of ninety days, the lead agency must notify the entity of the reason for the delay and provide an estimated review completion date.

(2) Review standards. The lead agency and nonlead agency, if applicable, must review all applications, plans, analyses, engineering reports, and operations and maintenance manuals to ensure they are reasonably consistent with the appropriate sections of the most recent edition of ecology's *Criteria for Sewage Works Design* (orange book) and ecology and health's *Reclaimed Water Facilities Manual* (purple book). Additional review references may include, but are not limited to, the documents listed in WAC 173-240-040. The purpose of the review is to evaluate whether the proposed reclaimed water facilities meet:

(a) State standards and other requirements for the generation, distribution, and use of reclaimed water under this chapter and chapter 90.46 RCW.

(b) Applicable requirements of chapters 90.48 and 90.54 RCW necessary to prevent and control pollution of waters of the state.

(c) Applicable requirements of chapter 70.118, 70.118A, 70.118B, 70.119, 70.119A, or 43.20 RCW with respect to on-site sewage systems or public water systems.

(d) All other applicable regulations and authorities.

NEW SECTION

WAC 173-219-210 Engineering report. (1) Submission of engineering report to lead agency. The engineering report is the technical basis for the design of a proposed reclaimed water facility. A generator must comply with the requirements of WAC 173-219-180 (1)(b) and (c) and include a section or stand-alone engineering report meeting the requirements of WAC 173-240-060 for the wastewater treatment facility or chapter 246-272B WAC, Part 4, for the on-site sewage systems, that will provide source water for the proposed reclaimed water facility. This does not apply if the source water is raw sewage.

(2) Engineering report contents. All engineering reports required under this chapter must reflect acceptable engineering practices and demonstrate the capacity of the generator to protect public health and the environment. The lead and non-lead agencies will determine the scope of the engineering report. Reports must include:

(a) Sufficient detail for a professional engineer to complete plans and specifications without substantial changes.

(b) Name and contact information for the owner and the owner's authorized representative(s).

(c) A project description and location maps. The maps must include:

(i) Location of all wastewater treatment and reclaimed water generation facilities, as well as all reclaimed and inadequately treated water storage facilities under direct control of the generator.

(ii) All additional facilities that may be under control of the generator, such as for storage and distribution of reclaimed water.

(iii) All potable water supply sources, wellhead protection areas for municipal water sources, and system facilities within one thousand feet of all identified potential reclaimed water generation, reclaimed water storage, and inadequately treated water storage facility areas, and any proposed use areas.

(d) Proposed quantity and quality of the reclaimed water generated by the reclaimed water facility, including an assessment that the proposed water quality meets the requirements for all proposed beneficial uses included in Table 3 of WAC 173-219-390.

(e) Description of who will operate and maintain the reclaimed water facility.

(f) Documentation of contact with potable water systems and their concerns, if any, as required in WAC 173-219-180 (1)(c).

(g) If applicable, locate potable water supply intakes that are within one thousand feet of the reclaimed water use area, and discuss whether a two hundred foot minimum separation distance between them is sufficient to protect the potable water supply intake(s) from physical impairment potentially created from a reclaimed water use for surface water augmentation.

Reclaimed water quality and quantity must not cause the need for intake modifications or additional treatment requirements for the production of potable water.

(h) Applicable requirements of chapter 51-56 WAC, including pipe colors and labeling.

(i) Design information for the reclaimed water distribution system directly under the control of the generator to demonstrate compliance with the requirements of WAC 173-219-360, and consistent with pressurized distribution systems in the most recent edition of health's *Water System Design Manual*.

(j) The anticipated amount, characteristics, and strength of the source water to be treated, including BOD_5, DO, TSS, and nitrate levels, and the degree of treatment required to generate proposed reclaimed water quality, and other influencing factors.

(k) Descriptions of proposed treatment processes, including preliminary flow diagrams of critical reclaimed water unit processes, as well as anticipated reliability features and controls. The report must contain sufficient detail to verify that the proposed facility will comply with the water quality and reliability requirements of this chapter.

(l) Description of alternative design options considered.

(m) Hydraulic, organic, and influent loading rates to the reclaimed water treatment facility.

(n) Summary of preliminary engineering design criteria for reclaimed water treatment processes, if required, including:

(i) Aeration/anaerobic organic carbon reduction.

(ii) Nutrient reduction, if required.

(iii) Disinfection system selection meeting the requirements of WAC 173-219-340.

(iv) Contact time within the disinfectant reactor.

(v) Coagulation and filtration processes, if required.

(vi) Reverse osmosis or comparable technology process, if required.

(o) A description of compliance with treatment reliability standards in WAC 173-219-350.

(p) A statement regarding or demonstration of compliance with:

(i) State Environmental Protection Act (SEPA), state environmental review process (SERP), or National Environmental Protection Act (NEPA).

(ii) Any applicable state or local water quality management plan or any plan adopted under the Federal Water Pollution Control Act as amended.

(iii) RCW 90.46.130, including any compensation or mitigation plans.

(iv) Governor's Executive Order 05-05 Archaeological and Cultural Resources.

(q) A pilot study proposal, if required. The lead agency may require a pilot reclaimed water facility study to evaluate the ability of the proposed facility to meet all reclaimed water quality requirements applicable to the project. The generator must include discussion and determination of the need for a pilot study in the engineering report and include the proposal for it, if required.

(r) Proposed pipeline separation distances, both horizontal and vertical, consistent with the most recent edition of ecology's and health's *Pipeline Separation Design and Installation Reference Guide*, in order to ensure trench stability and adequate access for repair and replacement, to minimize impacts to nearby utility pipes, and to protect public health.

(s) **Wetlands.** If a proposed beneficial use of the reclaimed water is for a wetland, or wetland restoration and/or enhancement, the reclaimed water engineering report must include the following:

(i) The wetland-rating category, size, hydrogeomorphic class, and vegetation class of the existing and proposed wetlands.

(ii) The beneficial uses of the existing and proposed wetland.

(iii) The hydrologic regime of the existing and proposed wetland, including depth and duration of inundation, average monthly water level fluctuations, and annual loadings of reclaimed water to the wetlands.

(iv) Demonstration that the proposed quality of reclaimed water meets the requirements for this beneficial use.

(v) Any studies conducted or additional information applicable to the specific project or site.

(vi) Information to support a claim of net environmental benefit, if proposed. At a minimum, a claim of net environmental benefit must demonstrate that the use of reclaimed water:

(A) Provides full and uninterrupted protection of all significant beneficial uses existing in the wetland prior to the use of reclaimed water.

(B) Creates new, or enhances existing, beneficial uses of the wetland.

(t) **Surface water augmentation.** If a proposed beneficial use of the reclaimed water is for surface water augmentation, the engineering report must also include the following:

(i) The location and proposed augmentation uses of the reclaimed water.

(ii) Demonstration of how the reclaimed water meets water quality standards at the point of release.

(iii) Demonstration that reclaimed water quality and quantity will not cause need for intake modifications or additional treatment requirements for the production of potable water.

(iv) If the intended beneficial use is for an instream flow per chapter 90.22 RCW, a draft or final mitigation plan is required.

(u) **Groundwater/aquifer recharge.** If a proposed beneficial use of the reclaimed water is for aquifer recharge, the engineering report must also include the following:

(i) Information requested by the lead agency necessary to assess the specific treatment and use of reclaimed water for application to recharge groundwater.

(ii) Site-specific information presented in the following:

(A) Project operation plan.

(B) Conceptual model of the hydrogeologic system.

(C) Description of the legal framework.

(D) Environmental assessment and analysis of any potential adverse conditions or potential impacts to the surrounding ecosystem.

(E) Project mitigation plan.

(F) Project monitoring plan.

(G) Pilot demonstration of project performance.

(v) **Recovery of reclaimed water stored in an aquifer.** Aquifer recharge and recovery projects will be evaluated based on the information provided in the engineering report under (u) of this subsection using the following criteria:

(i) Aquifer vulnerability and hydraulic continuity.

(ii) Aquifer boundaries and characteristics.

(iii) Geotechnical impacts of project operation.

(iv) Chemical compatibility of surface waters and groundwater.

(v) Recharge and recovery treatment procedures.

(vi) System operation.

(vii) Potential impairment of existing water rights.

(viii) Environmental impacts.

(ix) Pilot demonstration project performance.

(w) **On-site sewage treatment.** If the generator is or will be operating an on-site sewage treatment system, the generator may reference an approved engineering report, but the reclaimed water engineering report must also include the on-site sewage treatment system predesign report, site and environmental review, and engineering report as required under chapter 246-272B WAC, Parts 3 and 4.

(x) **Conveyance in waters of state.** For projects proposing conveyance in waters of the state, ecology must approve the conveyance report portion of the engineering report.

NEW SECTION

WAC 173-219-220 Plans and specifications. (1) Approved construction plans and specifications. Construction plans and specifications must be submitted to the lead agency for review and approval prior to construction of the facility. The generator must submit:

(a) Two complete sets of paper plans and specifications, and one complete set in an electronic format for approval as allowed by the lead agency. The lead agency may waive the requirement for paper submittals.

(b) Construction plan and specifications meeting lead agency guidance and standards.

Once the lead agency determines that the final design documents are acceptable, it will stamp one of the paper copies of the final plans "approved" and return them to the generator for their records.

(2) Content of construction document. The construction document must:

(a) Include a list of the design criteria for each unit process and for the overall facility.

(b) Include a field-commissioning plan for new facilities, if applicable. The plan must include testing of all processes, equipment, and reactors used in the generation of reclaimed water and be consistent with the most recent edition of ecology's and health's *Reclaimed Water Facilities Manual* (purple book) and the review standards provided in WAC 173-219-200.

(c) Include a plan for interim operation of facilities during construction, if applicable.

(d) Comply with WAC 173-219-310 and identify all potential cross-connections, and the device or assembly to be

installed to prevent them, as described in WAC 173-219-310. This information must also be included in the as-built drawings and final operations and maintenance manual under WAC 173-219-240.

(e) Follow applicable requirements in:

(i) WAC 173-240-070 for domestic wastewater facilities.

(ii) WAC 246-272B-04400 for on-site sewage systems.

NEW SECTION

WAC 173-219-230 Construction and declaration of construction. (1) Construction of reclaimed water facilities.

(a) Reclaimed water facilities must be constructed in accordance with chapter 90.46 RCW, this chapter, and the construction plans and specifications approved by the lead agency prior to construction.

(b) When health is the lead agency, no construction is permitted until health issues a written approval to construct, under chapter 246-272B WAC. If construction does not begin within two years following the date of health's approval of the plans and specifications, the approval shall expire or be extended as directed in WAC 246-272B-02350.

(2) Revisions to approved construction plans and specifications. If during construction, the engineer determines a substantial change to the approved plans and specifications is necessary and could affect the quality or quantity of the reclaimed water or has financial assistance implications, the generator must submit revisions to the approved engineering plans and specifications to the lead agency for review and approval prior to continuing construction of the facility.

(3) Declaration of construction. The professional engineer responsible for the construction portion of the project must comply with WAC 173-240-090 and submit a construction completion form provided for in WAC 173-240-095 to ecology within thirty calendar days of acceptance by the owner of the constructed or modified reclaimed water facility. Health's requirements are provided in WAC 246-272B-02350 and Part 5 of chapter 246-272B WAC.

NEW SECTION

WAC 173-219-240 Operations and maintenance. The generator must at all times properly operate and maintain any facilities or systems of control installed by the generator to achieve compliance with the terms and conditions of the permit. Where design criteria have been established, the generator must not allow flows or waste loadings to exceed approved design criteria, or approved revisions thereto.

(1) Operations and maintenance manual requirements. An operation and maintenance manual must be submitted to the lead agency for review and approval prior to operation of the facility and must be included together with any other relevant data required by the lead agency.

(2) Content of operations and maintenance manual. The following content with detail commensurate with the size and complexity of the generation facility must be included:

(a) Sufficient detail to describe the operation and maintenance and treatment reliability of the entire reclaimed water facility, storage, and as applicable, the distribution system.

(b) A copy of the reclaimed water permit.

(c) Manufacturer's information on the reclaimed water facility equipment.

(d) Technical guidance for both normal and emergency operating conditions.

(e) A section containing the generator's cross-connection control plan, in conformance with WAC 173-219-310.

(f) A communication plan outlining notification of any potable water purveyors identified in WAC 173-219-180 and any other affected agencies.

(g) Roles and responsibilities for managerial and operational staff.

(i) Include facility classification and the classification and certification requirements for treatment, distribution, and cross-connection control operators and personnel, if applicable.

(ii) A discussion of provisions to provide a sufficient number of qualified personnel to operate the facility, storage, and distribution system, if applicable.

(iii) List of persons to be alerted and their contact information in case of emergency.

(h) Principal design criteria including:

(i) A process description of each facility unit, including function, relationship to other facility units, and schematic diagrams.

(ii) Details of each unit operations and various controls, recommended settings, fail-safe features, and other elements that ensure proper operation of equipment.

(iii) Operation instructions for anticipated maintenance procedures, routine operations, less than design loading conditions, overload conditions, and if applicable, initial loading on a system designed for substantial growth.

(iv) Information on any maintenance procedures that contribute to the generation of wastewater or residual solids and the proper handling of the wastewater and solids generated.

(v) A maintenance log and schedule that incorporates manufacturer's recommendations, preventative maintenance, and housekeeping schedules, and special tools and equipment used to ensure that all unit processes and equipment are in reliable operating condition at all times.

(i) Laboratory procedures, including sampling techniques, monitoring requirements, sample analysis, and recordkeeping procedures, including sample and chain of custody forms.

(j) Safety procedures.

(k) Spare parts inventory, address of local suppliers, equipment warranties, and appropriate equipment catalogues.

(l) Emergency plans and procedures including, but not limited to:

(i) Facility shutdown and cleanup of a treatment process upset or failure.

(ii) Response plan to ensure that no inadequately treated water is delivered to a reclaimed water user or use site.

(m) If the generator is the distributor, include a section on the distribution system including, but not limited to:

(i) Responsibilities for operation and maintenance.

(ii) Operational controls, maintenance requirements, monitoring, and inspection.

(n) If the generator is the user, include a section on the reclaimed water use areas including, but not limited to:

(i) Responsibilities for operation and maintenance.

(ii) Operational controls, maintenance requirements, monitoring, and inspection.

NEW SECTION

WAC 173-219-250 Certified operators. (1) Certified operator requirements. Certified operators must perform certain functions for reclaimed water facilities, as identified in this chapter or the reclaimed water permit, and consistent with the certifications standards of the agency issuing the certificate. The reclaimed water permit must require that the generator and distributor, if separate persons, employ one or more operators, or a contractor(s) employing operators, with certain operator certification classifications or levels.

(2) Allowable certifications.

(a) Health, under chapter 246-292 WAC, for waterworks treatment, distribution management, cross-connection control, and backflow prevention assembly testing.

(b) Ecology, under chapter 173-230 WAC, for wastewater treatment.

(c) Either health or ecology, for reclaimed water treatment, when one develops a reclaimed water operator certification program.

NEW SECTION

WAC 173-219-260 Monitoring, recording, and reporting. Any use, generation, distribution, or storage of reclaimed water, authorized by a permit may be subject to such monitoring requirements as may be reasonably required by the lead agency, including the installation, use and maintenance of monitoring equipment or methods, and, where appropriate, biological monitoring methods. The lead agency must establish monitoring, recording, and reporting requirements and include them in the required permit(s).

(1) Monitoring schedules. A detailed self-monitoring and testing schedule for water quality limits, other substances, or parameters, required to demonstrate that the reclaimed water is protective of human health and the environment.

(2) Monitoring parameters. The lead agency may increase monitoring parameters or frequency for cause including, but not limited to, significant, recurrent reclaimed water permit violations, where determined necessary to protect public health or the environment, or for other cause. The lead agency may base parameters, sample types, locations, and frequencies requirements on:

(a) Available guidance or model permits.

(b) Quantity, quality, and variability of the reclaimed water.

(c) Treatment methods.

(d) Significance of the pollutants.

(e) Availability of appropriate indicator or surrogate parameters.

(f) Cost of monitoring.

(g) Past compliance history.

(3) Source water monitoring. If the influent to the reclaimed water facility is effluent from a wastewater facility, the generator may use monitoring data collected for the wastewater discharge permit to fulfill all or part of influent monitoring requirements. Minimum requirements include:

(a) Flow.

(b) BOD_5.

(c) TSS.

(d) pH.

(4) Representative sampling and analysis. In addition to the standard requirements, the lead or nonlead agency may establish specific conditions to assure that sampling and measurements accurately represent the volume and nature of the parameters monitored or their removal.

(5) Monitoring equipment maintenance and calibration. The lead and/or nonlead agency must establish maintenance and calibration requirements based on manufacturer's requirements and accepted scientific field practices for the appropriate installation, use, calibration, and maintenance of monitoring equipment for flow, and continuous monitoring devices and methods.

(6) Sampling and analytical procedures. Sampling and analytical methods must conform with this subsection, although the lead agency may require other sampling and analytical methods as needed and on a case-by-case basis.

(a) The *Guidelines Establishing Test Procedures for the Analysis of Pollutants contained in 40 C.F.R. Part 136* or *Guidelines Establishing Test Procedures for the Analysis of Pollutants contained in 40 C.F.R. Part 141*.

(b) *Standard Methods for the Examination of Water and Wastewater* in effect at time of permit issuance or renewal.

(c) A laboratory accredited under the provisions of chapter 173-50 WAC must conduct the analysis of all monitored data required by the reclaimed water permit. Field measurements such as flow, temperature, settleable solids, conductivity, pH, turbidity, and internal process control parameters are exempt from this subsection, unless the laboratory is on-site and must obtain accreditation for other parameters.

(7) Recordkeeping and reporting. The lead agency may provide and require a reporting form for this requirement. The lead and/or nonlead agency must:

(a) Specify the requirements for recordkeeping for each measurement or sample taken including, but not limited to:

(i) The date, the exact place, and time of sampling, and the individual who performed the sampling or measurement.

(ii) The dates the laboratory performed the analyses and the individual who performed the analyses.

(iii) The analytical techniques or methods used and the results of all analyses.

(b) Specify the reporting requirements for routine compliance monitoring including the content and forms, reporting frequency (monthly, quarterly, annually), the beginning and ending of reporting periods and due dates, whether reporting is required when the generator is not generating reclaimed water, and where and how to send reports to the lead agency.

(c) Establish requirements for recordkeeping and reporting of other operational records such as preventative maintenance activities and corrective actions.

(d) Require a reclaimed water summary report, containing, but not limited to, the following information:

(i) Frequency and date(s) of submission of a reclaimed water summary report.

(ii) Total volume of reclaimed water generated, distributed, and used since the last report.

(8) Records retention. The generator must retain all monitoring records for at least three years. The lead and/or nonlead agency may establish requirements that extend the period of retention for some or all records during the course of any unresolved litigation. The lead agency may specify other records to be retained by the generator. These include, but are not limited to, the following:

(a) Calibration and maintenance records.

(b) Original recordings for continuous monitoring instrumentation.

(c) Copies of all reports required by the permit.

(d) Records of all data used to complete the application for the permit.

NEW SECTION

WAC 173-219-270 Reclaimed water permit terms and conditions. The reclaimed water permit must identify terms and conditions determined to be necessary by the lead agency, for the protection of public health, the environment, and to implement this chapter and chapters 90.46, 90.48, 70.118, and 70.118B RCW as applicable. The reclaimed water permit may establish additional conditions on a case-by-case basis specific to the types of distribution systems and uses authorized through a use agreement. Terms and conditions must include, but are not limited to:

(1) Regulatory entry and access. For assessing compliance, the generator must allow the lead and nonlead agencies the right to:

(a) Enter the premises where the generator keeps records and the permitted reclaimed water facilities.

(b) Inspect any records that the permit requires the generator to keep under the conditions of the reclaimed water permit.

(c) Inspect any facility, equipment, practice, or operation permitted or required by the reclaimed water permit.

(d) Sample or monitor any substance or any parameter at the reclaimed water facility.

(e) Copy, at reasonable cost, any records required by the terms and conditions of the reclaimed water permit.

(2) Duty to provide information. The falsification of information submitted to the lead agency constitutes a violation of the terms and conditions of the reclaimed water permit. The generator must submit:

(a) All the information requested to determine if cause exists for modifying, revoking, reissuing, or terminating the reclaimed water permit, or to determine compliance with the permit or this chapter.

(b) Copies of records required by this chapter.

(3) Reporting planned changes. The generator must provide advance notice to the lead agency of any reclaimed water facility modifications, production increases, or other planned changes, such as maintenance activities or process modifications that may result in short-term noncompliance with permit limits or conditions.

(4) Noncompliance action required. In the event of an action that violates the terms and conditions of the permit, the generator must:

(a) Take immediate action to stop, contain, and remedy unauthorized generation, distribution, or use of reclaimed water.

(b) Immediately identify and report to the lead agency, no later than twenty-four hours from the time the generator becomes aware of the circumstances, any issue that threatens public health or the environment.

(c) Submit a written report to the lead agency within thirty days of any noncompliance that threatens public health or the environment that describes the following:

(i) The noncompliance and its cause, if known.

(ii) The period of noncompliance including times and dates, to the extent possible, and if the compliance has not been corrected, the anticipated date and time it is expected to be corrected.

(iii) The corrective actions taken.

(iv) Steps planned to reduce or eliminate recurrence.

(v) Any other pertinent information.

(5) Reclaimed water quality limits. The permit issued by the lead agency must:

(a) Specify enforceable limits on the quality of reclaimed water distributed for use that:

(i) Verify that the required treatment processes at the reclaimed water facility are functioning correctly.

(ii) Verify that the facility is reliably achieving the required technology-based and use-based standards.

(b) List:

(i) Each required parameter.

(ii) Regulatory limits.

(iii) Sample type, method, and point of compliance.

(iv) Establish action required when the generator exceeds a limit.

(6) Facility loading. The permit must establish conditions to assure that the facility operates within the approved design capacity. The reclaimed water permit may specify design limits that the facility must not exceed, periodic assessments, reporting of flow and loadings, and warning levels that trigger requirements to maintain adequate capacity.

(7) Authorized uses. The permit must:

(a) Require the generator to maintain use agreements with distributors and users receiving reclaimed water and document the use-based site evaluation, per WAC 173-219-380. The reclaimed water permit may include conditions requiring the generator to obtain lead agency review and approval of use agreements or may specify terms and conditions allowing the use of standardized agreement language or local ordinances for all or some distributors, uses, or users.

(b) Limit the distribution and use of reclaimed water to those uses and locations established in the permit or by a signed use agreement.

(c) Establish water quality limits that qualify reclaimed water for distribution and for shutoff in case of treatment system malfunction or failure.

(d) Specify conditions that require distribution of reclaimed water to be terminated.

(e) Prohibit the release or distribution of inadequately treated water.

For storage of reclaimed water in an aquifer and/or recovery of the water, the permit must include the recovery

period of the reclaimed water based on the hydrogeologist report. Ecology may modify or ask health to modify the reclaimed water permit and the recovery period based on later, supplemental documentation.

(8) Adding new users or uses. The lead agency may authorize the addition of new users or similar uses without reopening the permit, based on submission and approval of the use agreement to the lead agency or prior approval of a use or use agreement as prescribed in WAC 173-219-290.

(9) Use specific permit conditions. The reclaimed water permit must include appropriate, specific conditions authorizing and controlling the storage, generation, distribution, recovery, and permitted uses of the reclaimed water in a manner that protects public health and the environment.

(10) Cross-connection control. The permit must require the generator to meet the provisions of WAC 173-219-310 to protect higher quality water from lower quality water.

(11) Water rights impairment. The permit must require proof of continuing compliance with RCW 90.46.130, including the ecology final determination of impairment and adequacy of compensation or mitigation and, if necessary, enforceable provisions to ensure compensation or mitigation is implemented by the permittee.

NEW SECTION

WAC 173-219-280 Fact sheet. (1) Fact sheet required. The lead agency must prepare a fact sheet to support the reclaimed water permit.

(2) Content of the fact sheet. The fact sheet must include, but is not limited to, the following:

(a) Nature of the source water to the reclaimed water facility.

(b) Chemical, biological, and physical characteristics of the reclaimed water generated.

(c) Size of the reclaimed water facility, the approved facility design, reliability features, and methods of operation.

(d) Methods of distribution.

(e) Types of uses covered under the reclaimed water permit.

(f) For existing reclaimed water treatment facilities, the compliance history of the reclaimed water facility and the need for monitoring and recordkeeping to document compliance.

(g) Legal considerations relative to land use, water rights, local wellhead protection regulations, and the public interest.

(h) Requirements from other local, state, and federal agencies.

(i) Summary of:

(i) Type and location of all proposed reclaimed water facilities.

(ii) Reclaimed water quality and purpose of the proposed uses.

(iii) Legal and technical basis for the reclaimed water permit terms and conditions.

(iv) Procedures for public review and comment.

NEW SECTION

WAC 173-219-290 Use agreements. (1) Review and approval of use agreements. Together with the use site evaluation under WAC 173-219-380, the generator must submit to the lead agency for review and approval all proposed or signed contracts or use agreements, if applicable, between:

(a) Generator and distributor of reclaimed water.

(b) Generator and end user of reclaimed water.

(c) Distributor and each end user of reclaimed water.

(2) Content of use agreements. The agreements must include sufficient detail to ensure compliance with requirements of the reclaimed water permit in this chapter, and chapter 90.46 RCW, at the point of use, and must include at a minimum:

(a) Cross-connection control measures.

(b) Monitoring points, parameters, and sample times.

(c) Identification of the use site's inclusion in a wellhead protection area or critical aquifer recharge area, if applicable.

(d) A copy of the generator's notice to the potable water supplier(s) linked to any such area(s), of any treatment requirements and proposed use(s), and, if any, special protection measures proposed.

(e) Best management practices to ensure permit compliance.

(f) General use based requirements in WAC 173-219-380.

NEW SECTION

WAC 173-219-300 Source control and pretreatment requirements. (1) Source water controls. Source water controls must prevent the presence of substances that may affect the reclaimed water quality or the ability to generate reclaimed water.

(2) Other applicable requirements. Source water to reclaimed water facilities must comply with the applicable requirements for:

(a) Pretreatment of industrial wastewater under 40 C.F.R. Part 403, Sections 307(b) and 308 in the Federal Water Pollution Control Act, and chapter 90.48 RCW.

(b) Discharge restrictions and prohibitions for dangerous waste under chapter 173-303 WAC and WAC 173-216-060.

(c) Restrictions and prohibitions of certain substances entering an on-site sewage system under WAC 246-272B-06000, 246-272B-07050, and 246-272A-0270.

NEW SECTION

WAC 173-219-310 Cross-connection control. (1) Applicability, purpose, and responsibility.

(a) All reclaimed water generators and distributors must comply with the cross-connection control requirements specified in this section.

(b) The purpose of cross-connection control for reclaimed water is to protect reclaimed water treatment and distribution systems from contamination via cross-connection with lower quality water.

(c) Group A water systems, as defined in WAC 246-290-020, are responsible for protecting their potable water distribution system from cross connections.

(d) Reclaimed water distributors must give the potable water purveyor written notification prior to providing reclaimed water service to any property within the purveyor's service area so the purveyor can ensure compliance with the cross-connection control requirements under WAC 246-290-490.

(e) Generators must notify their potable water purveyor of the proposed and ongoing reclaimed water treatment activity and facility location.

(f) Reclaimed water generators and distributors must not provide reclaimed water to any user before the user has installed the correct backflow prevention assembly on the potable supply line, and the potable water purveyor verifies the installation is correct and complete.

(g) The generator and distributor must protect reclaimed water from lower quality water via cross-connection control, starting in the generation facility, including all treatment stages, storage, and distribution facilities, and ending at the point of delivery to the user's reclaimed water meter at the property line of the use area.

(h) Under the provisions of this section, reclaimed water generators and distributors are not responsible for eliminating or controlling cross-connections on the end user's property.

(i) A certified cross-connection control specialist (CCS) must review all plans, engineering reports, and operation and maintenance manuals to ensure compliance with cross-connection control requirements before documents are submitted to the lead agency for review.

(2) General program requirements. The reclaimed water generator and distributor must develop and implement a written cross-connection control program that meets the requirements of this section. They must:

(a) Ensure use of good engineering practices in the development and implementation of cross-connection control programs. Guidance publications and references such as, but not limited to, the most recent edition of the following, may be used for cross-connection program development and implementation:

(i) Foundation for Cross-Connection Control and Hydraulic Research, University of Southern California, *Manual of Cross-Connection Control*.

(ii) Washington state department of ecology *Criteria for Sewage Works Design.*

(iii) Washington state department of ecology *Reclaimed Water Facilities Manual.*

(iv) Pacific Northwest Section of the American Water Works Association *Cross-Connection Control Manual, Accepted Procedure and Practice*.

(b) Work with the potable water purveyor to ensure elimination of cross-connections between the reclaimed water facility or reclaimed water distribution system and the potable water system.

(c) Document and describe coordination and delineation of responsibilities in the written cross-connection control program.

(d) Ensure that cross-connections between the reclaimed water and lower quality water are eliminated, or controlled by the installation of approved backflow prevention assemblies.

(e) Ensure that a CCS determines the appropriate method of backflow protection to eliminate or control cross-connections in the reclaimed water facility and distribution system.

(f) Take appropriate corrective action if a cross-connection or potential cross-connection exists that is not controlled by the installation of an approved backflow prevention assembly, consistent with the requirements in subsection (3) of this section. Corrective action may include, but is not limited to:

(i) Diverting potentially contaminated reclaimed water or taking other action to prevent it from leaving the reclaimed water facility and entering the distribution system until the hazard is controlled or eliminated.

(ii) Denying or discontinuing reclaimed water service to a user's property until the cross-connection hazard is eliminated or controlled.

(iii) Requiring the user to install, repair, or replace an approved backflow prevention assembly for premises isolation of the reclaimed water system.

(g) Prohibit the intentional return of used water to the distribution system. Such water includes reclaimed water used for any purpose within the user's property.

(3) Minimum elements of a cross-connection control program. The reclaimed water generator and distributor must:

(a) **Element 1:** Adopt a local ordinance, resolution, code, bylaw, or other written legal instrument that:

(i) Establishes the generator's or distributor's legal authority to implement a cross-connection control program.

(ii) Describes the operating policies and technical provisions of the cross-connection control program.

(iii) Describes corrective actions to be taken to ensure compliance with the cross-connection control requirements.

(b) **Element 2:** Develop and implement procedures and schedules for ensuring that:

(i) Cross-connections are eliminated whenever possible.

(ii) When cross-connections cannot be eliminated, they are controlled by installation of approved backflow prevention assemblies commensurate with the degree of hazard.

(iii) Approved backflow prevention assemblies are installed in the approved orientation and in accordance with industry standards.

(iv) New and existing points of use are assessed for compliance with the cross-connection control program.

(v) Approved backflow prevention assemblies are inspected as required.

(c) **Element 3:** Ensure that personnel, including at least one person certified as a CCS, are provided to develop and implement the cross-connection control program.

(d) **Element 4:** Develop and implement a backflow prevention assembly testing quality control assurance program including, but not limited to, documentation of BAT certification and test kit calibration, test report contents, and time frames for submitting completed test reports.

(e) **Element 5:** Develop and implement, when appropriate, procedures for responding to backflow incidents.

(f) **Element 6:** Develop and maintain cross-connection control records including, but not limited to, the following:

(i) Locations in the generation facility where cross-connections between higher quality and lower quality water have been identified.

(ii) Property locations where reclaimed water is provided.

(iii) Property locations where users are served by both reclaimed water and potable water, and identification of the potable purveyor.

(iv) Approved backflow assemblies and air gaps protecting the reclaimed water generation and distribution systems; including exact location, description of the type, manufacturer, model, size, and serial number, assessed degree of hazard, installation date, history of inspections, tests and repairs, test results, and person performing tests.

(v) Cross-connection control program annual summary reports and backflow incident reports.

(4) Protecting the reclaimed water distribution system.

(a) If the reclaimed water use on a property poses a high likelihood of contaminating the reclaimed water distribution system, the reclaimed water distributor must ensure installation of an approved backflow prevention assembly at the meter or property line.

(b) Reclaimed water distributors may require backflow prevention assemblies to be installed at the meter or property line for properties with characteristics such as, but not limited to, the following:

(i) Complex piping arrangements or piping subject to frequent changes that make it impractical to assess whether cross-connections exist.

(ii) A repeated history of cross-connections being established or reestablished; or

(iii) Cross-connections that are unavoidable or not correctable.

(5) Approved backflow prevention assemblies. The reclaimed water generator and distributor must ensure that all installed backflow prevention assemblies relied upon to protect the reclaimed water facility and distribution system are models that appear on current *University of Southern California Foundation for Cross-Connection Control and Hydraulic Research* approved backflow prevention assemblies list.

(6) Approved backflow prevention assembly installation. The reclaimed water generator and distributor must ensure that:

(a) Approved backflow prevention assemblies are installed in a manner that:

(i) Facilitates their proper operation, maintenance, inspection, and/or in-line testing using standard procedures.

(ii) Ensures that the assembly will not become submerged due to weather-related conditions such as flooding.

(iii) Ensures compliance with all applicable safety regulations.

(b) Bypass piping installed around any approved backflow prevention assembly is equipped with an approved backflow prevention assembly that affords at least the same level of protection as the assembly that is being bypassed.

(7) Approved backflow prevention assembly inspection and testing. The reclaimed water generator and distributor must ensure that:

(a) Inspections and/or tests of approved air gaps and approved backflow prevention assemblies relied upon to protect the reclaimed water system are conducted:

(i) At the time of installation.

(ii) Annually after installation, or more frequently, if required by the reclaimed water distributor for connections serving premises or systems that pose a high health cross-connection hazard or for assemblies that repeatedly fail.

(iii) After a backflow incident.

(iv) After an assembly is repaired, reinstalled, or relocated or replumbing of an air gap.

(b) Approved backflow prevention assemblies relied upon to protect the reclaimed water system are tested using standards approved for assemblies installed to protect potable water systems in accordance with subsection (3) of this section.

(8) Recordkeeping and reporting. Reclaimed water generators and distributors:

(a) Must keep cross-connection control records for the following time frames:

(i) Records pertaining to the list of properties using reclaimed water must be kept as long as reclaimed water is provided to the property.

(ii) Records regarding information required in subsection (3)(f) of this section must be kept for five years or for the life of the approved backflow prevention assembly, whichever is shorter.

(b) May maintain records or data in any media, such as paper, film, or electronic format.

(c) Must complete the cross-connection control program annual summary report and make all records and reports available as required in the permit conditions.

(d) Must notify the lead agency, potable water purveyor, and local health jurisdiction as soon as possible, but no later than the end of the next business day, when a backflow incident is discovered by the reclaimed water generator or distributor to have contaminated the reclaimed water facility, distribution system, or the potable water system.

NEW SECTION

WAC 173-219-320 Class A and B reclaimed water. Reclaimed water must meet the minimum technology-based treatment methods and treatment reliability standards in WAC 173-219-350 before distribution and use. Reclaimed water must also meet the applicable performance standards established in Table 1 and Table 2 under WAC 173-219-330. Source water for the reclaimed water facility must meet or exceed minimum secondary treatment requirements in WAC 173-221-040 to satisfy the biological oxidation performance standards in this chapter. Raw source water must meet these standards through the reclaimed water treatment process.

(1) Allowable treatment methods for Class B reclaimed water. Class B reclaimed water must also meet the following treatment process train requirements: Biological oxidation followed by disinfection.

(2) Allowable treatment methods for Class A reclaimed water. Class A reclaimed water must also meet one of the following treatment process train requirements:

(a) Biological oxidation, followed by coagulation, filtration, and disinfection demonstrating at least a 4-log virus removal or inactivation.

(b) Biological oxidation followed by membrane filtration, and disinfection demonstrating at least a 4-log virus removal or inactivation.

(c) Combination of biological oxidation and membrane filtration via a membrane bioreactor followed by disinfection demonstrating at least a 4-log virus removal or inactivation.

(d) An alternative treatment method that demonstrates, to the satisfaction of the lead agency, that it provides for equivalent treatment and reliability.

Minimum performance standards for an equivalent process or treatment must demonstrate assurance that reclaimed water quality limits are consistently achieved through proper design, operation, and maintenance of each of the treatment units in the proposed alternative treatment process.

(3) Class A+ reclaimed water. Class A+ reclaimed water requirements must be established by health, on a case-by-case basis, and must have approval of the state board of health before it can be beneficially used for direct potable reuse.

NEW SECTION

WAC 173-219-330 Performance standards. Reclaimed water performance standards. All Class A and Class B reclaimed water at a minimum must meet the technology based performance standards listed in Table 1 and Table 2 for the class of reclaimed water generated at the facility. Compliance shall generally be measured at the end of treatment, however, the reclaimed water permit may specify alternative monitoring locations and water quality limits to ensure compliance with any additional use based requirements as listed in Table 3.

Table 1: Minimum Biological Oxidation Performance Standards

Biological Oxidation		
Parameter[1]	**Minimum Biological Oxidation Performance Standard**	
Dissolved Oxygen	Must be measurably present	
BOD_5	**Monthly Average**	**Weekly Average**
	30 mg/L	45 mg/L
$CBOD_5$	25mg/L	40 mg/L
TSS	30 mg/L	45 mg/L
pH	**Minimum**	**Maximum**
	6 s.u.	9 s.u.
pH (Groundwater recharge)	6.5 s.u.	8.5 s.u.

[1] The parameter must be measured at the end of the unit process.

Table 2: Class A and B Performance Standards

Coagulation/Filtration				
Parameter[1]	**Class A Reclaimed Water**		**Class B Reclaimed Water**	
***Turbidity*[2]**	Monthly Average	Sample Maximum	Monthly Average	Sample Maximum
	2 NTU	5 NTU	Not Applicable	Not Applicable
Membrane Filtration				
	Class A Reclaimed Water		**Class B Reclaimed Water**	
***Turbidity*[2]**	Monthly Average	Sample Maximum	Monthly Average	Sample Maximum
	0.2 NTU	0.5 NTU	Not Applicable	Not Applicable
Disinfection				
	Class A Reclaimed Water		**Class B Reclaimed Water**	
	7-Day Median	Sample Maximum	7-Day Median	Sample Maximum
Total Coliform	2.2 MPN/100 mL or CFU/100 mL	23 MPN/mL or CFU/mL	23 MPN/mL or CFU/mL	240 MPN/mL or CFU/mL
Virus Removal	See disinfection process standards in WAC 173-219-340		Not Applicable	Not Applicable

Denitrification[3]				
	Class A Reclaimed Water		Class B Reclaimed Water	
Total Nitrogen	Monthly Average	Weekly Average	Monthly Average	Weekly Average
	10 mg/L	15 mg/L	Not Applicable	Not Applicable

[1] The parameter must be measured at the end of the unit process.

[2] Sample maximum for turbidity is the highest value for the day that lasts longer than five minutes.

[3] Not applicable for beneficial uses 1-15 listed on Table 3: Use-Based Requirements.

NEW SECTION

WAC 173-219-340 Disinfection process standards. (1) Disinfection process: Class A and Class B reclaimed water. The engineering report must demonstrate, to the satisfaction of the lead agency, that the proposed disinfection method consistently provides the required level of adequate and reliable disinfection to help preserve water quality delivered to the use site. All Class A reclaimed water generation disinfection processes must result in a minimum of 4-log virus removal or inactivation. The disinfection process may use any or all of the following:

(a) **Chlorine.** Where chlorine is used as the disinfectant in the treatment process a minimum chlorine residual of at least 1 mg/L, after a t10 contact time of at least thirty minutes, is required.

The lead agency may require additional protections including defined concentration (C), time (T), or chlorine concentration multiplied by (CT) values as needed to protect public health.

(b) **Ultraviolet light.** The generator must design and install ultraviolet light disinfection processes that conform to recognized standards and engineering practices developed for use in reclaimed water facilities. Acceptable methods include the criteria in the most recent edition of:

(i) *Ultraviolet Disinfection, Guidelines for Drinking Water and Water Reuse, published by the National Water Research Institute* (NWRI) in collaboration with the American Water Works Association Research Foundation.

(ii) Ecology's *Criteria for Sewage Works Design* (orange book).

(iii) Water Environment Federation *MOP-8 Design of Municipal Wastewater Treatment Plants.*

(c) **Other disinfection methods.** Any other disinfection process proposed to the lead agency to meet the performance standard in this section must:

(i) Be in accordance with the most recent edition of ecology's *Criteria for Sewage Works Design* (orange book).

(ii) Demonstrate that the proposed process is equivalent to or better than chlorination or ultraviolet light treatment in this section.

(2) Validation of virus removal. For Class A reclaimed water, virus inactivation performance of the proposed disinfection reactor must be documented during design by using one of the following:

(a) **Chemical disinfection.** Validation of chemical disinfection process must include a tracer study at the facility subject to specific project conditions. Additional validations include:

(i) A challenge study or pilot facility demonstration specific to the project conditions.

(ii) An acceptable third-party challenge study or equipment verification study acceptable to the lead agency.

(iii) Design and operation limits from other regulatory programs applied to the production of reclaimed or recycled water equivalent to Class A reclaimed water as deemed acceptable by the lead agency.

(b) **Ultraviolet disinfection.** Validation of ultraviolet disinfection processes by an acceptable bioassay study conforming to the most recent edition of *Ultraviolet Disinfection, Guidelines for Drinking Water and Water Reuse, published by the National Water Research Institute* (NWRI).

Third-party validation studies that have been performed in off-site qualified test facilities and in accordance with the NWRI/AWWARF guidelines are allowed if approved by the lead agency.

(c) Existing reclaimed water facilities are exempt from the validation requirement unless a disinfection system is modified, replaced, or the facility expects an increase in hydraulic capacity.

NEW SECTION

WAC 173-219-350 Treatment reliability standards. (1) Operational reliability requirements.

(a) Entities must design and construct all reclaimed water facilities to assure operational reliability at all times, consistent with the approved engineering report, per WAC 173-219-210, operate it as directed in approved operations and maintenance manual, per WAC 173-219-240 to meet the reliability requirements in this section.

(b) The generator must demonstrate adequate capacity for failure of one or more treatment trains or standby replacement equipment acceptable to the lead agency such that treatment is maintained at all times with one or more treatment trains not in operation.

(2) Bypassing prohibited. The generator must not bypass inadequately treated wastewater from the approved and permitted reclaimed water facility to the distribution system or to the point of use. Reclaimed water facilities must either store inadequately treated water for additional treatment or have authorization to discharge the wastewater to an NPDES outfall, or another permitted disposal location in accordance with a wastewater discharge permit issued under chapter 90.48, 70.118, or 70.118B RCW. The lead agency may:

(a) Require a reclaimed water generator to maintain either storage or disposal options for inadequately treated water sized to accommodate the full design flow.

(b) Specify when and how the reclaimed water treatment facility must cease or otherwise control the generation, distribution, and use of reclaimed water including, but not limited to, the reduction, loss, failure, or bypass of any unit processes of the reclaimed water facility.

(c) Specify procedures to establish when the treatment processes are sufficiently restored to allow the generation, distribution, or use of the reclaimed water.

(d) Prohibit bypassing of inadequately treated water from the approved reclaimed water facility to the distribution system or to the point of use.

(3) Removed substances. The generator must not resuspend or reintroduce collected screenings, grit, solids, sludge, filter backwash, or other pollutants removed during treatment to the reclaimed water process or to the finished reclaimed water.

(4) Diversion requirements for inadequately treated water. Design requirements for diversions of reclaimed water when performance standards are not met must:

(a) Include all the necessary diversion works, conduits, and pumping and pump back equipment.

(b) Provide a power supply independent of the primary power supply or a standby source for all diversion equipment. An uninterruptible power supply backup is acceptable.

(c) Automated diversions must be capable of autonomously diverting all flow to the approved storage or disposal location based on input from appropriate process sensors and alarms. The reset of the process must be manually monitored to confirm performance standards are being met.

(5) Alarms required. All reclaimed water systems must have and use alarm systems to assure reliability. Alarm systems must:

(a) Provide alarm warning of all of the following:

(i) Loss of power from the primary power supply.

(ii) Failure of required treatment units.

(iii) Interruption of required chemical feeds.

(iv) Other events as required by the lead agency.

(b) Be capable of continuous operations when there is a loss of primary power supply to the facility.

(c) Sound at an attended location or through an automated notification system that will alert the responsible operator in charge or designee available to take immediate corrective action.

NEW SECTION

WAC 173-219-360 Storage and distribution system requirements. This section applies only to the storage or distribution facilities for Class A and Class B reclaimed water.

(1) Operational storage or distribution. The stored reclaimed water must meet the provisions of WAC 173-219-370, unless waived by the lead agency, in consultation with health when health is the nonlead agency. Water that is of equal or better quality than reclaimed water may be used with reclaimed water in storage or distributions systems provided the water supply is protected by an approved air gap in accordance with WAC 51-56-1500.

(2) Notice of facility location(s). The entity must provide distribution system information as described in the operations and maintenance manual, per WAC 173-219-240.

The entity must locate, identify, and provide notice of proposed reclaimed water storage facilities to all owners of potable water supplies with sources located within:

(a) One thousand feet; or

(b) Area determined by lead agency, based on the hydrogeology and soil type of the storage facility area.

(3) Labeling. The generator, distributor, and user must label or use color coded purple (Pantone 512, 522, or other shade approved in the engineering report) for all new reclaimed water piping, valves, outlets, storage facilities, and other appurtenances.

(4) Pipe separation. Reclaimed water distribution systems must, as determined in the reclaimed water engineering report prepared under WAC 173-219-210, provide adequate separation between the underground-reclaimed water lines and sanitary sewer lines, storm sewer lines, potable water lines, and potable water wells, to protect water quality.

(5) Distance to potable water supply intakes. The minimum horizontal distance between Class A and Class B reclaimed water storage and distribution and potable water supply intakes, including wellheads, springs, surface water, or designated groundwater under the influence of surface water, must be two hundred feet and identified in the reclaimed water engineering report prepared under WAC 173-219-210.

(6) Cross-connection control. Potential cross-connections between the reclaimed water and potable water and between the reclaimed water and wastewater, stormwater, or other systems of lower water quality must be managed as described in WAC 173-219-310.

(7) Distribution or use by entities other than the generator. Unless expressly stated otherwise in enforceable ordinances or contracts, the generator is responsible for all reclaimed water facilities and activities inherent to the generation and delivery of the reclaimed water.

(a) The generator and the distributor must coordinate with all potable water system purveyors in those service areas the generator operates or owns facilities for treatment, storage and distribution, and/or reclaimed water uses as required under WAC 173-219-180.

(b) Coordination must include, but is not limited to, cross-connection control requirements under WAC 173-219-310, pipe installation, storage and other facility construction, reclaimed water uses, wellhead protection, emergency responses, and any changes to these to assure protection of public health. The reclaimed water permit may include conditions authorizing the distribution or use of reclaimed water by entities other than the generator via the use agreement if enforceable provisions are in place ensuring construction, operation, maintenance, and use meet all the requirements of the reclaimed water permit, this chapter, and chapter 90.46 RCW.

(8) Other design requirements. Reclaimed water distribution pipe material, valves, valve covers, hydrants, and associated components must meet the standards provided by the lead agency.

(9) Conversion of existing storage tanks or pipe systems for reclaimed water use. In addition to the requirements in this section, the generator must apply for and receive approval from the lead agency prior to converting existing

potable water storage and pipe systems to reclaimed water storage and/or distribution. Prior to approval, the lead agency may require project specific design details for conversion of existing infrastructure (storage tanks and pipe systems) for storage and distribution of reclaimed water.

If the lead agency approves the conversion of existing storage and pipe systems for reclaimed water use, the generator must identify the water conveyed as nonpotable reclaimed water, in conformance with chapter 51-56 WAC, where applicable.

(10) Distribution by transport vehicles. The lead agency may allow distribution of reclaimed water using tank trucks or similar transport vehicles to distribute reclaimed water provided:

(a) Vehicles are clearly identified with reclaimed water advisory signs such as "nonpotable water."

(b) Vehicles used for transporting hazardous or dangerous waste are never used to transport reclaimed water.

(c) Vehicles used for transporting potable water are never used to transport reclaimed water.

NEW SECTION

WAC 173-219-370 Maintenance of chlorine residual. The generator and distributor must maintain a chlorine residual as follows:

(1) Chlorine residual in the distribution system. A minimum chlorine residual of ≥0.2 mg/L free chlorine or ≥0.5 mg/L total chlorine is required in pipeline distribution systems conveying the reclaimed water from the facility to the point of use to prevent biological growth, prevent deterioration of reclaimed water quality, and to protect public health.

The lead agency may waive or modify the requirements for maintaining a chlorine residual during storage or conveyance to the point of use, if the generator demonstrates a benefit from reducing or eliminating the chlorine residual. When ecology is lead agency, it must notify health of any such proposed or requested waiver or permit modification.

(2) Chlorine residual for use areas. A chlorine residual is not required in reclaimed water impoundments, storage ponds, and storage tanks at the point of use, or for conveyance along natural streams, lakes, surface waters, or groundwaters of the state.

NEW SECTION

WAC 173-219-380 General use-based requirements. (1) Site evaluation. The lead agency may include reclaimed water permit conditions for additional use area requirements in sensitive or critical areas, or where deemed that additional measures are needed or the lead agency may determine use in a proposed area is infeasible, and not approve it. The generator, responsible person or persons must:

(a) Assure that any proposed use site is appropriate for reclaimed water use, is not prohibited by local codes or ordinances, and is protective of public health and the environment.

(b) Provide site evaluation information to the lead agency.

(2) Signage or advisory notification. The generator, distributor, or user must notify the public and employees at the use site of the reclaimed water in all use areas by the posting of advisory signs, distribution of written advisory notices, or both.

(a) Signage must be clearly visible, emphasize the color purple, and read "Reclaimed Water - Do Not Drink," or other language acceptable to health or required by chapter 51-56 WAC when applicable.

(b) Health may approve other methods of notification that provide equivalent public health protection. The labeling, pipeline separation, and other design requirements of WAC 173-219-360 apply to all uses unless otherwise specified by the lead agency.

(3) Use confined to site. The generator, distributor, and user must confine Class B reclaimed water, including runoff and spray, to the use area in the permit and/or the use agreement.

(4) Restrict operation. The generator, distributor, and user must limit operation of all reclaimed water valves and outlets to authorized personnel. They must control or restrict access to hose bibs on reclaimed water lines.

(5) Labeling and design. The labeling, pipeline separation, and other design requirements of WAC 173-219-360, apply to all uses unless otherwise specified by the lead agency.

NEW SECTION

WAC 173-219-390 Specific use-based requirements. The lead agency may consider and approve other uses not listed in Table 3 below on a case-by-case basis.

Table 3: Use-Based Performance Standards

Beneficial Use	Reclaimed Water Class Requirements	Additional Requirements
Indoor Use		
(1) Commercial or industrial facilities, buildings, apartments, condominiums, hotels, and motels (toilet/urinal flushing or laundry).	Class A	Residents must not have access to the plumbing system for repairs or modifications. Where the residents have access to the plumbing system for repairs or modifications no use of reclaimed water is permitted.

Beneficial Use	Reclaimed Water Class Requirements	Additional Requirements
Commercial, Industrial and Institutional Uses[4]		
(2) Commercial, industrial and institutional uses with public contact.	Class A	
(3) Commercial, industrial and institutional uses with environmental contact.	Class B	Must minimize adverse impacts to the environment and dependent beneficial uses.
(4) Commercial, industrial and institutional uses with restricted access.	Class B	• Contact limited to qualified personnel. • Little potential for health impacts.
(5) Public contact (including public water features).	Class A	
Land Application or Irrigation[3]		
(6) Landscape irrigation with direct or indirect public access.	Class A	
(7) Landscape irrigation with restricted access and contact.	Class B	Contact limited to qualified personnel or used at times of no, or very limited public access.
(8) Irrigation of food crops.	Class A	
(9) Frost protection of orchard crops.	Class B	• Must not apply within 15 days of harvest. • 50 foot setback from public access.
(10) Irrigation of nonfood crops.	Class B	50 foot setback from public access.
(11) Irrigation of orchards or vineyards.	Class B	50 foot setback from public access.
(12) Irrigation of process food crops.	Class B	50 foot setback from public access.
(13) Irrigation of trees, fodder, fiber, or seed crops in pastures not accessed by milking animals.	Class B	50 foot setback from public access.
(14) Irrigation of trees, fodder, fiber, or seed crops in pastures accessed by milking animals.	Class A	
Release to Wetlands		
(15) Category I wetlands.	No reclaimed water use	
(16) Category II wetlands with special characteristics.	No reclaimed water use	On a case-by-case basis, Class A reclaimed water may be used, if it can be demonstrated that no existing significant wetlands functions will be decreased and a net environmental benefit can be demonstrated as required in WAC 173-219-210 (2)(h)(vi).
(17) Category II wetlands without special characteristics.	Class A	Unless it can be demonstrated that no existing significant wetlands functions will be decreased and overall net environmental benefits will result from the release of reclaimed water must not exceed on average annual basis: • 20 mg/L BOD, 20 mg/L TSS, 3 mg/L TKN, and 1 mg/L phosphorous. • Annual hydraulic load ≤2 cm/day.

Beneficial Use	Reclaimed Water Class Requirements	Additional Requirements
(18) Category III or IV wetlands.	Class A	Unless it can be demonstrated that no existing significant wetlands functions will be decreased and overall net environmental benefits will result from the release of reclaimed water must not exceed on average annual basis: • 20 mg/L BOD, 20 mg/L TSS, 3 mg/L N TKN, and 1 mg/L phosphorous. • Annual hydraulic load ≤3 cm/day.
(19) Depressional wetlands.	Class A	• Maximum increase of 10 cm above the natural average monthly water level. • This use excludes Category I and Category II with special characteristics as provided for in (1) and (2) of this section.
(20) Constructed beneficial wetlands with public access.	Class A	
(21) Constructed beneficial wetlands with no public access.	Class A or B	
Surface Water Augmentation		
(22) Surface water augmentation (including direct via impoundments, rivers, reservoirs or lakes and indirect via groundwater or bank infiltration).	Class A or B	Criteria established on a case-by-case basis to protect existing beneficial uses (recreational, environmental or other). Must meet applicable requirements of: • Chapter 173-201A WAC (surface water standards). • WAC 246-290-310 (drinking water maximum contaminant levels).
Groundwater Recharge		
(23) Indirect groundwater recharge (surface percolation, subsurface percolation or vadose wells).	Class A or B	Criteria established on a case-by-case basis. Must meet applicable requirements of: • Chapter 173-200 WAC (groundwater standards). • Chapter 173-218 WAC when using a UIC well (underground injection control program). • WAC 246-290-310 (drinking water maximum contaminant levels in finished reclaimed water or at alternative point of compliance). • Minimum physical setback of 200 feet, and sanitary control area requirements, whichever is greater, around water supply wells as outlined in WAC 246-290-135.

Beneficial Use	Reclaimed Water Class Requirements	Additional Requirements
(24) Direct groundwater recharge (aquifer recharge).	Class A	Criteria established on a case-by-case basis. Must meet applicable requirements of: • Chapter 173-200 WAC (groundwater standards). • Chapter 173-218 WAC (UIC program). • WAC 246-290-310 (drinking water maximum contaminant levels in finished reclaimed water product or at alternative point of compliance). • Minimum physical setback of 200 feet, and sanitary control zone area requirements, whichever is greater, around water supply wells as outlined in WAC 246-290-135.
(25) Recovery of reclaimed water stored in an aquifer (aquifer recovery).	Class A	The effects of recovering stored reclaimed water from an aquifer must be demonstrated using the criteria presented in the engineering report. They must not negatively impact groundwater quality, the surrounding environment, or water rights holders.
Direct Potable Reuse		
(26) Direct potable reuse.	Class A+	Class A+ treatment criteria will be established on a case-by-case basis by health. Direct potable reuse is not a beneficial use of reclaimed water unless and until the group A potable water purveyor or reclaimed water generator has applied for and received a waiver from the state board of health under WAC 246-290-060(4).

[3] Not applicable for beneficial uses 1-15 listed on Table 3: Use-Based Requirements.

[4] Class A reclaimed water may be used with no additional requirements.

WSR 17-17-155
PROPOSED RULES
HEALTH CARE AUTHORITY
(Washington Apple Health)
[Filed August 23, 2017, 8:49 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 17-04-099.

Title of Rule and Other Identifying Information: WAC 182-535-1050 Dental-related services—Definitions, 182-535-1060 Dental-related services—Client eligibility, 182-535-1066 Dental-related services—Medical care services clients, 182-535-1070 Dental-related services—Provider information, 182-535-1079 Dental-related services—General, 182-535-1082 Dental-related services—Covered—Preventative services, 182-535-1084 Dental-related services—Covered—Restorative services, 182-535-1086 Dental-related services—Covered—Endodontic services, 182-535-1088 Dental-related services—Covered—Periodontic services, 182-535-1090 Dental-related services—Covered—Prosthodontics (removable), 182-535-1094 Dental-related services—Covered—Oral and maxillofacial surgery services, 182-535-1098 Dental-related services—Covered—Adjunctive general services, 182-535-1099 Dental-related services for clients of the developmental disabilities administration of the department of social and health services, 182-535-1100 Dental-related services—Not covered, 182-535-1220 Obtaining prior authorization for dental-related services, 182-535-1245 Access to baby and child dentistry (ABCD) program, 182-535A-0010 Orthodontic services—Defini-

tions, 182-535A-0020 Orthodontic services—Client eligibility, 182-535A-0040 Orthodontic treatment and orthodontic-related services—Covered, noncovered, and limitations to coverage, and 182-535A-0060 Orthodontic treatment and orthodontic-related services—Payment.

Hearing Location(s): On September 26, 2017, at 10:00 a.m., at the Cherry Street Plaza Building, Sue Crystal Room 106A, 626 8th Avenue, Olympia, WA 98504. Metered public parking is available street side around building. A map is available at www.hca.wa.gov/documents/directions_to_csp.pdf or directions can be obtained by calling (360) 725-1000.

Date of Intended Adoption: Not sooner than September 27, 2017.

Submit Written Comments to: Health Care Authority (HCA) Rules Coordinator, P.O. Box 42716, Olympia, WA 98504-2716, email arc@hca.wa.gov, fax 360-589-9727, by September 26, 2017.

Assistance for Persons with Disabilities: Contact Amber Lougheed, phone 360-725-1349, TTY 800-848-5429 or 711, email amber.lougheed@hca.wa.gov, by September 22, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The agency is amending several sections of chapter 182-535 WAC, Dental-related services, and chapter 182-535A WAC, Orthodontic services. Amendments are being made to add, remove, or update definitions; add covered services; clarify or change coverage limits; remove or update some prior authorization requirements; and clarify processes described in WAC. The revisions also include housekeeping changes.

Reasons Supporting Proposal: See Purpose above.

Statutory Authority for Adoption: RCW 41.05.021, 41.05.160.

Statute Being Implemented: RCW 41.05.021, 41.05.160.

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

Name of Proponent: HCA, governmental.

Name of Agency Personnel Responsible for Drafting: Katie Pounds, P.O. Box 42716, Olympia, WA 98504-2716, 360-725-1346; Implementation and Enforcement: Casey Zimmer, P.O. Box 45502, Olympia, WA 98504-5502, 360-725-1822.

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. RCW 34.05.328 does not apply to HCA rules unless requested by the joint administrative rules review committee or applied voluntarily.

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

Is exempt under RCW 19.85.025(4).

Explanation of exemptions: The agency has determined that the proposed filing does not impose a disproportionate cost impact on small businesses or nonprofits.

August 23, 2017
Wendy Barcus
Rules Coordinator

AMENDATORY SECTION (Amending WSR 16-13-110, filed 6/20/16, effective 8/1/16)

WAC 182-535-1050 Dental-related services—Definitions. The following definitions and abbreviations and those found in chapter 182-500 WAC apply to this chapter. The medicaid agency also uses dental definitions found in the American Dental Association's Current Dental Terminology (CDT) and the American Medical Association's Physician's Current Procedural Terminology (CPT). Where there is any discrepancy between the CDT or CPT and this section, this section prevails. (CPT is a trademark of the American Medical Association.)

"Access to baby and child dentistry (ABCD)" is a program to increase access to dental services ((~~in targeted areas~~)) for medicaid eligible infants, toddlers, and preschoolers ((~~up~~)) through ((~~the~~)) age ((~~of~~)) five. See WAC ((~~182-535-1300~~)) 182-535-1245 for specific information.

"Alternate living facility" is defined in WAC 182-513-1100.

"American Dental Association (ADA)" is a national organization for dental professionals and dental societies.

"Anterior" refers to teeth (maxillary and mandibular incisors and canines) and tissue in the front of the mouth. Permanent maxillary anterior teeth include teeth six, seven, eight, nine, ten, and eleven. Permanent mandibular anterior teeth include teeth twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, and twenty-seven. Primary maxillary anterior teeth include teeth C, D, E, F, G, and H. Primary mandibular anterior teeth include teeth M, N, O, P, Q, and R.

((~~**"Asymptomatic"** means having or producing no symptoms.~~

~~**"Base metal"** means dental alloy containing little or no precious metals.~~))

"Behavior management" means using ((~~the assistance of~~)) one additional ((~~dental~~)) professional staff, who is employed by the dental provider or clinic and who is not delivering dental treatment to the client, to manage the ((~~behavior of a client~~)) client's behavior to facilitate ((~~the delivery of~~)) dental treatment delivery.

"By-report" ((-)) means a method of reimbursement in which the department determines the amount it will pay for a service when the rate for that service is not included in the agency's published fee schedules. Upon request the provider must submit a "report" ((~~which~~)) that describes the nature, extent, time, effort and/or equipment necessary to deliver the service.

"Caries" means carious lesions or tooth decay through the enamel or decay ((~~of~~)) on the root surface.

• **"Incipient caries"** means the beginning stages of caries or decay, or subsurface demineralization.

• **"Rampant caries"** means a sudden onset of widespread caries that affects most of the teeth and penetrates quickly to the dental pulp.

"Comprehensive oral evaluation" means a thorough evaluation and documentation of a client's dental and medical history to include extra-oral and intra-oral hard and soft tissues, dental caries, missing or unerupted teeth, restorations, occlusal relationships, periodontal conditions (including periodontal charting), hard and soft tissue anomalies, and oral cancer screening.

"Conscious sedation" ((~~is~~)) means a drug-induced depression of consciousness during which a client responds purposefully to verbal commands, either alone or accompanied by light tactile stimulation. No interventions are required to maintain a patent airway, spontaneous ventilation is adequate, and cardiovascular function is maintained.

"Core buildup" ((~~refers to~~)) means the building up of clinical crowns, including pins.

"Coronal" ((~~is~~)) means the portion of a tooth that is covered by enamel.

((~~**"Coronal polishing"** is a mechanical procedure limited to the removal of plaque and stain from exposed tooth surfaces.~~))

"Crown" means a restoration covering or replacing ((~~part or~~)) the whole clinical crown of a tooth.

"Current dental terminology (CDT)" ((~~is~~)) means a systematic listing of descriptive terms and identifying codes for reporting dental services and procedures performed by dental practitioners. CDT is published by the Council on Dental Benefit Programs of the American Dental Association (ADA).

"Current procedural terminology (CPT)" ((~~is~~)) means a systematic listing of descriptive terms and identifying codes for reporting medical services, procedures, and interventions performed by physicians and other practitioners who provide physician-related services. CPT is copyrighted and published annually by the American Medical Association (AMA).

"Decay" ((~~is~~)) means a term for caries or carious lesions and means decomposition of tooth structure.

"Deep sedation" ((~~is~~)) means a drug-induced depression of consciousness during which a client cannot be easily aroused, ventilatory function may be impaired, but the client responds to repeated or painful stimulation.

"Dental general anesthesia" see **"general anesthesia."**

"Dentures" means an artificial replacement for natural teeth and adjacent tissues, and includes complete dentures, immediate dentures, overdentures, and partial dentures.

"Denturist" means a person licensed under chapter 18.30 RCW to make, construct, alter, reproduce, or repair a denture.

"Edentulous" means lacking teeth.

"Endodontic" means the etiology, diagnosis, prevention and treatment of diseases and injuries of the pulp and associated periradicular conditions.

"EPSDT" means the agency's early and periodic screening, diagnosis, and treatment program for clients age twenty ((~~years of age~~)) and younger as described in chapter 182-534 WAC.

"Extraction" see **"simple extraction"** and **"surgical extraction."**

"Flowable composite" ((~~is~~)) means a diluted low-viscosity-filled resin-based composite dental restorative material that is used in cervical restorations and small, low stress bearing occlusal restorations.

"Fluoride varnish, rinse, foam or gel" ((~~is~~)) means a substance containing dental fluoride which is applied to teeth, not including silver diamine fluoride.

"General anesthesia" ((~~is~~)) means a drug-induced loss of consciousness during which a client is not arousable even by painful stimulation. The ability to independently maintain ventilatory function is often impaired. Clients may require assistance in maintaining a patent airway, and positive pressure ventilation may be required because of depressed spontaneous ventilation or drug-induced depression of neuromuscular function. Cardiovascular function may be impaired.

((~~**"High noble metal"** is a dental alloy containing at least sixty percent pure gold.~~))

"Interim therapeutic restoration (ITR)" means the placement of an adhesive restorative material following caries debridement by hand or other method for the management of early childhood caries. It is not considered a definitive restoration.

"Limited oral evaluation" ((~~is~~)) means an evaluation limited to a specific oral health condition or problem. Typically a client receiving this type of evaluation has a dental emergency, such as trauma or acute infection.

"Limited visual oral assessment" ((~~is~~)) means an assessment by a dentist or dental hygienist ((~~to determine the need for fluoride treatment and/or when triage services are provided in settings other than dental offices or dental clinics~~)) provided in a setting other than a dental office or dental clinic to identify signs of disease and the potential need for referral for diagnosis.

((~~**"Major bone grafts"** is a transplant of solid bone tissue(s).~~))

"Medically necessary" see WAC 182-500-0070.

((~~**"Minor bone grafts"** is a transplant of nonsolid bone tissue(s), such as powdered bone, buttons, or plugs.~~

~~**"Noble metal"** is a dental alloy containing at least twenty-five percent but less than sixty percent pure gold.~~))

"Oral evaluation" see **"comprehensive oral evaluation."**

"Oral hygiene instruction" means instruction for home oral hygiene care, such as tooth brushing techniques or flossing.

((~~**"Oral prophylaxis"** is the dental procedure of scaling and polishing which includes removal of calculus, plaque, and stains from teeth.~~))

"Partials" or **"partial dentures"** ((~~are~~)) mean a removable prosthetic appliance that replaces missing teeth ((~~in one~~)) on either arch.

"Periodic oral evaluation" ((~~is~~)) means an evaluation performed on a patient of record to determine any changes in the client's dental or medical status since a previous comprehensive or periodic evaluation.

"Periodontal maintenance" ((~~is~~)) means a procedure performed for clients who have previously been treated for periodontal disease with surgical or nonsurgical treatment. It includes the removal of supragingival and subgingival microorganisms, calculus, and deposits with hand and mechanical instrumentation, an evaluation of periodontal conditions, and a complete periodontal charting as appropriate.

"Periodontal scaling and root planing" ((~~is~~)) means a procedure to remove plaque, calculus, microorganisms, and rough cementum and dentin from tooth surfaces. This includes hand and mechanical instrumentation, an evaluation

of periodontal conditions, and a complete periodontal charting as appropriate.

"Posterior" ((~~refers to~~)) means the teeth (maxillary and mandibular premolars and molars) and tissue towards the back of the mouth. Permanent maxillary posterior teeth include teeth one, two, three, four, five, twelve, thirteen, fourteen, fifteen, and sixteen. Permanent mandibular posterior teeth include teeth seventeen, eighteen, nineteen, twenty, twenty-one, twenty-eight, twenty-nine, thirty, thirty-one, and thirty-two. Primary maxillary posterior teeth include teeth A, B, I, and J. Primary mandibular posterior teeth include teeth K, L, S, and T.

"Prophylaxis" means the dental procedure of scaling and polishing which includes removal of calculus, plaque, and stains from teeth.

"Proximal" ((~~is~~)) means the surface of the tooth near or next to the adjacent tooth.

"Radiograph (X ray)" ((~~is~~)) means an image or picture produced on a radiation sensitive film emulsion or digital sensor by exposure to ionizing radiation.

"Reline" means to resurface the tissue side of a denture with new base material or soft tissue conditioner in order to achieve a more accurate fit.

"Root canal" ((~~is~~)) means the chamber within the root of the tooth that contains the pulp.

"Root canal therapy" ((~~is~~)) means the treatment of the pulp and associated periradicular conditions.

"Root planing" ((~~is~~)) means a procedure to remove plaque, calculus, microorganisms, and rough cementum and dentin from tooth surfaces. This includes hand and mechanical instrumentation.

"Scaling" ((~~is~~)) means a procedure to remove plaque, calculus, and stain deposits from tooth surfaces.

"Sealant" ((~~is~~)) means a dental material applied to teeth to prevent dental caries.

"Simple extraction" ((~~is the routine removal of a tooth.~~

~~**"Six-months"** is equal to one hundred eighty days~~)) means the extraction of an erupted or exposed tooth to include the removal of tooth structure, minor smoothing of socket bone, and closure, as necessary.

"Standard of care" means what reasonable and prudent practitioners would do in the same or similar circumstances.

"Surgical extraction" ((~~is the removal of a tooth by cutting of the gingiva and bone~~)) means the extraction of an erupted or impacted tooth requiring removal of bone and/or sectioning of the tooth, and including elevation of mucoperiosteal flap if indicated. This includes ((~~soft tissue extractions, partial boney extractions, and complete boney extractions.~~

~~**"Symptomatic"** means having symptoms (e.g., pain, swelling, and infection)~~)) related cutting of gingiva and bone, removal of tooth structure, minor smoothing of socket bone, and closure.

"Temporomandibular joint dysfunction (TMJ/TMD)" ((~~is~~)) means an abnormal functioning of the temporomandibular joint or other areas secondary to the dysfunction.

"Therapeutic pulpotomy" ((~~is~~)) means the surgical removal of a portion of the pulp (inner soft tissue of a tooth), to retain the healthy remaining pulp.

"Usual and customary" means the fee that the provider usually charges nonmedicaid customers for the same service or item. This is the maximum amount that the provider may bill the agency.

((~~**"Wisdom teeth"** are the third molars, teeth one, sixteen, seventeen, and thirty-two.~~

~~**"Xerostomia"** is a dryness of the mouth due to decreased saliva.~~))

AMENDATORY SECTION (Amending WSR 14-08-032, filed 3/25/14, effective 4/30/14)

WAC 182-535-1060 Dental-related services—Client eligibility. (1) Refer to WAC 182-501-0060 to see which ((~~Washington~~)) apple health programs include dental-related services in their benefit package.

(2) Managed care clients are eligible under ((~~Washington~~)) apple health fee-for-service for covered dental-related services not covered by their managed care organization (MCO) ((~~plan~~)), subject to the provisions of this chapter and other applicable agency rules.

(3) See WAC 182-507-0115 for rules for clients eligible under ((~~an~~)) the alien emergency medical program.

(4) Exception to rule procedures as described in WAC ((~~182-501-0169~~)) 182-501-0160 are not available for services that are excluded from a client's benefit package.

AMENDATORY SECTION (Amending WSR 14-08-032, filed 3/25/14, effective 4/30/14)

WAC 182-535-1066 Dental-related services—Medical care services clients (formerly general assistance (GA)). (1) The medicaid agency covers the following dental-related services for a medical care services client ((~~as listed in~~)) under WAC 182-501-0060 when the services are provided by a dentist to assess, diagnose, and treat pain, infection, or trauma of the mouth, jaw, or teeth, including treatment of postsurgical complications, such as dry socket:

(a) Limited oral evaluation;

(b) Periapical or bitewing radiographs (X rays) that are medically necessary to diagnose only the client's chief complaint;

(c) Palliative treatment to relieve dental pain or infection;

(d) Pulpal debridement to relieve dental pain or infection; and

(e) Tooth extraction.

(2) Tooth extractions require prior authorization when:

(a) The extraction of a tooth or teeth results in the client becoming edentulous in the maxillary arch or mandibular arch; or

(b) A full mouth extraction is necessary because of radiation therapy for cancer of the head and neck.

(3) Each dental-related procedure described under this section is subject to the coverage limitations listed in this chapter.

AMENDATORY SECTION (Amending WSR 14-08-032, filed 3/25/14, effective 4/30/14)

WAC 182-535-1070 Dental-related services—Provider information. (1) The following providers are eligible to enroll with the medicaid agency to furnish and bill for dental-related services provided to eligible clients:

(a) Persons currently licensed by the state of Washington to:

(i) Practice dentistry or specialties of dentistry.

(ii) Practice as dental hygienists.

(iii) Practice as denturists.

(iv) Practice anesthesia by:

(A) Providing conscious sedation with parenteral or multiple oral agents, deep sedation, or general anesthesia as an anesthesiologist or dental anesthesiologist;

(B) Providing conscious sedation with parenteral or multiple oral agents, deep sedation, or general anesthesia as a ((~~certified registered nurse anesthetist (CRNA) under WAC 246-817-180~~)) qualified professional under chapter 246-817 WAC; or

(C) Providing conscious sedation with parenteral or multiple oral agents as a dentist, when the dentist has a conscious sedation permit issued by the department of health (DOH) that is current at the time the billed service(s) is provided; or

(D) Providing deep sedation or general anesthesia as a dentist when the dentist has a general anesthesia permit issued by DOH that is current at the time the billed service(s) is provided.

(v) Practice medicine and osteopathy for:

(A) Oral surgery procedures; or

(B) Providing fluoride varnish under EPSDT.

(b) Facilities that are:

(i) Hospitals currently licensed by the DOH;

(ii) Federally qualified health centers (FQHCs);

(iii) Medicare-certified ambulatory surgical centers (ASCs);

(iv) Medicare-certified rural health clinics (RHCs); or

(v) Community health centers.

(c) Participating local health jurisdictions.

(d) Bordering city or out-of-state providers of dental-related services who are qualified in their states to provide these services.

(2) Subject to the restrictions and limitations in this section and other applicable WAC, the agency pays licensed providers participating in the agency's dental program for only those services that are within their scope of practice.

(3) For the dental specialty of oral and maxillofacial surgery, the agency requires a dentist to meet the following requirements in order to be reimbursed for oral and maxillofacial surgery:

(a) The provider's professional organization guidelines;

(b) The department of health (DOH) requirements in chapter 246-817 WAC; and

(c) Any applicable DOH medical, dental, and nursing anesthesia regulations.

(4) See WAC 182-502-0020 for provider documentation and record retention requirements. The agency requires additional dental documentation under specific sections in this chapter and as required by DOH under chapter 246-817 WAC.

(5) See WAC 182-502-0100 and 182-502-0150 for provider billing and payment requirements. Enrolled dental providers who do not meet the conditions in subsection (3) of this section must bill all claims using only the CDT codes for services that are identified in WAC and the agency's published billing instructions and provider notices. The agency does not reimburse for billed CPT codes when the dental provider does not meet the requirements in subsection (3)(a) of this section.

(6) See WAC 182-502-0160 for regulations concerning charges billed to clients.

(7) See WAC 182-502-0230 for provider payment reviews and dispute rights.

(8) See chapter 182-502A WAC for provider audits and the audit appeal process.

AMENDATORY SECTION (Amending WSR 16-18-033, filed 8/26/16, effective 9/26/16)

WAC 182-535-1079 Dental-related services—General. (1) Clients described in WAC 182-535-1060 are eligible to receive the dental-related services described in this chapter, subject to coverage limitations, restrictions, and client age requirements identified for a specific service. The medicaid agency pays for dental-related services and procedures provided to eligible clients when the services and procedures:

(a) Are part of the client's dental benefit package;

(b) Are within the scope of an eligible client's Washington apple health program;

(c) Are medically necessary;

(d) Meet the agency's ((~~prior~~)) authorization requirements, if any;

(e) Are documented in the client's dental record in accordance with chapter 182-502 WAC and meet the department of health's requirements in WAC 246-817-305 and 246-817-310;

(f) Are within accepted dental or medical practice standards;

(g) Are consistent with a diagnosis of a dental disease or dental condition;

(h) Are reasonable in amount and duration of care, treatment, or service; and

(i) Are listed as covered in the agency's rules and published billing instructions and fee schedules.

(2) For orthodontic services, see chapter 182-535A WAC.

(3) The agency requires site-of-service prior authorization, in addition to prior authorization of the procedure, if applicable, for nonemergency dental-related services performed in a hospital or an ambulatory surgery center when:

(a) A client is not a client of the developmental disabilities administration of the department of social and health services (DSHS) according to WAC 182-535-1099;

(b) A client is age nine or older;

(c) The service is not listed as exempt from the site-of-service authorization requirement in the agency's current published dental-related services fee schedule or billing instructions; and

(d) The service is not listed as exempt from the prior authorization requirement for deep sedation or general anesthesia (see WAC 182-535-1098 (1)(c)(v)).

(4) To be eligible for payment, dental-related services performed in a hospital or an ambulatory surgery center must be listed in the agency's current published outpatient fee schedule or ambulatory surgery center fee schedule. The claim must be billed with the correct procedure code for the site-of-service.

(5) Under the early and periodic screening ((~~and~~)), diagnostic, and treatment (EPSDT) program, clients age twenty and younger may be eligible for dental-related services listed as noncovered. The standard for coverage for EPSDT is found in chapter 182-534 WAC.

(6) The agency evaluates a request for dental-related services that are:

(a) In excess of the dental program's limitations or restrictions, according to WAC 182-501-0169; and

(b) Listed as noncovered, according to WAC 182-501-0160.

AMENDATORY SECTION (Amending WSR 16-18-033, filed 8/26/16, effective 9/26/16)

WAC 182-535-1082 Dental-related services—Covered—Preventive services. Clients described in WAC 182-535-1060 are eligible for the dental-related preventive services listed in this section, subject to coverage limitations and client-age requirements identified for a specific service.

(1) **((~~Dental~~)) Prophylaxis.** The medicaid agency covers prophylaxis as follows. Prophylaxis:

(a) Includes scaling and polishing procedures to remove coronal plaque, calculus, and stains when performed on primary or permanent dentition.

(b) Is limited to once every:

(i) Six months for clients age eighteen and younger;

(ii) Twelve months for clients age nineteen and older; or

(iii) ((~~Four~~)) Six months for a client residing in ((~~a~~)) an alternate living facility or nursing facility.

(c) Is reimbursed ((~~only~~)) according to (b) of this subsection when the service is performed:

(i) At least six months after periodontal scaling and root planing, or periodontal maintenance services, for clients from age thirteen through eighteen;

(ii) At least twelve months after periodontal scaling and root planing, periodontal maintenance services, for clients age nineteen and older; or

(iii) At least six months after periodontal scaling and root planing, or periodontal maintenance services for clients who reside in ((~~a~~)) an alternate living facility or nursing facility.

(d) Is not reimbursed separately when performed on the same date of service as periodontal scaling and root planing, periodontal maintenance, gingivectomy, ((~~or~~)) gingivoplasty, or scaling in the presence of generalized moderate or severe gingival inflammation.

(e) Is covered for clients of the developmental disabilities administration of the department of social and health services (DSHS) according to (a), (c), and (d) of this subsection and WAC 182-535-1099.

(2) **Topical fluoride treatment.** The agency covers the following per client, per provider or clinic:

(a) Fluoride rinse, foam or gel, fluoride varnish, including disposable trays, for clients age six and younger, ((~~every four months~~)) three times within a twelve-month period with a minimum of one hundred ten days between applications.

(b) Fluoride rinse, foam or gel, fluoride varnish, including disposable trays, for clients from age seven through eighteen, ((~~every six months~~)) two times within a twelve-month period with a minimum of one hundred seventy days between applications.

(c) Fluoride rinse, foam or gel, fluoride varnish, including disposable trays, every ((~~four months~~)) three times within a twelve-month period during orthodontic treatment with a minimum of one hundred ten days between applications.

(d) Fluoride rinse, foam or gel, fluoride varnish, including disposable trays, for clients age nineteen and older, once within a twelve-month period.

(e) Fluoride rinse, foam or gel, fluoride varnish, including disposable trays, for clients who reside in alternate living facilities ((~~as defined in WAC 182-513-1301~~)) or nursing facilities, every ((~~four months~~)) two times within a twelve-month period with a minimum of one hundred seventy days between applications.

(f) Additional topical fluoride applications only on a case-by-case basis and when prior authorized.

(g) Topical fluoride treatment for clients of the developmental disabilities administration of DSHS according to WAC 182-535-1099.

(3) **Oral hygiene instruction.** Includes instruction for home care such as tooth brushing technique, flossing, and use of oral hygiene aids. Oral hygiene instruction is included as part of the global fee for prophylaxis for clients age nine and older. The agency covers individualized oral hygiene instruction((~~, per client, as follows~~)) for clients age eight and younger when all of the following criteria are met:

(a) ((~~For clients age eight and younger. For clients age nine and older, oral hygiene instruction is included as part of the global fee for oral prophylaxis.~~

~~(b) Once~~)) Only once per client every six months within a twelve-month period.

(((~~(c)~~))) (b) Only when not performed on the same date of service as prophylaxis or within six months from a prophylaxis by the same provider or clinic.

(((~~(d)~~))) (c) Only when provided by a licensed dentist or a licensed dental hygienist and the instruction is provided in a setting other than a dental office or clinic.

(4) **Tobacco cessation counseling for the control and prevention of oral disease.** The agency covers tobacco cessation counseling for pregnant women only. See WAC 182-531-1720.

(5) **Sealants.** The agency covers:

(a) Sealants for clients age twenty and younger and clients any age of the developmental disabilities administration of DSHS.

(b) Sealants, other than glass ionomer cement, only when used on a mechanically or chemically prepared enamel surface.

(c) Sealants once per tooth:

(i) In a three-year period for clients age twenty and younger; and

(ii) In a two-year period for clients any age of the developmental disabilities administration of DSHS according to WAC 182-535-1099.

(d) Sealants only when used on the occlusal surfaces of:

(i) Permanent teeth two, three, fourteen, fifteen, eighteen, nineteen, thirty, and thirty-one; and

(ii) Primary teeth A, B, I, J, K, L, S, and T.

(e) Sealants on noncarious teeth or teeth with incipient caries.

(f) Sealants only when placed on a tooth with no preexisting occlusal restoration, or any occlusal restoration placed on the same day.

(g) Sealants are included in the agency's payment for occlusal restoration placed on the same day.

(h) Additional sealants not described in this subsection on a case-by-case basis and when prior authorized.

(6) **Space maintenance.** The agency covers:

(a) One fixed unilateral space maintainer per quadrant or one fixed bilateral space maintainer per arch, including recementation, for missing primary molars A, B, I, J, K, L, S, and T, when:

(i) Evidence of pending permanent tooth eruption exists; and

(ii) The service is not provided during approved orthodontic treatment.

(b) Replacement space maintainers on a case-by-case basis when ((~~prior~~)) authorized.

(c) The removal of fixed space maintainers when removed by a different provider.

(i) Space maintainer removal is allowed once per appliance.

(ii) Reimbursement for space maintainer removal is included in the payment to the original provider that placed the space maintainer.

AMENDATORY SECTION (Amending WSR 16-18-033, filed 8/26/16, effective 9/26/16)

WAC 182-535-1084 Dental-related services—Covered—Restorative services. Clients described in WAC 182-535-1060 are eligible for the dental-related restorative services listed in this section, subject to coverage limitations, restrictions, and client age requirements identified for a specific service.

(1) **Amalgam and resin restorations for primary and permanent teeth.** The medicaid agency considers:

(a) Tooth preparation, acid etching, all adhesives (including bonding agents), liners and bases, indirect and direct pulp capping, polishing, and curing as part of the restoration.

(b) Occlusal adjustment of either the restored tooth or the opposing tooth or teeth as part of the restoration.

(c) Restorations placed within six months of a crown preparation by the same provider or clinic to be included in the payment for the crown.

(2) **Limitations for all restorations.** The agency:

(a) Considers multiple restoration involving the proximal and occlusal surfaces of the same tooth as a multisurface restoration, and limits reimbursement to a single multisurface restoration.

(b) Considers multiple restorative resins, flowable composite resins, or resin-based composites for the occlusal, buccal, lingual, mesial, and distal fissures and grooves on the same tooth as a one-surface restoration.

(c) Considers multiple restorations of fissures and grooves of the occlusal surface of the same tooth as a one-surface restoration.

(d) Considers resin-based composite restorations of teeth where the decay does not penetrate the ((~~dentoenamel~~)) dentinoenamel junction (DEJ) to be sealants. (See WAC 182-535-1082(((~~4~~))) for sealant coverage.)

(e) Reimburses proximal restorations that do not involve the incisal angle on anterior teeth as a two-surface restoration.

(f) Covers only one buccal and one lingual surface per tooth. The agency reimburses buccal or lingual restorations, regardless of size or extension, as a one-surface restoration.

(g) Does not cover preventive restorative resin or flowable composite resin on the interproximal surfaces (mesial or distal) when performed on posterior teeth or the incisal surface of anterior teeth.

(h) Does not pay for replacement restorations within a two-year period unless the restoration is cracked or broken or has an additional adjoining carious surface. The agency pays for the replacement restoration as one multisurface restoration. The client's record must include X rays or documentation supporting the medical necessity for the replacement restoration.

(3) **Additional limitations ((~~on~~)) for restorations on primary teeth.** The agency covers:

(a) A maximum of two surfaces for a primary first molar. (See subsection (6) of this section for a primary first molar that requires a restoration with three or more surfaces.) The agency does not pay for additional restorations on the same tooth.

(b) A maximum of three surfaces for a primary second molar. (See subsection (6) of this section for a primary posterior tooth that requires a restoration with four or more surfaces.) The agency does not pay for additional restorations on the same tooth.

(c) A maximum of three surfaces for a primary anterior tooth. (See subsection (6) of this section for a primary anterior tooth that requires a restoration with four or more surfaces.) The agency does not pay for additional restorations on the same tooth after three surfaces.

((~~(d) Glass ionomer restorations for primary teeth, only for clients age five and younger. The agency pays for these restorations as a one-surface, resin-based composite restoration.~~))

(4) **Additional limitations ((~~on~~)) for restorations on permanent teeth.** The agency covers:

(a) Two occlusal restorations for the upper molars on teeth one, two, three, fourteen, fifteen, and sixteen if, the restorations are anatomically separated by sound tooth structure.

(b) A maximum of five surfaces per tooth for permanent posterior teeth, except for upper molars. The agency allows a maximum of six surfaces per tooth for teeth one, two, three, fourteen, fifteen, and sixteen.

(c) A maximum of six surfaces per tooth for resin-based composite restorations for permanent anterior teeth.

(5) **Crowns.** The agency:

(a) Covers the following indirect crowns once every five years, per tooth, for permanent anterior teeth for clients age fifteen through twenty when the crowns meet prior authorization criteria in WAC 182-535-1220 and the provider follows the prior authorization requirements in (c) of this subsection:

(i) Porcelain/ceramic crowns to include all porcelains, glasses, glass-ceramic, and porcelain fused to metal crowns; and

(ii) Resin crowns and resin metal crowns to include any resin-based composite, fiber, or ceramic reinforced polymer compound.

(b) Considers the following to be included in the payment for a crown:

(i) Tooth and soft tissue preparation;

(ii) Amalgam and resin-based composite restoration, or any other restorative material placed within six months of the crown preparation. Exception: The agency covers a one-surface restoration on an endodontically treated tooth, or a core buildup or cast post and core;

(iii) Temporaries, including but not limited to, temporary restoration, temporary crown, provisional crown, temporary prefabricated stainless steel crown, ion crown, or acrylic crown;

(iv) Packing cord placement and removal;

(v) Diagnostic or final impressions;

(vi) Crown seating (placement), including cementing and insulating bases;

(vii) Occlusal adjustment of crown or opposing tooth or teeth; and

(viii) Local anesthesia.

(c) Requires the provider to submit the following with each prior authorization request:

(i) Radiographs to assess all remaining teeth;

(ii) Documentation and identification of all missing teeth;

(iii) Caries diagnosis and treatment plan for all remaining teeth, including a caries control plan for clients with rampant caries;

(iv) Pre- and post-endodontic treatment radiographs for requests on endodontically treated teeth; and

(v) Documentation supporting a five-year prognosis that the client will retain the tooth or crown if the tooth is crowned.

(d) Requires a provider to bill for a crown only after delivery and seating of the crown, not at the impression date.

(6) **Other restorative services.** The agency covers the following restorative services:

(a) All recementations of permanent indirect crowns.

(b) Prefabricated stainless steel crowns, including stainless steel crowns with resin window, resin-based composite crowns (direct), prefabricated esthetic coated stainless steel crowns, and prefabricated resin crowns for primary anterior teeth once every three years only for clients age twenty and younger as follows:

(i) For age twelve and younger without prior authorization if the tooth requires a four or more surface restoration; and

(ii) For age thirteen through twenty with prior authorization.

(c) Prefabricated stainless steel crowns, including stainless steel crowns with resin window, resin-based composite crowns (direct), prefabricated esthetic coated stainless steel crowns, and prefabricated resin crowns, for primary posterior teeth once every three years without prior authorization if:

(i) Decay involves three or more surfaces for a primary first molar;

(ii) Decay involves four or more surfaces for a primary second molar; or

(iii) The tooth had a pulpotomy.

(d) Prefabricated stainless steel crowns, including stainless steel crowns with resin window, and prefabricated resin crowns, for permanent posterior teeth excluding one, sixteen, seventeen, and thirty-two once every three years, for clients age twenty and younger, without prior authorization.

(e) Prefabricated stainless steel crowns for clients of the developmental disabilities administration of the department of social and health services (DSHS) without prior authorization according to WAC 182-535-1099.

(f) Core buildup, including pins, only on permanent teeth, only for clients age twenty and younger, and only allowed in conjunction with crowns and when prior authorized. For indirect crowns, prior authorization must be obtained from the agency at the same time as the crown. Providers must submit pre- and post-endodontic treatment radiographs to the agency with the authorization request for endodontically treated teeth.

(g) Cast post and core or prefabricated post and core, only on permanent teeth, only for clients age twenty and younger, and only when in conjunction with a crown and when prior authorized.

(7) **Silver diamine fluoride.** The agency covers silver diamine fluoride per application as follows:

(a) When used for stopping the progression of caries only;

(b) May be provided two times per client in a twelve-month period; and

(c) Cannot be performed with interim therapeutic restoration on the same tooth.

AMENDATORY SECTION (Amending WSR 14-08-032, filed 3/25/14, effective 4/30/14)

WAC 182-535-1086 Dental-related services—Covered—Endodontic services. Clients described in WAC 182-535-1060 are eligible to receive the dental-related endodontic services listed in this section, subject to coverage limitations, restrictions, and client age requirements identified for a specific service.

(1) **Pulp capping.** The medicaid agency considers pulp capping to be included in the payment for the restoration.

(2) **Pulpotomy.** The agency covers:

(a) Therapeutic pulpotomy on primary teeth only for clients age twenty ((~~years of age~~)) and younger.

(b) Pulpal debridement on permanent teeth only, excluding teeth one, sixteen, seventeen, and thirty-two. The agency does not pay for pulpal debridement when performed with palliative treatment of dental pain or when performed on the same day as endodontic treatment.

(3) **Endodontic treatment on primary teeth.** The agency covers endodontic treatment with resorbable material for primary teeth, if the entire root is present at treatment.

(4) **Endodontic treatment on permanent teeth.** The agency:

(a) Covers endodontic treatment for permanent anterior teeth for all clients.

(b) Covers endodontic treatment for permanent bicuspid and molar teeth, excluding teeth one, sixteen, seventeen, and thirty-two for clients age twenty ((~~years of age~~)) and younger.

(c) Considers the following included in endodontic treatment:

(i) Pulpectomy when part of root canal therapy;

(ii) All procedures necessary to complete treatment; and

(iii) All intra-operative and final evaluation radiographs (X rays) for the endodontic procedure.

(d) Pays separately for the following services that are related to the endodontic treatment:

(i) Initial diagnostic evaluation;

(ii) Initial diagnostic radiographs; and

(iii) Post treatment evaluation radiographs if taken at least three months after treatment.

(5) **Endodontic retreatment on permanent anterior teeth.** The agency:

(a) Covers endodontic retreatment for clients age twenty ((~~years of age~~)) and younger when prior authorized.

(b) Covers endodontic retreatment of permanent anterior teeth for clients twenty-one years of age and older when prior authorized.

(c) Considers endodontic retreatment to include:

(i) The removal of post(s), pin(s), old root canal filling material, and all procedures necessary to prepare the canals;

(ii) Placement of new filling material; and

(iii) Retreatment for permanent anterior, bicuspid, and molar teeth, excluding teeth one, sixteen, seventeen, and thirty-two.

(d) Pays separately for the following services that are related to the endodontic retreatment:

(i) Initial diagnostic evaluation;

(ii) Initial diagnostic radiographs; and

(iii) Post treatment evaluation radiographs if taken at least three months after treatment.

(e) Does not pay for endodontic retreatment when provided by the original treating provider or clinic unless prior authorized by the agency.

(6) **Apexification/apicoectomy.** The agency covers:

(a) Apexification for apical closures for anterior permanent teeth only ((~~on a case-by-case basis and when prior authorized~~)). Apexification is limited to the initial visit and three interim treatment visits per tooth and is limited to clients age twenty ((~~years of age~~)) and younger((~~, per tooth~~)).

(b) Apicoectomy and a retrograde fill for anterior teeth only for clients age twenty ((~~years of age~~)) and younger.

AMENDATORY SECTION (Amending WSR 16-18-033, filed 8/26/16, effective 9/26/16)

WAC 182-535-1088 Dental-related services—Covered—Periodontic services. Clients described in WAC 182-535-1060 are eligible to receive the dental-related periodontic services listed in this section, subject to coverage limitations, restrictions, and client-age requirements identified for a specified service.

(1) **Surgical periodontal services.** The medicaid agency covers the following surgical periodontal services, including all postoperative care:

(a) Gingivectomy/gingivoplasty (does not include distal wedge procedures on erupting molars) only on a case-by-case basis and when prior authorized and only for clients age twenty and younger; and

(b) Gingivectomy/gingivoplasty (does not include distal wedge procedures on erupting molars) for clients of the developmental disabilities administration of the department of social and health services (DSHS) according to WAC 182-535-1099.

(2) **Nonsurgical periodontal services.** The agency:

(a) Covers periodontal scaling and root planing for clients age thirteen through eighteen, once per quadrant per client, in a two-year period on a case-by-case basis, when prior authorized, and only when:

(i) The client has radiographic evidence of periodontal disease and subgingival calculus;

(ii) The client's record includes supporting documentation for the medical necessity, including complete periodontal charting done within the past twelve months from the date of the prior authorization request and a definitive diagnosis of periodontal disease;

(iii) The client's clinical condition meets current published periodontal guidelines; and

(iv) Performed at least two years from the date of completion of periodontal scaling and root planing or surgical periodontal treatment, or at least twelve calendar months from the completion of periodontal maintenance.

(b) Covers periodontal scaling and root planing once per quadrant per client in a two-year period for clients age nineteen and older. Criteria in (a)(i) through (iv) of this subsection must be met.

(c) Considers ultrasonic scaling, gross scaling, or gross debridement to be included in the procedure and not a substitution for periodontal scaling and root planing.

(d) Covers periodontal scaling and root planing only when the services are not performed on the same date of service as prophylaxis, periodontal maintenance, gingivectomy, or gingivoplasty.

(e) Covers periodontal scaling and root planing for clients of the developmental disabilities administration of DSHS according to WAC 182-535-1099.

(f) Covers periodontal scaling and root planing, one time per quadrant in a twelve-month period for clients residing in ((~~a~~)) an alternate living facility or nursing facility.

(3) **Other periodontal services.** The agency:

(a) Covers periodontal maintenance for clients age thirteen through eighteen once per client in a twelve-month period on a case-by-case basis, when prior authorized, and only when:

(i) The client has radiographic evidence of periodontal disease;

(ii) The client's record includes supporting documentation for the medical necessity, including complete periodontal charting done within the past twelve months with location of the gingival margin and clinical attachment loss and a definitive diagnosis of periodontal disease;

(iii) The client's clinical condition meets current published periodontal guidelines; and

(iv) The client has had periodontal scaling and root planing but not within twelve months of the date of completion of periodontal scaling and root planing, or surgical periodontal treatment.

(b) Covers periodontal maintenance once per client in a twelve month period for clients age nineteen and older. Criteria in (a)(i) through (iv) of this subsection must be met.

(c) Covers periodontal maintenance only if performed at least twelve calendar months after receiving prophylaxis, periodontal scaling and root planing, gingivectomy, or gingivoplasty.

(d) Covers periodontal maintenance for clients of the developmental disabilities administration of DSHS according to WAC 182-535-1099.

(e) Covers periodontal maintenance for clients residing in ((~~a~~)) an alternate living facility or nursing facility:

(i) Periodontal maintenance (four quadrants) substitutes for an eligible periodontal scaling or root planing once every six months.

(ii) Periodontal maintenance allowed six months after scaling or root planing.

(f) Covers full-mouth scaling in the presence of generalized moderate or severe gingival inflammation and only:

(i) For clients age nineteen and older once in a twelve-month period after an oral evaluation; and

(ii) For clients age thirteen through eighteen once in a twelve-month period after an oral evaluation and when prior authorized.

AMENDATORY SECTION (Amending WSR 16-18-033, filed 8/26/16, effective 9/26/16)

WAC 182-535-1090 Dental-related services—Covered—Prosthodontics (removable). Clients described in WAC 182-535-1060 are eligible to receive the prosthodontics (removable) and related services, subject to the coverage limitations, restrictions, and client-age requirements identified for a specific service.

(1) **Prosthodontics.** The medicaid agency requires prior authorization for ((~~all~~)) removable prosthodontic and prosthodontic-related procedures, except as otherwise noted in this section. Prior authorization requests must meet the criteria in WAC 182-535-1220. In addition, the agency requires the dental provider to submit:

(a) Appropriate and diagnostic radiographs of all remaining teeth.

(b) A dental record which identifies:

(i) All missing teeth for both arches;

(ii) Teeth that are to be extracted; and

(iii) Dental and periodontal services completed on all remaining teeth.

(2) **Complete dentures.** The agency covers complete dentures, including overdentures, when prior authorized, except as otherwise noted in this section.

The agency considers three-month post-delivery care (e.g., adjustments, soft relines, and repairs) from the delivery (placement) date of the complete denture as part of the complete denture procedure and does not pay separately for this care.

(a) The agency covers complete dentures only as follows:

(i) One initial maxillary complete denture and one initial mandibular complete denture per client((~~, per the client's lifetime~~)).

(ii) Replacement of a partial denture with a complete denture only when the replacement occurs three or more years after the ((~~seat~~)) delivery (placement) date of the last resin partial denture.

(iii) One replacement maxillary complete denture and one replacement mandibular complete denture per client, per client's lifetime. The replacement must occur at least five years after the delivery (placement) date of the initial complete denture or overdenture. The replacement does not require prior authorization.

(b) ((~~The agency covers replacement of a complete denture or overdenture only if prior authorized, and only when the replacement occurs at least five years after the seat date of the initial complete denture or overdenture.~~)) The agency reviews requests for replacement that exceed the limits in this subsection (2) under WAC 182-501-0050(7).

(c) The provider must obtain a current signed Denture Agreement of Acceptance (HCA 13-809) form from the client at the conclusion of the final denture try-in and at the time of delivery for an agency-authorized complete denture. If the client abandons the complete denture after signing the agreement of acceptance, the agency will deny subsequent requests for the same type of dental prosthesis if the request occurs prior to the dates specified in this section. A copy of the signed agreement must be kept in the provider's files and be available upon request by the agency. Failure to submit the completed, signed Denture Agreement of Acceptance form when requested may result in recoupment of the agency's payment.

(3) **Resin partial dentures.** The agency covers resin partial dentures only as follows:

(a) For anterior and posterior teeth only when the following criteria are met:

(i) The remaining teeth in the arch must be free of periodontal disease and have a reasonable prognosis.

(ii) The client has established caries control.

(iii) The client has one or more missing anterior teeth or four or more missing posterior teeth (excluding teeth one, two, fifteen, and sixteen((~~,~~))) on the upper arch to qualify for a maxillary partial denture. Pontics on an existing fixed bridge do not count as missing teeth. The agency does not

consider closed spaces of missing teeth to qualify as a missing tooth.

(iv) The client has one or more missing anterior teeth or four or more missing posterior teeth (excluding teeth seventeen, eighteen, thirty-one, and thirty-two) on the lower arch to qualify for a mandibular partial denture. Pontics on an existing fixed bridge do not count as missing teeth. The agency does not consider closed spaces of missing teeth to qualify as a missing tooth.

((~~(iv)~~)) (v) There is a minimum of four functional, stable teeth remaining per arch.

((~~(v)~~)) (vi) There is a three-year prognosis for retention of the remaining teeth.

(b) Prior authorization is required.

(c) The agency considers three-month post-delivery care (e.g., adjustments, soft relines, and repairs) from the delivery (placement) date of the resin partial denture as part of the resin partial denture procedure and does not pay separately for this care.

(d) Replacement of a resin-based partial denture with a new resin partial denture or a complete denture if it occurs at least three years after the ((~~seat~~)) delivery (placement) date of the resin-based partial denture. The replacement partial or complete denture must be prior authorized and meet agency coverage criteria in (a) of this subsection.

(e) The agency ((~~does not cover replacement of a cast-metal framework partial denture, with any type of denture, within five years of the seat date of the cast-metal partial denture.~~)) reviews requests for replacement that exceed the limits in this subsection (3) under WAC 182-501-0050(7).

(f) The provider must obtain a signed Partial Denture Agreement of Acceptance (HCA 13-809) form from the client at the time of delivery for an agency-authorized partial denture. A copy of the signed agreement must be kept in the provider's files and be available upon request by the agency. Failure to submit the completed, signed Partial Denture Agreement of Acceptance form when requested may result in recoupment of the agency's payment.

(4) **Provider requirements.**

(a) The agency requires a provider to bill for a removable partial or complete denture only after the delivery of the prosthesis, not at the impression date. Refer to subsection (5)(e) of this section for what the agency may pay if the removable partial or complete denture is not delivered and inserted.

(b) The agency requires a provider to submit the following with a prior authorization request for a removable resin partial or complete denture for a client residing in an alternate living facility ((~~(ALF) as defined in WAC 182-513-1301 or in a~~)) or nursing facility ((~~as defined in WAC 182-500-0075~~)):

(i) The client's medical diagnosis or prognosis;

(ii) The attending physician's request for prosthetic services;

(iii) The attending dentist's or denturist's statement documenting medical necessity;

(iv) A written and signed consent for treatment from the client's legal guardian when a guardian has been appointed; and

(v) A completed copy of the Denture/Partial Appliance Request for Skilled Nursing Facility Client (HCA 13-788) form available from the agency's published billing instructions which can be downloaded from the agency's web site.

(c) The agency limits removable partial dentures to resin-based partial dentures for all clients residing in one of the facilities listed in (b) of this subsection.

(d) The agency requires a provider to deliver services and procedures that are of acceptable quality to the agency. The agency may recoup payment for services that are determined to be below the standard of care or of an unacceptable product quality.

(5) **Other services for removable prosthodontics.** The agency covers:

(a) Adjustments to complete and partial dentures three months after the date of delivery.

(b) Repairs:

(i) To complete dentures, once in a twelve-month period, per arch. The cost of repairs cannot exceed the cost of the replacement denture. The agency covers additional repairs on a case-by-case basis and when prior authorized.

(ii) To partial dentures, once in a twelve-month period, per arch. The cost of the repairs cannot exceed the cost of the replacement partial denture. The agency covers additional repairs on a case-by-case basis and when prior authorized.

(c) A laboratory reline or rebase to a complete or partial denture, once in a three-year period when performed at least six months after the delivery (placement) date. The agency does not pay for a denture reline and a rebase in the same three-year period. An additional reline or rebase may be covered for complete or partial dentures on a case-by-case basis when prior authorized.

(d) ((~~Up to two tissue conditionings, only for clients age twenty and younger, and only when performed within three months after the delivery (placement) date.~~

~~(e)~~)) Laboratory fees, subject to the following:

(i) The agency does not pay separately for laboratory or professional fees for complete and partial dentures; and

(ii) The agency may pay part of billed laboratory fees when the provider obtains prior authorization, and the client:

(A) Is not eligible at the time of delivery of the partial or complete denture;

(B) Moves from the state;

(C) Cannot be located;

(D) Does not participate in completing the partial or complete denture; or

(E) Dies.

(iii) A provider must submit copies of laboratory prescriptions and receipts or invoices for each claim when billing for laboratory fees.

AMENDATORY SECTION (Amending WSR 16-18-033, filed 8/26/16, effective 9/26/16)

WAC 182-535-1094 Dental-related services—Covered—Oral and maxillofacial surgery services. Clients described in WAC 182-535-1060 are eligible to receive the oral and maxillofacial surgery services listed in this section, subject to the coverage limitations, restrictions, and client-age requirements identified for a specific service.

(1) **Oral and maxillofacial surgery services.** The medicaid agency:

(a) Requires enrolled providers who do not meet the conditions in WAC 182-535-1070(3) to bill claims for services that are listed in this subsection using only the current dental terminology (CDT) codes.

(b) Requires enrolled providers (oral and maxillofacial surgeons) who meet the conditions in WAC 182-535-1070(3) to bill claims using current procedural terminology (CPT) codes unless the procedure is specifically listed in the agency's current published billing guide as a CDT covered code (e.g., extractions).

(c) Covers nonemergency oral surgery performed in a hospital or ambulatory surgery center only for:

(i) Clients age eight and younger;

(ii) Clients age nine through twenty only on a case-by-case basis and when the site-of-service is prior authorized by the agency; and

(iii) Clients any age of the developmental disabilities administration of the department of social and health services (DSHS).

(d) For site-of-service and oral surgery CPT codes that require prior authorization, the agency requires the dental provider to submit current records (within the past twelve months), including:

(i) Documentation used to determine medical appropriateness;

(ii) Cephalometric films;

(iii) Radiographs (X rays);

(iv) Photographs; and

(v) Written narrative/letter of medical necessity, including proposed billing codes.

(e) Requires the client's dental record to include supporting documentation for each type of extraction or any other surgical procedure billed to the agency. The documentation must include:

(i) Appropriate consent form signed by the client or the client's legal representative;

(ii) Appropriate radiographs;

(iii) Medical justification with diagnosis;

(iv) Client's blood pressure, when appropriate;

(v) A surgical narrative and complete description of each service performed beyond surgical extraction or beyond code definition;

(vi) A copy of the post-operative instructions; and

(vii) A copy of all pre- and post-operative prescriptions.

(f) Covers ((~~routine~~)) simple and surgical extractions. ((~~Prior~~)) Authorization is required ((~~when the~~)) for the following:

(i) Surgical extractions of four or more teeth per arch over a six-month period, resulting in the client becoming edentulous in the maxillary arch or mandibular arch; ((~~or~~))

(ii) Simple extractions of four or more teeth per arch over a six-month period, resulting in the client becoming edentulous in the maxillary arch or mandibular arch; or

(iii) Tooth number is not able to be determined.

(g) Covers unusual, complicated surgical extractions with prior authorization.

(h) Covers tooth reimplantation/stabilization of accidentally evulsed or displaced teeth.

(i) Covers surgical extraction of unerupted teeth for clients ((~~age twenty and younger~~)).

(j) Covers debridement of a granuloma or cyst that is five millimeters or greater in diameter. The agency includes debridement of a granuloma or cyst that is less than five millimeters as part of the global fee for the extraction.

(k) Covers the following without prior authorization:

(i) Biopsy of soft oral tissue;

(ii) Brush biopsy; and

(iii) Surgical excision of soft tissue lesions.

(l) Requires providers to keep all biopsy reports or findings in the client's dental record.

(m) Covers the following with prior authorization (photos or radiographs, as appropriate, must be submitted to the agency with the prior authorization request):

(i) Alveoloplasty on a case-by-case basis.

(ii) ((~~Surgical excision of soft tissue lesions only on a case-by-case basis.~~

(~~iii~~))) Only the following excisions of bone tissue in conjunction with placement of complete or partial dentures:

(A) Removal of lateral exostosis;

(B) Removal of torus palatinus or torus mandibularis; and

(C) Surgical reduction of osseous tuberosity.

(((~~iv~~))) (iii) Surgical access of unerupted teeth for clients age twenty and younger.

(2) **Surgical incisions.** The agency covers the following surgical incision-related services:

(a) Uncomplicated intraoral and extraoral soft tissue incision and drainage of abscess. The agency does not cover this service when combined with an extraction or root canal treatment. Documentation supporting the medical necessity must be in the client's record.

(b) Removal of foreign body from mucosa, skin, or subcutaneous alveolar tissue ((~~when prior authorized~~)). Documentation supporting the medical necessity for the service must be in the client's record.

(c) Frenuloplasty/frenulectomy for clients age six and younger without prior authorization.

(d) Frenuloplasty/frenulectomy for clients age seven through twelve only on a case-by-case basis and when prior authorized. Photos must be submitted to the agency with the prior authorization request. Documentation supporting the medical necessity for the service must be in the client's record.

(3) **Occlusal orthotic devices.** (Refer to WAC 182-535-1098 (4)(c) for occlusal guard coverage and limitations on coverage.) The agency covers:

(a) Occlusal orthotic devices for clients age twelve through twenty only on a case-by-case basis and when prior authorized.

(b) An occlusal orthotic device only as a laboratory processed full arch appliance.

AMENDATORY SECTION (Amending WSR 16-18-033, filed 8/26/16, effective 9/26/16)

WAC 182-535-1098 Dental-related services—Covered—Adjunctive general services. Clients described in WAC 182-535-1060 are eligible to receive the adjunctive

general services listed in this section, subject to coverage limitations, restrictions, and client-age requirements identified for a specific service.

(1) **Adjunctive general services.** The medicaid agency:

(a) Covers palliative (emergency) treatment, not to include pupal debridement (see WAC 182-535-1086 (2)(b)), for treatment of dental pain, limited to once per day, per client, as follows:

(i) The treatment must occur during limited evaluation appointments;

(ii) A comprehensive description of the diagnosis and services provided must be documented in the client's record; and

(iii) Appropriate radiographs must be in the client's record supporting the medical necessity of the treatment.

(b) Covers local anesthesia and regional blocks as part of the global fee for any procedure being provided to clients.

(c) Covers office-based deep sedation/general anesthesia services:

(i) For all eligible clients age eight and younger and clients any age of the developmental disabilities administration of the department of social and health services (DSHS). Documentation supporting the medical necessity of the anesthesia service must be in the client's record.

(ii) For clients age nine through twenty on a case-by-case basis and when prior authorized, except for oral surgery services. For oral surgery services listed in WAC 182-535-1094 (1)(f) through (m) and clients with cleft palate diagnoses, deep sedation/general anesthesia services do not require prior authorization.

(iii) For clients age twenty-one and older when prior authorized. The agency considers these services for only those clients:

(A) With medical conditions such as tremors, seizures, or asthma;

(B) Whose ((~~files~~)) records contain documentation of tried and failed treatment under local anesthesia or other less costly sedation alternatives due to behavioral health conditions; or

(C) With other conditions for which general anesthesia is medically necessary, as defined in WAC 182-500-0070.

(d) Covers office-based intravenous moderate (conscious) sedation/analgesia:

(i) For any dental service for clients age twenty and younger, and for clients any age of the developmental disabilities administration of DSHS. Documentation supporting the medical necessity of the service must be in the client's record.

(ii) For clients age twenty-one and older when prior authorized. The agency considers these services for only those clients:

(A) With medical conditions such as tremors, seizures, or asthma;

(B) Whose ((~~files~~)) records contain documentation of tried and failed treatment under local anesthesia, or other less costly sedation alternatives due to behavioral health conditions; or

(C) With other conditions for which general anesthesia or conscious sedation is medically necessary, as defined in WAC 182-500-0070.

(e) Covers office-based nonintravenous conscious sedation:

(i) For any dental service for clients age twenty and younger, and for clients any age of the developmental disabilities administration of DSHS. Documentation supporting the medical necessity of the service must be in the client's record.

(ii) For clients age twenty-one and older, only when prior authorized.

(f) Requires providers to bill anesthesia services using the current dental terminology (CDT) codes listed in the agency's current published billing instructions.

(g) Requires providers to have a current anesthesia permit on file with the agency.

(h) Covers administration of nitrous oxide((~~,~~)) once per day, per client per provider.

(i) Requires providers of oral or parenteral conscious sedation, deep sedation, or general anesthesia to meet:

(i) The prevailing standard of care;

(ii) The provider's professional organizational guidelines;

(iii) The requirements in chapter 246-817 WAC; and

(iv) Relevant department of health (DOH) medical, dental, or nursing anesthesia regulations.

(j) Pays for dental anesthesia services according to WAC 182-535-1350.

(k) Covers professional consultation/diagnostic services as follows:

(i) A dentist or a physician other than the practitioner providing treatment must provide the services; and

(ii) A client must be referred by the agency for the services to be covered.

(2) **Professional visits.** The agency covers:

(a) Up to two house/extended care facility calls (visits) per facility, per provider. The agency limits payment to two facilities per day, per provider.

(b) One hospital visit, including emergency care, per day, per provider, per client, and not in combination with a surgical code unless the decision for surgery is a result of the visit.

(c) Emergency office visits after regularly scheduled hours. The agency limits payment to one emergency visit per day, per client, per provider.

(3) **Drugs and medicaments (pharmaceuticals).**

(a) The agency covers oral sedation medications only when prescribed and the prescription is filled at a pharmacy. The agency does not cover oral sedation medications that are dispensed in the provider's office for home use.

(b) The agency covers therapeutic parenteral drugs as follows:

(i) Includes antibiotics, steroids, anti-inflammatory drugs, or other therapeutic medications. This does not include sedative, anesthetic, or reversal agents.

(ii) Only one single-drug injection or one multiple-drug injection per date of service.

(c) For clients age twenty and younger, the agency covers other drugs and medicaments dispensed in the provider's office for home use. This includes, but is not limited to, oral antibiotics and oral analgesics. The agency does not cover the time spent writing prescriptions.

(4) **Miscellaneous services.** The agency covers:

(a) Behavior management provided ((~~in dental offices or dental clinics.~~)) by a dental provider or clinic. The agency does not cover assistance with managing a client's behavior provided by a dental provider or staff member delivering the client's dental treatment.

(i) Documentation supporting the need for behavior management must be in the client's record((~~. Behavior management is for the following clients~~)) and including the following:

(A) A description of the behavior to be managed;

(B) The behavior management technique used; and

(C) The identity of the additional professional staff used to provide the behavior management.

(ii) Clients, who meet one of the following criteria and whose documented behavior requires the assistance of one additional professional staff employed by the dental provider or clinic to protect the client and the professional staff from injury while treatment is rendered, may receive behavior management:

((~~(i)~~)) (A) Clients age eight and younger;

((~~(ii)~~)) (B) Clients age nine through twenty, only on a case-by-case basis and when prior authorized;

((~~(iii)~~)) (C) Clients any age of the developmental disabilities administration of DSHS;

((~~(iv)~~)) (D) Clients diagnosed with autism; ((~~and (v)~~))

(E) Clients who reside in an alternate living facility (ALF) as defined in WAC 182-513-1301, or in a nursing facility as defined in WAC 182-500-0075.

(iii) Behavior management can be performed in the following settings:

(A) Clinics (including independent clinics, tribal health clinics, federally qualified health centers, rural health clinics, and public health clinics);

(B) Offices;

(C) Homes (including private homes and group homes); and

(D) Facilities (including nursing facilities and alternate living facilities).

(b) Treatment of post-surgical complications (e.g., dry socket). Documentation supporting the medical necessity of the service must be in the client's record.

(c) Occlusal guards when medically necessary and prior authorized. (Refer to WAC 182-535-1094(3) for occlusal orthotic device coverage and coverage limitations.) The agency covers:

(i) An occlusal guard only for clients age twelve through twenty when the client has permanent dentition; and

(ii) An occlusal guard only as a laboratory processed full arch appliance.

AMENDATORY SECTION (Amending WSR 16-18-033, filed 8/26/16, effective 9/26/16)

WAC 182-535-1099 Dental-related services for clients of the developmental disabilities administration of the department of social and health services. Subject to coverage limitations and restrictions identified for a specific service, the medicaid agency pays for the additional dental-related services listed in this section that are provided to clients of the developmental disabilities administration of the department of social and health services (DSHS), regardless of age.

(1) **Preventive services.** The agency covers:

(a) Periodic oral evaluations once every four months per client, per provider.

(b) ((~~Dental~~)) Prophylaxis once every four months.

(c) Periodontal maintenance once every six months (see subsection (3) of this section for limitations on periodontal scaling and root planing).

(d) Topical fluoride varnish, rinse, foam or gel, once every four months, per client, per provider or clinic.

(e) Sealants:

(i) Only when used on the occlusal surfaces of:

(A) Primary teeth A, B, I, J, K, L, S, and T; or

(B) Permanent teeth two, three, four, five, twelve, thirteen, fourteen, fifteen, eighteen, nineteen, twenty, twenty-one, twenty-eight, twenty-nine, thirty, and thirty-one.

(ii) Once per tooth in a two-year period.

(2) **Other restorative services.** The agency covers:

(a) All recementations of permanent indirect crowns.

(b) Prefabricated stainless steel crowns, including stainless steel crowns with resin window, resin-based composite crowns (direct), prefabricated esthetic coated stainless steel crowns, and prefabricated resin crowns for primary anterior teeth once every two years only for clients age twenty and younger without prior authorization.

(c) Prefabricated stainless steel crowns, including stainless steel crowns with resin window, resin-based composite crowns (direct), prefabricated esthetic coated stainless steel crowns, and prefabricated resin crowns for primary posterior teeth once every two years for clients age twenty and younger without prior authorization if:

(i) Decay involves three or more surfaces for a primary first molar;

(ii) Decay involves four or more surfaces for a primary second molar; or

(iii) The tooth had a pulpotomy.

(d) Prefabricated stainless steel crowns, including stainless steel crowns with resin window, and prefabricated resin crowns for permanent posterior teeth excluding one, sixteen, seventeen, and thirty-two once every two years without prior authorization for any age.

(3) **Periodontic services.**

(a) **Surgical periodontal services.** The agency covers:

(i) Gingivectomy/gingivoplasty once every three years. Documentation supporting the medical necessity of the service must be in the client's record (e.g., drug induced gingival hyperplasia).

(ii) Gingivectomy/gingivoplasty with periodontal scaling and root planing or periodontal maintenance when the services are performed:

(A) In a hospital or ambulatory surgical center; or

(B) For clients under conscious sedation, deep sedation, or general anesthesia.

(b) **Nonsurgical periodontal services.** The agency covers:

(i) Periodontal scaling and root planing, one time per quadrant in a twelve-month period.

(ii) Periodontal maintenance (four quadrants) substitutes for an eligible periodontal scaling or root planing, twice in a twelve-month period.

(iii) Periodontal maintenance allowed six months after scaling or root planing.

(iv) Full-mouth or quadrant debridement allowed once in a twelve-month period.

(v) Full-mouth scaling in the presence of generalized moderate or severe gingival inflammation.

(4) **Adjunctive general services.** The agency covers:

(a) Oral parenteral conscious sedation, deep sedation, or general anesthesia for any dental services performed in a dental office or clinic. Documentation supporting the medical necessity must be in the client's record.

(b) Sedation services according to WAC 182-535-1098 (1)(c) and (e).

(5) **Nonemergency dental services.** The agency covers nonemergency dental services performed in a hospital or an ambulatory surgical center for services listed as covered in WAC 182-535-1082, 182-535-1084, 182-535-1086, 182-535-1088, and 182-535-1094. Documentation supporting the medical necessity of the service must be included in the client's record.

(6) **Miscellaneous services - Behavior management.** The agency covers behavior management ((~~provided in dental offices or dental clinics. Documentation supporting the medical necessity of the service must be included in the client's record~~)) according to WAC 182-535-1098.

AMENDATORY SECTION (Amending WSR 15-10-043, filed 4/29/15, effective 5/30/15)

WAC 182-535-1100 Dental-related services—Not covered. (1) The medicaid agency does not cover the following under the dental program:

(a) The dental-related services described in subsection (2) of this section unless the services are covered under the early periodic screening, diagnosis, and treatment (EPSDT) program. When EPSDT applies, the agency evaluates a noncovered service, equipment, or supply according to the process in WAC 182-501-0165 to determine if it is medically necessary, safe, effective, and not experimental.

(b) Any service specifically excluded by statute.

(c) More costly services when less costly, equally effective services as determined by the agency are available.

(d) Services, procedures, treatment, devices, drugs, or application of associated services:

(i) That the agency or the Centers for Medicare and Medicaid Services (CMS) considers investigative or experimental on the date the services were provided.

(ii) That are not listed as covered in one or both of the following:

(A) Washington Administrative Code (WAC).

(B) The agency's current published documents.

(2) The agency does not cover dental-related services listed under the following categories of service (see subsection (1)(a) of this section for services provided under the EPSDT program):

(a) **Diagnostic services.** The agency does not cover:

(i) Detailed and extensive oral evaluations or reevaluations.

(ii) Posterior-anterior or lateral skull and facial bone survey films.

(iii) Any temporomandibular joint films.

(iv) Tomographic surveys/3-D imaging.

(v) Comprehensive periodontal evaluations.

(vi) Viral cultures, genetic testing, caries susceptibility tests, or adjunctive prediagnostic tests.

(b) **Preventive services.** The agency does not cover:

(i) Nutritional counseling for control of dental disease.

(ii) Removable space maintainers of any type.

(iii) Sealants placed on a tooth with the same-day occlusal restoration, preexisting occlusal restoration, or a tooth with occlusal decay.

(iv) Custom fluoride trays of any type.

(v) Bleach trays.

(c) **Restorative services.** The agency does not cover:

(i) Restorations for wear on any surface of any tooth without evidence of decay through the ((~~dentoenamel~~)) dentinoenamel junction (DEJ) or on the root surface.

(ii) Preventative restorations.

(iii) Labial veneer resin or porcelain laminate restorations.

(iv) Sedative fillings.

(v) Crowns and crown related services.

(A) Gold foil restorations.

(B) Metallic, resin-based composite, or porcelain/ceramic inlay/onlay restorations.

(C) Crowns for cosmetic purposes (e.g., peg laterals and tetracycline staining).

(D) Permanent indirect crowns for posterior teeth.

(E) Permanent indirect crowns on permanent anterior teeth for clients age fourteen ((~~years of age~~)) and younger.

(F) Temporary or provisional crowns (including ion crowns).

(G) Any type of coping.

(H) Crown repairs.

(I) Crowns on teeth one, sixteen, seventeen, and thirty-two.

(vi) Polishing or recontouring restorations or overhang removal for any type of restoration.

(vii) Any services other than extraction on supernumerary teeth.

(d) **Endodontic services.** The agency does not cover:

(i) Indirect or direct pulp caps.

(ii) Any endodontic ((~~therapy~~)) treatment on primary teeth, except as described in WAC 182-535-1086(3)(((~~a~~))).

(e) **Periodontic services.** The agency does not cover:

(i) Surgical periodontal services including, but not limited to:

(A) Gingival flap procedures.

(B) Clinical crown lengthening.

(C) Osseous surgery.

(D) Bone or soft tissue grafts.

(E) Biological material to aid in soft and osseous tissue regeneration.

(F) Guided tissue regeneration.

(G) Pedicle, free soft tissue, apical positioning, subepithelial connective tissue, soft tissue allograft, combined connective tissue and double pedicle, or any other soft tissue or osseous grafts.

(H) Distal or proximal wedge procedures.

(ii) Nonsurgical periodontal services including, but not limited to:

(A) Intracoronal or extracoronal provisional splinting.

(B) Full mouth or quadrant debridement (except for clients of the developmental disabilities administration).

(C) Localized delivery of chemotherapeutic agents.

(D) Any other type of surgical periodontal service.

(f) **Removable prosthodontics.** The agency does not cover:

(i) Removable unilateral partial dentures.

(ii) Any interim complete or partial dentures.

(iii) Flexible base partial dentures.

(iv) Any type of permanent soft reline (e.g., molloplast).

(v) Precision attachments.

(vi) Replacement of replaceable parts for semi-precision or precision attachments.

(vii) Replacement of second or third molars for any removable prosthesis.

(viii) Immediate dentures.

(ix) Cast-metal framework partial dentures.

(x) Replacement of ((~~upper and lower prosthodonic no sooner than every five years for complete dentures and every three years for resin partial dentures.~~

~~(xi) More than one replacement of complete denture upper and lower arch per lifetime~~)) agency-purchased removable prosthodontics that have been lost, broken, stolen, sold, or destroyed as a result of the client's carelessness, negligence, recklessness, deliberate intent, or misuse as described in WAC 182-501-0050.

(g) **Implant services.** The agency does not cover:

(i) Any type of implant procedures, including, but not limited to, any tooth implant abutment (e.g., periosteal implants, eposteal implants, and transosteal implants), abutments or implant supported crowns, abutment supported retainers, and implant supported retainers.

(ii) Any maintenance or repairs to procedures listed in (g)(i) of this subsection.

(iii) The removal of any implant as described in (g)(i) of this subsection.

(h) **Fixed prosthodontics.** The agency does not cover any type of:

(i) Fixed partial denture pontic.

(ii) Fixed partial denture retainer.

(iii) Precision attachment, stress breaker, connector bar, coping, cast post, or any other type of fixed attachment or prosthesis.

((~~(iv) Occlusal orthotic splint or device, bruxing or grinding splint or device, temporomandibular joint splint or device, or sleep apnea splint or device.~~))

(i) **Oral maxillofacial prosthetic services.** The agency does not cover any type of oral or facial prosthesis other than those listed in WAC 182-535-1092.

(j) **Oral and maxillofacial surgery.** The agency does not cover:

(i) Any oral surgery service not listed in WAC 182-535-1094.

(ii) ((~~Any oral surgery service that is not listed in the agency's list of covered current procedural terminology (CPT) codes published in the agency's current rules or billing instructions.~~

~~(iii)~~)) Vestibuloplasty.

(k) **Adjunctive general services.** The agency does not cover:

(i) Anesthesia, including, but not limited to:

(A) Local anesthesia as a separate procedure.

(B) Regional block anesthesia as a separate procedure.

(C) Trigeminal division block anesthesia as a separate procedure.

(D) Medication for oral sedation, or therapeutic intramuscular (IM) drug injections, including antibiotic and injection of sedative.

(E) Application of any type of desensitizing medicament or resin.

(ii) Other general services including, but not limited to:

(A) Fabrication of an athletic mouthguard.

(B) ((~~Nightguards.~~)) Sleep apnea devices or splints.

(C) Occlusion analysis.

(D) Occlusal adjustment, tooth or restoration adjustment or smoothing, or odontoplasties.

(E) Enamel microabrasion.

(F) Dental supplies such as toothbrushes, toothpaste, floss, and other take home items.

(G) Dentist's or dental hygienist's time writing or calling in prescriptions.

(H) Dentist's or dental hygienist's time consulting with clients on the phone.

(I) Educational supplies.

(J) Nonmedical equipment or supplies.

(K) Personal comfort items or services.

(L) Provider mileage or travel costs.

(M) Fees for no-show, canceled, or late arrival appointments.

(N) Service charges of any type, including fees to create or copy charts.

(O) Office supplies used in conjunction with an office visit.

(P) Teeth whitening services or bleaching, or materials used in whitening or bleaching.

(Q) Botox or ((~~derma-fillers~~)) dermal fillers.

(3) The agency does not cover the following dental-related services for clients age twenty-one ((~~years of age~~)) and older:

(a) The following diagnostic services:

(i) Occlusal intraoral radiographs;

(ii) Diagnostic casts;

(iii) Sealants (for clients of the developmental disabilities administration, see WAC 182-535-1099);

(iv) Pulp vitality tests.

(b) The following restorative services:

(i) Prefabricated resin crowns;

(ii) Any type of core buildup, cast post and core, or prefabricated post and core.

(c) The following endodontic services:

(i) Endodontic treatment on permanent bicuspids or molar teeth;

(ii) Any apexification/recalcification procedures;

(iii) Any apicoectomy/periradicular surgical endodontic procedures including, but not limited to, retrograde fillings (except for anterior teeth), root amputation, reimplantation, and hemisections.

(d) The following adjunctive general services:

(i) Occlusal guards, occlusal orthotic splints or devices, bruxing or grinding splints or devices, or temporomandibular joint splints or devices; and

(ii) Analgesia or anxiolysis as a separate procedure except for administration of nitrous oxide.

(4) The agency evaluates a request for any dental-related services listed as noncovered in this chapter under the provisions of WAC 182-501-0160.

AMENDATORY SECTION (Amending WSR 16-18-033, filed 8/26/16, effective 9/26/16)

WAC 182-535-1220 Obtaining prior authorization for dental-related services. (1) The medicaid agency uses the determination process for payment described in WAC 182-501-0165 for covered dental-related services that require prior authorization.

(2) The agency requires a dental provider who is requesting prior authorization to submit sufficient, current (within the past twelve months), objective clinical information to establish medical necessity. The request must be submitted in writing on the General Information for Authorization (HCA 13-835) form, available on the agency's web site.

(3) The agency may request additional information as follows:

(a) Additional radiographs (X rays) (refer to WAC 182-535-1080(2));

(b) Study models;

(c) Photographs; and

(d) Any other information as determined by the agency.

(4) The agency may require second opinions and/or consultations by a licensed independent doctor of dental surgery (DDS)/doctor of dental medicine (DMD) before authorizing any procedure.

(5) When the agency authorizes a dental-related service for a client, that authorization indicates only that the specific service is medically necessary; it is not a guarantee of payment. The authorization is valid for six to twelve months as indicated in the agency's authorization letter and only if the client is eligible for covered services on the date of service.

(6) The agency denies a request for a dental-related service when the requested service:

(a) Is covered by another state agency program;

(b) Is covered by an ((~~agency or other~~)) entity outside the agency; or

(c) Fails to meet the program criteria, limitations, or restrictions in this chapter.

AMENDATORY SECTION (Amending WSR 16-13-110, filed 6/20/16, effective 8/1/16)

WAC 182-535-1245 Access to baby and child dentistry (ABCD) program. The access to baby and child dentistry (ABCD) program is a program established to increase access to dental services for medicaid-eligible clients ages five and younger.

(1) Client eligibility for the ABCD program is as follows:

(a) Clients must be age five and younger. Once enrolled in the ABCD program, eligible clients are covered until their sixth birthday.

(b) Clients eligible under one of the following medical assistance programs are eligible for the ABCD program:

(i) Categorically needy program (CNP);

(ii) Limited casualty program-medically needy program (LCP-MNP);

(iii) Children's health program; or

(iv) State children's health insurance program (SCHIP).

(c) ABCD program services for eligible clients enrolled in a managed care organization (MCO) plan are paid through the fee-for-service payment system.

(2) Health care providers and community service programs identify and refer eligible clients to the ABCD program. If enrolled, the client and an adult family member may receive:

(a) Oral health education;

(b) "Anticipatory guidance" (expectations of the client and the client's family members, including the importance of keeping appointments); and

(c) Assistance with transportation, interpreter services, and other issues related to dental services.

(3) The medicaid agency pays enhanced fees only to ABCD-certified dentists and other agency-approved certified providers for furnishing ABCD program services. ABCD program services include, when appropriate:

(a) Family oral health education. An oral health education visit:

(i) Is limited to one visit per day per family, up to two visits per child in a twelve-month period, per provider or clinic; and

(ii) Must include documentation of all of the following in the client's record:

(A) "Lift the lip" training;

(B) Oral hygiene training;

(C) Risk assessment for early childhood caries;

(D) Dietary counseling;

(E) Discussion of fluoride supplements; and

(F) Documentation in the client's ((~~file or the client's designated adult member's (family member or other responsible adult) file~~)) record to record the activities provided and duration of the oral education visit.

(b) Comprehensive oral evaluations as defined in WAC 182-535-1050, once per client, per provider or clinic, as an initial examination. The agency covers an additional comprehensive oral evaluation if the client has not been treated by the same provider or clinic within the past five years;

(c) Periodic oral evaluations as defined in WAC 182-535-1050, once every six months. Six months must elapse

between the comprehensive oral evaluation and the first periodic oral evaluation;

(d) Topical application of fluoride varnish;

(e) Amalgam, resin, and glass ionomer restorations on primary teeth, as specified in the agency's current published documents;

(f) Interim therapeutic restorations (ITRs) for primary teeth, only for clients age five and younger. The agency pays an enhanced rate for these restorations to ABCD-certified, ITR-trained dentists as follows:

(i) A one-surface, resin-based composite restoration with a maximum of five teeth per visit; and

(ii) Restorations on a tooth can be done every twelve months through age five, or until the client can be definitively treated for a restoration.

(g) Therapeutic pulpotomy;

((~~(g)~~)) (h) Prefabricated stainless steel crowns on primary teeth, as specified in the agency's current published documents;

((~~(h)~~)) (i) Resin-based composite crowns on anterior primary teeth; and

((~~(i)~~)) (j) Other dental-related services, as specified in the agency's current published documents.

(4) The client's ((~~file~~)) record must show documentation of the ABCD program services provided.

AMENDATORY SECTION (Amending WSR 14-08-032, filed 3/25/14, effective 4/30/14)

WAC 182-535A-0010 Orthodontic services—Definitions. The following definitions and those found in chapter 182-500 WAC apply to this chapter.

"Adolescent dentition" means teeth that are present after the normal loss of primary teeth and prior to the cessation of growth that affects orthodontic treatment.

"Appliance placement" means the application of orthodontic attachments to the teeth for the purpose of correcting dentofacial abnormalities.

"Cleft" means an opening or fissure involving the dentition and supporting structures, especially one occurring in utero. These can be:

(1) Cleft lip;

(2) Cleft palate (involving the roof of the mouth); or

(3) Facial clefts (e.g., macrostomia).

"Comprehensive full orthodontic treatment" means utilizing fixed orthodontic appliances for treatment of ((~~the permanent~~)) adolescent dentition leading to the improvement of a client's severe handicapping craniofacial dysfunction and/or dentofacial deformity, including anatomical and functional relationships.

"Craniofacial anomalies" means abnormalities of the head and face, either congenital or acquired, involving disruption of the dentition and supporting structures.

"Craniofacial team" means a cleft palate/maxillofacial team or an American Cleft Palate Association-certified craniofacial team. These teams are responsible for the management (review, evaluation, and approval) of patients with cleft palate craniofacial anomalies to provide integrated management, promote parent-professional partnership, and make appropriate referrals to implement and coordinate treatment plans.

"Crossbite" means an abnormal relationship of a tooth or teeth to the opposing tooth or teeth, in which normal buccolingual or labiolingual relations are reversed.

"Dental dysplasia" means an abnormality in the development of the teeth.

"Ectopic eruption" means a condition in which a tooth erupts in an abnormal position or is fifty percent blocked out of its normal alignment in the dental arch.

"EPSDT" means the agency's early and periodic screening, diagnosis, and treatment program for clients twenty years of age and younger as described in chapter 182-534 WAC.

"Hemifacial microsomia" means a developmental condition involving the first and second brachial arch. This creates an abnormality of the upper and lower jaw, ear, and associated structures (half or part of the face ((~~appears~~)) is smaller ((~~sized~~)) in size).

"Interceptive orthodontic treatment" means procedures to lessen the severity or future effects of a malformation and to affect or eliminate the cause. Such treatment may occur in the primary or transitional dentition and may include such procedures as the redirection of ectopically erupting teeth, correction of isolated dental cross-bite, or recovery of recent minor space loss where overall space is adequate.

"Limited ((~~transitional~~)) orthodontic treatment" means orthodontic treatment with a limited objective, not involving the entire dentition. It may be directed only at the existing problem, or at only one aspect of a larger problem in which a decision is made to defer or forego more comprehensive therapy.

"Malocclusion" means improper alignment of biting or chewing surfaces of upper and lower teeth or abnormal relationship of the upper and lower dental arches.

"Maxillofacial" means relating to the jaws and face.

"Occlusion" means the relation of the upper and lower teeth when in functional contact during jaw movement.

"Orthodontics" means treatment involving the use of any appliance, in or out of the mouth, removable or fixed, or any surgical procedure designed to redirect teeth and surrounding tissues.

"Orthodontist" means a dentist who specializes in orthodontics, who is a graduate of a postgraduate program in orthodontics that is accredited by the American Dental Association, and who meets the licensure requirements of the department of health.

"Permanent dentition" means those teeth that succeed the primary teeth and the additional molars that erupt.

"Primary dentition" means teeth that develop and erupt first in order of time and are normally shed and replaced by permanent teeth.

"Transitional dentition" means the final phase from primary to permanent dentition, in which most primary teeth have been lost or are in the process of exfoliating and the permanent successors are erupting.

AMENDATORY SECTION (Amending WSR 14-08-032, filed 3/25/14, effective 4/30/14)

WAC 182-535A-0020 Orthodontic treatment and orthodontic services—Client eligibility. (1) Subject to the limitations of this chapter ((~~and the age restrictions listed in this section~~)), the medicaid agency covers medically necessary orthodontic treatment and orthodontic-related services for severe handicapping malocclusions, craniofacial anomalies, or cleft lip or palate, for eligible clients through age twenty. Refer to WAC 182-501-0060 to see which Washington apple health programs include orthodontic services in their benefit package. ((~~Any orthodontic treatment plan that extends beyond the client's twenty-first birthday will not be approved by the agency.~~))

(2) Eligible clients may receive the same orthodontic treatment and orthodontic-related services in recognized out-of-state bordering cities on the same basis as if provided in-state. See WAC 182-501-0175.

(3) Eligible clients may receive the same orthodontic treatment and orthodontic-related services for continued orthodontic treatment when originally rendered by a nonmedicaid or out-of-state provider as follows:

(a) The provider must submit the initial orthodontic case study and treatment plan records with the request for continued treatment.

(b) The agency evaluates the initial orthodontic case study and treatment plan to determine if the client met the agency's orthodontic criteria per WAC 182-535A-0040 (1) through (3).

(c) The agency determines continued treatment duration based on the client's current orthodontic conditions.

(d) The agency does not cover continued treatment if the client's initial condition did not meet the agency's criteria for the initial orthodontic treatment. The agency pays a deband and retainer fee if the client does not meet the initial orthodontic treatment criteria.

AMENDATORY SECTION (Amending WSR 16-10-064, filed 5/2/16, effective 6/2/16)

WAC 182-535A-0040 Orthodontic treatment and orthodontic-related services—Covered, noncovered, and limitations to coverage. (1) Subject to the limitations in this section and other applicable WAC, the medicaid agency covers orthodontic treatment and orthodontic-related services for a client who has one of the medical conditions listed in (a) and (b) of this subsection. Treatment and follow-up care must be performed only by an orthodontist or agency-recognized craniofacial team and do not require prior authorization.

(a) Cleft lip and palate, cleft palate, or cleft lip with alveolar process involvement.

(b) The following craniofacial anomalies including, but not limited to:

(i) Hemifacial microsomia;

(ii) Craniosynostosis syndromes;

(iii) Cleidocranial dental dysplasia;

(iv) Arthrogryposis; ((~~or~~))

(v) Marfan syndrome;

(vi) Treacher Collins syndrome;

(vii) Ectodermal dysplasia; or

(viii) Achondroplasia.

(2) Subject to prior authorization requirements and the limitations in this section and other applicable WAC, the agency covers orthodontic treatment and orthodontic-related services for severe malocclusions with a Washington Modified Handicapping Labiolingual Deviation (HLD) Index Score of twenty-five or higher. The agency determines the final HLD Index Score based on documentation submitted by the provider.

(3) The agency may cover orthodontic treatment for dental malocclusions other than those listed in subsection (1) and (2) of this section on a case-by-case basis and when prior authorized. The agency determines medical necessity based on documentation submitted by the provider.

(4) The agency does not cover the following orthodontic treatment or orthodontic-related services:

(a) ((~~Replacement of lost, or repair of broken, orthodontic appliances;~~

~~(b)~~)) Orthodontic treatment for cosmetic purposes;

(((~~(c)~~))) (b) Orthodontic treatment that is not medically necessary (as defined in WAC 182-500-0070);

(((~~(d) Out-of-state~~))) (c) Orthodontic treatment provided out-of-state, except as stated in WAC 182-501-0180 (see also WAC 182-501-0175 for medical care provided in bordering cities); ((~~or~~

~~(e)~~))) (d) Orthodontic treatment and orthodontic-related services that do not meet the requirements of this section or other applicable WAC; or

(e) Case studies that do not include a definitive orthodontic treatment plan.

(5) The agency covers the following orthodontic treatment and orthodontic-related services with prior authorization, subject to the following limitations ((~~listed~~)) (providers must bill for these services according to WAC 182-535A-0060):

(a) Panoramic radiographs (X rays) when medically necessary.

(b) Interceptive orthodontic treatment, when medically necessary.

(c) Limited ((~~transitional~~)) orthodontic treatment, when medically necessary. ((~~The treatment must be completed within twelve months of the date of the original appliance placement (see subsection (8)(a) of this section for information on limitation extensions). The agency's payment includes final records, photos, panoramic X rays, cephalometric films, and final trimmed study models.~~))

(i) Approval for limited orthodontic treatment includes up to twelve months of treatment. (See subsection (7)(a) of this section for information on limitation extensions.)

(ii) The agency may approve a single impacted tooth for limited orthodontic treatment.

(d) Comprehensive full orthodontic treatment on adolescent dentition, when medically necessary. The treatment must be completed within thirty months ((~~of~~)) from the date of the original appliance placement (see subsection (((~~(8)~~))) (7)(a) of this section for information on limitation extensions). ((~~The agency's payment includes final records, photos, panoramic X rays, cephalometric films, and final trimmed study models.~~))

(e) Orthodontic appliance removal as a stand-alone service only when:

(i) The client's appliance was placed by a different provider or dental clinic; and

(ii) The provider has not furnished any other orthodontic treatment or orthodontic-related services to the client.

(f) Other medically necessary orthodontic treatment and orthodontic-related services as determined by the agency.

(6) ((~~The treatment plan must indicate that the course of treatment will be completed prior to the client's twenty-first birthday.~~

~~(7)~~)) The treatment must meet industry standards and correct the medical issue. If treatment is discontinued prior to completion, or treatment objectives are not obtained, clear documentation must be kept in the client's ((~~file~~)) record explaining why treatment was discontinued or not completed or why treatment goals were not achieved.

(((~~(8)~~))) (7) The agency evaluates a request for orthodontic treatment or orthodontic-related services:

(a) That are in excess of the limitations or restrictions listed in this section, according to WAC 182-501-0169; and

(b) That are listed as noncovered according to WAC 182-501-0160.

(((~~(9)~~))) (8) The agency reviews requests for orthodontic treatment or orthodontic-related services for clients who are eligible for services under the EPSDT program according to the provisions of WAC 182-534-0100.

AMENDATORY SECTION (Amending WSR 16-10-064, filed 5/2/16, effective 6/2/16)

WAC 182-535A-0060 Orthodontic treatment and orthodontic-related services—Payment. (1) The medicaid agency pays providers for furnishing covered orthodontic treatment and orthodontic-related services described in WAC 182-535A-0040 according to this section and other applicable WAC.

(2) The agency considers that a provider who furnishes covered orthodontic treatment and orthodontic-related services to an eligible client ((~~has accepted~~)) accepts the agency's fees as published in the agency's fee schedules according to WAC 182-502-0010.

(3) The agency requires a provider to deliver services and procedures that are of acceptable quality to the agency. The agency may recoup payment for services that are determined to be below the standard of care or of an unacceptable product quality.

(4) **Interceptive orthodontic treatment.** The agency pays for interceptive orthodontic treatment ((~~as follows:~~

~~(a) The first three months of treatment starts the date the initial appliance is placed and includes active treatment for the first three months.~~

~~(b) Treatment must be completed within twelve months of the date of appliance placement~~)) on primary or transitional dentition in one payment that includes all professional fees, laboratory costs, and required follow-up.

(((~~(4)~~))) (5) **Limited ((~~transitional~~)) orthodontic treatment.** The agency pays for limited ((~~transitional~~)) orthodontic treatment on transitional or adolescent dentition as follows:

(a) The first three months of treatment starts on the date the initial appliance is placed and includes active treatment for the first three months. The provider must bill the agency with the date of service that the initial appliance is placed.

(b) The agency's initial payment includes replacement of brackets and lost or broken orthodontic appliances, appliance removal, initial and replacement retainer fees, and final records (photos, a panoramic X ray, a cephalometric film, and final trimmed study models).

(c) Continuing follow-up treatment must be billed after each three-month treatment interval during the treatment.

(((~~(c) Treatment must be completed within twelve months of the date of appliance placement.~~))) (d) Treatment provided after ((~~one year~~)) twelve months from the date the appliance is placed requires a limitation extension. See WAC 182-535A-0040(8).

(((~~(5)~~))) (6) **Comprehensive full orthodontic treatment.** The agency pays for comprehensive full orthodontic treatment on adolescent dentition as follows:

(a) The first six months of treatment starts the date the initial appliance is placed and includes active treatment for the first six months. The provider must bill the agency with the date of service that the initial appliance is placed.

(b) The agency's initial payment includes replacement of brackets and lost or broken orthodontic appliances, appliance removal, initial and replacement retainer fees, and final records (photos, a panoramic X ray, a cephalometric film, and final trimmed study models).

(c) Continuing follow-up treatment must be billed after each three-month treatment interval, with the first three-month interval beginning six months after the initial appliance placement.

(((~~(c) Treatment must be completed within thirty months of the date of appliance placement.~~))) (d) Treatment provided after thirty months from the date the appliance is placed requires a limitation extension. See WAC 182-535A-0040 (8).

(((~~(6)~~))) (7) Payment for orthodontic treatment and orthodontic-related services is based on the agency's published fee schedule.

(((~~(7)~~))) (8) Orthodontic providers who are in agency-designated bordering cities must:

(a) Meet the licensure requirements of their state; and

(b) Meet the same criteria for payment as in-state providers, including the requirements to contract with the agency.

(((~~(8)~~))) (9) If the client's eligibility for orthodontic treatment under WAC 182-535A-0020 ends before the conclusion of the orthodontic treatment, payment for any remaining treatment is the client's responsibility. The agency does not pay for these services.

(((~~(9)~~))) (10) Any orthodontic treatment provided after the client's twenty-first birthday will not be paid for by the agency and will become the client's financial responsibility.

(11) The client is responsible for payment of any orthodontic service or treatment received during any period of medicaid ineligibility, even if the treatment was started when the client was eligible. The agency does not pay for these services.

(((~~(10)~~))) (12) See WAC 182-502-0160 and 182-501-0200 for when a provider or a client is responsible to pay for a covered service.

WSR 17-17-157
PROPOSED RULES
ATTORNEY GENERAL'S OFFICE

[Filed August 23, 2017, 9:39 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 16-23-038.

Title of Rule and Other Identifying Information: Public Records Act—Model rules, chapter 44-14 WAC.

Hearing Location(s): On October 4, 2017, at 6:00 p.m. - 8:00 p.m., at the Legislative Building, Columbia Room, Washington State Capitol, 416 Sid Snyder Avenue S.W., Olympia, WA 98504.

Date of Intended Adoption: On or after October 13, 2017.

Submit Written Comments to: Nancy Krier, 1125 Washington Street S.E., P.O. Box 40100, Olympia, WA 98504-0100, email nancyk1@atg.wa.gov. Written comments may also be submitted through the online comment form available on the web site of the office of the attorney general on the Rulemaking Activity page at http://www.atg.wa.gov/rule making-activity, by September 29, 2017.

Assistance for Persons with Disabilities: Contact Nancy Krier, phone 360-586-7842, email nancyk1@atg.wa.gov, alternate contact is Melissa Brearty, Rules Coordinator, 360-534-4849, MelB@ATG.WA.GOV, by September 29, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The office of the attorney general has proposed amendments to several advisory Public Records Act (PRA) model rules and comments in chapter 44-14 WAC, and proposed to repeal one comment (WAC 44-14-07003). The purpose of the proposal is to update the model rules and comments to reflect developments in statutes, case law and technology since the rules and comments were last revised in 2007. For example, the proposed amendments address use of personal devices with respect to public records, electronic records, procedures to make requests, procedures to process requests, copying charges, other new PRA requirements, statutory citations, and other topics. All the model rules and comments in chapter 44-14 WAC are proposed to be amended, except for WAC 44-14-04007 Later-discovered records, 44-14-060 Exemptions, and 44-14-08003 Alternative dispute resolution. The proposal would repeal WAC 44-14-07003 Charges for electronic records, since such charges are now addressed in the PRA. Much of WAC 44-14-06002 Summary of exemptions, is proposed to be repealed since the comment is quickly outdated when new court decisions concerning exemptions are issued, or when the state legislature enacts or amends exemptions. Instead, the comment would refer readers to the office's online *Open Government Resource Manual*, which links to many court decisions and statutes concerning exemptions.

The anticipated effect is to modernize the model rules and comments so they are a more functional PRA resource for requestors, public agencies, the courts, the state legislature and others.

Reasons Supporting Proposal: The PRA at chapter 42.56 RCW provides the public access to state and local government agency public records. The PRA directs the office of the attorney general to adopt, and from time to time revise, advisory model rules. RCW 42.56.570 (2) and (3). Under RCW 42.56.570(2), the attorney general is required to adopt model rules addressing the following subjects: (a) Providing fullest assistance to requestors; (b) fulfilling large requests in the most efficient manner; (c) fulfilling requests for electronic records; and (d) any other issues pertaining to public disclosure as determined by the attorney general. RCW 42.56.570(4) provides that local agencies should consult the model rules when establishing local ordinances for compliance with the requirements and responsibilities under chapter 42.56 RCW. RCW 42.56.152 provides that records training must be consistent with the model rules.

The model rules are at chapter 44-14 WAC. The purpose of the model rules and their comments is to provide information to records requestors and state and local agencies about "best practices" for complying with the PRA. WAC 44-14-00001. The model rules are advisory but they provide public agencies model language, and other information in comments, to consider when adopting their PRA regulations, ordinances or policies.

In 2006-2007, the attorney general adopted the model rules and comments. Several of the rules and their comments are now outdated in part due to multiple statutory, case law and technological developments since 2007. While the model rules and comments are advisory only, they are a resource. However, due to the passage of time the outdated provisions are currently less useful for public records requestors, public agencies, the courts, the state legislature, and others.

The reasons to support the proposal to amend the model rules and comments, and to repeal one rule comment, include modernizing the rules and comments so they better reflect current laws and so they are a more functional resource about the PRA and suggested best practices.

Statutory Authority for Adoption: RCW 42.56.570.

Statute Being Implemented: RCW 42.56.570, chapter 42.56 RCW.

Rule is not necessitated by federal law, federal or state court decision. Note: While the rules are advisory and are not mandated by court decisions, several Public Records Act court decisions have been issued since the model rules and their comments were adopted in 2006-2007. The court decisions referred to in the model rules and comments, and in the proposed amendments, are listed in the footnotes to the model rules and comments.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: The state legislature enacted a number of changes in the PRA since 2007. The state legislature also recodified the PRA from chapter 42.17 RCW to chapter 42.56 RCW. In addition to other updates to statutory citations, the proposed amendments to chapter 44-14 WAC remove the citations to former chapter 42.17 RCW. A recodification table providing a crosswalk between chapter 42.17

RCW citations and chapter 42.56 RCW citations is available on the web site of the office of the attorney general.

Name of Proponent: Bob Ferguson, attorney general, governmental.

Name of Agency Personnel Responsible for Drafting: Nancy Krier, Olympia, Washington, 360-586-7842; Implementation and Enforcement: Not applicable.

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. Pursuant to RCW 34.05.328 (5)(a)(i), this agency is not an agency mandated to comply with RCW 34.05.328. Further, the agency does not voluntarily make that section applicable to the adoption of this rule pursuant to subsection (5)(a)(ii), and to date, the joint administrative rules review committee has not made the section applicable to the adoption of this rule.

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

Is exempt under RCW 42.56.570, 42.56.070, 42.56.120.

Explanation of exemptions: The model rules are advisory only and apply only to governmental agencies, not small businesses. RCW 42.56.570. To the extent there are costs assessed by public agencies providing records in response to PRA requests by small businesses, the authorized costs are set out in statute and apply to all requestors. RCW 42.56.070, 42.56.120.

August 22, 2017
Bob Ferguson
Attorney General

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-00001 Statutory authority and purpose. The legislature directed the attorney general to adopt advisory model rules on public records compliance and to revise them from time to time. RCW ((~~42.17.348 (2) and (3)~~)) 42.56.570 (2) and (3). The purpose of the model rules is to provide information to records requestors and state and local agencies about "best practices" for complying with the Public Records Act, ((~~RCW 42.17.250/42.56.040 through 42.17.348/42.56.570 (~~)) chapter 42.56 RCW ("PRA" or "act"). The overall goal of the model rules is to establish a culture of compliance among agencies and a culture of cooperation among requestors by standardizing best practices throughout the state. The attorney general encourages state and local agencies to adopt the model rules (but not necessarily the comments) by regulation or ordinance. The act provides that local agencies should consult the model rules when establishing local ordinances implementing the act. RCW 42.56.570 (4). The act further provides that public records officer training must be consistent with the model rules. RCW 42.56.152(3).

The act applies to all state agencies and local units of government. The model rules use the term "agency" to refer to either a state or local agency. Upon adoption, each agency would change that term to name itself (such as changing references from "name of agency" to "city"). To assist state and local agencies considering adopting the model rules, an electronic version of the rules is available on the attorney general's web site, ((~~www.atg.wa.gov/records/modelrules~~)) http://www.atg.wa.gov/model-rules-public-disclosure.

The initial model rules ((~~are~~)) in 2006-2007 were the product of an extensive outreach project. The attorney general held thirteen public forums all across the state to obtain the views of requestors and agencies. Many requestors and agencies also provided detailed written comments ((~~that are contained in the rule-making file~~)). The model rules reflect many of the points and concerns presented in those forums. For the model rules updates in 2017, the attorney general considered case law and legislative developments since 2006-2007. The attorney general sought additional comments from requestors, agencies, and others.

The model rules provide one approach (or, in some cases, alternate approaches) to processing public records requests. Agencies vary enormously in size, resources, and complexity of requests received. Any "one-size-fits-all" approach in the model rules, therefore, may not be best for requestors and agencies.[1]

Note: [1]See also *Hearst v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978) (agencies "are afforded some discretion concerning the procedures whereby agency information is made available.")

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-00002 Format of model rules. ((~~We are publishing~~)) The model rules are published with comments. The comments have five-digit WAC numbers such as WAC 44-14-04001. The model rules themselves have three-digit WAC numbers such as WAC 44-14-040.

The comments are designed to explain the basis and rationale for the rules themselves as well as provide broader context and legal guidance. To do so, the comments contain many citations to statutes, cases, and formal attorney ((~~general's~~)) general opinions.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-00003 Model rules and comments are nonbinding. The model rules, and the comments accompanying them, are advisory only and do not bind any agency. Accordingly, many of the comments to the model rules use the word "should" or "may" to describe what an agency or requestor is encouraged to do. The use of the words "should" or "may" are permissive, not mandatory, and are not intended to create any legal duty.

While the model rules and comments are nonbinding, they should be carefully considered by requestors and state agencies. ((~~The model rules and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties.~~)) Local agencies are required to consider them in establishing local ordinances implementing the act. RCW 42.56.570. The Washington courts have also considered the model rules in several appellate decisions.[1]

Note: [1] See, e.g., *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009); *Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 277 P.3d 670 (2011); *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-00004 Recodification of the act. On July 1, 2006, the act ((~~will be recodified. Chapter 274, Laws of 2005. The act will be known as the "Public Records Act" and will be codified in chapter 42.56 RCW. The exemptions in the act are recodified and grouped together by topic.~~)) was recodified from chapter 42.17 to 42.56 RCW, and titled the "Public Records Act." The recodification ((~~does~~)) did not change substantive law. The initial model rules ((~~provide dual citations to the current act, chapter 42.17 RCW, and the newly codified act, chapter 42.56 RCW (for example, RCW 42.17.340/42.56.550)~~)) and older court decisions referred to the prior codification numbers in chapter 42.17 RCW. A recodification conversion chart (from chapter 42.17 to 42.56 RCW) is on the attorney general's office web site at http://www.atg.wa.gov/model-rules-public-disclosure.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-00005 Training is ((~~critical~~)) required. The act is complicated, and compliance requires training. ((~~Training can be the difference between a satisfied requestor and expensive litigation. The attorney general's office strongly encourages agencies to provide thorough and ongoing training to agency staff on public records compliance.~~)) Training on the act is required for local elected officials, statewide elected officials, persons appointed to fill vacancies in a local or statewide office, and public records officers. RCW 42.56.150; 42.56.152. Public records officers must also receive training on electronic records. RCW 42.56.152(5). All agency employees should receive basic training on public records compliance and records retention; public records officers should receive more intensive training. Agencies are encouraged to document training for persons required to receive training. The attorney general's office has training resources including sample training documentation forms available on its web site at http://www.atg.wa.gov/OpenGovernmentTraining.aspx. Training can be the difference between a satisfied requestor and expensive litigation. The courts can consider lack of training as a penalty factor in actions filed under RCW 42.56.550, the act's enforcement provision.[1]

Note: [1] *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 738 (2010).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-00006 Additional resources. Several web sites provide information on the act. The attorney general office's web site on public records is ((~~www.atg.wa.gov/records/deskbook.shtml~~)) http://www.atg.wa.gov/obtaining-records, which also includes a link to an *Open Government Resource Manual*. The municipal research and services center, an entity serving local governments, provides ((~~a~~)) public records ((~~handbook at www.mrsc.org/Publications/prdpub04.pdf~~)) resources on its web site at http://mrsc.org/Home.aspx. A requestor's organization, the Washington Coalition for Open Government, has materials on its web site at www.washingtoncog.org.

More materials are available from other organizations such as the Washington State Bar Association ((~~is publishing a twenty-two-chapter deskbook on public records in 2006. It will be available for purchase at www.wsba.org~~)).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-010 Authority and purpose. (1) RCW ((~~42.17.260(1)/~~)) 42.56.070(1) requires each agency to make available for inspection and copying nonexempt "public records" in accordance with published rules. The act defines "public record" at RCW 42.56.010(3) to include any "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained" by the agency. RCW 42.56.010(3) excludes from the definition of "public record" the records of volunteers that are not otherwise required to be retained by the agency and which are held by volunteers who do not serve in an administrative capacity; have not been appointed by the agency to an agency board, commission or internship; and do not have a supervisory role or delegated authority. RCW ((~~42.17.260(2)/~~)) 42.56.070(2) requires each agency to set forth "for informational purposes" every law, in addition to the Public Records Act, that exempts or prohibits the disclosure of public records held by that agency.

(2) The purpose of these rules is to establish the procedures (name of agency) will follow in order to provide full access to public records. These rules provide information to persons wishing to request access to public records of the (name of agency) and establish processes for both requestors and (name of agency) staff that are designed to best assist members of the public in obtaining such access.

(3) The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act and these rules will be interpreted in favor of disclosure. In carrying out its responsibilities under the act, the (name of agency) will be guided by the provisions of the act describing its purposes and interpretation.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-01001 Scope of coverage of Public Records Act. The act applies to an "agency." RCW ((~~42.17.260(1)/~~)) 42.56.070(1). "'Agency' includes all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or

special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." RCW ((~~42.17.020(2)~~)) 42.56.010(1).

Court ((~~files and~~)) records, judges' files, and the records of judicial branch agencies are not subject to the act.[1] Access to these records is governed by court rules and common law. The model rules, therefore, do not address access to court or judicial branch records.

An entity which is not an "agency" can still be subject to the act when it is the functional equivalent of an agency. Courts have applied a four-factor, case-by-case test. The factors are:

(1) Whether the entity performs a government function;

(2) The level of government funding;

(3) The extent of government involvement or regulation; and

(4) Whether the entity was created by the government((~~. Op. Att'y Gen. 2 (2002)~~)).[2]

Some agencies, most notably counties, are a collection of separate quasi-autonomous departments which are governed by different elected officials (such as a county assessor and prosecuting attorney). The act includes a county "office" as an agency. RCW 42.56.010(1). However, the act ((~~defines~~)) also includes the county as a whole as an "agency" subject to the act. ((~~RCW 42.17.020(2). An agency should coordinate responses to records requests across departmental lines. RCW 42.17.253(1)~~)) *Id*. Therefore, some counties may have one public records officer for the entire county; others may have public records officers for each county official or department. The act does not require a public agency that has a records request directed to it to coordinate its response with other public agencies.[3] Regardless, public records officers must be publicly identified. RCW 42.56.580 (2) and (3) (agency's public records officer must "oversee the agency's compliance" with act).

Notes:

[1] *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986); *West v. Washington State Assoc. of District and Municipal Court Judges*, 190 Wn. App. 931, 361 P.3d 210 (2015). See the courts' General Rule 31 and 31.1 regarding access to court records.

[2] ~~*((See also))*~~ *Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149, 162, 974 P.2d 886((~~, *review denied*, 138 Wn.2d 1015, 989 P.2d 1143~~)) (1999); *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 387 P.3d 690 (2017). See also Op. Att'y Gen. 2 (2002) and Op. Att'y Gen. 5 (1991).

[3] *Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.3d 423 (2009).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-01002 Requirement that agencies adopt reasonable regulations for public records requests. The act provides that state agencies are to publish a rule in the Washington Administrative Code (WAC) and local agencies are to make publicly available at the central office guidance for the public that includes where the public may obtain information and make submittals and requests. RCW 42.56.040.

The act provides: "Agencies shall adopt and enforce reasonable rules and regulations… to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency…. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW ((~~42.17.290~~)) 42.56.100. Therefore, an agency must adopt "reasonable" regulations providing for the "fullest assistance" to requestors and the "most timely possible action on requests."[1]

At the same time, an agency's regulations must "protect public records from damage or disorganization" and "prevent excessive interference" with other essential agency functions. Another provision of the act states that providing public records should not "unreasonably disrupt the operations of the agency." RCW ((~~42.17.270~~)) 42.56.080. This provision allows an agency to take reasonable precautions to prevent a requestor from being unreasonably disruptive or disrespectful to agency staff.

The courts have held that the act requires strict compliance with its procedural provisions, but also that reasonable procedures will be sustained.[2]

Notes:

[1] *Andrews v. Washington State Patrol*, 183 Wn .App. 644, 334 P.3d 94 (2014) (Court of Appeals recognized that agencies must provide fullest assistance to requestors, but also that "a flexible approach" that focuses on the thoroughness and diligence of an agency's response is most consistent with the concept of "fullest assistance.")

[2] *Zink v. City of Mesa*, 140 Wn. App. 328, 166 P.3d 738 (2007); *Parmelee v. Clarke*, 148 Wn. App. 748, 201 P.3d 1022 (2008).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-01003 Construction and application of act. The act declares: "The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW ((~~42.17.251~~)) 42.56.030. The initiative creating the act further provides: "… mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." RCW ((~~42.17.010(11)~~)) 42.17A.001(11). The act further provides: "Courts shall take into account the policy of (the act) that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW ((~~42.17.340(3)~~)) 42.56.550(3).

Because the purpose of the act is to allow people to be informed about governmental decisions (and therefore help keep government accountable) while at the same time being "mindful of the right of individuals to privacy," it should not be used to obtain records containing purely personal information that has absolutely no bearing on the conduct of government.[1]

The act emphasizes ((~~three separate times~~)) that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records. RCW ((~~42.17.010, 42.17.251/~~)) 42.56.030((~~, 42.17.920.[1]~~)). The act places the burden on the agency of proving a record is not subject to disclosure, or that its estimate of time to provide a ((~~full~~)) response ((~~is~~)) or its estimated copy charges are "reasonable." RCW ((~~42.17.340 (1) and (2)/~~)) 42.56.550 (1) and (2). The act also encourages disclosure by awarding a prevailing requestor reasonable attorneys' fees, costs, and a possible daily penalty if the agency fails to meet its burden of proving the record is not subject to disclosure, or its estimate of time, or its estimate of copying costs, is not "reasonable." RCW ((~~42.17.340(4)/~~)) 42.56.550(4).

An additional incentive for disclosure is RCW ((~~42.17.258~~)) 42.56.060, which provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply" with the act.

Note: [1]See *King County v. Sheehan*, 114 Wn. App. 325, 338, 57 P.3d 307 (2002) (referring to the ((~~three~~)) legislative intent provisions of the act as "the thrice-repeated legislative mandate that exemptions under the Public Records Act are to be narrowly construed.")((~~.~~))

The courts have repeatedly held that the purpose of the act is a strongly worded mandate to provide access to public agency records concerning the workings of government, in order for the people to hold the government accountable. *Prog. Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994); *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). The legislature addressed concerns about uses of the act by prison inmates and persons residing in a civil commitment facility for sexually violent predators for purposes other than government accountability. RCW 42.56.565 (criteria for obtaining injunctions with respect to inmate requests, including requests made for the purposes of harassment); see also RCW 71.09.120(3) (persons residing in a civil commitment facility for sexually violent predators). The courts have also spoken with disfavor concerning use of the act for purposes other than government accountability. See, e.g., *Kozol v. Dept. of Corr.*, 191 Wn. App. 1034, 366 P.3d 933 (2015) (inmate "concocted a scheme in prison to make money off the Public Records Act"); *Mitchell v. Wash. State Inst. Of Pub. Policy*, 153 Wn. App. 803, 830 P.3d 280 (2009) ("Using the PRA as a vehicle of personal profit through false, inaccurate, or inflated costs is contrary to the PRA's stated purpose to keep the governed informed about their government and costs based on false, inaccurate, or inflated claims do not serve that purpose and are not reasonable.")

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-020 Agency description—Contact information—Public records officer. (1) The (name of agency) (describe services provided by agency). The (name of agency's) central office is located at (describe). The (name of agency) has field offices at (describe, if applicable).

(2) Any person wishing to request access to public records of (agency), or seeking assistance in making such a request should contact the public records officer of the (name of agency):

Public Records Officer
(Agency)
(Address)
(Telephone number)
(fax number if relevant)
(email)

Information is also available at the (name of agency's) web site at (web site address).

(3) The public records officer will oversee compliance with the act but another (name of agency) staff member may process the request. Therefore, these rules will refer to the public records officer "or designee." The public records officer or designee and the (name of agency) will provide the "fullest assistance" to requestors; create and maintain for use by the public and (name of agency) officials an index to public records of the (name of agency, if applicable); ensure that public records are protected from damage or disorganization; and prevent fulfilling public records requests from causing excessive interference with essential functions of the (name of agency).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-02001 Agency must publish its procedures. An agency must publish its public records policies, organizational information, and methods for requestors to obtain public records. RCW ((~~42.17.250(1)/~~)) 42.56.040(1).[1] A state agency must publish its procedures in the Washington Administrative Code and a local agency must prominently display and make them available at the central office of such local agency. RCW ((~~42.17.250(1)/~~)) 42.56.040(1). An agency should post its public records rules on its web site. An agency cannot invoke a procedure if it did not publish or display it as required (unless the party had actual and timely notice of its contents). RCW ((~~42.17.250(2)/~~)) 42.56.040(2).

Note: [1]See, e.g., WAC 44-06-030 (attorney ((~~general office's~~)) general's office organizational and public records methods statement); WAC 388-01-020 (department of social and health services organizational structure rule); City of Kirkland Public Records Act Rule 020 available at http://www.kirklandwa.gov/depart/Finance_and_Administration/Public_Records/Public_Records_Request.htm (agency description).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-02002 Public records officers. An agency must appoint a public records officer whose responsibility is to serve as a "point of contact" for members of the public seeking public records. RCW ((~~42.17.253(1)~~)) 42.56.580(1). The purpose of this requirement is to provide the public with one point of contact within the agency to make a request. A state agency must provide the public records officer's name and contact information by publishing it in the state register. RCW 42.56.580(2). A state agency is encouraged to provide the public records officer's contact information on its web

site. A local agency must publish the public records officer's name and contact information in a way reasonably calculated to provide notice to the public, such as posting it on the agency's web site. RCW ((~~42.17.253(3)~~)) 42.56.580(3).

The public records officer is not required to personally fulfill requests for public records. A request can be fulfilled by an agency employee other than the public records officer. If the request is made to the public records officer, but should actually be fulfilled by others in the agency, the public records officer should route the request to the appropriate person or persons in the agency for processing. An agency is not required to hire a new staff member to be the public records officer.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-030 Availability of public records. (1) **Hours for inspection of records.** Public records are available for inspection and copying during normal business hours of the (name of agency), (provide hours, e.g., Monday through Friday, 8:00 a.m. to 5:00 p.m., excluding legal holidays). Records must be inspected at the offices of the (name of agency). Many public records are also available for inspection and copying on the (name of agency's) web site at any time, at no cost.

(2) **Records index.** (*If agency keeps an index.*) An index of public records is available for use by members of the public, including (describe contents). The index may be accessed online at (web site address). (If there are multiple indices, describe each and its availability.)

(*If agency is local agency opting out of the index requirement.*) The (name of agency) finds that maintaining an index is unduly burdensome and would interfere with agency operations. The requirement would unduly burden or interfere with (name of agency) operations in the following ways (specify reasons).

(3) **Organization of records.** The (name of agency) will maintain its records in a reasonably organized manner. The (name of agency) will take reasonable actions to protect records from damage and disorganization. A requestor shall not take (name of agency) records from (name of agency) offices without the permission of the public records officer or designee. A variety of records is available on the (name of agency) web site at (web site address). Requestors are encouraged to view the documents available on the web site prior to submitting a records request.

(4) **Making a request for public records.**

(a) Any person wishing to inspect or copy public records of the (name of agency) should make the request in writing on the (name of agency's) request form or through an online portal, or by letter, fax (if the agency uses fax), or email addressed to the public records officer at the email address publicly designated by (name of agency), or by submitting the request in person at (name of agency and address) and including the following information:

• Name of requestor;

• Address of requestor;

• Other contact information, including telephone number and any email address;

• Identification of the public records adequate for the public records officer or designee to locate the records; and

• The date and time of day of the request.

(b) If the requestor wishes to have copies of the records made instead of simply inspecting them, he or she should so indicate and make arrangements to pay for copies of the records or a deposit. Pursuant to section (insert section), ((~~standard photocopies will be provided at (amount) cents per page~~)) charges for copies are provided in a fee schedule available at (agency office location and web site address).

(c) A records request form is available for use by requestors at the office of the public records officer and online at (web site address).

(d) The public records officer or designee may accept requests for public records that contain the above information by telephone or in person. If the public records officer or designee accepts such a request, he or she will confirm receipt of the information and the substance of the request in writing.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-03001 "Public record" defined. For most public records, the courts use a three-part test to determine if a record is a "public record." The document must be: A "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency.((~~:~~)) Effective July 23, 2017, records of certain volunteers are excluded from the definition. RCW 42.56.010(3) (chapter 303, Laws of 2017).

(1) **Writing.** A "public record" can be any writing "regardless of physical form or characteristics." RCW ((~~42.17.020(41)~~)) 42.56.010(3). "Writing" is defined very broadly as: "… handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation((~~,~~)) including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated." RCW ((~~42.17.020(48)~~)) 42.56.010(4). An email ((~~is a "writing~~)), text, social media posting and database are therefore also "writings."

(2) **Relating to the conduct of government.** To be a "public record," a document must relate to the "conduct of government or the performance of any governmental or proprietary function." RCW ((~~42.17.020(41)~~)) 42.56.010(3).[1] Almost all records held by an agency relate to the conduct of government; however, some do not. A purely personal record having absolutely no relation to the conduct of government is not a "public record." Even though a purely personal record might not be a "public record," a record of its existence might be if its existence was used for a governmental purpose.[2] For example, a record showing the existence of a purely personal email sent by an agency employee on an agency computer would probably be a "public record," even if the contents of the email itself were not.((~~2~~)) [3]

(3) **"Prepared, owned, used, or retained."** A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW ((~~42.17.020(41)~~)) 42.56.010(3).

A record can be "used" by an agency even if the agency does not actually possess the record. If an agency uses a record in its decision-making process it is a "public record."((~~(3)~~)) [4] For example, if an agency considered technical specifications of a public works project and returned the specifications to the contractor in another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process.((~~(4)~~)) [5] The agency could be required to obtain the public record, unless doing so would be impossible. An agency cannot send its only copy of a public record to a third party for the sole purpose of avoiding disclosure.((~~(5)~~)) [6]

Sometimes agency employees or officials may work on agency business from home computers((~~. These home computer~~)) or on other personal devices, or from nonagency accounts (such as a nonagency email account), creating and storing agency records on those devices or in those accounts. When the records are prepared, owned, used or retained within the scope of the employee's or official's employment, those records (including emails, texts and other records) were "used" by the agency and relate to the "conduct of government" so they are "public records."[7] RCW ((~~42.17.020(41)~~)) 42.56.010(3). However, the act does not authorize unbridled searches of agency property.((~~(6)~~)) [8] If agency property is not subject to unbridled searches, then neither is the home computer, or personal device or personal account of an agency employee or official. Yet, because the ((~~home computer documents~~)) records relating to agency business are "public records," they are subject to disclosure (unless exempt). Agencies should instruct employees and officials that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees and officials to keep agency-related documents with any retention requirements on home computers or personal devices in separate folders ((~~and~~)) temporarily, until they are provided to the agency. An agency could also require an employee or official to routinely blind carbon copy ("bcc") work emails in a personal account back to ((~~the employee's~~)) an agency email account. If the agency receives a request for records that are located solely on employees' or officials' home computers or personal devices, or in personal accounts, the agency should direct the ((~~employee~~)) individual to ((~~forward~~)) search for and provide any responsive documents ((~~back~~)) to the agency, and the agency should process the request as it would if the records were on the agency's computers((~~.~~)) or in agency-owned devices or accounts. The agency employee or official may be required by the agency to sign an affidavit describing the nature and extent of his or her search for and production of responsive public records located on a home computer or personal device, or in a nonagency account, and a description of personal records not provided with sufficient facts to show the records are not public records.[9]

Agencies could provide employees and officials with an agency-issued device that the agency retains a right to access. Or an agency could limit or prohibit employees' and officials' use of home computers, personal devices or personal accounts for agency business. Agencies should have policies describing permitted uses, if any, of home computers, personal devices or personal accounts for agency business. The policies should also describe the obligations of employees and officials for retaining, searching for and producing the agency's public records.[10]

Notes:

[1] *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748, 958 P.2d 260 (1998)((~~. For records held by the secretary of the senate or chief clerk of the house of representatives, a "public record" is a "legislative record" as defined in RCW 40.14.100. RCW 42.17.020(41)~~)) (broadly interpreting the provision concerning governmental function).

[2] See *Mechling v. Monroe*, 152 Wn. App. 830, 867, 222 P.3d 808 (2009) ("[P]urely personal emails of those government officials are not public records."); *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015) (describing that an employee or official must provide the agency responsive "public records" but is not required to provide "personal records").

[3] *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000) (record of volume of personal emails used for governmental purpose).

((~~(3)~~)) [4] *Concerned Ratepayers v. Public Utility Dist. No. 1*, 138 Wn.2d 950, 958-61, 983 P.2d 635 (1999)((~~.~~)); *Nissen*, 183 Wn.2d at 882. (For a record to be "used" it must bear a nexus with the agency's decision-making process; a record held by a third party, without more, is not a public record unless an agency "uses" it.)

((~~[4] Id.~~)) [5] *Concerned Ratepayers,* 138 Wn.2d 950.

((~~(5)~~)) [6] See Op. Att'y Gen. 11 (1989), at 4, n.2 ("We do not wish to encourage agencies to avoid the provisions of the public disclosure act by transferring public records to private parties. If a record otherwise meeting the statutory definition were transferred into private hands solely to prevent its public disclosure, we expect courts would take appropriate steps to require the agency to make disclosure or to sanction the responsible public officers.")

((~~(6)~~)) [7] *Nissen*, 183 Wn.2d at 882; *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016). In *Nissen* the State Supreme Court held that a communication is "within the scope of employment" when the job requires it, the employer directs it, or it furthers the employer's interests. This inquiry is always case- and record-specific.

[8] See *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).

[9] *Nissen,* 183 Wn.2d at 886-887.

[10] *Id.* at 877, 886-887.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-03002 Times for inspection and copying of records. An agency must make records available for inspection and copying during the "customary office hours of the agency." RCW ((~~42.17.280~~)) 42.56.090. If the agency is very small and does not have customary office hours of at least thirty hours per week, and while the act does not specify a particular schedule, making the records ((~~must be~~)) available from 9:00 a.m. to noon, and 1:00 p.m. to 4:00 p.m. satisfies the thirty-hour requirement. The agency and requestor can make mutually agreeable arrangements for the times of inspection and copying.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-03003 Index of records. State and local agencies are required by RCW ((~~42.17.260/~~)) 42.56.070 to provide an index for certain categories of records. An agency is not required to index every record it creates. Since agencies maintain records in a wide variety of ways, agency indices will also vary. An agency cannot use, rely on, or cite to as precedent a public record unless it was indexed or made available to the parties affected by it. RCW ((~~42.17.260(6)/~~)) 42.56.070(6). An agency should post its index on its web site.

The index requirements differ for state and local agencies.

A state agency must index only two categories of records:

(1) All records, if any, issued before July 1, 1990 for which the agency has maintained an index; and

(2) Final orders, declaratory orders, interpretive statements, and statements of policy issued after June 30, 1990. RCW ((~~42.17.260(5)/~~)) 42.56.070(5).

A state agency must adopt a rule governing its index.

A local agency may opt out of the indexing requirement if it issues a formal order specifying the reasons why doing so would "unduly burden or interfere with agency operations." RCW ((~~42.17.260 (4)(a)/~~)) 42.56.070 (4)(a). To lawfully opt out of the index requirement, a local agency must actually issue an order or adopt an ordinance specifying the reasons it cannot maintain an index.

The index requirements of the act were enacted in 1972 when agencies had far fewer records, the vast majority of records were paper, and an index was easier to maintain. However, technology allows agencies to map out, archive, and then electronically search for electronic documents. Agency resources vary greatly so not every agency can afford to utilize this technology. However, agencies should explore the feasibility of electronic indexing and retrieval to assist both the agency and requestor in locating public records. Agencies could also consider using their records retention schedules as their index, or direct requestors to the schedules as a way to describe the types of records an agency retains and for what periods of time. See chapter 40.14 RCW and WAC 44-14-03005.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-03004 Organization of records. An agency must "protect public records from damage or disorganization." RCW ((~~42.17.290/~~)) 42.56.100. An agency owns public records (subject to the public's right, as defined in the act, to inspect or copy nonexempt records) and must maintain custody of them. RCW 40.14.020; chapter 434-615 WAC. An agency's information "must be managed with great care to meet the objectives of citizens and their governments." RCW 43.105.351. Therefore, an agency should not allow a requestor to take original agency records out of the agency's office, or alter or damage an original record. An agency may send original records to a reputable commercial copying center to fulfill a records request if the agency takes reasonable precautions to protect the records. See WAC 44-14-07001(5).[1]

The legislature encourages agencies to electronically store and provide public records:

Broad public access to state and local government records and information has potential for expanding citizen access to that information and for providing government services. Electronic methods of locating and transferring information can improve linkages between and among citizens((~~...and~~)), organizations, business, and governments. Information must be managed with great care to meet the objectives of citizens and their governments. ((~~...~~))

It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public.

RCW ((~~43.105.250~~)) 43.105.351. An agency could fulfill its obligation to provide "access" to a public record by providing a requestor with a link to an agency web site containing an electronic copy of that record. RCW 42.56.520. Agencies are encouraged to do so, and requestors are encouraged to access records posted online in order to preserve taxpayer resources.[2] For those requestors without access to the internet, an agency ((~~could provide a~~)) is to provide copies or allow the requestor to view copies using an agency computer terminal at its office. RCW 42.56.520.

Notes:

[1]See also *Benton County v. Zink*, 191 Wn. App. 269, 361 P.3d 801 (2015) (agency can send records to outside vendor for copying).

[2]See legislative findings in chapter 69, Laws of 2010 ("The internet provides for instant access to public records at a significantly reduced cost to the agency and the public. Agencies are encouraged to make commonly requested records available on agency web sites. When an agency has made records available on its web site, members of the public with computer access should be encouraged to preserve taxpayer resources by accessing those records online.")

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-03005 Retention of records. An agency is not required to retain every record it ever created or used. The state and local records committees approve a general retention schedule for state and local agency records that applies to records that are common to most agencies.[1] Individual agencies seek approval from the state or local records committee for retention schedules that are specific to their agency, or that, because of particular needs of the agency, must be kept longer than provided in the general records retention schedule. The retention schedules for state and local agencies are available at ((~~www.secstate.wa.gov/archives/gs.aspx~~)) www.sos.wa.gov/archives/ (select "Records Management").

Retention schedules vary based on the content of the record. For example, documents with no value such as internal meeting scheduling emails can be destroyed when no longer needed, but documents such as periodic accounting reports must be kept for a period of years. Because different kinds of records must be retained for different periods of time, an agency is prohibited from automatically deleting all emails after a short period of time (such as thirty days). While many of the emails (like other public records) could be destroyed when no longer needed, many others must be retained for several years. Indiscriminate automatic deletion of all emails or other public records after a short period no matter what their content may prevent an agency from complying with its retention duties and could complicate performance of its duties under the Public Records Act. An agency should have a retention policy in which employees save retainable documents and delete nonretainable ones. An agency is strongly encouraged to train employees on retention schedules. Public records officers must receive training on retention of electronic records. RCW 42.56.152(5).

The lawful destruction of public records is governed by retention schedules. The unlawful destruction of public records can be a crime. RCW 40.16.010 and 40.16.020.

An agency is prohibited from destroying a public record, even if it is about to be lawfully destroyed under a retention schedule, if a public records request has been made for that record. RCW ((~~42.17.290./~~)) 42.56.100. Additional retention requirements might apply if the records may be relevant to actual or anticipated litigation. The agency is required to retain the record until the record request has been resolved. An exception exists for certain portions of a state employee's personnel file. RCW ((~~42.17.295./~~)) 42.56.110.

Note: [1]An agency can be found to violate the Public Records Act and be subject to the attorneys' fees and penalty provision if it prematurely destroys a requested record after a request is made. See *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989). However, it is not a violation of the Public Records Act if a record is destroyed prior to an agency's receipt of a public records request for that record. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009); *West v. Dep't of Nat. Res.*, 163 Wn. App. 238, 258 P.3d 78 (2011). The Public Records Act (chapter 42.56 RCW) and the records retention statutes (chapter 40.14 RCW) are two different laws.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-03006 Form of requests. There is no statutorily required format for a valid public records request.((~~:~~)) RCW 42.56.080(2). Agencies may recommend that requestors submit requests using an agency-provided form or web page. However, a person seeking records must make a "specific request" for "identifiable records" which provides "fair notice" and "sufficient clarity" that it is a records request.[1] An agency may prescribe the means of requests in its rules. RCW 42.56.040; RCW 42.56.070(1); RCW 42.56.100; RCW 34.05.220 (1)(b) (state agencies). An agency can adopt reasonable procedures requiring requests to be submitted only to designated persons[2] (such as the public records officer), or a specific agency address (such as a dedicated agency email address for receiving requests, or a mailing/street address of the office where the public records officer is located).

Agency public internet web site records - No request required. A requestor is not required to make a public records request before inspecting, downloading or copying records posted on an agency's public web site. To save resources for both agencies and requestors, agencies are strongly encouraged to post commonly requested records on their web sites. Requestors are strongly encouraged to review an agency's web site before submitting a public records request.

In-person requests. An agency must honor requests received in person during normal business hours. RCW 42.56.080(2). An agency should have its public records request form available at the office reception area so it can be provided to a "walk-in" requestor. The form should be directed to the agency's public records officer.

Mail, email and fax requests. A request can be sent ((~~in~~)) to the appropriate person or address by U.S. mail. RCW ((~~42.17.290./~~)) 42.56.100. A request can also be made by email, fax (if an agency still uses fax), or orally((~~. A request should be made to the agency's public records officer. An agency may prescribe means of requests in its rules. RCW 42.17.250/42.56.040 and 42.17.260(1)/42.56.070(1); RCW 34.05.220 (state agencies)~~)) (but should then be confirmed in writing; see further comment herein).

Public records requests using the agency's form or web page. An agency should have a public records request form. An agency is encouraged to make its public records request form available at its office, and on its web site((~~.~~

~~A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger ones, oral requests may be allowed but are problematic. An oral request does not memorialize the exact records sought and therefore prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in WAC 44-14-04002(1), a requestor must provide the agency with reasonable notice that the request is for the disclosure of public records; oral requests, especially to agency staff other than the public records officer or designee, may not provide the agency with the required reasonable notice. Therefore, requestors are strongly encouraged to make written requests. If an agency receives an oral request, the agency staff person receiving it should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorializes the request.~~

~~An agency should have a public records request form~~)). Some agencies also have online public records request forms or portals on a page on their web sites, set up to specifically receive public records requests. Agencies may recommend that requestors submit requests using an agency-provided form or web page. RCW 42.56.080(2). In this comment, requestors are strongly encouraged to use the agency's public records request form or online form or portal to make records requests, and then provide it to the designated agency person or address. Following this step begins the important commu-

nication process under the act between the requestor and the agency.[3] This step also helps both the requestor and the agency, because it better enables the agency to more promptly identify the inquiry as a public records request, timely confirm its receipt with the requestor, promptly seek clarification from the requestor if needed, and otherwise begin processing the agency's response to the request under the act.

An agency request form or online form or portal should ask the requestor whether he or she seeks to inspect the records, receive a copy of them, or to inspect the records first and then consider selecting records to copy. An agency request form or online portal should recite that inspection of records is free and provide ((~~the per-page charge for standard photocopies~~)) information about copying fees.

An agency request form or online form or portal should require the requestor to provide contact information so the agency can communicate with the requestor to, for example, clarify the request, inform the requestor that the records are available, or provide an explanation of an exemption. Contact information such as a name, phone number, and address or email should be provided. Requestors should provide an email address because it is an efficient means of communication and creates a written record of the communications between them and the agency. An agency should not require a requestor to provide a driver's license number, date of birth, or photo identification. This information is not necessary for the agency to contact the requestor and requiring it might intimidate some requestors.

Bot requests. An agency may deny a "bot" request, which is one of multiple requests from a requestor to the agency within a twenty-four-hour period, if the agency establishes that responding to the multiple requests would cause excessive interference with other essential agency functions. RCW 42.56.080(3). A "bot" request means a records request that an agency reasonably believes was automatically generated by a computer program or script.

Oral requests. A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger or complex ones, oral requests may be allowed but are problematic.[4] An oral request does not memorialize the exact records sought and therefore prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in this comment and in WAC 44-14-04002(1), a requestor must provide the agency with fair notice that the request is for the disclosure of public records; oral requests, especially to agency staff other than the public records officer or designee, may not provide the agency with the required notice or satisfy the agency's Public Records Act procedures. Therefore, requestors are strongly encouraged to make written requests, directed to the designated agency person or address.

If an agency receives an oral request, the agency staff person authorized to receive the request such as the public records officer, should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorialized the request. If the staff person is not the proper recipient, he or she should inform the person of how to contact the public records officer to receive information on submitting records requests. The public records officer serves "as a point of contact for members of the public in requesting disclosure of public records and oversees the agency's compliance with the public records disclosure requirements." RCW 42.56.580.

Prioritization of records requested. An agency may ask a requestor to prioritize the records he or she is requesting so that the agency is able to provide the most important records first. An agency is not required to ask for prioritization, and a requestor is not required to provide it.

Purpose of request. An agency cannot require the requestor to disclose the purpose of the request ((~~with two~~)), apart from exceptions permitted by law. RCW ((~~42.17.270~~)) 42.56.080. ((~~First~~)) For example, if the request is for a list of individuals, an agency may ask the requestor if he or she intends to use the records for a commercial purpose and require the requestor to provide information about the purpose of the use of the list.((~~[2]~~))[5] An agency should specify on its request form that the agency is not authorized to provide public records consisting of a list of individuals for a commercial use. RCW ((~~42.17.260(9)~~)) 42.56.070(9).

((~~Second~~)) And, an agency may seek information sufficient to allow it to determine if another statute prohibits disclosure. For example, some statutes allow an agency to disclose a record only to ((~~a claimant for benefits or his or her representative~~)) identified persons. In such cases, an agency is authorized to ask the requestor if he or she fits ((~~this criterion~~)) the statutory criteria for disclosure of the record.

Indemnification. An agency is not authorized to require a requestor to indemnify the agency. ((~~Op. Att'y Gen. 12 (1988).[3]~~))[6]

Notes:

[1] RCW 42.56.080 (1) and (2); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) ("there is no official format for a valid PDA [PRA] request.")((~~.~~)); *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000) (an agency's duty under the act is triggered when it receives a "specific request" for records and when the requestor states "the request with sufficient clarity to give the agency fair notice that it had received a request for public records").

[2] ((~~Op. Att'y Gen. 12 (1988), at 11; Op. Att'y Gen. 2 (1998), at 4.~~)) *Parmelee v. Clarke*, 148 Wn. App. 748, 201 P.3d 1022 (2008) (upholding agency's procedures requiring public records requests to be made to a designated person).

[3] See *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014) (Court of Appeals encouraged requestors to communicate with agencies about issues related to their PRA requests) and WAC 44-14-04003(3) ("Communication is usually the key to a smooth public records process for both requestors and agencies.").

[4] Oral requests make it "unnecessarily difficult" for the requestor to prove what was requested. *Beal v. City of Seattle*, 150 Wn. App. 865, 874-75, 209 P.3d 872 (2009); see also *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 151, 240 P.3d 1149 (2010) (holding that an oral request for "that email" did not provide the city with sufficient notice that metadata was also being requested).

[5] *SEIU Healthcare 775W v. State et al.*, 193 Wn. App. 377, 377 P.3d 214 (2016).

[6]Op. Att'y Gen. 12 (1988). See also RCW ((~~42.17.258~~)) 42.56.060 which provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter." ((~~Therefore, an agency has little need for an indemnification clause. Requiring a requestor to indemnify an agency inhibits some requestors from exercising their right to request public records. Op. Att'y Gen. 12 (1988), at 11.~~))

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-040 Processing of public records requests—General. (1) **Providing "fullest assistance."** The (name of agency) is charged by statute with adopting rules which provide for how it will "provide full access to public records," "protect records from damage or disorganization," "prevent excessive interference with other essential functions of the agency," provide "fullest assistance" to requestors, and provide the "most timely possible action" on public records requests. The public records officer or designee will process requests in the order allowing the most requests to be processed in the most efficient manner.

((~~(2)~~)) (a) Upon receipt of a request, the (name of agency) will assign it a tracking number and log it in.

(b) The public records officer or designee will evaluate the request according to the nature of the request, volume, and availability of requested records, and give it a priority category.

(i) The priority category guides the (name of agency) in determining its reasonable level of effort to devote to responding to the request, as the (name of agency) is obligated to prevent public disclosure demands from causing excessive interference with other essential agency functions. RCW 42.56.100.

(ii) The priority category also guides the (name of agency) in providing a reasonable estimate of time to respond to a request. RCW 42.56.520.

(iii) The priority category also guides the (name of agency) in determining the order of requests processed. Responding to a records request is not always a sequential process. The (name of agency) may process requests out of order, enabling it to better respond to simple as well as complex requests. At any given time, the (name of agency) may have multiple records requests in the queue. The processing of requests in the queue will depend upon the priority category; the number of records responsive to a request; the number and size of other records requests in the queue; the amount of processing required for a request or other requests in the queue; the status of a particular request, such as whether the (name of agency) is awaiting clarification or payment from the requestor, a response to a third-party notice, or legal review; and, the current volume of other (name of agency) work, as it affects the amount of staff time that can be devoted to a request or requests.

(2) The request will be evaluated for prioritization using the following criteria: The immediacy of the required response in the interest of public safety (documented imminent danger); the complexity of the records request in terms of breadth, ease of identification of potentially responsive records, clarity and accessibility; the amount of coordination required between (departments) (divisions); the number of records requested; the extent of research and searching needed by staff who are not primarily responsible for public disclosure; the format of the records; the need for legal review and/or additional assistance from third parties in identification and assembly; the need to notify affected third parties; the need to consider customized access, and, other criteria the public records officer deems appropriate.

(3) Following evaluation, the (name of agency) will assign a category number. After initial categorization, requests may be recategorized in response to unanticipated circumstances or additional information. The estimated time periods for each category are goals; the (name of agency) may not be able to comply with the goals but will notify the requestor if the estimated time periods will not be met and need to be adjusted.

(4) **Acknowledging receipt of request.** Following the initial evaluation of the request under (2) and (3) of this subsection, and within five business days[1] of receipt of the request, the public records officer will do one or more of the following, depending upon the category assigned to the request:

(a) Make the records available for inspection or copying((~~;~~

~~(b)~~)) including:

(i) If copies are available on the (name of agency's) internet web site, provide an internet address and link on the web site to specific records requested;

(ii) If copies are requested and payment of a deposit for the copies, if any, is made or other terms of payment are agreed upon, send the copies to the requestor;

((~~(c)~~)) (b) Acknowledge receipt of the request and provide a reasonable estimate of when records or an installment of records will be available (the public records officer or designee may revise the estimate of when records will be available); or

((~~(d) If the request is unclear or does not sufficiently identify the requested records, request clarification from the requestor.~~)) (c) Acknowledge receipt of the request and ask the requestor to provide clarification for a request that is unclear, and provide, to the greatest extent possible, a reasonable estimate of time the (name of agency) will require to respond to the request if it is not clarified.

(i) Such clarification may be requested and provided by telephone((~~. The public records officer or designee may revise the estimate of when records will be available~~)), and memorialized in writing;

(ii) If the requestor fails to respond to a request for clarification and the entire request is unclear, the (name of agency) need not respond to it. The (name of agency) will respond to those portions of a request that are clear; or

((~~(e)~~)) (d) Deny the request.

((~~(3)~~)) (5) **Consequences of failure to respond.** If the (name of agency) does not respond in writing within five

business days of receipt of the request for disclosure, the requestor should ((~~consider contacting~~)) contact the public records officer to determine the reason for the failure to respond.

(((~~4~~))) (6) **Protecting rights of others.** In the event that the requested records contain information that may affect rights of others and may be exempt from disclosure, the public records officer may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requestor and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure. The notice to the affected persons will include a copy of the request.

(((~~5~~))) (7) **Records exempt from disclosure.** Some records are exempt from disclosure, in whole or in part. If the (name of agency) believes that a record is exempt from disclosure and should be withheld, the public records officer will state the specific exemption and provide a brief written explanation of why the record or a portion of the record is being withheld. If only a portion of a record is exempt from disclosure, but the remainder is not exempt, the public records officer will redact the exempt portions, provide the nonexempt portions, and indicate to the requestor why portions of the record are being redacted.

(((~~6~~))) (8) **Inspection of records.**

(a) Consistent with other demands, the (name of agency) shall promptly provide space to inspect public records. No member of the public may remove a document from the viewing area or disassemble or alter any document. The requestor shall indicate which documents he or she wishes the agency to copy.

(b) The requestor must claim or review the assembled records within thirty days of the (name of agency's) notification to him or her that the records are available for inspection or copying. The agency will notify the requestor in writing of this requirement and inform the requestor that he or she should contact the agency to make arrangements to claim or review the records. If the requestor or a representative of the requestor fails to claim or review the records within the thirty-day period or make other arrangements, the (name of agency) may close the request and refile the assembled records. Other public records requests can be processed ahead of a subsequent request by the same person for the same or almost identical records, which can be processed as a new request.

(((~~7~~))) (9) **Providing copies of records.** After inspection is complete, the public records officer or designee shall make the requested copies or arrange for copying. Where (name of agency) charges for copies, the requestor must pay for the copies.

(((~~8~~))) (10) **Providing records in installments.** When the request is for a large number of records, the public records officer or designee will provide access for inspection and copying in installments, if he or she reasonably determines that it would be practical to provide the records in that way. If, within thirty days, the requestor fails to inspect the entire set of records or one or more of the installments, the public records officer or designee may stop searching for the remaining records and close the request.

(((~~9~~))) (11) **Completion of inspection.** When the inspection of the requested records is complete and all requested copies are provided, the public records officer or designee will indicate that the (name of agency) has completed a ((~~diligent~~)) reasonable search for the requested records and made any located nonexempt records available for inspection.

(((~~10~~))) (12) **Closing withdrawn or abandoned request.** When the requestor either withdraws the request, or fails to clarify an entirely unclear request, or fails to fulfill his or her obligations to inspect the records ((~~or~~)), pay the deposit, pay the required fees for an installment, or make final payment for the requested copies, the public records officer will close the request and indicate to the requestor that the (name of agency) has closed the request.

(((~~11~~))) (13) **Later discovered documents.** If, after the (name of agency) has informed the requestor that it has provided all available records, the (name of agency) becomes aware of additional responsive documents existing at the time of the request, it will promptly inform the requestor of the additional documents and provide them on an expedited basis.

Note: [1]In calculating the five business days, the following are not counted: The day the agency receives the request, Saturdays, Sundays and holidays. RCW 1.12.040. See also WAC 44-14-03006.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-04001 Introduction. Both requestors and agencies have responsibilities under the act. The public records process can function properly only when both parties perform their respective responsibilities. An agency has a duty to promptly provide access to all nonexempt public records.[1] A requestor has a duty to give fair notice that he or she is making a records request, request identifiable records,[2] follow the agency's reasonable procedures, inspect the assembled records or pay for the copies, and be respectful to agency staff.((2)) Both the agency and the requestor have a responsibility to communicate with each other when issues arise concerning a request.[3]

Requestors should keep in mind that all agencies have essential functions in addition to providing public records. Agencies also have greatly differing resources. The act recognizes that agency public records procedures should prevent "excessive interference" with the other "essential functions" of the agency. RCW ((~~42.17.290~~)) 42.56.100. Therefore, while providing public records is an essential function of an agency, it is not required to abandon its other, nonpublic records functions. Agencies without a full-time public records officer may assign staff part-time to fulfill records requests, provided the agency is providing the "fullest assistance" and the "most timely possible" action on the request. The proper level of staffing for public records requests will vary among agencies, considering the complexity and number of requests to that agency, agency resources, and the agency's other functions.

The burden of proof is on an agency to prove its estimate of time to provide a full response is "reasonable." RCW ((~~42.17.340(2)~~)) 42.56.550(2). An agency should be pre-

pared to explain how it arrived at its estimate of time and why the estimate is reasonable.

Agencies are encouraged to use technology to provide public records more quickly and, if possible, less expensively. An agency is allowed, of course, to do more for the requestor than is required by the letter of the act. Doing so often saves the agency time and money in the long run, improves relations with the public, and prevents litigation. For example, agencies are encouraged to post many nonexempt records of broad public interest on the internet. This may result in fewer requests for public records. See RCW ((~~43.105.270 (state~~)) chapter 69, Laws of 2010 (agencies encouraged to post frequently sought documents on the internet); RCW 43.105.351 (legislative intent that agencies prioritize making records widely available electronically to the public).

Notes:

[1]RCW ((~~42.17.260(1)/~~)) 42.56.070(1) (agency "shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions" listed in the act or other statute).

[2]See RCW ((~~42.17.270/~~)) 42.56.080 ("identifiable record" requirement); RCW ((~~42.17.300/~~)) 42.56.120 (claim or review requirement); RCW ((~~42.17.290/~~)) 42.56.100 (agency may prevent excessive interference with other essential agency functions).

[3]See *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014) (Court of Appeals encouraged requestors to communicate with agencies about issues related to their PRA requests) and WAC 44-14-04003(3). ("Communication is usually the key to a smooth public records process for both requestors and agencies.")

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-04002 Obligations of requestors. (1) **((~~Reasonable~~)) Fair notice that request is for public records.** A requestor must give an agency ((~~reasonable~~)) fair notice that the request is being made pursuant to the act. Requestors are encouraged to cite or name the act but are not required to do so.[1] A request using the agency's request form or online request form or portal, or using the terms "public records," "public disclosure," "FOIA," or "Freedom of Information Act" (the terms commonly used for federal records requests), especially in the subject line of an email or letter, is recommended. The request should be directed to the agency-designated person to receive requests (such as the public records officer) or the agency-designated address for public records requests, which should provide an agency with ((~~reasonable~~)) fair notice in most cases. A requestor should not submit a "stealth" request, which is buried in another document in an attempt to trick the agency into not responding.

(2) **Identifiable record.** A requestor must request an "identifiable record" or "class of records" before an agency must respond to it. RCW ((~~42.17.270/~~)) 42.56.080 and ((~~42.17.340(1)/~~)) 42.56.550(1).

An "identifiable record" is one that is existing at the time of the request and which agency staff can reasonably locate.((~~[2]~~)) The act does not require agencies to be "mind readers" and to guess what records are being requested.[2] The act does not allow a requestor to make "future" or "standing" (ongoing) requests for records not in existence; nonexistent records are not "identifiable."[3]

A request for all or substantially all records prepared, owned, used or retained by an agency is not a valid request for identifiable records, provided that a request for all records regarding a particular topic or containing a particular keyword or name shall not be considered a request for all of an agency's records. RCW 42.56.080(1). A "keyword" must have some meaning that reduces a request from all or substantially all of an agency's records. For example, a request seeking any and all records from the department of ecology which contain the word "ecology" is not a request containing a keyword. The word "ecology" is likely on every agency letterhead, email signature block, notice, order, brochure, form, pleading and virtually every other agency document. A request for all of an agency's emails can encompass substantially all of an agency's records, and such a request contains no keywords. The act does not allow a requestor nor require an agency to search through agency files for records which cannot be reasonably identified or described to the agency.((~~[3]~~))[4] It benefits both the requestor and the agency when the request includes terms that are for identifiable records actually sought by the requestor, and which produce meaningful search results by the agency.

However, a requestor is not required to identify the exact record he or she seeks. For example, if a requestor requested an agency's "2001 budget," but the agency only had a 2000-2002 budget, the requestor made a request for an identifiable record.((~~(4)~~))[5]

An "identifiable record" is not a request for "information" in general.((~~(5)~~))[6] For example, asking "what policies" an agency has for handling discrimination complaints is merely a request for "information."[6] A request to inspect or copy an agency's policies and procedures for handling discrimination complaints would be a request for an "identifiable record."

Public records requests are not interrogatories (questions). An agency is not required to answer questions about records, or conduct legal research for a requestor.[7] A request for "any law that allows the county to impose taxes on me" is not a request for an identifiable record. Conversely, a request for "all records discussing the passage of this year's tax increase on real property" is a request for an "identifiable record."

When a request uses an inexact phrase such as all records "relating to" a topic (such as "all records relating to the property tax increase"), the agency may interpret the request to be for records which directly and fairly address the topic. When an agency receives a "relating to" or similar request, it should seek clarification of the request from the requestor or explain how the agency is interpreting the requestor's request.

(3) **"Overbroad" requests.** An agency cannot "deny a request for identifiable public records based solely on the basis that the request is overbroad." RCW ((~~42.17.270/~~)) 42.56.080. However, if such a request is not for identifiable records or otherwise is not proper, the request can still be denied. When confronted with a request that is unclear, an agency should seek clarification.

Notes: [1]*Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000).

[2]*Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998), ((~~*review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999)~~)) ("identifiable record" requirement is satisfied when there is a "reasonable description" of the record "enabling the government employee to locate the requested records.").

[3]*Limstrom v. Ladenburg*, 136 Wn.2d 595, 604, n.3, 963 P.2d 869 (1998), *appeal after remand*, 110 Wn. App. 133, 39 P.3d 351 (2002); *Sargent v. Seattle Police Dep't*, 16 Wn. App. 1, 260 P.3d 1006 (2011), *aff'd in part, rev'd in part on other grounds*, 179 Wn.2d 376, 314 P.3d 1093 (2013) ("We hold that there is no standing request under the PRA."); *Smith v. Okanogan County*, 100 Wn. App.7, 994 P.2d 857 (2000) (agency not required to create a record to respond to a PRA request).

[4]*Bonamy*, 92 Wn. App. at 409.

[5]*Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, n.4, 59 P.3d 109 (2002).

((~~[5]*Bonamy*, 92 Wn. App. at 409.~~))

[6]((~~*Id.*~~)) *Bonamy*, 92 Wn. App. at 409.

[7]See *Limstrom*, 136 Wn.2d at 604, n.3 (act does not require "an agency to go outside its own records and resources to try to identify or locate the record requested."); *Bonamy*, 92 Wn. App. at 409 (act "does not require agencies to research or explain public records, but only to make those records accessible to the public((~~.~~))").

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-04003 Responsibilities of agencies in processing requests. (1) **Similar treatment and purpose of the request.** The act provides: "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request" (except to determine if the request is seeking a list of individuals for a commercial use or would violate another statute prohibiting disclosure or restricting disclosure to only certain persons). RCW ((~~42.17.270~~)) 42.56.080.[1] The act also requires an agency to take the "most timely possible action on requests" and make records "promptly available." RCW ((~~42.17.290~~)) 42.56.100 and ((~~42.17.270~~)) 42.56.080. However, treating requestors similarly does not mean that agencies must process requests strictly in the order received because this might not be providing the "most timely possible action" for all requests. A relatively simple request need not wait for a long period of time while a much larger or more complex request is being fulfilled. Agencies are encouraged to be flexible and process as many requests as possible even if they are out of order.((~~[2]~~))

(a) Agencies can use criteria to assess whether the request is routine or complex (WAC 44-14-040) in order to assist them in calculating their estimate of time and in their processing. Complex and broad requests typically take more time to process and may require an agency to provide records in installments, and use additional time to locate and assemble records, notify third parties, and determine if information is exempt.[2]

(b) For example, upon receipt of a request, an agency will log it in (see subsection (14) of this section). Then, an agency could apply categories of similar requests and thus treat them similarly in processing the request. To further illustrate, an agency could consider the following processing categories or similar categories with response goal initial estimates:

(i) **Category 1.** Requests requiring immediate response in the interest of public safety (requestor has documented imminent danger), and limited redaction or legal review is needed. These requests take priority over all other requests.

Generally, the agency will respond to these requests immediately (including to seek clarification if necessary), or within the next business day or thereafter as soon as possible.

(ii) **Category 2.** Requests that are routine or readily filled because they request easily identified and immediately accessible records requiring little or no coordination among departments or divisions, and do not require clarification or production in installments. Examples include records that are available on the agency's web site, records typically made available at an office reception or often provided without a formal records request (such as copies of current agency brochures or forms, sometimes called "counter records"), and similar records.

Generally, the agency will respond to Category 2 requests within five business days. If the records cannot be made available within five business days, the agency may extend the time to respond.

(iii) **Category 3.** Requests that are routine and involve a large number of records; responsive records are not easily identified (thus clarification may be needed) or are not easily located or accessible; and, processing the request requires some coordination among departments or divisions.

The agency will provide a written response to the requestor within five business days with a reasonable estimate of time necessary for further response, including seeking clarification if needed. The estimate is made on a case-by-case basis. Depending upon the nature and the scope of the request, and clarifications, Category 3 requests usually require between five and thirty business days.

(iv) **Category 4.** Requests that are complex and which may be especially broad and vague and which involve: A large number of records that are not easily identified (thus clarification may be needed) or are not easily located or accessible; require significant coordination among multiple departments or divisions; require research by agency staff who are not primarily responsible for public disclosure; and/or require review by public disclosure staff to determine whether any of the records are exempt from production; and/or involve third-party notice to one person or entity.

The agency will provide a written response to the requestor within five business days with a reasonable estimate of time necessary for further response, including seeking clarification if needed. The estimate is made on a case-by-case basis. Depending upon the nature and the scope of the request, and clarifications, Category 4 requests may require several weeks or months.

(v) **Category 5.** Requests that meet the criteria of Category 4 and in addition: Require legal review and creation of an exemption log or other multiple brief explanations of withheld or redacted information; and/or involve third-party notice to multiple persons or entities.

Category 5 also separately includes a request for customized access to information under RCW 42.56.120(3) where the request would require the use of information technology expertise to prepare data compilations, or notice that the agency may proceed with the request by providing customized access services when such compilations and customized access services are not used by the agency for other agency purposes.

The agency will provide a written response to the requestor within five business days with a reasonable estimate of time necessary for further response, including seeking clarification if needed, or notice of customized access service procedures and charges if relevant. The estimate is made on a case-by-case basis. Depending upon the nature and the scope of the request, and clarifications, Category 5 requests may require several weeks or months, or longer.

(2) **Purpose of request.** An agency cannot require a requestor to state the purpose of the request (with limited exceptions). RCW ((~~42.17.270~~)) 42.56.080. However, in an effort to better understand the request and provide all responsive records, the agency can inquire about the purpose of the request. The requestor is not required to answer the agency's inquiry (with limited exceptions as previously noted).

(((~~2~~))) (3) **Provide "fullest assistance" and "most timely possible action."** The act requires agencies to adopt and enforce reasonable rules to provide for the "fullest assistance" to a requestor. RCW ((~~42.17.290~~)) 42.56.100. The "fullest assistance" principle should guide agencies when processing requests. In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an "excessive interference" with the agency's "other essential functions." RCW ((~~42.17.290~~)) 42.56.100. The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others.

The act also requires agencies to adopt and enforce rules to provide for the "most timely possible action on requests." RCW ((~~42.17.290~~)) 42.56.100. This principle should guide agencies when processing requests. It should be noted that this provision requires the most timely "possible" action on requests. This recognizes that an agency is not always capable of fulfilling a request as quickly as the requestor would like.

(((~~3~~))) (4) **Communicate with requestor.** Communication is usually the key to a smooth public records process for both requestors and agencies.[3] Clear requests for a small number of records usually do not require predelivery communication with the requestor. However, when an agency receives a large or unclear request, the agency should communicate with the requestor to clarify the request. If a requestor asks for a summary of applicable charges before any copies are made, an agency must provide it. RCW 42.56.120 (2)(f). The requestor may then revise the request to reduce the number of requested copies. If the request is clarified or modified orally, the public records officer or designee should memorialize the communication in writing.

For large requests, the agency may ask the requestor to prioritize the request so that he or she receives the most important records first. If feasible, the agency should provide periodic updates to the requestor of the progress of the request. Similarly, the requestor should periodically communicate with the agency and promptly answer any clarification questions. Sometimes a requestor finds the records he or she is seeking at the beginning of a request. If so, the requestor should communicate with the agency that the requested records have been provided and that he or she is canceling the remainder of the request. If the requestor's cancellation communication is not in writing, the agency should confirm it in writing.

(((~~4~~))) (5) **Failure to provide initial response within five business days.** Within five business days of receiving a request, an agency must provide an initial response to requestor. The initial response must do one of four things:

(a) Provide the record;

(b) Acknowledge that the agency has received the request and provide a reasonable estimate of the time it will require to ((~~fully~~)) further respond;

(c) Seek a clarification of the request and if unclear, provide to the greatest extent possible a reasonable estimate of time the agency will require to respond to the request if it is not clarified; or

(d) Deny the request. RCW ((~~42.17.320~~)) 42.56.520. An agency's failure to provide an initial response is arguably a violation of the act.((~~2~~)) [4]

(((~~5~~))) (6) **No duty to create records.** An agency is not obligated to create a new record to satisfy a records request.((~~4~~)) [5] However, sometimes it is easier for an agency to create a record responsive to the request rather than collecting and making available voluminous records that contain small pieces of the information sought by the requestor or find itself in a controversy about whether the request requires the creation of a new record. The decision to create a new record is left to the discretion of the agency. With respect to databases, for example, there is not always a simple dichotomy between producing an existing record and creating a new record.[6] In addition, an agency may decide to provide a customized service and if so, assess a customized service charge for the actual costs of staff technology expertise needed to prepare data compilations, or when such customized access services are not used by the agency for other business purposes. RCW 42.56.120.

If the agency is considering creating a new record instead of disclosing the underlying records, or creating new records from a database, it should obtain the consent of the requestor to ensure that the requestor is not actually seeking the underlying records, and describe any customized service charges that may apply.

Making an electronic copy of an electronic record is not "creating" a new record; instead, it is similar to copying a paper copy. If an agency translates a record into an alternative electronic format at the request of a requestor, the copy created does not constitute a new public record. RCW 42.56.120(1). Similarly, eliminating a field of an electronic record can be a method of redaction; it is ((~~similar to~~)) like redacting portions of a paper record using a black pen or white-out tape to make it available for inspection or copying. Scanning paper copies to make electronic copies is a method of copying paper records and does not create a new public record. RCW 42.56.120(1).

(((~~(6)~~))) (7) **Provide a reasonable estimate of the time to fully respond.** Unless it is providing the records or claiming an exemption from disclosure within the five-business day period, an agency must provide a reasonable estimate of the time it will take to ((~~fully~~)) respond to the request. RCW ((~~42.17.320/~~)) 42.56.520. ((~~Fully~~)) Responding can mean processing the request (locating and assembling records, redacting, preparing a withholding ((~~index~~)) log, making an installment available, or notifying third parties named in the records who might seek an injunction against disclosure) or determining if the records are exempt from disclosure.

An estimate must be "reasonable." The act provides a requestor a quick and simple method of challenging the reasonableness of an agency's estimate. RCW ((~~42.17.340(2)/~~)) 42.56.550(2). See WAC 44-14-08004 (5)(b). The burden of proof is on the agency to prove its estimate is "reasonable." RCW ((~~42.17.340(2)/~~)) 42.56.550(2).

To provide a "reasonable" estimate, an agency should not use the same estimate for every request. An agency should roughly calculate the time it will take to respond to the request and send estimates of varying lengths, as appropriate. It can consider if a request falls into a category it has defined for processing purposes. See subsection (1)(b) of this section. Some very large requests can legitimately take months or longer to fully provide. See WAC 44-14-040. There is no standard amount of time for fulfilling a request so reasonable estimates should vary.

Some agencies send form letters with thirty-day estimates to all requestors, no matter the size or complexity of the request. Form letter thirty-day estimates for every requestor, regardless of the nature of the request, are rarely "reasonable" because an agency, which has the burden of proof, could find it difficult to prove that every single request it receives would take the same thirty-day period.

While not required,[7] in order to avoid unnecessary litigation over the reasonableness of an estimate, an agency ((~~should~~)) could briefly explain to the requestor the basis for the estimate in the initial response, including describing or referring to its processing categories. See WAC 44-14-040. The explanation need not be elaborate but should allow the requestor to make a threshold determination of whether he or she should question that estimate further or has a basis to seek judicial review of the reasonableness of the estimate.

An agency should either fulfill the request within the estimated time or, if warranted, communicate with the requestor about clarifications or the need for a revised estimate.[8] An agency should not ignore a request and then continuously send extended estimates. Routine extensions with little or no action to fulfill the request would show that the previous estimates probably were not "reasonable." Extended estimates are appropriate when the circumstances have changed (such as an increase in other requests or discovering that the request will require extensive redaction). An estimate can be revised when appropriate, but unwarranted serial extensions have the effect of denying a requestor access to public records.

(((~~(7)~~))) (8) **Seek clarification of a request or additional time.** An agency may seek a clarification of an "unclear" or partially unclear request. RCW ((~~42.17.320/~~)) 42.56.520. An agency can only seek a clarification when the request is objectively "unclear." Seeking a "clarification" of an objectively clear request delays access to public records.

If the requestor fails to clarify an entirely unclear request, the agency need not respond to it further. RCW ((~~42.17.320/~~)) 42.56.520. However, an agency must respond to those parts of a request that are clear. If the requestor does not respond to the agency's request for a clarification within thirty days of the agency's request or other specified time, the agency may consider the request abandoned. If the agency considers the request abandoned, it should send a closing letter to the requestor if it has not already explained when it will close a request due to lack of response by the requestor.

An agency may take additional time to provide the records or deny the request if it is awaiting a clarification. RCW ((~~42.17.320/~~)) 42.56.520. After providing the initial response and perhaps even beginning to assemble the records, an agency might discover it needs to clarify a request and is allowed to do so. A clarification could also affect a reasonable estimate.

(((~~(8)~~))) (9) **Preserving requested records.** If a requested record is scheduled shortly for destruction, and the agency receives a public records request for it, the record cannot be destroyed until the request is resolved. RCW ((~~42.17.290/~~)) 42.56.100.((~~[5]~~)) [9] Once a request has been closed, the agency can destroy the requested records in accordance with its retention schedule.

(((~~(9)~~))) (10) **Searching for records.** An agency must conduct an objectively reasonable search for responsive records. The adequacy of a search is judged by the standard of reasonableness.[10] A requestor is not required to "ferret out" records on his or her own.((~~[6]~~)) A reasonable agency search usually begins with the public records officer for the agency or a records coordinator for a department of the agency deciding where the records are likely to be and who is likely to know where they are. One of the most important parts of an adequate search is to decide how wide the search will be. If the agency is small, it might be appropriate to initially ask all agency employees and officials if they have responsive records. If the agency is larger, the agency may choose to initially ask only the staff of the department or departments of an agency most likely to have the records. For example, a request for records showing or discussing payments on a public works project might initially be directed to all staff in the finance and public works departments if those departments are deemed most likely to have the responsive documents, even though other departments may have copies or alternative versions of the same documents. Meanwhile, other departments that may have documents should be instructed to preserve their records in case they are later deemed to be necessary to respond to the request. The agency could notify the requestor which departments are being surveyed for the documents so the requestor may suggest other departments.

If agency employees or officials are using home computers, personal devices, or personal accounts to conduct agency business, those devices and accounts also need to be searched by the employees or officials who are using them when those devices and accounts may have responsive records.[11] If an agency's contractors performing agency work have responsive public records of an agency as a consequence of the agency's contract, they should also be notified of the records

request. It is better to be over inclusive rather than under inclusive when deciding which staff or others should be contacted, but not everyone in an agency needs to be asked if there is no reason to believe he or she has responsive records. An email to staff or agency officials selected as most likely to have responsive records is usually sufficient. Such an email also allows an agency to document whom it asked for records. Documentation of searches is recommended. The courts can consider the reasonableness of an agency's search when considering assessing penalties for an agency's failure to produce records.[12]

Agency policies should require staff and officials to promptly respond to inquiries about responsive records from the public records officer.

After records which are deemed potentially responsive are located, an agency should take reasonable steps to narrow down the number of records to those which are responsive. In some cases, an agency might find it helpful to consult with the requestor on the scope of the documents to be assembled. An agency cannot "bury" a requestor with nonresponsive documents. However, an agency is allowed to provide arguably, but not clearly, responsive records to allow the requestor to select the ones he or she wants, particularly if the requestor is unable or unwilling to help narrow the scope of the documents. If an agency does not find responsive documents, it should explain, in at least general terms, the places searched.[13]

(((~~(10)~~))) (11) **Expiration of reasonable estimate.** An agency should provide a record within the time provided in its reasonable estimate or communicate with the requestor that additional time is required to fulfill the request based on specified criteria. ((~~Unjustified failure to provide the record by the expiration of the estimate is a denial of access to the record~~)) A failure of an agency to meet its own internal deadline is not a violation of the act, assuming the agency is working diligently to respond to the request.[14] Nevertheless, an agency should promptly communicate with a requestor when it determines its original estimate of time needs to be adjusted.

(((~~(11)~~))) (12) **Notice to affected third parties.** Sometimes an agency decides it must release all or a part of a public record affecting a third party. The third party can file an action to obtain an injunction to prevent an agency from disclosing it, but the third party must prove the record or portion of it is exempt from disclosure.((~~[7]~~)) RCW ((~~42.17.330~~)) 42.56.540. Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record.

The act provides that before releasing a record an agency may, at its "option," provide notice to a person named in a public record or to whom the record specifically pertains (unless notice is required by law). RCW ((~~42.17.330~~)) 42.56.540.[15] This would include all of those whose identity could reasonably be ascertained in the record and who might have a reason to seek to prevent the release of the record. An agency has wide discretion to decide whom to notify or not notify. First, an agency has the "option" to notify or not (unless notice is required by law). RCW ((~~42.17.330~~)) 42.56.540. Second, if it acted in good faith, an agency cannot be held liable for its failure to notify enough people under the act. RCW ((~~42.17.258~~)) 42.56.060. However, if an agency had a contractual obligation to provide notice of a request but failed to do so, the agency might lose the immunity provided by RCW ((~~42.17.258~~)) 42.56.060 because breaching the agreement probably is not a "good faith" attempt to comply with the act.

The practice of many agencies is to give ten days' notice. Many agencies expressly indicate the deadline date on which it must receive a court order enjoining disclosure, to avoid any confusion or potential liability. More notice might be appropriate in some cases, such as when numerous notices are required, but every additional day of notice is another day the potentially disclosable record is being withheld. When it provides a notice, the agency should include in its calculation the notice period in the "reasonable estimate" of time it provides to a requestor.

The notice informs the third party that release will occur on the stated date unless he or she obtains an order from a court enjoining release. The requestor has an interest in any legal action to prevent the disclosure of the records he or she requested. Therefore, the agency's notice should inform the third party that he or she should name the requestor as a party to any action to enjoin disclosure. If an injunctive action is filed, the third party or agency should name the requestor as a party or, at a minimum, must inform the requestor of the action to allow the requestor to intervene.

(((~~(12)~~))) (13) **Later discovered records.** If the agency becomes aware of the existence of records responsive to a request which were not provided, the agency should notify the requestor in writing, and provide a brief explanation of the circumstances, and provide the nonexempt records with a written explanation of any redacted or withheld records.

(14) **Maintaining a log.** Effective July 23, 2017, the agency must maintain a log of public records requests to include the identity of the requestor if provided by the requestor, the date the request was received, the text of the original request, a description of the records redacted or withheld and the reasons therefor, the date of the final disposition of the request. Section 6, chapter 303, Laws of 2017 (to be codified in chapter 40.14 RCW).

Notes:

[1] See also Op. Att'y Gen. 2 (1998).

[2] *West v. Dep't of Licensing*, 182 Wn. App. 500, 331 P.3d 72 (2014).

[3] See *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004, n.12 (2014) (Court of Appeals encouraged requestors to communicate with agencies about issues related to their records requests).

[4] See *Smith v. Okanogan County*, 100 Wn. App. 7, 13, 994 P.2d 857 (2000) ("When an agency fails to respond as provided in RCW 42.17.320 (42.56.520), it violates the act and the individual requesting the public record is entitled to a statutory penalty."); *West v. State Dep't of Natural Res.*, 163 Wn. App. 235, 243, 258 P.3d 78 (2011) (failure to respond within five business days); *Rufin v. City of Seattle*, X Wn. App. X, X P.3d X (2017) (failure to respond within five business days entitles plaintiff to seek attorneys' fees but not penalties).

((~~[3] While an agency can fulfill requests out of order, an agency is not allowed to ignore a large request while it is exclusively fulfilling smaller requests. The agency should strike a balance between fulfilling small and large requests.~~

~~4~~)) [5] *Smith*, 100 Wn. App. at 14.

((~~5~~)) [6] *Fisher Broadcasting v. City of Seattle*, 180 Wn.2d 515, 326 P.3d 688 (2014).

[7] *Ockerman v. King County Dep't of Dev. & Envtl. Servs.*, 102 Wn. App. 212, 214, 6 P.3d 1215 (2000) (agency is not required to provide a written explanation of its reasonable estimate of time when it does not provide records within five days of the request).

[8] *Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 334 P.3d 94 (2014) (the act recognizes that agencies may need more time than initially anticipated to locate records).

[9] An exception is some state-agency employee personnel records. RCW ((~~42.17.295~~)) 42.56.110.

((~~6 *Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002) ("an applicant need not exhaust his or her own ingenuity to 'ferret out' records through some combination of 'intuition and diligent research'").~~

~~7~~)) [10] *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012).

[11] *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010); *Nissen v. Pierce County*, 182 Wn.2d 363, 357 P.3d 45 (2015); *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016).

[12] *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010); *Neighborhood Alliance*, 172 Wn.2d at 728.

[13] *Neighborhood Alliance,* 172 Wn.2d at 728.

[14] *Andrews v. Wash. State Patrol*, 183 Wn. App. 644 at 653; *Hikel v. Lynnwood*, 197 Wn. App. 366, 389 P.3d 677 (2016).

[15] The agency holding the record can also file a RCW ((~~42.17.330~~)) 42.56.540 injunctive action to establish that it is not required to release the record or portion of it. An agency can also file an action under the Uniform Declaratory Judgments Act at chapter 7.24 RCW. *Benton County v. Zink*, 191 Wn. App. 194, 361 P.2d 283 (2015).

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-04004 Responsibilities of agency in providing records. (1) **General.** An agency may simply provide the records or make them available within the five-business day period of the initial response. When it does so, an agency should also provide the requestor a written cover letter or email briefly describing the records provided and informing the requestor that the request has been closed. This assists the agency in later proving that it provided the specified records on a certain date and told the requestor that the request had been closed. However, a cover letter or email might not be practical in some circumstances, such as when the agency provides a small number of records or fulfills routine requests.

An agency can, of course, provide the records sooner than five business days. Providing the "fullest assistance" to a requestor would mean providing a readily available record as soon as possible. For example, an agency might routinely prepare a premeeting packet of documents three days in advance of a city council meeting. The packet is readily available so the agency should provide it to a requestor on the same day of the request so he or she can have it for the council meeting.

(2) **Means of providing access.** An agency must make nonexempt public records "available" for inspection or provide a copy. RCW ((~~42.17.270~~)) 42.56.080. An agency is only required to make records "available" and has no duty to explain the meaning of public records.[1] Making records available is often called "access."

Access to a public record can be provided by allowing inspection of the record, providing a copy, or posting the record on the agency's web site and assisting the requestor in finding it (if necessary). An agency must mail a copy of records if requested and if the requestor pays the actual cost of postage and the mailing container.[2] The requestor can specify which method of access (or combination, such as inspection and then copying) he or she prefers. Different processes apply to requests for inspection versus copying (such as copy charges) so an agency should clarify with a requestor whether he or she seeks to inspect or copy a public record.

An agency can provide access to a public record by posting it on its public internet web site. Once an agency provides a requestor an internet address and link on the agency's web site to the specific records requested, the agency has provided the records, and at no cost to the requestor. RCW 42.56.520. If requested, an agency should provide reasonable assistance to a requestor in finding a public record posted on its web site. If the requestor does not have internet access, the agency may provide access to the record by allowing the requestor to view the record on a specific computer terminal at the agency open to the public. An agency ((~~is not required to do so. Despite the availability of the record on the agency's web site, a requestor can still make a public records request and inspect the record or obtain a copy of it by paying the appropriate per-page copying charge~~)) shall not impose copying charges for access to or downloading records that the agency routinely posts on its web site prior to receipt of a request unless the requestor has specifically requested that the agency provide copies of such records through other means. RCW 42.56.120 (2)(e).

(3) **Providing records in installments.** The act ((~~now~~)) provides that an agency must provide records "if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure." RCW ((~~42.17.270~~)) 42.56.080. An installment can include links to records on the agency's internet web site. The purpose of this installments provision is to allow requestors to obtain records in installments as they are assembled and to allow agencies to provide records in logical batches. The provision is also designed to allow an agency to only assemble the first installment and then see if the requestor claims or reviews it before assembling the next installments. An agency can assess charges per installment for copies made for the requestor, unless it is using the up to two-dollar flat fee charge. RCW 42.56.120(4).

Not all requests should be provided in installments. For example, a request for a small number of documents which are located at nearly the same time should be provided all at

once. Installments are useful for large requests when, for example, an agency can provide the first box of records as an installment. An agency has wide discretion to determine when providing records in installments is "applicable." However, an agency cannot use installments to delay access by, for example, calling a small number of documents an "installment" and sending out separate notifications for each one. The agency must provide the "fullest assistance" and the "most timely possible action on requests" when processing requests. RCW ((~~42.17.290~~)) 42.56.100.

(4) **Failure to provide records.** A "denial" of a request can occur when an agency:

((~~Does not have the record;~~))

Fails to respond to a request;

Claims an exemption of the entire record or a portion of it; ((~~or~~))

Without justification, fails to provide the record after the reasonable estimate of time to respond expires((~~:~~

~~(a) **When the agency does not have the record**~~)); or

Determines the request is an improper "bot" request. An agency is only required to provide access to public records it has or has used.[3] An agency is not required to create a public record in response to a request.

An agency must only provide access to public records in existence at the time of the request. An agency is not obligated to supplement responses. Therefore, if a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided. A requestor must make a new request to obtain subsequently created public records.

Sometimes more than one agency holds the same record. When more than one agency holds a record, and a requestor makes a request to the first agency (agency A), ((~~the first~~)) agency A cannot respond to the request by telling the requestor to obtain the record from the second agency (agency B). Instead, an agency must provide access to a record it holds regardless of its availability from another agency.[4]

However, an agency is not required to go outside its own public records to respond to a request.[5] If agency A never prepared, owned, used or retained a record, but the record is available at agency B, the requestor must make the request to agency B, not agency A.

An agency is not required to provide access to records that were not requested. An agency does not "deny" a request when it does not provide records that are outside the scope of the request because they were never asked for.

((~~(b)~~)) (5) **Claiming exemptions.**

((~~(i)~~)) (a) **Redactions.** If a portion of a record is exempt from disclosure, but the remainder is not, an agency generally is required to redact (black out) the exempt portion and then provide the remainder. RCW ((~~42.17.310(2)~~)) 42.56.210(1). There are a few exceptions.((~~[5]~~)) [6] Withholding an entire record where only a portion of it is exempt violates the act.((~~[6]~~)) [7] Some records are almost entirely exempt but small portions remain nonexempt. For example, information revealing the identity of a crime victim is exempt from disclosure if certain conditions are met. RCW ((~~42.17.310 (1)(e)~~)) 42.56.240(2). If a requestor requested a police report in a case in which charges have been filed, and the conditions of RCW 42.56.240(2) are met, the agency must redact the victim's identifying information but provide the rest of the report.

Statistical information "not descriptive of any readily identifiable person or persons" is generally not subject to redaction or withholding. RCW ((~~42.17.310(2)~~)) 42.56.210 (1). For example, if a statute exempted the identity of a person who had been assessed a particular kind of penalty, and an agency record showed the amount of penalties assessed against various persons, the agency must provide the record with the names of the persons redacted but with the penalty amounts remaining.

Originals should not be redacted. For paper records, an agency should redact materials by first copying the record and then either using a black marker on the copy or covering the exempt portions with copying tape, and then making a copy. Another approach is to scan the paper record and redact it electronically. It is often a good practice to keep the initial copies which were redacted in case there is a need to make additional copies for disclosure or to show what was redacted; in addition, an agency is required under its records retention schedules to keep responses to a public records request for a defined period of time. For electronic records such as databases, an agency can sometimes redact a field of exempt information by excluding it from the set of fields to be copied. For other electronic records, an agency may use software that permits it to electronically redact on the copy of the record. However, in some instances electronic redaction might not be feasible and a paper copy of the record with traditional redaction might be the only way to provide the redacted record. If a record is redacted electronically, by deleting a field of data or in any other way, the agency must identify the redaction and state the basis for the claimed exemption as required by RCW 42.56.210(3). ((~~See (b)(ii) of this subsection.~~

((~~ii~~))))

(b) **Brief explanation of withholding.** When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. RCW ((~~42.17.310(4)~~)) 42.56.210 (3). The brief explanation should cite the statute the agency claims grants an exemption from disclosure. The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as "proprietary" or "privacy" are insufficient.

One way to properly provide a brief explanation of the withheld record or redaction is for the agency to provide a withholding ((~~index. It~~)) log, along with the statutory citation permitting withholding, and a description of how the exemption applies to the information withheld. The log identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt).((~~[7]~~)) [8] The withholding ((~~index~~)) log need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

Another way to properly provide a brief explanation is to use another format, such as a letter providing the required exemption citations, description of records, and brief expla-

nations. Another way to properly provide a brief explanation is to have a code for each statutory exemption, place that code on the redacted information, and attach a list of codes and the brief explanations with the agency's response.

(((~~(5)~~))) (6) **Notifying requestor that records are available.** If the requestor sought to inspect the records, the agency should notify him or her that the entire request or an installment is available for inspection and ask the requestor to contact the agency to arrange for a mutually agreeable time for inspection.((~~(8)~~)) [9] The notification should recite that if the requestor fails to inspect or copy the records or make other arrangements within thirty days of the date of the notification that the agency will close the request and refile the records. An agency might consider on a case-by-case basis sending the notification by certified mail to document that the requestor received it.

If the requestor sought copies, the agency should notify him or her of the projected costs and whether a copying deposit is required before the copies will be made. Such notice by the agency with a summary of applicable estimated charges is required when the requestor asks for an estimate. RCW 42.56.120 (2)(f). The notification can be oral to provide the most timely possible response, although it is recommended that the agency document that conversation in its file or in a follow-up email or letter.

(((~~(6)~~))) (7) **Documenting compliance.** An agency should have a process to identify which records were provided to a requestor and the date of production. In some cases, an agency may wish to number-stamp or number-label paper records provided to a requestor to document which records were provided. The agency could also keep a copy of the numbered records so either the agency or requestor can later determine which records were or were not provided; and, an agency is required to keep copies of its response to a request for the time period set out in its records retention schedule. However, the agency should balance the benefits of stamping or labeling the documents and making extra copies against the costs and burdens of doing so. For example, it may not be necessary to affix a number on the pages of records provided in response to a small request.

If memorializing which specific documents were offered for inspection is impractical, an agency might consider documenting which records were provided for inspection by making ((~~an index or~~)) a list of the files or records made available for inspection.

Notes:

[1] *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999).

[2] *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997); RCW 42.56.120.

[3] *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004).

[4] *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978).

[5] *Limstrom v. Ladenburg* (*Limstrom II*), 136 Wn.2d 595, 963 P.2d 896 (1998) n.3 ("On its face the Act does not require, and we do not interpret it to require, an agency to go outside its own records and resources to try to identify or locate the record requested."); *Koenig v. Pierce County*, 151 Wn. App. 221, 232-33, 211 P.3d 423 (2009) (agency has no duty to coordinate responses with other agencies, citing to and quoting *Limstrom II*).

[6] The two main exceptions to the redaction requirement are state "tax information" (RCW 82.32.330 (1)(c)) and law enforcement case files in active cases (((~~*Newman v. King County*, 133 Wn.2d 565, 574, 947 P.2d 712 (1997)~~))) *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 314 P.3d 1093 (2013). Neither of these two kinds of records must be redacted but rather may be withheld in their entirety.

((~~(6)~~)) [7] *Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 132, 737 P.2d 1302 (1987).

((~~(7)~~)) [8] *Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 271, n.18, 884 P.2d 592 (1994) ("*PAWS II*").

((~~(8)~~)) [9] For smaller requests, the agency might simply provide them with the initial response or earlier so no notification is necessary.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-04005 Inspection of records. (1) **Obligation of requestor to claim or review records.** After the agency notifies the requestor that the records or an installment of them are ready for inspection or copying, the requestor must claim or review the records or the installment. RCW ((~~42.17.300~~)) 42.56.120. If the requestor cannot claim or review the records him or herself, a representative may do so within the thirty-day period. Other arrangements can be mutually agreed to between the requestor and the agency.

If a requestor fails to claim or review the records or an installment after the expiration of thirty days, an agency is authorized to stop assembling the remainder of the records or making copies. RCW ((~~42.17.300~~)) 42.56.120. If the request is abandoned, the agency is no longer bound by the records retention requirements of the act prohibiting the scheduled destruction of a requested record. RCW ((~~42.17.290~~)) 42.56.100.

If a requestor fails to claim or review the records or any installment of them within the thirty-day notification period, the agency may close the request and refile the records. If a requestor who has failed to claim or review the records then requests the same or almost identical records again, the agency, which has the flexibility to prioritize its responses to be most efficient to all requestors (see WAC 44-14-040), can process the repeat request for the now-refiled records as a new request after other pending requests.

(2) **Time, place, and conditions for inspection.** Inspection should occur at a time mutually agreed (within reason) by the agency and requestor. An agency should not limit the time for inspection to times in which the requestor is unavailable. Requestors cannot dictate unusual times for inspection. The agency is only required to allow inspection during the agency's customary office hours. RCW ((~~42.17.280~~)) 42.56.090. Often an agency will provide the records in a conference room or other office area.

The inspection of records cannot create "excessive interference" with the other "essential functions" of the agency. RCW ((~~42.17.290/~~)) 42.56.100. Similarly, copying records at agency facilities cannot "unreasonably disrupt" the operations of the agency. RCW ((~~42.17.270/~~)) 42.56.080.

An agency may have an agency employee observe the inspection or copying of records by the requestor to ensure they are not altered, destroyed ((~~or~~)), disorganized, or removed. RCW ((~~42.17.290/~~)) 42.56.100. A requestor cannot alter, mark on, or destroy an original record during inspection. To select a paper record for copying during an inspection, a requestor must use a nonpermanent method such as a removable adhesive note or paper clip.

Inspection times can be broken down into reasonable segments such as half days. However, inspection times cannot be broken down into unreasonable segments to either harass the agency or delay access to the timely inspection of records.

Note: [1]See, e.g., WAC 296-06-120 (department of labor and industries provides thirty days to claim or review records).

Reviser's note: The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-04006 Closing request and documenting compliance. (1) **Fulfilling request and closing letter.** A records request has been fulfilled and can be closed when a requestor has inspected all the requested records, all copies have been provided, a web link has been provided (with assistance from the agency in finding it, if necessary), an entirely unclear request has not been clarified, a request or installment has not been claimed or reviewed, or the requestor cancels the request. An agency should provide a closing letter stating the scope of the request and memorializing the outcome of the request. A closing letter may not be necessary for smaller requests, or where the last communication with the requestor established that the request would be closed on a date certain. The outcome described in the closing letter might be that the requestor inspected records, copies were provided (with the number range of the stamped or labeled records, if applicable), the agency sent the requestor the web link, the requestor failed to clarify the request, the requestor failed to claim or review the records within thirty days, or the requestor canceled the request. The closing letter should also ask the requestor to promptly contact the agency if he or she believes additional responsive records have not been provided.

(2) **Returning assembled records.** An agency is not required to keep assembled records set aside indefinitely. This would "unreasonably disrupt" the operations of the agency. RCW ((~~42.17.270/~~)) 42.56.080. After a request has been closed, an agency should return the assembled records to their original locations. Once returned, the records are no longer subject to the prohibition on destroying records scheduled for destruction under the agency's retention schedule. RCW ((~~42.17.290/~~)) 42.56.100.

(3) **Retain copy of records provided.** In some cases, particularly for commonly requested records, it may be wise for the agency to keep a separate copy of the records it copied and provided in response to a request. ((~~This allows the agency to document what was provided.~~)) A growing number of requests are for a copy of the records provided to another requestor, which can easily be fulfilled if the agency retains a copy of the records provided to the first requestor. The copy of the records provided should be retained for ((~~a~~)) the period of time consistent with the agency's retention schedules for records related to disclosure of documents.

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-050 Processing of public records requests—Electronic records. (1) **Requesting electronic records.** The process for requesting electronic public records is the same as for requesting paper public records.

(2) **Providing electronic records.** When a requestor requests records in an electronic format, the public records officer will provide the nonexempt records or portions of such records that are reasonably locatable in an electronic format that is used by the (name of agency) and is generally commercially available, or in a format that is reasonably translatable from the format in which the agency keeps the record. Costs for providing electronic records are governed by ((~~WAC 44-14-07003~~)) RCW 42.56.120 and 42.56.130. The fee schedule is available at (agency address and web site address).

(3) **Customized electronic access ((~~to databases~~)) services.** While not required, and with the consent of the requestor, the (name of agency) may decide to provide customized ((~~access under RCW 43.105.280 if the record is not reasonably locatable or not reasonably translatable into the format requested~~)) electronic access services and assess charges under RCW 42.56.120 (2)(f). A customized service charge applies only if the (name of agency) estimates that the request would require the use of information technology expertise to prepare data compilations, or provide customized electronic access services when such compilations and customized access services are not used by the agency for other purposes. The (name of agency) may charge a fee consistent with RCW ((~~43.105.280~~)) 42.56.120 (2)(f) for such customized access. The fee schedule is available at (agency address and web site address).

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-05001 Access to electronic records. The Public Records Act does not distinguish between access to paper and electronic records. Instead, the act explicitly includes electronic records within its coverage. The definition of "public record" includes a "writing," which in turn includes "existing data compilations from which information may be obtained or translated." RCW ((~~42.17.020(48) (incorporated by reference into the act by RCW 42.56.010)~~)) 42.56.010(4). Many agency records are now in an electronic format. Many of these electronic formats such as Windows® products are generally available and are designed to operate

with other computers to quickly and efficiently locate and transfer information. Providing electronic records can be cheaper and easier for an agency than paper records. Furthermore, RCW ((~~43.105.250~~)) 43.105.351 provides: "It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public."

In general, an agency should provide electronic records in an electronic format if requested in that format, if it is reasonable and feasible to do so.[1] While not required, an agency may translate a record into an alternative electronic format at the request of the requestor if it is reasonable and feasible to do so, and that action does not create a new public record for the purposes of copying fees. RCW 42.56.120(1). For example, an agency may scan a paper record to make an electronic copy, and that action does not create a new public record. *Id*. An agency can provide links to specific records on the agency's public internet web site. RCW 42.56.520. An agency shall not impose copy charges for access to or downloading records that the agency routinely posts on its internet web site prior to the receipt of a request unless the requestor has specifically requested that the agency provide copies of such records by other means. RCW 42.56.120 (2)(e).

Reasonableness and technical feasibility ((~~is~~)) are the touchstones for providing electronic records. An agency should provide reasonably locatable electronic public records in either their original generally commercially available format (such as an Acrobat PDF® file) or, if the records are not in a generally commercially available format, the agency should provide them in a reasonably translatable electronic format if possible. In the rare cases when the requested electronic records are not reasonably locatable, or are not in a generally commercially available format or are not reasonably translatable into one, the agency might consider customized access. ((~~See WAC 44-14-05004. An agency may recover its actual costs for providing electronic records, which in many cases is de minimis. See WAC 44-14-050(3).~~))

Delivering electronic records can be accomplished in several ways or a combination of ways. For example, an agency may post records on the agency's internet web site and provide the requestor links to specific documents; make a computer terminal available at the agency so a requestor can inspect electronic records and designate specific ones for copying; send records by email; copy records onto a CD, DVD or thumb drive and mail it to the requestor or making it available for pickup; upload records to a cloud-based server, including to a file transfer protocol (FTP) site and send the requestor a link to the site; provide records through an agency portal; or, through other means. Practices may vary among agencies in how they deliver records in an electronic format; the act does not mandate only one method and the courts have said agencies have some discretion in establishing their reasonable procedures under the act.[2] Finally, other delivery issues may be relevant to a particular agency or request. For example, there may be limits with the agency's email system or the requestor's email account with respect to the volume, size or types of emails and attachments that can be sent or received.

What is reasonable and technically feasible for copying and delivery of electronic records in one situation or for one agency may not be in another. Not all agencies, especially smaller units of local government, have the electronic resources of larger agencies and some of the generalizations in these model rules may not apply every time. If an agency initially believes it cannot provide electronic records in an electronic format, it should confer with the requestor and the two parties should attempt to cooperatively resolve any technical difficulties. See WAC 44-14-05003. It is usually a purely technical question whether an agency can provide electronic records in a particular format in a specific case.

An agency is not required to buy new software, hardware or licenses to process a request for production or delivery of public records. However, an agency lacking resources to provide, redact or deliver more records electronically may want to consider seeking funding or other arrangements in an effort to obtain such technologies. See RCW 43.105.355 (state and local agencies); chapter 40.14 RCW (local agencies - competitive grant program).

Notes:

[1] *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009) ("[T]here is no provision in the PDA that expressly requires a governmental agency to provide records in electronic form. … [a]lthough the City has no express obligation to provide the requested email records in an electronic format, consistent with the statutory duty to provide the fullest assistance and the model rules, on remand the trial court shall determine whether it is reasonable and feasible for the City to do so."); *Mitchell v. Dep't of Corr.*, 164 Wn. App. 597 (2011) ("Nothing in the PRA obligates an agency to disclose records electronically.")

[2] *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978).

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-05002 "Reasonably locatable" and "reasonably translatable" electronic records. (1) **"Reasonably locatable" electronic records.** The act obligates an agency to provide nonexempt "identifiable … records." RCW 42.56.080. An "identifiable record" is essentially one that agency staff can "reasonably locate." WAC 44-14-04002(2). Therefore, a general summary of the "identifiable record" standard as it relates to electronically locating public records is that the act requires an agency to provide a nonexempt "reasonably locatable" record. This does not mean that an agency can decide if a request is "reasonable" and only fulfill those requests. Rather, "reasonably locatable" is a concept, grounded in the act, for analyzing electronic records issues.

In general, a "reasonably locatable" electronic record is one which can be located with typical search features and organizing methods contained in the agency's current software. For example, a retained email containing the term "XYZ" is usually reasonably locatable by using the email program search feature. However, ((~~an~~)) some email search

((~~feature has~~)) features have limitations, such as not searching attachments, but ((~~is~~)) are a good starting point for the search. Information might be "reasonably locatable" by methods other than a search feature. For example, a request for a copy of all retained emails sent by a specific agency employee for a particular date is "reasonably locatable" because it can be found utilizing a common organizing feature of the agency's email program, such as a chronological "sent" folder. Another indicator of what is "reasonably locatable" is whether the agency keeps the information in a particular way for its business purposes. For example, an agency might keep a database of permit holders including the name of the business. The agency does not separate the businesses by whether they are publicly traded corporations or not because it has no reason to do so. A request for the names of the businesses which are publicly traded is not "reasonably locatable" because the agency has no business purpose for keeping the information that way. In such a case, the agency should provide the names of the businesses (assuming they are not exempt from disclosure) and the requestor can analyze the database to determine which businesses are publicly traded corporations.

(2) **"Reasonably translatable" electronic records.** The act requires an agency to provide a "copy" of nonexempt records (subject to certain copying charges). RCW 42.56.070(1) and 42.56.080. To provide a photocopy of a paper record, an agency must take some reasonable steps to mechanically translate the agency's original document into a useable copy for the requestor such as copying it in a copying machine, or scanning it into Adobe Acrobat PDF®. Similarly, an agency must take some reasonable steps to prepare an electronic copy of an electronic record or a paper record. Providing an electronic copy is analogous to providing a paper record: An agency must take ((~~reasonable~~)) steps to translate the agency's original into a useable copy for the requestor, if it is reasonable and feasible for it to do so.

The "reasonably translatable" concept typically operates in three kinds of situations:

(a) An agency has only a paper record;

(b) An agency has an electronic record in a generally commercially available format (such as a Windows® product); or

(c) An agency has an electronic record in an electronic format but the requestor seeks a copy in a different electronic format.

The following examples assume no redactions are necessary.

(i) **Agency has paper-only records.** When an agency only has a paper copy of a record, an example of a "reasonably translatable" copy would be scanning the record into an Adobe Acrobat PDF® file and providing it to the requestor. The agency could recover its actual or statutory cost for scanning. See RCW 42.56.120 and WAC 44-14-07003. While not required, providing a PDF copy of the record is analogous to making a paper copy. However, if the agency lacked a scanner (such as a small unit of local government), the record would not be "reasonably translatable" with the agency's own resources. In such a case, the agency could provide a paper copy to the requestor.

(ii) **Agency has electronic records in a generally commercially available format.** When an agency has an electronic record in a generally commercially available format, such as an Excel® spreadsheet, and the requestor requests an electronic copy in that format, no translation into another format is necessary; the agency should provide the spreadsheet electronically. Another example is where an agency has an electronic record in a generally commercially available format (such as Word®) and the requestor requests an electronic copy in Word®. An agency cannot instead provide a WordPerfect® copy because there is no need to translate the electronic record into a different format. In the paper-record context, this would be analogous to the agency intentionally making an unreadable photocopy when it could make a legible one. Similarly, the WordPerfect® "translation" by the agency is an attempt to hinder access to the record. In this example, the agency should provide the document in Word® format. Electronic records in generally commercially available formats such as Word® could be easily altered by the requestor. Requestors should note that altering public records and then intentionally passing them off as exact copies of public records might violate various criminal and civil laws.

(iii) **Agency has electronic records in an electronic format other than the format requested**. When an agency has an electronic record in an electronic format (such as a Word® document) but the requestor seeks a copy in another format (such as WordPerfect®), the question is whether the agency's document is "reasonably translatable" into the requested format. If the format of the agency document allows it to "save as" another format without changing the substantive accuracy of the document, and the agency has a WordPerfect® license, this would be "reasonably translatable." The agency's record might not translate perfectly, but it was the requestor who requested the record in a format other than the one used by the agency. Another example is where an agency has a database in a unique format that is not generally commercially available. A requestor requests an electronic copy. The agency can convert the data in its unique system into a near-universal format such as a comma-delimited or tab-delimited format. The requestor can then convert the comma-delimited or tab-delimited data into a database program (such as Access®) and use it. The data in this example is "reasonably translatable" into a comma-delimited or tab-delimited format so the agency should do so. A final example is where an agency has an electronic record in a generally commercially available format (such as Word®) but the requestor requests a copy in an obscure word processing format. The agency offers to provide the record in Word® format but the requestor refuses. The agency can easily convert the Word® document into a standard text file which, in turn, can be converted into most programs. The Word® document is "reasonably translatable" into a text file so the agency should do so. It is up to the requestor to convert the text file into his or her preferred format, but the agency has provided access to the electronic record in the most technically feasible way and not attempted to hinder the requestor's access to it.

(3) **Agency should keep an electronic copy of the electronic records it provides.** An electronic record is usually more susceptible to manipulation and alteration than a paper

record. Therefore, an agency should keep((~~, when feasible,~~)) an electronic copy of the electronic records it provides to a requestor to show the exact records it provided, for the time period required in its records retention schedule. Additionally, an electronic copy might also be helpful when responding to subsequent electronic records requests for the same records.

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-05003 Parties should confer on technical issues. Technical reasonableness and feasibility can vary from request to request. When a request for electronic records involves technical issues, the best approach is for both parties to confer and cooperatively resolve them. Often a telephone conference will be sufficient. This approach is consistent with the requirement that agencies provide the "fullest assistance" to a requestor. RCW 42.56.100 and WAC 44-14-04003(2). Furthermore, if a requestor files an enforcement action under the act to obtain the records, the burden of proof is on the agency to justify its refusal to provide the records. RCW 42.56.550(1). If the requestor articulates a reasonable technical alternative to the agency's refusal to provide the records electronically or in the requested format, and the agency never offered to confer with the requestor, the agency will have difficulty proving that its refusal was justified.

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-05004 Customized access. When locating the requested records or translating them into the requested format cannot be done without specialized programming, RCW ((~~43.105.280 allows agencies to charge some fees for "customized access." The statute provides: "Agencies should not offer customized electronic access services as the primary way of responding to requests or as a primary source of revenue."~~)) 42.56.120(3) authorizes agencies to assess a customized service charge if the agency estimates that the request would require use of information technology expertise to prepare data compilations, or provide customized electronic access services when such compilations and customized access services are not used by the agency for other business purposes.

Most public records requests for electronic records can be fulfilled based on the "reasonably locatable" and "reasonably translatable" standards. Resorting to customized access should not be the norm. An example of where "customized access" would be appropriate is if a state agency's old computer system stored data in a manner in which it was impossible to extract the data into comma-delimited or tab-delimited formats, but rather required a programmer to spend more than a nominal amount of time to write computer code specifically to extract it. Before resorting to customized access, the agency should confer with the requestor to determine if a technical solution exists not requiring the specialized programming. An agency must notify the requestor to provide an explanation of the service charge including why it applies, a description of the specific expertise, and a reasonable estimate of the cost of the charge. The notice must also provide the requestor the opportunity to amend his or her request in order to avoid or reduce the customized service charge. RCW 42.56.120(3).

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-05005 Relationship of Public Records Act to court rules on discovery of "electronically stored information." The ((~~December 2006 amendments to the~~)) Federal Rules of Civil Procedure provide guidance to parties in litigation on their respective obligations to provide access to, or produce, "electronically stored information." See Federal Rules of Civil Procedure 26 and 34. The obligations of state and local agencies under those federal rules (and under any state-imposed rules or procedures that adopt the federal rules) to search for and provide electronic records may be different, and in some instances more demanding, than those required under the Public Records Act. The federal discovery rules and the Public Records Act are two separate laws imposing different standards. However, sometimes requestors make public records requests to obtain evidence that later may be used in non-Public Records Act litigation against the agency providing the records. Therefore, it may be prudent for agencies to consult with their attorneys regarding best practices of retaining copies of the records provided under the act so there can be no question later of what was and what was not produced in response to the request in the event that electronic records, or records derived from them, become issues in court.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-06001 Agency must publish list of applicable exemptions. An agency must publish and maintain a list of the "other statute" exemptions from disclosure (that is, those exemptions found outside the Public Records Act) that it believes potentially exempt records it holds from disclosure. RCW ((~~42.17.260(2)/~~)) 42.56.070(2). The list is "for informational purposes" only and an agency's failure to list an exemption "shall not affect the efficacy of any exemption." RCW ((~~42.17.260(2)/~~)) 42.56.070(2). A list of possible "other statute" exemptions is posted on the attorney general's office web site ((~~of the Municipal Research Service Center at www.mrsc.org/Publications/prdpub04.pdf (scroll to Appendix C)~~)). See WAC 44-14-06002.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-06002 Summary of exemptions. ((~~(1) General.~~)) The act and other statutes contain hundreds of exemptions from disclosure and dozens of court cases interpret them. A full treatment of all exemptions is beyond the scope of the model rules. ((~~Instead, these comments to the model rules provide general guidance on exemptions and summarize a few of the most frequently invoked exemptions. However, the scope of exemptions is determined exclusively by statute and case law; the comments to the model rules~~

merely provide guidance on a few of the most common issues.

An exemption from disclosure will be narrowly construed in favor of disclosure. RCW 42.17.251/42.56.030. An exemption from disclosure must specifically exempt a record or portion of a record from disclosure. RCW 42.17.260(1)/42.56.070(1). An exemption will not be inferred.[1]

An agency cannot define the scope of a statutory exemption through rule making or policy.[2] An agency agreement or promise not to disclose a record cannot make a disclosable record exempt from disclosure. RCW 42.17.260(1)/42.56.070(1).[3] Any agency contract regarding the disclosure of records should recite that the act controls.

An agency must describe why each withheld record or redacted portion of a record is exempt from disclosure. RCW 42.17.310(4)/42.56.210(4). One way to describe why a record was withheld or redacted is by using a withholding index.

After invoking an exemption in its response, an agency may revise its original claim of exemption in a response to a motion to show cause.[4]

Exemptions are "permissive rather than mandatory." Op. Att'y Gen. 1 (1980), at 5. Therefore, an agency has the discretion to provide an exempt record. However, in contrast to a waivable "exemption," an agency cannot provide a record when a statute makes it "confidential" or otherwise prohibits disclosure. For example, the Health Care Information Act generally prohibits the disclosure of medical information without the patient's consent. RCW 70.02.020(1). If a statute classifies information as "confidential" or otherwise prohibits disclosure, an agency has no discretion to release a record or the confidential portion of it.[5] Some statutes provide civil and criminal penalties for the release of particular "confidential" records. See RCW 82.32.330(5) (release of certain state tax information a misdemeanor).

(2) **"Privacy" exemption.** There is no general "privacy" exemption. Op. Att'y Gen. 12 (1988).[6] However, a few specific exemptions incorporate privacy as one of the elements of the exemption. For example, personal information in agency employee files is exempt to the extent that disclosure would violate the employee's right to "privacy." RCW 42.17.310 (1)(b)/42.56.210 (1)(b). "Privacy" is then one of the elements, in addition to the others in RCW 42.17.310 (1)(b)/42.56.210 (1)(b), that an agency or a third party resisting disclosure must prove.

"Privacy" is defined in RCW 42.17.255/42.56.050 as the disclosure of information that "(1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." This is a two-part test requiring the party seeking to prevent disclosure to prove both elements.[7]

Because "privacy" is not a stand-alone exemption, an agency cannot claim RCW 42.17.255/42.56.050 as an exemption.[8]

(3) **Attorney-client privilege.** The attorney-client privilege statute, RCW 5.60.060 (2)(a), is an "other statute" exemption from disclosure.[9] In addition, RCW 42.17.310 (1)(j)/42.56.210 (1)(j) exempts attorney work-product involving a "controversy," which means completed, existing, or reasonably anticipated litigation involving the agency.[10] The exact boundaries of the attorney-client privilege and work-product doctrine is beyond the scope of these comments. However, in general, the attorney-client privilege covers records reflecting communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties and an attorney serving in the capacity of legal advisor for the purpose of rendering or obtaining legal advice, and records prepared by the attorney in furtherance of the rendition of legal advice. The attorney-client privilege does not exempt records merely because they reflect communications in meetings where legal counsel was present or because a record or copy of a record was provided to legal counsel if the other elements of the privilege are not met.[11] A guidance document prepared by the attorney general's office on the attorney-client privilege and work-product doctrine is available at www.atg.wa.gov/records/modelrules.

(4) **Deliberative process exemption.** RCW 42.17.310 (1)(i)/42.56.210 (1)(i) exempts "Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended" except if the record is cited by the agency.

In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.[12] Courts have held that this exemption is "severely limited" by its purpose, which is to protect the free flow of opinions by policy makers.[13] It applies only to those portions of a record containing recommendations, opinions, and proposed policies; it does not apply to factual data contained in the record.[14] The exemption does not apply to records or portions of records concerning the implementation of policy or the factual basis for the policy.[15] The exemption does not apply merely because a record is called a "draft" or stamped "draft." Recommendations that are actually implemented lose their protection from disclosure after they have been adopted by the agency.[16]

(5) **"Overbroad" exemption.** There is no "overbroad" exemption. RCW 42.17.270/42.56.080. See WAC 44-14-04002(3).

(6) **Commercial use exemption.** The act does not allow an agency to provide access to "lists of individuals requested for commercial purposes." RCW 42.17.260(9)/42.56.070(9). An agency may require a requestor to sign a declaration that he or she will not put a list of individuals in the record to use for a commercial purpose.[17] This authority is limited to a list of individuals, not a list of companies.[18] A requestor who signs a declaration promising not to use a list of individuals for a commercial purpose, but who then violates this declaration, could arguably be charged with the crime of false swearing. RCW 9A.72.040.[19]

(7) **Trade secrets.** Many agencies hold sensitive proprietary information of businesses they regulate. For example, an agency might require an applicant for a regulatory approval to submit designs for a product it produces. A

~~record is exempt from disclosure if it constitutes a "trade secret" under the Uniform Trade Secrets Act, chapter 19.108 RCW.[20] However, the definition of a "trade secret" can be very complex and often the facts showing why the record is or is not a trade secret are only known by the potential holder of the trade secret who submitted the record in question.~~

~~When an agency receives a request for a record that might be a trade secret, often it does not have enough information to determine whether the record arguably qualifies as a "trade secret." An agency is allowed additional time under the act to determine if an exemption might apply. RCW 42.17.320/42.56.520.~~

~~When an agency cannot determine whether a requested record contains a "trade secret," usually it should communicate with the requestor that the agency is providing the potential holder of the trade secret an opportunity to object to the disclosure. The agency should then contact the potential holder of the trade secret in question and state that the record will be released in a certain amount of time unless the holder files a court action seeking an injunction prohibiting the agency from disclosing the record under RCW 42.17.330/42.56.540. Alternatively, the agency can ask the potential holder of the trade secret for an explanation of why it contends the record is a trade secret, and state that if the record is not a trade secret or otherwise exempt from disclosure that the agency intends to release it. The agency should inform the potential holder of a trade secret that its explanation will be shared with the requestor. The explanation can assist the agency in determining whether it will claim the trade secret exemption. If the agency concludes that the record is arguably not exempt, it should provide a notice of intent to disclose unless the potential holder of the trade secret obtains an injunction preventing disclosure under RCW 42.17.330/42.56.540.~~

~~As a general matter, many agencies do not assert the trade secret exemption on behalf of the potential holder of the trade secret but rather allow the potential holder to seek an injunction.~~

~~Notes:~~

~~[1] *Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) ("*PAWS II*").~~

~~[2] *Servais v. Port of Bellingham*, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995).~~

~~[3] *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 40, 769 P.2d 283 (1989); *Van Buren v. Miller*, 22 Wn. App. 836, 845, 592 P.2d 671, *review denied*, 92 Wn.2d 1021 (1979).~~

~~[4] *PAWS II*, 125 Wn.2d at 253.~~

~~[5] Op. Att'y Gen. 7 (1986).~~

~~[6] *See* RCW 42.17.255/42.56.050 ("privacy" linked to rights of privacy "specified in (the act) as express exemptions").~~

~~[7] *King County v. Sheehan*, 114 Wn. App. 325, 344, 57 P.3d 307 (2002).~~

~~[8] Op. Att'y Gen. 12 (1988), at 3 ("The legislature clearly repudiated the notion that agencies could withhold records based solely on general concerns about privacy.").~~

~~[9] *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004).~~

~~[10] *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993).~~

~~[11] This summary comes from the attorney general's proposed definition of the privilege in the first version of House Bill No. 1758 (2005).~~

~~[12] *PAWS II*, 125 Wn.2d at 256.~~

~~[13] *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978); *PAWS II*, 125 Wn.2d at 256.~~

~~[14] *PAWS II*, 125 Wn.2d at 256.~~

~~[15] *Cowles Pub. Co. v. City of Spokane*, 69 Wn. App. 678, 685, 849 P.2d 1271 (1993).~~

~~[16] *Dawson*, 120 Wn.2d at 793.~~

~~[17] Op. Att'y Gen. 12 (1988). However, a list of individuals applying for professional licensing or examination may be provided to professional associations recognized by the licensing or examination board. RCW 42.17.260(9)/42.56.070(9).~~

~~[18] Op. Att'y Gen. 2 (1998).~~

~~[19] RCW 9A.72.040 provides: "(1) A person is guilty of false swearing if he makes a false statement, which he knows to be false, under an oath required or authorized by law. (2) False swearing is a gross misdemeanor." RCW 42.17.270/42.56.080 authorizes an agency to determine if a requestor will use a list of individuals for commercial purpose. *See* Op. Att'y Gen. 12 (1988), at 10-11 (agency could require requestor to sign affidavit of noncommercial use).~~

~~[20] *PAWS II*, 125 Wn.2d at 262.~~))

For a discussion of several commonly used exemptions, see these documents on the attorney general's office web site: *Open Government Resource Manual* at http://www.atg.wa.gov/open-government-resource-manual (the manual contains a discussion and summaries of many exemptions, links to statutes, and links to many court decisions and several attorney general opinions); the code reviser's annual list of exemptions in the state code, available at http://www.atg.wa.gov/sunshine-committee; and a guidance document on the attorney-client privilege and work-product doctrine, available at http://www.atg.wa.gov/model-rules-public-disclosure.

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-070 Costs of providing copies of public records. (1) **((~~Costs for paper copies~~)) Inspection.** There is no fee for inspecting public records, including inspecting records on the (name of agency) web site.

((~~A requestor may obtain standard black and white photocopies for (amount) cents per page and color copies for (amount) cents per page.~~

~~(If agency decides to charge more than fifteen cents per page, use the following language:) The (name of agency) charges (amount) per page for a standard black and white photocopy of a record selected by a requestor.~~)) (2) **Actual costs.** (*If the agency determines it will charge actual costs for copies, it may do so after providing notice and a public hearing.*) A statement of the factors and the manner used to determine ((~~this charge~~)) the charges for copies is available from the public records officer. The costs for copies of records are as follows (provide details):

(3) (*Alternative*) **Statutory default costs.** (*If the agency determines it will not charge actual costs for copies but*

instead will assess statutory costs, it must have a rule or regulation declaring the reasons that determining actual costs would be unduly burdensome). The (name of agency) is not calculating actual costs for copying its records because to do so would be unduly burdensome for the following reasons: The (name of agency) does not have the resources to conduct a study to determine actual copying costs for all its records; to conduct such a study would interfere with other essential agency functions; and, through the legislative process, the public and requestors have commented on and been informed of authorized fees and costs provided in the Public Records Act including RCW 42.56.120 and other laws. Therefore, in order to timely implement a fee schedule consistent with the Public Records Act, it is more cost efficient, expeditious and in the public interest for the (name of agency) to adopt the state legislature's approved fees and costs for most of the (name of agency) records, as authorized in RCW 42.56.120 and as published in the agency's fee schedule.

(4) **Fee schedule.** The fee schedule is available at (office location) and on (name of agency) web site at (insert web site address).

(5) **Processing payments.** Before beginning to make the copies or processing a customized service, the public records officer or designee may require a deposit of up to ten percent of the estimated costs of copying all the records selected by the requestor. The public records officer or designee may also require the payment of the remainder of the copying costs before providing all the records, or the payment of the costs of copying an installment before providing that installment. The (name of agency) will not charge sales tax when it makes copies of public records.

(((~~(2) **Costs for electronic records.** The cost of electronic copies of records shall be (amount) for information on a CD-ROM. (If the agency has scanning equipment at its offices: The cost of scanning existing (agency) paper or other nonelectronic records is (amount) per page.) There will be no charge for emailing electronic records to a requestor, unless another cost applies such as a scanning fee.~~

~~(3)~~)) (6) **Costs of mailing.** The (name of agency) may also charge actual costs of mailing, including the cost of the shipping container.

(((~~(4)~~)) (7) **Payment.** Payment may be made by cash, check, or money order to the (name of agency).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-07001 General rules for charging for copies. (1) **No fees for costs of locating records or preparing records for inspection or copying.** An agency cannot charge a fee for locating public records or for preparing the records for inspection or copying. RCW ((~~42.17.300/~~)) 42.56.120.[1] An agency cannot charge fees for a person to inspect or access records on the agency's public internet web site. An agency cannot charge a fee for access to or downloading records the agency routinely posts on its public internet web site prior to the receipt of a request unless the requestor has specifically requested that the agency provide copies of such records through other means. RCW 42.56.120 (2)(e).

An agency cannot charge a "redaction fee" for the staff time necessary to prepare the records for inspection, for the copying required to redact records before they are inspected, or an archive fee for getting the records from ((~~offsite~~)) offsite. Op. Att'y Gen. 6 (1991). These are the costs of making the records available for inspection or copying and cannot be charged to the requestor.

(2) ((~~**Standard photocopy charges.** Standard photocopies are black and white 8x11 paper copies. An agency can choose to calculate its copying charges for standard photocopies or to opt for a default copying charge of no more than fifteen cents per page.~~

~~If it attempts to charge more than the fifteen cents per page maximum for photocopies,~~)) **Actual costs.** If assessing actual costs, an agency must establish a statement of the "actual cost" of the copies it provides, which must include a "statement of the factors and the manner used to the determine the actual per page cost." RCW ((~~42.17.260(7)/~~)) 42.56.070(7). ((~~An agency may include the costs "directly incident" to providing the copies such as paper, copying equipment, and staff time to make the copies. RCW 42.17.260 (7)(a)/42.56.070 (7)(a).[2]~~

~~An agency failing to properly establish a copying charge in excess of the default fifteen cents per page maximum is limited to the default amount. RCW 42.17.260 (7)(a) and (b)/42.56.070 (7)(a) and (b) and 42.17.300/42.56.120.~~

~~If it charges more than the default rate of fifteen cents per page, an agency must provide its calculations and the reasoning for its charges. RCW 42.17.260(7)/42.56.070(7) and 42.17.300/42.56.120.[3] A price list with no analysis is insufficient~~))[2] The actual costs include the actual cost of the paper and the per page cost for use of agency copying (including scanning) equipment; the actual cost of the electronic production or file transfer of the record; the use of any cloud-based data storage and processing service; costs directly incident to the cost of postage or delivery charges and the cost of any container or envelope used; and, the costs directly incident to transmitting such records in an electronic format, including the cost of any transmission charge and the use of any physical media device provided by the agency. An agency may include staff salaries, benefits or other general administrative or overhead charges only if those costs are directly related to the actual cost of copying the public records. Staff time to copy and send the records may be included in an agency's actual costs. An agency's calculations and reasoning need not be elaborate but should be detailed enough to allow a requestor or court to determine if the agency has properly calculated its copying charges. An agency should generally compare its copying charges to those of commercial copying centers.

An agency's statement of such actual costs may be adopted by an agency only after providing notice and public hearing. RCW 42.56.070(3).

(3) **Statutory default costs.** If an agency opts for the default copying charges ((~~of fifteen cents per page~~)) pursuant to RCW 42.56.120, it need not calculate its actual costs. RCW ((~~42.17.260(8)/42.56.070(8).~~

~~(3) **Charges for copies other than standard photocopies.** Nonstandard copies include color copies, engineering drawings, and photographs. An agency can charge its actual~~

~~costs for nonstandard photocopies. RCW 42.17.300/42.56.120. For example, when an agency provides records in an electronic format by putting the records on a disk, it may charge its actual costs for the disk. The agency can provide a requestor with documentation for its actual costs by providing a catalog or price list from a vendor.~~

~~(4)~~)) 42.56.120 (2)(b). However, it must declare the reasons for why calculating the actual costs would be unduly burdensome, and then it is limited to the statutory costs for those records. *Id.*

The statutory default costs include different charges per record or groups of records, or an alternative flat fee of up to two dollars for any request when the agency reasonably estimates and documents that the allowable statutory costs are clearly equal to or more than two dollars. RCW 42.56.120 (2)(d). If using the statutory flat fee, the agency can charge the flat fee only for the first installment for records produced in multiple installments, and no fees can be assessed for subsequent installments.

Statutory default charges can be combined to the extent that more than one type of charge applies to a particular request, unless the agency is assessing the statutory flat fee for a request. RCW 42.56.120 (3)(c). The statutory default costs include actual costs of digital storage media, mailing containers, and postage. RCW 42.56.120 (3)(d).

(4) **Fee schedule.** The agency should make its fee schedule publicly available on its web site and through other means.

(5) **Estimate of costs for requestor**. If a requestor asks, an agency must provide a summary of the applicable charges before copies are made and the requestor may revise the request to reduce the number of copies to be made, thus the applicable charges. RCW 42.56.120 (2)(f). An agency must also provide a requestor, in advance, information concerning customized service charges if the request involves customized service. RCW 42.56.120(3).

(6) **Copying charges apply to copies selected by requestor.** Often a requestor will seek to inspect a large number of records but only select a smaller group of them for copying. Copy charges can only be charged for the records selected by the requestor. RCW ((~~42.17.300/~~)) 42.56.120 (charges allowed for "providing" copies to requestor).

The requestor should specify whether he or she seeks inspection or copying. The agency should inform the requestor that inspection is free. This can be noted on the agency's request form. If the requestor seeks copies, then the agency should inform the requestor of the copying charges for the request. An agency should not assemble a large number of records, fail to inform the requestor that inspection is free, and then attempt to charge for copying all the records.

Sometimes a requestor will choose to pay for the copying of a large batch of records without inspecting them. This is allowed((~~, provided that the requestor is informed that inspection is free~~)). Informing the requestor on a request form that inspection is free is sufficient.

(((~~5~~))) (7) **Use of outside vendor.** Typically an agency makes the requested copies. However, an agency is not required to copy records at its own facilities. An agency can send the project to a commercial copying center and bill the requestor for the amount charged by the vendor.[3] An agency is encouraged to do so when an outside vendor can make copies more quickly and less expensively than an agency. An agency can arrange with the requestor for him or her to pay the vendor directly. This is an example of where any agency might enter into an alternative fee arrangement under RCW 42.56.080(4). An agency cannot charge the default ((~~fifteen cents per page rate~~)) charges when its "actual cost" at a copying vendor is less. The default rates ((~~is~~)) are only for agency-produced copies. RCW ((~~42.17.300/~~)) 42.56.120.

(((~~6~~))) (8) **Sales tax.** An agency cannot charge sales tax on copies it makes at its own facilities. RCW 82.12.02525.

(((~~7~~))) (9) **Costs of mailing or sending records.** If a requestor asks an agency to mail copies, the agency may charge for the actual cost of postage and the shipping container (such as an envelope or CD mailing sleeve). RCW ((~~42.17.260 (7)(a)/~~)) 42.56.070 (7)(a).

(10) **Sample fee statutory default schedule.** A sample statutory default fee schedule is provided in this comment. Some agencies may have other statutes that govern fees for particular types of records and which they may want to also include in the schedule. See RCW 42.56.130. Or, an agency may use the statutory default schedule for the majority of its records and go through the process to determine actual costs for some specialized records (for example, for large blueprints or oversized colored maps that are printed onto paper). While not included in the sample schedule below, an agency might also decide to use the up to two dollar statutory flat fee for some types of requests, per RCW 42.56.120 (2)(d).

(Name of Agency) Fee Schedule	
Inspection:	
No fee	Inspection of agency records on agency public internet web site or scheduled at agency office.
No fee	Accessing or downloading records the agency routinely posts on its public internet web site, unless the requestor asks the agency for records to be provided through other means (the following copy charges below then apply).
Copies:	
15 cents/page	Photocopies, printed copies of electronic records when requested by the requestor, or for the use of agency equipment to make photocopies.
10 cents/page	Scanned records, or use of agency equipment for scanning.
5 cents/each 4 electronic files or attachment	Records uploaded to email, or cloud-based data storage service, or other means of electronic delivery.
10 cents/gigabyte	Records transmitted in electronic format or for use of agency equipment to send records electronically.

(Name of Agency) Fee Schedule	
Actual cost	Digital storage media or devices (*list*): • CD • DVD • Thumb drive • Other
Actual cost	Postage or delivery charges - Specific amount based upon postage/delivery charges for specific mailings or deliveries.
(Varies)	Records for which other costs are authorized pursuant to specific fee statutes (describe).
↑ *Copy charges above may be combined to the extent more than one type of charge applies to copies responsive to a particular request.*	
Customized Service:	
Actual cost	Data compilations prepared or accessed as a customized service (cost is in addition to above fees for copies).

Notes: [1]See also Op. Att'y Gen. 6 (1991).

[2]The costs of staff time is allowed only for making copies. An agency cannot charge for staff time for locating records or other noncopying functions. See RCW ((~~42.17.300/~~)) 42.56.120. ("No fee shall be charged for locating public documents and making them available for copying.")((.))

[3]((~~See also Op. Att'y Gen. 6 (1991) (agency must "justify" its copy charges).~~)) *Benton County v. Zink*, 191 Wn. App. 269, 361 P.3d 801 (2015).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-07004 Other statutes govern copying of particular records. The act generally governs copying charges for public records, but several specific statutes govern charges for particular kinds of records. RCW ((~~42.17.305/~~)) 42.56.130. The following nonexhaustive list provides some examples: RCW 46.52.085 (charges for traffic accident reports), RCW 10.97.100 (copies of criminal histories), RCW 3.62.060 and 3.62.065 (charges for certain records of municipal courts), and RCW 70.58.107 (charges for birth certificates).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-07005 Waiver of copying charges; other fee arrangements. (1) An agency ((~~has the discretion to waive copying charges. For administrative convenience, many agencies waive copying charges for small requests. For example, the attorney general's office does not charge copying fees if the request is for twenty-five or fewer standard photocopies~~)) may waive charges pursuant to its rules and regulations. RCW 42.56.120(4).

(2) An agency may enter into a contract, memorandum of understanding or other agreement with a requestor that provides an alternative fee arrangement to the charges, or in response to a voluminous or frequently occurring request. RCW 42.56.120(4).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-07006 Requiring partial payment. (1) **Copying deposit.** An agency may charge a deposit of up to ten percent of the estimated copying costs of an entire request, including a customized service charge, before beginning to copy the records. RCW ((~~42.17.300/~~)) 42.56.120 (4).((+)) The estimate must be reasonable. An agency can require the payment of the deposit before copying an installment of the records or the entire request. The deposit applies to the records selected for copying by the requestor, not all the records made available for inspection. An agency is not required to charge a deposit. An agency might find a deposit burdensome for small requests where the deposit might be only a few dollars. Any unused deposit must be refunded to the requestor.

When copying is completed, the agency can require the payment of the remainder of the copying charges before providing the records. For example, a requestor makes a request for records that comprise one box of paper documents. The requestor selects the entire box for copying. The agency estimates that the box contains three thousand pages of records. The agency charges ((~~ten~~)) fifteen cents per page so the cost would be three hundred fifty dollars. The agency obtains a ten percent deposit of ((~~thirty~~)) thirty-five dollars and then begins to copy the records. The total number of pages turns out to be two thousand nine hundred so the total cost is two hundred ninety dollars. The ((~~thirty~~)) thirty-five dollar deposit is credited to the two hundred ninety dollars. The agency requires payment of the remaining ((~~two hundred sixty dollars~~)) amount before providing the records to the requestor.

(2) **Copying charges for each installment.** If an agency provides records in installments, the agency may charge and collect all applicable copying fees (not just the ten percent deposit) for each installment, unless the agency is assessing a two-dollar flat fee. RCW ((~~42.17.300/~~)) 42.56.120. The agency may agree to provide an installment without first receiving payment for that installment.

((~~Note:~~ [1]*~~See~~* ~~RCW 42.17.300/42.56.120 (ten percent deposit for "a request").~~))

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-080 Review of denials of public records. (1) **Petition for internal administrative review of denial of access.** Any person who objects to the initial denial or partial denial of a records request may petition in writing (including email) to the public records officer for a review of that decision. The petition shall include a copy of or reasonably iden-

tify the written statement by the public records officer or designee denying the request.

(2) **Consideration of petition for review.** The public records officer shall promptly provide the petition and any other relevant information to (public records officer's supervisor or other agency official designated by the agency to conduct the review). That person will immediately consider the petition and either affirm or reverse the denial within two business days following the (agency's) receipt of the petition, or within such other time as (name of agency) and the requestor mutually agree to.

(3) **(Applicable to state agencies only.) Review by the attorney general's office.** Pursuant to RCW ((~~42.17.325~~)) 42.56.530, if the (name of state agency) denies a requestor access to public records because it claims the record is exempt in whole or in part from disclosure, the requestor may request the attorney general's office to review the matter. The attorney general has adopted rules on such requests in WAC 44-06-160.

(4) **Judicial review.** Any person may obtain court review of denials of public records requests pursuant to RCW ((~~42.17.340~~)) 42.56.550 at the conclusion of two business days after the initial denial regardless of any internal administrative appeal.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-08001 Agency internal procedure for review of denials of requests. The act requires an agency to "establish mechanisms for the most prompt possible review of decisions denying" records requests. RCW ((~~42.17.320~~)) 42.56.520. An agency internal review of a denial need not be elaborate. It could be reviewed by the public records officer's supervisor, or other person designated by the agency. The act deems agency review to be complete two business days after the initial denial, after which the requestor may obtain judicial review. Large requests or requests involving many redactions may take longer than two business days for the agency to review. In such a case, the requestor could agree to a longer internal review period.

Requestors are encouraged to use such internal review procedures. The procedures give the requestor an opportunity to communicate his/her issues with respect to the request, give the agency a chance to do a "second look," and may result in release of additional records or other favorable outcomes at no cost to the requestor.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-08002 Attorney general's office review of denials by state agencies. The attorney general's office is authorized to review a state agency's claim of exemption and provide a written opinion. RCW ((~~42.17.325~~)) 42.56.530. This only applies to state agencies and a claim of exemption. See WAC 44-06-160. A requestor may initiate such a review by sending a request for review to Public Records Review, Office of the Attorney General, P.O. Box 40100, Olympia, Washington 98504-0100 or publicrecords@atg.wa.gov.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-08004 Judicial review. While a full discussion of judicial review is not provided in these comments, a few processes in the act are described.

(1) **Seeking judicial review.** The act provides that an agency's decision to deny a request is final for purposes of judicial review two business days after the initial denial of the request. RCW ((~~42.17.320~~)) 42.56.520.[1] Therefore, the statute allows a requestor to seek judicial review two business days after the initial denial whether or not he or she has exhausted the internal agency review process.[2] An agency should not have an internal review process that implies that a requestor cannot seek judicial review until internal reviews are complete because RCW ((~~42.17.320~~)) 42.56.520 allows judicial review two business days after the initial denial.

The act provides a speedy remedy for a requestor to obtain a court hearing on whether the agency has violated the act. RCW ((~~42.17.340 (1) and (2)~~)) 42.56.550 (1) and (2). The court proceeding is a civil action, seeking judicial review. The purpose of the quick judicial procedure is to allow requestors to expeditiously find out if they are entitled to obtain public records.[3] To speed up the court process, a public records case may be decided merely on the "motion" of a requestor and "solely on affidavits." RCW ((~~42.17.340 (1) and (3)~~)) 42.56.550 (1) and (3).

(2) **Statute of limitations.** The statute of limitations for an action under the act is one year after the agency's claim of exemption or the last production of a record on a partial or installment basis. RCW ((~~42.17.340(6)~~)) 42.56.550(6).

(3) **Procedure.** To initiate court review of a public records case, a requestor can file a "motion to show cause" which directs the agency to appear before the court and show any cause why the agency did not violate the act. RCW ((~~42.17.340 (1) and (2)~~)) 42.56.550 (1) and (2).[4] A requestor can also file a summons and complaint, initiating the civil action, and then file a motion. The case must be filed in the superior court in the county in which the record is maintained. RCW ((~~42.17.340 (1) and (2)~~)) 42.56.550 (1) and (2). In a case against a county, the case may be filed in the superior court of that county, or in the superior court of either of the two nearest adjoining counties. RCW ((~~42.17.340(5)~~)) 42.56.550(5). The show-cause procedure is designed so that a nonattorney requestor can obtain judicial review himself or herself without hiring an attorney. A requestor can file a motion for summary judgment to adjudicate the case.[5] ((~~However, most cases are decided on a motion to show cause.~~[6]))

(4) **Burden of proof.** The burden is on an agency to demonstrate that it complied with the act. RCW ((~~42.17.340 (1) and (2)~~)) 42.56.550 (1) and (2).

(5) **Types of cases subject to judicial review.** The act provides three mechanisms for court review of a public records dispute.

(a) **Denial of record.** The first kind of judicial review is when a requestor's request has been denied by an agency. RCW ((~~42.17.340(1)~~)) 42.56.550(1). This is the most common kind of case.

(b) **((~~"Reasonable estimate."~~)) Estimates.** The second form of judicial review is when a requestor challenges an

agency's "reasonable estimate" of the time to provide a full response or estimated charges for copies. RCW ((~~42.17.340 (2)/~~)) 42.56.550(2).

(c) **Injunctive action to prevent disclosure.** The third mechanism of judicial review is an injunctive action to restrain the disclosure of public records. RCW ((~~42.17.330/~~)) 42.56.540. An action under this statute can be initiated by the agency, a person named in the disputed record, or a person to whom the record "specifically pertains." The party seeking to prevent disclosure has the burden of proving the record is exempt from disclosure.((~~7~~)) [6] The party seeking to prevent disclosure must prove both the necessary elements of an injunction and that a specific exemption prevents disclosure.((~~8~~)) [7]

(6) **"In camera" review by court.** The act authorizes a court to review withheld records or portions of records "in camera." RCW ((~~42.17.340(3)/~~)) 42.56.550(3). "In camera" means a confidential review by the judge alone in his or her chambers. Courts are encouraged to conduct an in camera review because it is often the only way to determine if an exemption has been properly claimed.((~~9~~)) [8]

However, in camera review is not always required, and it is up to the discretion of the trial court.[9]

A court may have local court rules on Public Records Act cases and in camera review procedures. In the alternative, an agency should prepare an in camera index of each withheld record or portion of a record to assist the judge's in camera review. This is a second index, in addition to a withholding index provided to the requestor. The in camera index should number each withheld record or redacted portion of the record, provide the unredacted record or portion to the judge with a reference to the index number, and provide a brief explanation of each claimed exemption corresponding to the numbering system. The agency's brief explanation should not be as detailed as a legal brief because the opposing party will not have an opportunity to review it and respond. The agency's legal briefing should be done in the normal course of pleadings, with the opposing party having an opportunity to respond.

The in camera index and disputed records or unredacted portions of records should be filed under seal. The judge should explain his or her ruling on each withheld record or redacted portion by referring to the numbering system in the in camera index. If the trial court's decision is appealed, the in camera index and its attachments should be made part of the record on appeal and filed under seal in the appellate court.

(7) **Attorneys' fees, costs, and penalties to prevailing requestor.** The act requires an agency to pay a prevailing requestor's reasonable attorneys' fees((~~,~~)) and costs((~~, and~~)). In addition, it is within the discretion of a court to assess a daily penalty against the agency, considering several factors. RCW ((~~42.17.340(4)/~~)) 42.56.550(4).[10] Only a requestor can be awarded attorneys' fees, costs, or a daily penalty under the act; an agency or a third party resisting disclosure cannot.((~~10~~)) [11]

A special process regarding attorneys' fees and penalties applies to actions involving the disclosure of body worn camera recordings governed by RCW 42.56.240. Another process applies to requests by inmates; penalties may not be awarded to an inmate unless a court determines the agency acted in bad faith. RCW 42.56.565.

A requestor is the "prevailing" party when he or she obtains a judgment in his or her favor, the suit was reasonably necessary to obtain the record, or a wrongfully withheld record was provided for another reason.((~~11~~)) [12] In an injunctive action under RCW ((~~42.17.330/~~)) 42.56.540, the prevailing requestor cannot be awarded attorneys' fees, costs, or a daily penalty against an agency if the agency took the position that the record was subject to disclosure.((~~12~~)) [13]

The purpose of the act's attorneys' fees, costs, and daily penalty provisions is to reimburse the requestor for vindicating the public's right to obtain public records, to make it financially feasible for requestors to do so, and to deter agencies from improperly withholding records.((~~13~~)) [14] However, a court is only authorized to award "reasonable" attorneys' fees. RCW ((~~42.17.340(4)/~~)) 42.56.550(4). A court has discretion to award attorneys' fees based on an assessment of reasonable hourly rates and which work was necessary to obtain the favorable result.((~~14~~)) [15]

The award of "costs" under the act is for all of a requestor's nonattorney-fee costs and is broader than the court costs awarded to prevailing parties in other kinds of cases.((~~15~~)) [16]

((~~A daily penalty of between five dollars to one hundred dollars must be awarded to a prevailing requestor, regardless of an agency's "good faith."[16] An agency's "bad faith" can warrant a penalty on the higher end of this scale.[17] The penalty is per day, not per record per day.[18]~~)) The penalty range is up to one hundred dollars a day. RCW 42.56.550(4). Courts will consider a nonexclusive list of penalty factors in determining whether to assess a penalty, and the amount.[17]

Notes:

[1] *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) ("*PAWS II*") (RCW ((~~42.17.320/~~)) 42.56.520 "provides that, regardless of internal review, initial decisions become final for purposes of judicial review after two business days."); a request is required to have a "final action" taken on it by the agency denying the record, prior to a requestor filing a lawsuit. *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014).

[2] See, e.g., WAC 44-06-120 (attorney general's office internal review procedure specifying that review is final when the agency renders a decision on the appeal, or the close of the second business day after it receives the appeal, "whichever occurs first").

[3] *Spokane Research & Def. Fund v. City of Spokane*, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), *reversed on other grounds*, 155 Wn.2d 89, 117 P.3d 1117 (2005) ("The purpose of the PDA [PRA] is to ensure speedy disclosure of public records. The statute sets forth a simple procedure to achieve this.").

[4] See generally *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005).

[5] *Id.* at 106.

[6] ((~~*Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003).~~

[7]) *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 735, 744, 958 P.2d 260 (1998).

((8)) 7*PAWS II*, 125 Wn.2d at 257-58. See also *SEIU Healthcare 775 NW v. State et al*, 198 Wn. App. 745, X P.3d X (2017) (party seeking injunction under RCW 42.56.540 must show that (1) record pertains to that party, (2) exemption applies, and (3) disclosure would not be in the public interest and would substantially and irreparably harm the party or a vital governmental function.)

((9)) 8*Spokane Research & Def. Fund v. City of Spokane*, 96 Wn. App. 568, 577 & 588, 983 P.2d 676 (1999), *review denied*, 140 Wn.2d 1001, 999 P.2d 1259 (2000).

9*Block v. City of Gold Bar*, 189 Wn. App. 262, 355 P.3d 122 (2015); *Nissen v. Pierce County*, 182 Wn.2d 863, 357 P.3d 45 (2015).

10*Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004) (factors).

11RCW ((~~42.17.340(4)~~)) 42.56.550(4) (providing award only for "person" prevailing against "agency"); *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691-92, 13 P.3d 1104 (2000) (third party resisting disclosure not entitled to award).

((11)) 12*Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, 59 P.3d 109 (2002); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 104, 117 P.3d 1117 (2005).

((12)) 13*Confederated Tribes*, 135 Wn.2d at 757; *Doe v. Washington State Patrol*, 185 Wn.2d 363, 374 P.3d 63 (2016).

((13)) 14*Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) ("*ACLU II*") ("permitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access to public records.").

((14)) 15*Id*. at 118.

((15)) 16*Id*. at 115.

((~~16 *American Civil Liberties Union v. Blaine School Dist. No. 503*, 86 Wn. App. 688, 698-99, 937 P.2d 1176 (1997) ("ACLU I").~~

~~17 *Id*.~~

~~18~~)) 17*Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004).

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 44-14-07003 Charges for electronic records.

WSR 17-17-166
PROPOSED RULES
SUPERINTENDENT OF PUBLIC INSTRUCTION

[Filed August 23, 2017, 10:17 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 17-13-123.

Title of Rule and Other Identifying Information: Chapter 392-172A WAC, Rules for the provision of special education.

Hearing Location(s): On September 28, 2017, at 10:00 a.m., at the Office of Superintendent of Public Instruction (OSPI), Brouillet Conference Room, 600 Washington Street S.E., Olympia, WA 98501.

Date of Intended Adoption: October 2, 2017.

Submit Written Comments to: Glenna Gallo, Assistant Superintendent of Special Education, OSPI, P.O. Box 47200, Olympia, WA 98504-7200, Attn: Special Education Section, email speced@k12.wa.us (please put "2017 Rulemaking" in the subject line), fax 360-586-0247, by September 28, 2017.

Assistance for Persons with Disabilities: Contact Kristin Murphy, phone 360-725-6133, fax 360-753-4201, TTY 360-664-3631, email Kristin.murphy@k12.wa.us, by September 21, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: This proposed rule change amends, adds to, and repeals sections of chapter 392-172A WAC, Rules for the provision of special education, to address changes to the Elementary and Secondary Act (ESEA) of 1965, which was amended in December 2015 by the Every Student Succeeds Act (ESSA), and to address changes in Washington state law. OSPI is also proposing to amend other sections of chapter 392-172A WAC to better align with the Individuals [with] Disabilities Education Act (IDEA). Additionally, OSPI is proposing to amend other sections of the chapter 392-172A WAC to correct typographical errors and other outdated information, and to clarify current requirements of the existing rules.

Specifically, the proposed rules make the following changes to existing rules:

1. Address changes to federal law - ESEA of 1965, which was amended in December 2015 by ESSA.

- Adding WAC 392-172A-01062.
- Amending WAC 392-172A-01120, 392-172A-02090, 392-172A-04040, 392-172A-04085, 392-172A-06030, 392-172A-06055, and 392-172A-07035.
- Repealing WAC 392-172A-01045, 392-172A-01110, and 392-172A-01085.

2. Align with federal law - IDEA.

- Amending WAC 392-172A-03105.

3. Address changes to Washington state law -

- Amending WAC 392-172A-02090 to address RCW 28A.410.271 regarding educational interpreters and ESHB 1115 (effective July 23, 2017) regarding paraeducators.
- Amending WAC 392-172A-05170 to address WAC 392-400-245, 392-400-260, and 392-400-275.

4. Clarify existing requirements under the rules for the provision of special education.

- Amending WAC 392-172A-02095, 392-172A-02100, and 392-172A-03015.
- Reorganizing special education discipline rules -

- Splitting WAC 392-172A-05145 into six WAC [sections]: Amending WAC 392-172A-05145 (authority of school personnel), adding WAC 392-172A-05146 (manifestation determination), 392-172A-05147 (conduct is a manifestation of a student's disability), 392-172A-05148 (conduct is not a manifestation of a student's disability), 392-172A-05149 (special circumstances); and amending WAC 392-172A-05150, no longer addresses determination of setting (incorporated into other new discipline WAC), but now addresses notification of change of placement.
- Amending WAC 392-172A-05140, 392-172A-05160, 392-172A-05165, and 392-172A-05170, to reflect the reorganization of the other discipline WAC.

- Splitting WAC 392-172A-05000 into two WAC [sections]:
  - Amending WAC 392-172A-05000 to only address opportunity to examine records.
  - Adding WAC 392-172A-05001 to only address parent participation in meetings.

5. Correct typographical errors and other outdated information.

- Amending WAC 392-172A-01035, 392-172A-03015, 392-172A-05025, and 392-172A-05185.

Reasons Supporting Proposal: OSPI must amend its special education rules to address changes to federal law and state law. OSPI also seeks to further clarify existing requirements under chapter 392-172A WAC and to update and reorganize the rules for ease of interpretation and implementation.

Statutory Authority for Adoption: RCW 28A.155.090.

Statute Being Implemented: Chapter 28A.155 RCW.

Rule is necessary because of federal law, ESSA, Pub.L. 114-95 (2015), codified at 20 U.S.C. 6301 et seq.

Name of Agency Personnel Responsible for Drafting: Kasi Walker, Program Supervisor, OSPI, P.O. Box 47200, Olympia, WA 98504-7200, 360-725-6075; Implementation and Enforcement: Glenna Gallo, Assistant Superintendent of Special Education, OSPI, P.O. Box 47200, Olympia, WA 98504-7200, 360-725-6075.

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. The proposed changes do not impose new or additional fiscal requirements.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how the costs were calculated. No small business economic impact statement has been prepared under chapter 19.85 RCW. The proposed amendment does not have an impact on small business and therefore does not meet the requirements for a statement under RCW 19.85.030 (1) or (2).

August 23, 2017
Chris P. S. Reykdal
State Superintendent
of Public Instruction

AMENDATORY SECTION (Amending WSR 13-20-034, filed 9/24/13, effective 10/25/13)

WAC 392-172A-01035 Child with a disability or student eligible for special education. (1)(a) Child with a disability or as used in this chapter, a student eligible for special education means a student who has been evaluated and determined to need special education because of having a disability in one of the following eligibility categories: Intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), an emotional/behavioral disability, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, multiple disabilities, or for students, three through eight, a developmental delay and who, because of the disability and adverse educational impact, has unique needs that cannot be addressed exclusively through education in general education classes with or without individual accommodations, and needs special education and related services.

(b) For purposes of providing a student with procedural safeguard protections identified in WAC 392-172A-05015, the term, "student eligible for special education" also includes a student whose identification, evaluation or placement is at issue.

(c) If it is determined, through an appropriate evaluation, that a student has one of the disabilities identified in ((~~subsection (1)~~)) (a) of this ((~~section~~)) subsection, but only needs a related service and not special education, the student is not a student eligible for special education under this chapter. School districts and other public agencies must be aware that they have obligations under other federal and state civil rights laws and rules, including 29 U.S.C. 764, RCW 49.60.030, and 43 U.S.C. 12101 that apply to students who have a disability regardless of the student's eligibility for special education and related services.

(d) Speech and language pathology, audiology, physical therapy, and occupational therapy services, may be provided as specially designed instruction, if the student requires those therapies as specially designed instruction, and meets the eligibility requirements which include a disability, adverse educational impact and need for specially designed instruction. They are provided as a related service under WAC 392-172A-01155 when the service is required to allow the student to benefit from specially designed instruction.

(2) The terms used in subsection (1)(a) of this section are defined as follows:

(a)(i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a student's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

(ii) Autism does not apply if a student's educational performance is adversely affected primarily because the student has an emotional/behavioral disability, as defined in subsection (2)(e) of this section.

(iii) A student who manifests the characteristics of autism after age three could be identified as having autism if the criteria in (a)(i) of this subsection are satisfied.

(b) Deaf-blindness means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for students with deafness or students with blindness and adversely affect a student's educational performance.

(c) Deafness means a hearing impairment that is so severe that the student is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a student's educational performance.

(d)(i) Developmental delay means a student three through eight who is experiencing developmental delays that adversely affect the student's educational performance in one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development or adaptive development and who demonstrates a delay on a standardized norm referenced test, with a test-retest or split-half reliability of .80 that is at least:

(A) Two standard deviations below the mean in one or more of the five developmental areas; or

(B) One and one-half standard deviations below the mean in two or more of the five developmental areas.

(ii) The five developmental areas for students with a developmental delay are:

(A) Cognitive development: Comprehending, remembering, and making sense out of one's experience. Cognitive ability is the ability to think and is often thought of in terms of intelligence;

(B) Communication development: The ability to effectively use or understand age-appropriate language, including vocabulary, grammar, and speech sounds;

(C) Physical development: Fine and/or gross motor skills requiring precise, coordinated, use of small muscles and/or motor skills used for body control such as standing, walking, balance, and climbing;

(D) Social or emotional development: The ability to develop and maintain functional interpersonal relationships and to exhibit age appropriate social and emotional behaviors; and

(E) Adaptive development: The ability to develop and exhibit age-appropriate self-help skills, including independent feeding, toileting, personal hygiene and dressing skills.

(iii) A school district is not required to adopt and use the category "developmentally delayed" for students, three through eight.

(iv) If a school district uses the category "developmentally delayed," the district must conform to both the definition and age range of three through eight, established under this section.

(v) School districts using the category "developmentally delayed," for students three through eight may also use any other eligibility category.

(vi) Students who qualify under the developmental delay eligibility category must be reevaluated before age nine and determined eligible for services under one of the other eligibility categories.

(vii) The term "developmentally delayed, birth to three years" are those infants and toddlers under three years of age who:

(A) Meet the eligibility criteria established by the state lead agency under Part C of IDEA; and

(B) Are in need of early intervention services under Part C of IDEA. Infants and toddlers who qualify for early intervention services must be evaluated prior to age three in order to determine eligibility for special education and related services.

(e)(i) Emotional/behavioral disability means a condition where the student exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a student's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional/behavioral disability includes schizophrenia. The term does not apply to students who are socially maladjusted, unless it is determined that they have an emotional disturbance under (e)(i) of this subsection.

(f) Hearing impairment means an impairment in hearing, whether permanent or fluctuating, that adversely affects a student's educational performance but that is not included under the definition of deafness in this section.

(g) Intellectual disability means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a student's educational performance.

(h) Multiple disabilities means concomitant impairments, the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. The term, multiple disabilities does not include deaf-blindness.

(i) Orthopedic impairment means a severe orthopedic impairment that adversely affects a student's educational performance. The term includes impairments caused by a congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(j) Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that:

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemo-

philia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a student's educational performance.

(k)(i) Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia, that adversely affects a student's educational performance.

(ii) Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(l) Speech or language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a student's educational performance.

(m) Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a student's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

(n) Visual impairment including blindness means an impairment in vision that, even with correction, adversely affects a student's educational performance. The term includes both partial sight and blindness.

NEW SECTION

WAC 392-172A-01062 English learner. English learner has the meaning given the term in 20 U.S.C. Section 7801(20). The term "English learner," when used with respect to an individual, means an individual:

(1) Who is aged three through twenty-one;

(2) Who is enrolled or preparing to enroll in an elementary school or secondary school;

(3)(a) Who was not born in the United States or whose native language is a language other than English;

(b)(i) Who is a Native American or Alaska native, or a native resident of the outlying areas; and

(ii) Who comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or

(c) Who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; and

(4) Whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual:

(a) The ability to meet the challenging state academic standards;

(b) The ability to successfully achieve in classrooms where the language of instruction is English; or

(c) The opportunity to participate fully in society.

AMENDATORY SECTION (Amending WSR 07-14-078, filed 6/29/07, effective 7/30/07)

WAC 392-172A-01120 Native language. (1) Native language, when used with respect to an individual who is ((~~limited~~)) an English ((~~proficient~~)) learner, means the following:

(a) The language normally used by that individual, or, in the case of a student, the language normally used by the parents of the student, except as provided in (b) of this subsection.

(b) In all direct contact with a student (including evaluation of the student), the language normally used by the student in the home or learning environment.

(2) For an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual, such as sign language, Braille, or oral communication.

AMENDATORY SECTION (Amending WSR 11-06-052, filed 3/1/11, effective 4/1/11)

WAC 392-172A-02090 Personnel qualifications. (1) ((~~In addition to the highly qualified requirements for teachers, pursuant to WAC 392-172A-01085,~~)) All school district personnel providing special education services and/or related services shall meet the following qualifications:

(a) All employees shall hold such credentials, licenses, certificates, endorsements or permits as are now or hereafter required by the professional educator standards board for the particular position of employment and shall meet such supplemental standards as may be established by the school district of employment. Supplemental standards established by a district or other public agency may exceed, but not be less than, those established by the professional educator standards board in accordance with Title 181 WAC and this section.

(b) In addition to the requirement in (a) of this subsection (((~~(1)~~))), all special education teachers providing, designing, supervising, monitoring or evaluating the provision of special education shall possess "substantial professional training." "Substantial professional training" as used in this section shall be evidenced by issuance of an appropriate special education endorsement on an individual teaching certificate issued by the OSPI, professional education and certification section.

(c) A teacher will be considered to meet the applicable requirements in (a) and (b) of this subsection if that teacher is participating in an alternative route to a special education certification program under which the teacher:

(i) Receives high-quality professional development that is sustained, intensive, and classroom-focused in order to

have a positive and lasting impact on classroom instruction, before and while teaching;

(ii) Participates in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program;

(iii) Assumes functions as a teacher only for a specified period of time not to exceed three years; and

(iv) Demonstrates satisfactory progress toward full certification according to the state professional standards board rules, and the state ensures, through its certification and endorsement process, that the provisions of subsection (2) of this section are met.

(d) Other certificated related services personnel providing specially designed instruction or related services as defined in this chapter, shall meet standards established under the educational staff associate rules of the professional educator standards board, as now or hereafter amended.

(((~~(d)~~))) (e) Employees with only an early childhood special education endorsement may be assigned to programs that serve students birth through eight. Preference for an early childhood special education assignment must be given first to employees having early childhood special education endorsement, but may be assigned to an individual with a special education endorsement.

(((~~(e)~~))) (f) Certified and/or classified staff assigned to provide instruction in Braille, the use of Braille, or the production of Braille must demonstrate competency with grade two standard literary Braille code by successful completion of a test approved by the professional educator standards board pursuant to WAC 181-82-130.

(((~~(f)~~))) (g) Certified and/or classified staff assigned as educational interpreters, must meet the performance standards outlined in RCW 28A.410.271 by passing an educational interpreter assessment approved by the professional educator standards board.

(h) Paraprofessional staff and aides shall present evidence of skills and knowledge established under the rules of the professional educator standards board, necessary to meet the needs of students eligible for special education, and shall be under the supervision of a certificated teacher with a special education endorsement, or a certificated educational staff associate or a licensed staff, as provided in (((~~(g)~~))) (i) of this subsection. Paraprofessional staff ((~~in~~)) assigned to Title 1 school-wide programs shall also meet ESEA standards for paraprofessionals((~~. Districts shall have procedures that ensure that classified staff receive training to meet state recommended core competencies pursuant to RCW 28A.415.310~~)).

(((~~(g)~~))) (i) Special education and related services must be provided by appropriately qualified staff. Other staff including general education teachers and paraprofessionals may assist in the provision of special education and related services, provided that the instruction is designed and supervised by special education certificated staff, or for related services by a certificated educational staff associate. Student progress must be monitored and evaluated by special education certificated staff or for related services, a certificated educational staff associate.

(2) School districts must take measurable steps to recruit, hire, train, and retain ((~~highly qualified~~)) personnel, who meet the applicable requirements described in subsection (1)(a) of this section, to provide special education and related services to students eligible for special education. There may be occasions when, despite efforts to hire or retain ((~~highly qualified~~)) teachers who meet the applicable requirements, they are unable to do so. The following options are available in these situations:

(a) Teachers who meet state board criteria pursuant to WAC 181-82-110(3) as now or hereafter amended, are eligible for a preendorsement waiver. Application for the special education preendorsement waiver shall be made to the special education section at the OSPI.

(b) In order to temporarily assign a classroom teacher without a special education endorsement to a special education position, the district or other public agency must keep written documentation on the following:

(i) The school district must make one or more of the following factual determinations:

(A) The district or other public agency was unable to recruit a teacher with the proper endorsement who was qualified for the position;

(B) The need for a teacher with such an endorsement could not have been reasonably anticipated and the recruitment of such a classroom teacher at the time of assignment was not reasonably practicable; and/or

(C) The reassignment of another teacher within the district or other public agency with the appropriate endorsement to such assignment would be unreasonably disruptive to the current assignments of other classroom teachers or would have an adverse effect on the educational program of the students assigned such other classroom teachers.

(ii) Upon determination by a school district that one or more of these criteria can be documented, and the district determines that a teacher has the competencies to be an effective special education teacher but does not have endorsement in special education, the district can so assign the teacher to special education. The school district is responsible for determining that the assigned teacher ((~~so assigned~~)) must have completed nine quarter hours (six semester hours) ((~~or nine quarter hours~~)) of course work ((~~which are~~)) applicable to an endorsement in special education. ((~~The following requirements apply:~~))

(iii) Pursuant to WAC 181-82-110, if teachers are so assigned, the following requirements apply:

(A) A designated representative of the district and any such teacher shall mutually develop a written plan which provides for necessary assistance to the teacher, and which provides for a reasonable amount of planning and study time associated specifically with the out-of-endorsement assignment;

(B) Such teachers shall not be subject to nonrenewal or probation based on evaluations of their teaching effectiveness in the out-of-endorsement assignments; and

(C) Such teaching assignments shall be approved by a formal vote of the local school board for each teacher so assigned((~~; and~~

~~(D) The assignment of such teachers for the previous school year shall be reported annually to the professional educator standards board by the employing school district as required by WAC 180-16-195~~)).

(3) Teachers placed under the options described in subsection (2) of this section do not meet the definition of ((~~highly qualified~~)) substantial professional training.

(4) Notwithstanding any other individual right of action that a parent or student may maintain under this chapter, nothing in this section shall be construed to create a right of action on behalf of an individual student or a class of students for the failure of a particular school district employee ((~~be highly qualified~~)) to meet the applicable requirements described in subsection (1)(a) of this section, or to prevent a parent from filing a state complaint about staff qualifications with the OSPI under WAC 392-172A-05025 through 392-172A-05040.

(5) School districts and other public agencies that are recipients of funding under Part B of the act must make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of the act.

AMENDATORY SECTION (Amending WSR 07-14-078, filed 6/29/07, effective 7/30/07)

WAC 392-172A-02095 Transportation. (1) Methods. Transportation options for students eligible for special education shall include the following categories and shall be exercised in the following sequence:

(a) A scheduled school bus;

(b) Contracted transportation, including public transportation; and

(c) Other transportation arrangements, including that provided by parents. Board and room cost in lieu of transportation may be provided whenever the above stated transportation options are not feasible because of the need(s) of the student or because of the unavailability of adequate means of transportation, in accordance with rules of the superintendent of public instruction.

(2) Welfare of the student. The transportation of the student shall be in accordance with ((~~rules of the OSPI governing transportation by public school districts~~)) chapters 392-143, 392-144, and 392-145 WAC.

(3) Bus aides and drivers. Training and supervision of bus aides and drivers shall be the responsibility of the school district.

(4) Special equipment. Special equipment may include lifts, wheelchair holders, restraints, and two-way radios. All such special equipment shall comply with specifications contained in the specifications for school buses as now or hereafter established by the OSPI.

(5) Transportation time on bus. Wherever reasonably possible, no student should be required to ride more than sixty minutes one way.

(6) Transportation for state residential school students to and from the residential school and the sites of the educational program shall be the responsibility of the department of social and health services and each state residential school pursuant to law.

(7) Transportation for a state residential school student, including students attending the state school for the deaf and the state school for the blind, to and from such school and the residency of such student shall be the responsibility of the district of residency only if the student's placement was made by such district or other public agency pursuant to an interagency agreement—i.e., an appropriate placement in the least restrictive environment.

AMENDATORY SECTION (Amending WSR 09-20-053, filed 10/1/09, effective 11/1/09)

WAC 392-172A-02100 Home/hospital instruction. Home or hospital instruction shall be provided to students eligible for special education and other students who are unable to attend school for an estimated period of four weeks or more because of disability or illness. As a condition to such services, the parent of a student shall request the services and provide a written statement to the school district from a qualified medical practitioner that states the student will not be able to attend school for an estimated period of at least four weeks. A student who is not determined eligible for special education, but who qualifies pursuant to this subsection shall be deemed "disabled" only for the purpose of home/hospital instructional services and funding and may not otherwise qualify as a student eligible for special education for the purposes of generating state or federal special education funds. A school district shall not pay for the cost of the statement from a qualified medical practitioner for the purposes of qualifying a student for home/hospital instructional services pursuant to this section.

Home/hospital instructional services funded in accordance with the provisions of this section shall not be used for the initial or ongoing delivery of services to students eligible for special education((~~. It~~)) in a homebound placement. Home/hospital instruction shall be limited to services necessary to provide temporary intervention as a result of a physical disability or illness.

A student eligible for special education who qualifies for home/hospital instruction must continue to receive educational services that provide a FAPE, so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP. The IEP team determines the appropriate services.

AMENDATORY SECTION (Amending WSR 07-14-078, filed 6/29/07, effective 7/30/07)

WAC 392-172A-03015 Reevaluation timelines. (1) A school district must ensure that a reevaluation of each student eligible for special education is conducted in accordance with WAC 392-172A-03020 through 392-172A-03080 when:

(a) The school district determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reevaluation; or

(b) If the child's parent or teacher requests a reevaluation.

(2) A reevaluation conducted under subsection (1) of this section:

(a) May occur not more than once a year, unless the parent and the school district agree otherwise; and

(b) Must occur at least once every three years, unless the parent and the school district agree that a reevaluation is unnecessary.

(3) Reevaluations shall be completed within:

(a) Thirty-five school days after the date written consent for an evaluation has been provided to the school district by the parent;

(b) Thirty-five school days after the date the refusal of the parent was overridden through due process procedures or agreed to using mediation; or

(c) Such other time period as may be agreed to by the parent and documented by the school district, ((~~within the time frames in subsection (2) of this section~~)) including specifying the reasons for extending the timeline.

AMENDATORY SECTION (Amending WSR 13-20-034, filed 9/24/13, effective 10/25/13)

WAC 392-172A-03105 When IEPs must be in effect. (1) At the beginning of each school year, each school district must have an IEP in effect for each student eligible for special education that it is serving through enrollment in the district.

(2) For an initial IEP, a school district must ensure that:

(a) The school district holds a meeting to develop the student's IEP within thirty days of a determination that the student is eligible for special education and related services; and

(b) As soon as possible following development of the IEP, special education and related services are made available to the student in accordance with the student's IEP.

(3) Each school district must ensure that:

(a) The student's IEP is accessible to each general education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and

(b) Each teacher and provider described in (a) of this subsection is informed of:

(i) His or her specific responsibilities related to implementing the student's IEP; and

(ii) The specific accommodations, modifications, and supports that must be provided for the student in accordance with the IEP.

(4) If a student eligible for special education transfers from one school district to another school district within ((~~the~~)) Washington state and ((~~has~~)) had an IEP that was in effect ((~~for the current school year from~~)) in the previous school district, the new school district, in consultation with the parents, must provide FAPE to the student including services comparable to those described in the student's IEP, until the new school district either:

(a) Adopts the student's IEP from the previous school district; or

(b) Develops((~~, adopts,~~)) and implements a new IEP that meets the applicable requirements in WAC 392-172A-03090 through 392-172A-03110.

(5) If a student eligible for special education transfers from a school district located in another state to a school district within ((~~the~~)) Washington state and ((~~has~~)) had an IEP that ((~~is~~)) was in effect ((~~for the current school year from~~)) in the previous school district, the new school district, in consultation with the parents, must provide FAPE to the student including services comparable to those described in the student's IEP, until the new school district:

(a) Conducts an evaluation to determine whether the student is eligible for special education services in ((~~this~~)) Washington state, if the school district determines an evaluation is necessary to establish eligibility requirements under Washington state standards; and

(b) Develops((~~, adopts,~~)) and implements a new IEP, if appropriate, that meets the applicable requirements in WAC 392-172A-03090 through 392-172A-03110.

(6) To facilitate the transition for a student described in subsections (4) and (5) of this section:

(a) The new school in which the student enrolls must take reasonable steps to promptly obtain the student's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the student, from the school district in which the student was previously enrolled, pursuant to RCW 28A.225.330 and consistent with applicable Family Education Rights and Privacy Act (FERPA) requirements; and

(b) The school district in which the student was enrolled must take reasonable steps to promptly respond to the request from the new school district, pursuant to RCW 28A.225.330 and applicable FERPA requirements.

AMENDATORY SECTION (Amending WSR 09-20-053, filed 10/1/09, effective 11/1/09)

WAC 392-172A-04040 Equitable services provided. (1) The services provided to parentally placed private school students eligible for special education must be provided by personnel meeting the same standards as personnel providing services in the public schools((~~, except that private elementary school and secondary school teachers who are providing equitable services to parentally placed private school students eligible for special education do not have to meet the highly qualified special education teacher requirements~~)).

(2) Parentally placed private school students eligible for special education may receive a different amount of services than students eligible for special education attending public schools.

(3) Each parentally placed private school student eligible for special education who has been designated to receive services must have a services plan that describes the specific special education and related services that the school district will provide in light of the services that the school district has determined, it will make available to parentally placed private school students eligible for special education.

(4) The services plan must, to the extent appropriate:

(a) Meet the requirements of WAC 392-172A-03090, with respect to the services provided; and

(b) Be developed, reviewed, and revised consistent with WAC 392-172A-03090 through 392-172A-03110.

(5) The provision of services must be provided:

(a) By employees of a school district or ESD; or

(b) Through contract by the school district with an individual, association, agency, organization, or other entity.

(6) Special education and related services provided to parentally placed private school students eligible for special education, including materials and equipment, must be secular, neutral, and nonideological.

AMENDATORY SECTION (Amending WSR 13-20-034, filed 9/24/13, effective 10/25/13)

WAC 392-172A-04085 Responsibility of the school district. (1) A school district that places a student eligible for special education with a nonpublic agency or with another private or public agency under WAC 392-172A-04080(2) for special education and related services shall develop a written contract or interdistrict agreement which will include, but not be limited to, the following elements:

(a) The names of the parties involved;

(b) The name(s) of the student(s);

(c) The location(s) and setting(s) of the services to be provided;

(d) A description of services provided, program administration and supervision;

(e) The charges and reimbursement including billing and payment procedures;

(f) The total contract cost;

(g) Any other contractual elements including those identified in WAC 392-121-188 that may be necessary to assure compliance with state and federal rules.

(2) Each school district must ensure that a student eligible for special education services placed in or referred to a nonpublic agency under WAC 392-172A-04080(1) or with another private or public agency under WAC 392-172A-04080(2) is provided special education and related services:

(a) In conformance with an IEP developed by the school district that meets the requirements of this chapter; and

(b) At no cost to the parents.

(3) The student shall be provided with a FAPE((~~, except that the certificated teachers, including those with a special education endorsement, do not have to meet the highly qualified standards for core academic content areas under WAC 392-172A-01085~~)).

(4) The school district remains responsible for evaluations and IEP meetings for the student. If the school district requests that the nonpublic agency conduct evaluations or IEP meetings, the school district will ensure that all applicable requirements of Part B of the act are met.

(5) The student has all of the rights of a student eligible for special education who is served within the school district.

AMENDATORY SECTION (Amending WSR 07-14-078, filed 6/29/07, effective 7/30/07)

WAC 392-172A-05000 Opportunity to examine records((~~—Parent participation in meetings~~)). (((~~(1)~~))) The parents of a student eligible for special education must be afforded an opportunity to inspect and review all education records. Inspection and review of education records is provided consistent with WAC 392-172A-05180 through 392-172A-05245.

(((~~(2)(a) The parents of a student eligible for special education must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, educational placement and the provision of FAPE to the student.~~

~~(b) Each school district must provide notice consistent with WAC 392-172A-03100 (1) and (3) to ensure that parents of students eligible for special education have the opportunity to participate in meetings described in (a) of this subsection.~~

~~(c) A meeting does not include informal or unscheduled conversations involving school district personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that school district personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.~~

~~(3)(a) Each school district must ensure that a parent of each student eligible for special education is a member of any group that makes decisions on the educational placement of the parent's child.~~

~~(b) In implementing the requirements of (a) of this subsection, the school district must use procedures consistent with the procedures described in WAC 392-172A-03100 (1) through (3).~~

~~(c) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the school district must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.~~

~~(d) A placement decision may be made by a group without the involvement of a parent, if the school district is unable to obtain the parent's participation in the decision. In this case, the school district must have a record of its attempt to ensure their involvement.~~

~~(4) When conducting IEP team meetings and placement meetings and in carrying out administrative matters such as scheduling, exchange of witness lists and status conferences for due process hearing requests, the parent and the district may agree to use alternative means of meeting participation such as video conferences and conference calls.~~))

NEW SECTION

WAC 392-172A-05001 Parent participation in meetings. (1)(a) The parents of a student eligible for special education must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, educational placement and the provision of FAPE to the student.

(b) Each school district must provide notice consistent with WAC 392-172A-03100 (1) and (3) to ensure that parents of students eligible for special education have the opportunity to participate in meetings described in (a) of this subsection.

(c) A meeting does not include informal or unscheduled conversations involving school district personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that school district personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(2)(a) Each school district must ensure that a parent of each student eligible for special education is a member of any

group that makes decisions on the educational placement of the parent's child.

(b) In implementing the requirements of (a) of this subsection, the school district must use procedures consistent with the procedures described in WAC 392-172A-03100 (1) through (3).

(c) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the school district must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

(d) A placement decision may be made by a group without the involvement of a parent, if the school district is unable to obtain the parent's participation in the decision. In this case, the school district must have a record of its attempt to ensure their involvement.

(3) When conducting IEP team meetings and placement meetings and in carrying out administrative matters such as scheduling, exchange of witness lists and status conferences for due process hearing requests, the parent and the district may agree to use alternative means of meeting participation such as video conferences and conference calls.

AMENDATORY SECTION (Amending WSR 07-14-078, filed 6/29/07, effective 7/30/07)

WAC 392-172A-05025 Procedures for filing a complaint. (1) An organization or individual, including an organization or individual from another state, may file with the OSPI, special education section, a written, signed complaint that the OSPI, or a subgrantee of the OSPI((,)) including, but not limited to, an ESD, school district, or other subgrantee is violating or has violated Part B of the Individuals with Disabilities Education Act or regulations implementing the act.

(2)(a) A written complaint filed with OSPI will include:

(i)(A) A statement that the agency has violated or is violating one or more requirements of Part B of IDEA including the state and federal regulations implementing the act; or

(B) A statement that the school district is not implementing a mediation agreement or a resolution agreement;

(ii) The facts on which the statement is based;

(iii) The signature and contact information, including an address of the complainant; and

(iv) The name and address of the school district, or other agency subject to the complaint.

(b) If the allegations are with respect to a specific student the information must also include:

(i) The name and address of the student, or in the case of a homeless child or youth, contact information for the student;

(ii) The name of the school the student attends and the name of the school district;

(iii) A description of the nature of the problem of the student, including the facts relating to the problem; and

(iv) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

(c) The complainant must send a copy of the complaint to the agency serving the student at the same time the complainant files the complaint with OSPI. Complaints under this chapter are filed with the ((~~director~~)) assistant superintendent of special education, OSPI.

(d) The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received.

(e) The OSPI has developed a form for use by persons or organizations filing a complaint. Use of the form is not required, but the complaint must contain the elements addressed in (a) and (b) of this subsection.

AMENDATORY SECTION (Amending WSR 13-20-034, filed 9/24/13, effective 10/25/13)

WAC 392-172A-05140 Purpose. The purpose of WAC 392-172A-05140 through 392-172A-05175 is to ensure that students eligible for special education services are not improperly excluded from school for disciplinary reasons and are provided services in accordance with WAC 392-172A-05145, 392-172A-05148, and 392-172A-05149. Each school district shall take steps to ensure that each employee, contractor, and other agent is knowledgeable of the disciplinary procedures to be followed for students eligible for special education and students who may be deemed to be eligible for special education, and knowledgeable of the rules and procedures contained in chapter 392-400 WAC governing discipline for all students.

AMENDATORY SECTION (Amending WSR 11-06-052, filed 3/1/11, effective 4/1/11)

WAC 392-172A-05145 Authority of school personnel. (1) School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a student eligible for special education services, who violates a code of student conduct.

(2)(a) School personnel may remove a student eligible for special education who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten consecutive school days to the extent those alternatives are applied to students without disabilities under this section, and for additional removals of not more than ten consecutive school days in that same school year for separate incidents of misconduct as long as those removals do not constitute a change of placement under WAC 392-172A-05155.

(b) A school district is only required to provide services during periods of removal to a student eligible for special education who has been removed from his or her current placement for ten school days or less in that school year, if it provides services to a student without disabilities who is similarly removed. The services may be provided in an interim alternative educational setting.

(3) After a student eligible for special education has been removed from his or her current placement for ten school days in the same school year, and the removal is a change of placement under WAC 392-172A-05155, during any subsequent days of removal ((~~the school district must provide services to the extent required under subsection (4) of this section.~~

~~(3) When disciplinary changes in placement exceed ten consecutive school days, and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the student's disability pursuant to subsection (5) of this section, school personnel may apply the relevant disciplinary procedures to students eligible for special education in the same manner and for the same duration as a district would apply discipline procedures to students without disabilities, except that services shall be provided in accordance with subsection (4) of this section.~~

~~(4) A student who is removed from the student's current placement pursuant to subsection (3) or (7) of this section must:~~

~~(a) Continue to receive educational services, that provide a FAPE, so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP; and~~

~~(b) Receive, as appropriate when a student's removal is not a manifestation of the student's disability, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.~~

~~(c) The services required by (a), (d), (e), and (f) of this subsection may be provided in an interim alternative educational setting.~~

~~(d) A school district is only required to provide services during periods of removal to a student eligible for special education who has been removed from his or her current placement for ten school days or less in that school year, if it provides services to a student without disabilities who is similarly removed~~)) the student must continue to receive educational services, that provide a FAPE, so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP. The student's IEP team determines appropriate services. The services may be provided in an interim alternative educational setting.

(((~~(e)~~))) (4) After a student eligible for special education has been removed from his or her current placement for ten school days in the same school year, if the current removal is for not more than ten consecutive school days and is not a change of placement under WAC 392-172A-05155, during any subsequent days of removals, school personnel, in consultation with at least one of the student's teachers, determine the extent to which services are needed, to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP. The services may be provided in an interim alternative educational setting.

(((~~(f) If the removal is a change of placement under WAC 392-172A-05155, the student's IEP team determines appropriate services under (a) of this subsection.~~

~~(5)(a) Within ten school days of any decision to change the placement of a student eligible for special education because of a violation of a code of student conduct, the school district, the parent, and relevant members of the student's IEP team (as determined by the parent and the school district) must review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine:~~

~~(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or~~

~~(ii) If the conduct in question was the direct result of the school district's failure to implement the IEP.~~

~~(b) The conduct must be determined to be a manifestation of the student's disability if the school district, the parent, and relevant members of the student's IEP team determine that a condition in (a)(i) or (ii) of this subsection was met.~~

~~(c) If the school district, the parent, and relevant members of the student's IEP team determine the conduct was manifestation of the student's disability, the school district must take immediate steps to remedy those deficiencies.~~

~~(6) If the school district, the parent, and relevant members of the student's IEP team determine the conduct was manifestation of the student's disability, the IEP team must either:~~

~~(a) Conduct a functional behavioral assessment, unless the school district had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; or~~

~~(b) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and~~

~~(c) Except as provided in subsection (7) of this section, return the student to the placement from which the student was removed, unless the parent and the school district agree to a change of placement as part of the modification of the behavioral intervention plan.~~

~~(7) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than forty-five school days without regard to whether the behavior is determined to be a manifestation of the student's disability, if the student:~~

~~(a) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of a school district;~~

~~(b) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a school district; or~~

~~(c) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a school district.~~

~~(8) Notification. On the date on which the decision is made to make a removal that constitutes a change of placement of a student eligible for special education because of a violation of a code of student conduct, the school district must notify the parents of that decision, and provide the parents the procedural safeguards notice.~~

~~(9) Definitions. For purposes of this section, the following definitions apply:~~

~~(a) Controlled substance means a drug or other substance identified under Schedules I, II, III, IV, or V in Section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).~~

~~(b) Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or~~

~~used under the supervision of a licensed health care professional or that is legally possessed or used under any other authority under that act or under any other provision of federal law.~~

~~(c) Serious bodily injury has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of Section 1365 of Title 18, United States Code.~~

~~(d) Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of subsection (g) of Section 930 of Title 18, United States Code.~~))

NEW SECTION

WAC 392-172A-05146 Manifestation determination. (1) Within ten school days of any decision to change the placement of a student eligible for special education because of a violation of a code of student conduct, the school district, the parent, and relevant members of the student's IEP team (as determined by the parent and the school district) must review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine:

(a) If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or

(b) If the conduct in question was the direct result of the school district's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the student's disability if the school district, the parent, and relevant members of the student's IEP team determine that a condition in subsection (1)(a) or (b) of this section was met.

If the school district, the parent, and relevant members of the student's IEP team determine the conduct was manifestation of the student's disability, the school district must take immediate steps to remedy those deficiencies.

NEW SECTION

WAC 392-172A-05147 Conduct is a manifestation of student's disability. If the school district, the parent, and relevant members of the student's IEP team determine the conduct to be a manifestation of the student's disability, the IEP team must either:

(1) Conduct a functional behavioral assessment, unless the school district had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; or

(2) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(3) Except in special circumstances as described in WAC 392-172A-05149, return the student to the placement from which the student was removed, unless the parent and the school district agree to a change of placement as part of the modification of the behavioral intervention plan.

NEW SECTION

WAC 392-172A-05148 Conduct is not a manifestation of student's disability. (1) When disciplinary changes in placement exceed ten consecutive school days, and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the student's disability pursuant to WAC 392-172A-05146, school personnel may apply the relevant disciplinary procedures to students eligible for special education in the same manner and for the same duration as a district would apply discipline procedures to students without disabilities, except that services shall be provided in accordance with subsection (2) of this section.

(2) A student who is removed from the student's current placement pursuant to subsection (1) of this section must:

(a) Continue to receive educational services, that provide a FAPE, so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP; and

(b) Receive, as appropriate when a student's removal is not a manifestation of the student's disability, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

(3) The student's IEP team determines appropriate services.

(4) The services required may be provided in an interim alternative educational setting.

(5) The student's IEP team determines the interim alternative educational setting.

NEW SECTION

WAC 392-172A-05149 Special circumstances. (1) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than forty-five school days without regard to whether the behavior is determined to be a manifestation of the student's disability, if the student:

(a) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of a school district;

(b) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a school district; or

(c) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a school district.

(2) A student removed to an interim alternative educational setting under this section must: Continue to receive educational services that provide a FAPE, so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP.

(a) The student's IEP team determines appropriate services.

(b) The student's IEP team determines the interim alternative educational setting.

(3) A student removed to an interim alternative educational setting under this section must receive a functional behavioral assessment and behavioral intervention services to the extent required in WAC 392-172A-05147 or 392-172A-05148.

(4) Definitions. For purposes of this section, the following definitions apply:

(a) Controlled substance means a drug or other substance identified under Schedules I, II, III, IV, or V in Section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(b) Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health care professional or that is legally possessed or used under any other authority under that act or under any other provision of federal law.

(c) Serious bodily injury has the meaning given the term "serious bodily injury" under Section 1365 (h)(3) of Title 18, U.S.C.

(d) Weapon has the meaning given the term "dangerous weapon" under Section 930 (g)(2) of Title 18, U.S.C.

AMENDATORY SECTION (Amending WSR 13-20-034, filed 9/24/13, effective 10/25/13)

WAC 392-172A-05150 ((~~Determination of setting.~~)) Notification of change of placement. ((~~The student's IEP team determines the interim alternative educational setting for services under WAC 392-172A-05145 (3), (4)(f) and (7).~~)) On the date on which the decision is made to make a removal that constitutes a change of placement of a student eligible for special education because of a violation of a code of student conduct, the school district must notify the parents of that decision, and provide the parents the procedural safeguards notice.

AMENDATORY SECTION (Amending WSR 07-14-078, filed 6/29/07, effective 7/30/07)

WAC 392-172A-05160 Appeal of placement decisions and manifestation determinations. (1) The parent of a student eligible for special education who disagrees with any decision regarding placement under WAC 392-172A-05145 and 392-172A-05155, or the manifestation determination under WAC ((~~392-172A-05145(5)~~)) 392-172A-05146, or a school district that believes that maintaining the current placement of the student is substantially likely to result in injury to the student or others, may appeal the decision by requesting a due process hearing. The hearing is requested by filing a due process hearing request pursuant to WAC 392-172A-05080 and 392-172A-05085.

(2)(a) An administrative law judge under WAC 392-172A-05095 hears, and makes a determination regarding an appeal under subsection (1) of this section.

(b) In making the determination under (a) of this subsection, the administrative law judge may:

(i) Return the student to the placement from which the student was removed if the administrative law judge determines that the removal was a violation of WAC 392-172A-05145 through 392-172A-05155 or that the student's behavior was a manifestation of the student's disability; or

(ii) Order a change of placement of the student to an appropriate interim alternative educational setting for not more than forty-five school days if the administrative law judge determines that maintaining the current placement of the student is substantially likely to result in injury to the student or to others.

(c) The procedures under subsection (1) of this section and (b) of this subsection may be repeated, if the school district believes that returning the student to the original placement is substantially likely to result in injury to the student or to others.

(3) Whenever a hearing is requested under subsection (1) of this section, the parents and the school district involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of WAC 392-172A-05080 through 392-172A-05090 and 392-172A-05100 through 392-172A-05110, except:

(a) The due process hearing must be expedited, and must occur within twenty school days of the date the due process hearing request is filed. The administrative law judge must make a determination within ten school days after the hearing.

(b) Unless the parents and school district agree in writing to waive the resolution meeting described in (b)(i) of this subsection, or agree to use the mediation process:

(i) A resolution meeting must occur within seven days of receiving notice of the due process hearing request; and

(ii) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within fifteen days of the receipt of the due process hearing request.

(4) The administrative hearing decisions on expedited due process hearings may be appealed, by initiating a civil action consistent with WAC 392-172A-05115.

AMENDATORY SECTION (Amending WSR 07-14-078, filed 6/29/07, effective 7/30/07)

WAC 392-172A-05165 Placement during an appeal through a due process hearing. When either the parent or the school district requests a due process hearing, the student must remain in the interim alternative educational setting pending the decision of the administrative law judge or until the expiration of the time period specified in WAC ((~~392-172A-05145 (3) or (7)~~)) 392-172A-05148 or 392-172A-05149, whichever occurs first, unless the parent and the school district agree otherwise.

AMENDATORY SECTION (Amending WSR 09-20-053, filed 10/1/09, effective 11/1/09)

WAC 392-172A-05170 Protections for students not determined eligible for special education and related services. (1) A student who has not been determined to be eligible for special education and related services under this chapter and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this chapter if the school district had knowledge as determined in accordance with subsection (2) of this section that the student was a student eligible for special education before the behavior that precipitated the disciplinary action occurred.

(2) Basis of knowledge. A school district must be deemed to have knowledge that a student is eligible for special education if before the behavior that precipitated the disciplinary action occurred:

(a) The parent of the student expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the student, that the student is in need of special education and related services;

(b) The parent of the student requested an evaluation of the student pursuant to WAC 392-172A-03005; or

(c) The teacher of the student, or other personnel of the school district, expressed specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education or to other supervisory personnel of the school district.

(3) A school district would not be deemed to have knowledge under subsection (2) of this section if:

(a) The parent of the student:

(i) Has not allowed an evaluation of the student pursuant to WAC 392-172A-03000 through 392-172A-03080; or

(ii) Has refused services under this chapter; or

(b) The student has been evaluated in accordance with WAC 392-172A-03005 through 392-172A-03080 and determined to not be eligible for special education and related services under this part.

(4)(a) If a school district does not have knowledge that a student is eligible for special education prior to taking disciplinary measures against the student, the student may be disciplined using the same disciplinary measures applied to students without disabilities who engage in comparable behaviors consistent with (b) of this subsection.

(b)(i) If a request is made for an evaluation of a student during the time period in which the student is subjected to disciplinary measures under WAC 392-172A-05145, 392-172A-05148, or 392-172A-05149 the evaluation must be conducted in an expedited manner.

(ii) Until the evaluation is completed, the student remains in the educational placement determined by school authorities, which can include suspension or expulsion ((~~without educational services~~)).

(iii) If the student is determined to be eligible for special education services, taking into consideration information from the evaluation conducted by the school district and information provided by the parents, the agency must provide special education and related services in accordance with this chapter and follow the discipline requirements, including the provision of a free appropriate public education for students suspended or expelled from school.

AMENDATORY SECTION (Amending WSR 13-20-034, filed 9/24/13, effective 10/25/13)

WAC 392-172A-05185 Notice to parents. (1) Parents of students eligible for special education have rights regarding the protection of the confidentiality of any personally identifiable information collected, used, or maintained under WAC 392-172A-05180 through 392-172A-05240, the Family Educational Rights and Privacy Act of 1974, as amended, state laws contained in Title 28A RCW that address personally identifiable information, regulations implementing state law, and Part B of IDEA.

(2) State forms, procedural safeguards and parent handbooks regarding special education are available in ((~~Spanish, Vietnamese, Russian, Khmer, Ukrainian, Somali, and Korean~~)) multiple languages, and alternate formats ((~~on~~)) upon request.

(3) Personally identifiable information about students for use by the OSPI, special education section, may be contained in state complaints, due process hearing requests and decisions, monitoring, safety net applications, and mediation agreements. The state may also receive personally identifiable information as a result of grant evaluation performance. This information is removed before forwarding information to other agencies or individuals requesting the information, unless the parent or adult student consents to release the information or the information is allowed to be released without parent consent under the regulations implementing the Family Educational Rights and Privacy Act, 34 C.F.R. Part 99.

(4) School districts are responsible for child find activities for students who may be eligible for special education. If the state were to conduct any major identification, location, or evaluation activity, the state would publish notices in newspapers with circulation adequate to notify parents throughout the state of the activity, notify school districts and post information on its web site.

AMENDATORY SECTION (Amending WSR 15-18-077, filed 8/28/15, effective 9/28/15)

WAC 392-172A-06030 School wide programs under Title 1 of the ((~~ESEA~~)) ESSA. (1) A school district may use funds received under Part B of the act for any fiscal year to carry out a school wide program under ((~~section 1114 of the Elementary and Secondary Education Act of 1965~~)) 20 U.S.C. Section 6314, except that the amount used in any school wide program may not exceed:

(a) The amount received by the school district under Part B for that fiscal year; divided by the number of students eligible for special education in the jurisdiction; multiplied by

(b) The number of students eligible for special education participating in the school wide program.

(2) The funds described in subsection (1) of this section may be used without regard to WAC 392-172A-06010 (1)(a).

(3) The funds described in subsection (1) of this section must be considered as federal Part B funds for purposes of the calculations in WAC 392-172A-06015(2).

(4) Except as provided in subsections (2) and (3) of this section, all other requirements of Part B must be met, including ensuring that students eligible for special education in school wide program schools:

(a) Receive services in accordance with a properly developed IEP; and

(b) Are afforded all of the rights and services guaranteed to students eligible for special education under the IDEA.

AMENDATORY SECTION (Amending WSR 13-20-034, filed 9/24/13, effective 10/25/13)

WAC 392-172A-06055 Records regarding migratory students eligible for special education. The school district must cooperate in the secretary's efforts under ((~~section 1308 of the ESEA~~)) 20 U.S.C. Section 6398 to ensure the linkage of records pertaining to migratory students eligible for special education for the purpose of electronically exchanging, among the states, health and educational information regarding those students.

AMENDATORY SECTION (Amending WSR 09-20-053, filed 10/1/09, effective 11/1/09)

WAC 392-172A-07035 Child count. The OSPI reports to the Secretary of the U.S. Department of Education ((~~no later than February 1 of each year~~)) annually as required by the office of special education programs the number of students aged three through twenty-one residing in the state who are receiving special education and related services. This report is based on the school districts' annual federal count of eligible students provided to OSPI on a date selected by OSPI between October 1st and December 1st of each year.

(1) Information required in the report includes:

(a) The number of students receiving special education and related services;

(b) The number of students aged three through five receiving special education and related services;

(c) The number of students aged six through seventeen, and eighteen through twenty-one within each disability category; and

(d) The number of students aged three through twenty-one for each year of age (three, four, five, etc.).

(2) For the purpose of this part, a student's age is the student's actual age on the date of the child count.

(3) A student may not be reported under more than one disability category.

(4) If a special education student has more than one disability, the student is reported as follows:

(a) A student with deaf-blindness and not reported as having a developmental delay must be reported under the category "deaf-blindness."

(b) A student who has more than one disability (other than deaf-blindness or developmental delay) must be reported under the category "multiple disabilities."

(5) School districts must provide OSPI a certification signed by an authorized official of the district, stating that the information provided by the district is an accurate and unduplicated count of special education students receiving special education and related services on the dates in question.

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 392-172A-01045	Core academic subjects.
WAC 392-172A-01085	Highly qualified special education teachers.
WAC 392-172A-01110	Limited English proficient.

WSR 17-17-167
PROPOSED RULES
SUPERINTENDENT OF PUBLIC INSTRUCTION

[Filed August 23, 2017, 10:19 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 16-22-071.

Title of Rule and Other Identifying Information: Chapter 392-401 WAC, Statewide definition of absence, excused and unexcused.

Hearing Location(s): On October 31, 2017, at 1:00 p.m., at the Office of Superintendent of Public Instruction (OSPI), Brouillet Conference Room, 600 South Washington Street, Olympia, WA 98501.

Date of Intended Adoption: November 3, 2017.

Submit Written Comments to: Krissy Johnson, OSPI, P.O. Box 47200, Olympia, WA 98504-7200, email krissy.johnson@k12.wa.us, fax 360-753-4201, by October 31, 2017.

Assistance for Persons with Disabilities: Contact Kristin Murphy, phone 360-725-6133, fax 360-753-4201, TTY 360-664-3631, email Kristin.murphy@k12.wa.us, by October 24, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of this proposed rule is to establish a statewide definition of absence for students enrolled in public schools. The proposed rule would change the current rule's definition of what constitutes an excused or unexcused absence.

Reasons Supporting Proposal: Several recent developments have necessitated a revision of the existing rule: (1) OSPI is publicly displaying chronic absenteeism data through the key performance indicator analytics; (2) United States Department of Education (USDOE) is collecting an annual chronic absenteeism report; (3) USDOE Office of Civil Rights collects chronic absenteeism in its civil rights data collection; and (4) chronic absenteeism is included in Washington state's draft ESSA plan. The intent of the rule making is to align OSPI's state data collection with federal reporting and create consistent reporting across the state so as to increase data quality and comparability as accountability for and the visibility of chronic absenteeism increases.

Statutory Authority for Adoption: RCW 28A.300.046.

Statute Being Implemented: RCW 28A.300.046.

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

Name of Agency Personnel Responsible for Drafting and Implementation: Krissy Johnson, OSPI, 600 South Washington Street, Olympia, WA, 360-725-6045; and Enforcement: Dixie Grunenfelder, OSPI, 600 South Washington Street, Olympia, WA, 360-725-0415.

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. OSPI is not subject to RCW 34.05.328 per subsection (5)(a)(i). Additionally, this rule is not a significant legislative rule per subsection (5)(c)(iii).

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's

analysis showing how the costs were calculated. No small business economic impact statement has been prepared under chapter 19.85 RCW. The proposed amendment does not have an impact on small business and therefore does not meet the requirements for a statement under RCW 19.85.030 (1) or (2).

August 23, 2017
Chris P. S. Reykdal
State Superintendent
of Public Instruction

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 392-400-325 Statewide definition of excused and unexcused daily absences.

Chapter 392-401 WAC

STATEWIDE DEFINITION OF ABSENCE, EXCUSED AND UNEXCUSED

NEW SECTION

WAC 392-401-005 Purpose. The purpose of this chapter is to provide a definition of absence to districts that supports accurate and consistent attendance data collection across the state. This effort will support the state and districts to address the challenge of chronic absenteeism, in an effort to improve learning outcomes and success in school for all students and to support the whole child.

NEW SECTION

WAC 392-401-010 Authority. The authority for this chapter is RCW 28A.300.046, which requires the superintendent of public instruction to adopt rules establishing a standard definition of student absence from school.

NEW SECTION

WAC 392-401-015 Definition of absent or absence. (1) "Absent" or "absence" means a student is:

(a) Not physically present on school grounds; and

(b) Not participating in instruction or instruction-related activities at an approved off-grounds location for at least fifty percent of the student's scheduled school day.

(2) Absences due to suspensions, expulsions or emergency expulsions imposed pursuant to chapter 392-400 WAC should be reported as excused absences, unless the student is receiving educational services as required by RCW 28A.600.015 and chapter 392-400 WAC.

(3) A student who is marked tardy to class is not absent unless the student otherwise meets the criteria for absence provided in WAC 392-401-015(1).

NEW SECTION

WAC 392-401-020 Excused absences. The following are valid excuses for absences from school:

(1) Participation in a district or school approved activity, that is not instruction-related;

(2) Illness, health condition or medical appointment (including, but not limited to, medical, counseling, dental or optometry) for the student or person for who the student is legally responsible;

(3) Family emergency including, but not limited to, a death or illness in the family;

(4) Religious or cultural purpose including observance of a religious or cultural holiday or participation in religious or cultural instruction;

(5) Court, judicial proceeding, or serving on a jury;

(6) Post-secondary, technical school or apprenticeship program visitation, or scholarship interview;

(7) State-recognized search and rescue activities consistent with RCW 28A.225.055;

(8) Absence directly related to the student's homeless status;

(9) Absences related to deployment activities of a parent or legal guardian who is an active duty member consistent with RCW 28A.705.010;

(10) Absences due to suspensions, expulsions or emergency expulsions imposed pursuant to chapter 392-400 WAC, unless the student is receiving educational services as required by RCW 28A.600.015 and chapter 392-400 WAC; and

(11) Principal (or designee) and parent, guardian, or emancipated youth mutually agreed upon approved activity.

The school principal (or designee) has the authority to determine if an absence meets the above criteria for an excused absence.

NEW SECTION

WAC 392-401-030 Unexcused absences. Any absence from school is unexcused unless it meets one of the criteria provided in WAC 392-401-015.

WSR 17-17-174
PROPOSED RULES
OFFICE OF FINANCIAL MANAGEMENT
[Filed August 23, 2017, 10:43 a.m.]

Continuance of WSR 17-15-109.

Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1).

Title of Rule and Other Identifying Information: WAC 357-31-165 At what rate do employees accrue vacation leave? and 357-31-166 At what rate do higher education employees accrue vacation leave?

Hearing Location(s): On September 26, 2017, at 8:30 a.m., at the Office of Financial Management (OFM), RAAD Building, 128 10th Avenue, 4th Floor, Conference Room 429, Olympia, WA 98501.

Date of Intended Adoption: September 26, 2017.

Submit Written Comments to: Kristie Wilson, OFM, P.O. Box 47500, Olympia, WA 98501, email Kristie.wilson @ofm.wa.gov, fax 360-586-4694, by September 19, 2017.

Assistance for Persons with Disabilities: Contact OFM, TTY 711 or 1-800-833-6384, by September 19, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: This is to continue WSR 17-15-109 hearing date from August 23, 2017, 8:30 a.m. to September 26, 2017, 8:30 a.m.

Reasons Supporting Proposal: To extend the hearing date from August 23, 2017, to September 26, 2017.

Statutory Authority for Adoption: Chapter 43.01 RCW.

Statute Being Implemented: RCW 43.01.040 and 43.01.-044.

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

Name of Proponent: OFM, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Kristie Wilson, 128 10th Avenue, 360-407-4139.

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. Rules are related to internal government operations and are not subject to violation by a nongovernmental party. See RCW 34.05.328 (5)(b)(ii) for exemption.

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

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party.

August 23, 2017
Roselyn Marcus
Assistant Director of
Legal and Legislative Affairs

WSR 17-17-176
PROPOSED RULES
PUGET SOUND CLEAN AIR AGENCY

[Filed August 23, 2017, 10:59 a.m.]

Original Notice.

Proposal is exempt under RCW 34.05.310(4) or 34.05.-330(1).

Title of Rule and Other Identifying Information: Amend Regulation I, Sections 3.11 (Civil Penalties) and 3.25 (Federal Regulation Reference Date).

Hearing Location(s): On September 28, 2017, at 8:45 a.m., at the Puget Sound Clean Air Agency, 1904 3rd Avenue, Suite 105, Seattle, WA 98101.

Date of Intended Adoption: September 28, 2017.

Submit Written Comments to: Robert Switalski, Puget Sound Clean Air Agency, 1904 3rd Avenue, Suite 105, Seattle, WA 98101, email robs@pscleanair.org, fax 206-343-7522, by September 27, 2017.

Assistance for Persons with Disabilities: Contact agency receptionist, phone 206-689-4010, fax 206-343-7522, TTY 800-833-6388 or 800-833-6385 (Braille), email robs@pscleanair.org, by September 21, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: **Section 3.11** - The agency's practice for many years has been to annually adjust the maximum civil penalty amount as allowed by law. The proposed adjustment to the maximum civil penalty amount accounts for inflation, as authorized by RCW 70.94.431 and as determined by the state office of the economic and revenue forecast council. Without this adjustment, the maximum penalty amount would effectively decrease each year. The CPI for the Seattle/Tacoma/Bremerton area increased by 2.49 percent for the 2016 calendar year, which amounts to an increase of $459.00 in the maximum civil penalty amount.

The proposed amendment does not affect the way the agency determines actual civil penalty amounts in individual cases. This continues to be done following civil penalty worksheets previously approved by the board.

Section 3.25 - This section currently provides that whenever federal rules are referenced in agency regulations, the effective date of the federal regulations referred to is July 1, 2016. This provides certainty so that persons affected by the regulations and agency staff know which version of a federal regulation to reference. For many years, the agency's practice has been to update this date annually to stay current with federal regulations. Following this practice, the proposed amendments would change the reference date to July 1, 2017.

Reasons Supporting Proposal: There are no benefits or costs associated with the proposed amendments.

Statutory Authority for Adoption: Chapter 70.94 RCW.

Statute Being Implemented: Chapter 70.94 RCW.

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

Name of Proponent: Puget Sound Clean Air Agency, governmental.

Name of Agency Personnel Responsible for Drafting: Carole Cenci, 1904 3rd Avenue, Suite 105, Seattle, WA 98101, 206-689-4061; Implementation and Enforcement: Jennifer Dold, 1904 3rd Avenue, Suite 105, Seattle, WA 98101, 206-689-4015.

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. RCW 34.05.328 does not apply to local air agencies, per RCW 70.94.141.

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

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party; and rules are adopting or incorporating 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.

Is exempt under RCW 19.85.011.

Explanation of exemptions: Chapter 19.85 RCW does not appear to apply to local air agencies.

August 23, 2017
Craig Kenworthy
Executive Director

AMENDATORY SECTION

REGULATION I, SECTION 3.11 CIVIL PENALTIES

(a) Any person who violates any of the provisions of chapter 70.94 RCW or any of the rules or regulations in force pursuant thereto, may incur a civil penalty in an amount not to exceed $((~~18,388.00~~)) 18,847.00, per day for each violation.

(b) Any person who fails to take action as specified by an order issued pursuant to chapter 70.94 RCW or Regulations I, II, and III of the Puget Sound Clean Air Agency shall be liable for a civil penalty of not more than $((~~18,388.00~~)) 18,847.00, for each day of continued noncompliance.

(c) Within 30 days of the date of receipt of a Notice and Order of Civil Penalty, the person incurring the penalty may apply in writing to the Control Officer for the remission or mitigation of the penalty. To be considered timely, a mitigation request must be actually received by the Agency, during regular office hours, within 30 days of the date of receipt of a Notice and Order of Civil Penalty. This time period shall be calculated by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or legal holiday, and then it is excluded and the next succeeding day that is not a Saturday, Sunday, or legal holiday is included. The date stamped by the Agency on the mitigation request is prima facie evidence of the date the Agency received the request.

(d) A mitigation request must contain the following:

(1) The name, mailing address, telephone number, and telefacsimile number (if available) of the party requesting mitigation;

(2) A copy of the Notice and Order of Civil Penalty involved;

(3) A short and plain statement showing the grounds upon which the party requesting mitigation considers such order to be unjust or unlawful;

(4) A clear and concise statement of facts upon which the party requesting mitigation relies to sustain his or her grounds for mitigation;

(5) The relief sought, including the specific nature and extent; and

(6) A statement that the party requesting mitigation has read the mitigation request and believes the contents to be true, followed by the party's signature.

The Control Officer shall remit or mitigate the penalty only upon a demonstration by the requestor of extraordinary circumstances such as the presence of information or factors not considered in setting the original penalty.

(e) Any civil penalty may also be appealed to the Pollution Control Hearings Board pursuant to chapter 43.21B RCW and chapter 371-08 WAC. An appeal must be filed with the Hearings Board and served on the Agency within 30 days of the date of receipt of the Notice and Order of Civil Penalty or the notice of disposition on the application for relief from penalty.

(f) A civil penalty shall become due and payable on the later of:

(1) 30 days after receipt of the notice imposing the penalty;

(2) 30 days after receipt of the notice of disposition on application for relief from penalty, if such application is made; or

(3) 30 days after receipt of the notice of decision of the Hearings Board if the penalty is appealed.

(g) If the amount of the civil penalty is not paid to the Agency within 30 days after it becomes due and payable, the Agency may bring action to recover the penalty in King County Superior Court or in the superior court of any county in which the violator does business. In these actions, the procedures and rules of evidence shall be the same as in an ordinary civil action.

(h) Civil penalties incurred but not paid shall accrue interest beginning on the 91st day following the date that the penalty becomes due and payable, at the highest rate allowed by RCW 19.52.020 on the date that the penalty becomes due and payable. If violations or penalties are appealed, interest shall not begin to accrue until the 31st day following final resolution of the appeal.

(i) To secure the penalty incurred under this section, the Agency shall have a lien on any vessel used or operated in violation of Regulations I, II, and III which shall be enforced as provided in RCW 60.36.050.

AMENDATORY SECTION

REGULATION I, SECTION 3.25 FEDERAL REGULATION REFERENCE DATE

Whenever federal regulations are referenced in Regulation I, II, or III, the effective date shall be July 1, ((~~2016~~)) 2017.

WSR 17-17-177
PROPOSED RULES
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Developmental Disabilities Administration)

[Filed August 23, 2017, 11:09 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 17-11-110.

Title of Rule and Other Identifying Information: The department is proposing to create new sections in a new chapter 388-829B WAC, Enhanced case management program.

Hearing Location(s): On September 26, 2017, at 10:00 a.m., at Office Building 2, Department of Social and Health Services (DSHS) Headquarters, 1115 Washington, Olympia, WA 98504. Public parking at 11th and Jefferson. A map is

available at https://www.dshs.wa.gov/sesa/rules-and-policies-assistance-unit/driving-directions-office-bldg-2.

Date of Intended Adoption: Not earlier than September 27, 2017.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504, email DSHSRPAU RulesCoordinator@dshs.wa.gov, fax 360-664-6185, by 5:00 p.m., September 26, 2017.

Assistance for Persons with Disabilities: Contact Jeff Kildahl, phone 360-664-6092, TTY 360-664-6178, email KildaJA@dshs.wa.gov, by September 12, 2017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department is proposing to create new rules in order to implement SB 6564 (2016).

Reasons Supporting Proposal: The proposed rules address abuse and neglect of individuals with developmental disabilities by increasing monitoring, reporting, and home visits for clients assessed as being at the highest risk of abuse and neglect.

Statutory Authority for Adoption: RCW 71A.12.030.

Statute Being Implemented: Chapters 71A.12, 43.382 RCW.

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

Name of Proponent: DSHS, governmental.

Name of Agency Personnel Responsible for Drafting: Chantelle Diaz, P.O. Box 45310, Olympia, WA 98504-5310, 360-407-1589; Implementation and Enforcement: Heather Lum, P.O. Box 45310, Olympia, WA 98504-5310, 360-407-1526.

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

A cost-benefit analysis is required under RCW 34.05.-328. A preliminary cost-benefit analysis may be obtained by contacting Chantelle Diaz, P.O. Box 45310, Olympia, WA 98504-5310, phone 360-407-1589, fax 360-407-0955, email chantelle.diaz@dshs.wa.gov.

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

Is exempt under RCW 19.85.025(4).

Explanation of exemptions: Under RCW 19.85.025(4), the department is exempt from preparing a small business economic impact statement if the department has prepared a cost-benefit analysis that meets requirements under RCW 34.05.328.

August 22, 2017
Katherine I. Vasquez
Rules Coordinator

Chapter 388-829B WAC

ENHANCED CASE MANAGEMENT PROGRAM

NEW SECTION

WAC 388-829B-100 What is the enhanced case management program? The enhanced case management program (ECMP) is a program that facilitates client integration, improves quality of care, and promotes a safe home environment. Funds appropriated for the ECMP supports up to seven hundred clients through increased:

(1) Access to a case manager;

(2) Access to education and resources; and

(3) Frequency of home visits.

NEW SECTION

WAC 388-829B-200 What definitions apply to this chapter? The following definitions apply to this chapter.

"**CARE assessment**" means an inventory and evaluation of abilities and needs based on an in-person interview in the client's home or place of residence.

"**Caregiver**" means a person contracted with the developmental disabilities administration (DDA) to provide medicaid or waiver personal care, respite care, or attendant care services.

"**Client**" means a person who has a developmental disability as defined in RCW 71A.10.020 (5) and has been determined eligible to receive services by DDA under chapter 71A.16 RCW.

"**Collateral contact**" means a person or agency that is involved in the client's life, such as a legal guardian, family member, provider, or friend.

"**Independent supports**" means an adult, other than the client's paid caregiver, who observes the care a client receives from their paid caregiver.

NEW SECTION

WAC 388-829B-300 Who may DDA enroll in the enhanced case management program? The developmental disabilities administration (DDA) may enroll a client in the enhanced case management program if the client is largely dependent on a paid caregiver in the client's home and:

(1) The client's CARE assessment indicates the client:

(a) Is not always able to supervise their caregiver;

(b) Has communication barriers and few documented community contacts; and

(c) Lacks additional, independent supports that regularly help the client monitor the care being provided in their home; or

(2) The client lives with the paid caregiver and:

(a) The client has been the subject of an adult protective services or child protective services referral in the past year; or

(b) DDA has concerns that the home environment or quality of care may jeopardize the client's health or safety.

NEW SECTION

WAC 388-829B-400 How often must the case manager visit the enhanced case management program client? (1) The client's case manager must visit each enhanced case management program (ECMP) client at least once every four months at the client's home, including unannounced visits as needed. Each required visit must not occur more than four months apart.

(2) An unannounced visit may replace a scheduled visit.

(3) If a client declines a visit, announced or unannounced, the case manager must document the declined visit in the ECMP node.

(4) If the case manager is unable to meet with the client for a required visit, the case manager must schedule a follow-up visit as soon as possible and no later than thirty days.

NEW SECTION

WAC 388-829B-500 When will I transfer off of the enhanced case management program? If you no longer meet eligibility criteria for the enhanced case management program under WAC 388-829B-300, DDA will disenroll you from the program.

NEW SECTION

WAC 388-829B-600 May I request a review of my enhanced case management program eligibility? (1) If you request a review of your enhanced case management program eligibility, the developmental disabilities administration (DDA) will perform an independent quality assurance review. The quality assurance review may include but is not limited to:

(a) An in-home visit or visits;

(b) Review of your CARE assessment; and

(c) Interviews with your collateral contacts, providers, and case manager.

(2) If the quality assurance review determines you meet eligibility criteria, then you will remain in the enhanced case management program.

(3) If the quality assurance review determines you no longer meet eligibility criteria, DDA will disenroll you from the enhanced case management program.

(4) If, following an independent quality assurance review, you disagree with a decision made by DDA, you may request an administrative hearing under RCW 71A.10.050 and chapter 388-02 WAC.