

WSR 21-23-109
PROPOSED RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
[Filed November 17, 2021, 10:22 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-23-054.

Title of Rule and Other Identifying Information: The department is proposing to amend WAC 388-101-3020 Compliance, and 388-101-3000 Definitions, to incorporate 2SHB 1651, 2020 regular legislative session into rules.

Hearing Location(s): On December 21, 2021, at 10:00 a.m., at Office Building 2, Department of Social and Health Services (DSHS) Headquarters, 1115 Washington [Street S.E.], Olympia, WA 98504. Public parking at 11th and Jefferson. A map is available at <https://www.dshs.wa.gov/office-of-the-secretary/driving-directions-office-bldg-2>; or virtual. Due to the COVID-19 pandemic, hearings are being held virtually. Please see the DSHS website for the most current information.

Date of Intended Adoption: Not earlier than December 22, 2021.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504, email DSHSRPAURulesCoordinator@dshs.wa.gov, fax 360-664-6185, by 5:00 p.m., December 21, 2021.

Assistance for Persons with Disabilities: Contact Shelley Tencza, DSHS rules consultant, phone 360-664-6198, fax 360-664-6185, TTY 711 relay service, email shelley.tencza@dshs.wa.gov, by 5:00 p.m., on December 7, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The proposal amendments to WAC 388-101-3020 would adopt by reference 2SHB 1651, 2020 regular legislative session, codified as chapter 71A.26 RCW, as an additional law governing the chapter and to make editorial changes for clarity.

Reasons Supporting Proposal: The proposal is in response to legislation passed during the 2020 regular legislative session. Chapter 71A.26 RCW took effect June 11, 2020. The purpose of this proposal is to amend these rules to ensure compliance by certified community residential services and supports providers and improve readability.

Statutory Authority for Adoption: RCW 71A.12.030, 71A.12.080, and 71A.26.040.

Statute Being Implemented: Chapter 71A.26 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, Implementation, and Enforcement: Debbie Hoeman, P.O. Box 45600, Olympia, WA 98504-5600, 360-725-3210.

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 meet the definition of significant legislative rule under RCW 34.05.328.

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; and rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect.

Explanation of exemptions: The proposal is exempt from the requirements of the Regulatory Fairness Act as it updates WAC 388-101-3020 to adopt by reference 2SHB 1651, 2020 regular legislative session, codified as chapter 71A.26 RCW as an additional law governing the chapter and to makes editorial changes for clarity.

November 16, 2021
Katherine I. Vasquez
Rules Coordinator

SHS-4848.2

AMENDATORY SECTION (Amending WSR 18-07-061, filed 3/15/18, effective 4/15/18)

WAC 388-101-3000 Definitions. The definitions in this section apply throughout this chapter and chapter 388-101D WAC unless the context clearly indicates otherwise.

(1) **"Abandonment"** (~~means action or inaction by a person or entity with a duty of care for a vulnerable adult that leaves the vulnerable person without the means or ability to obtain necessary food, clothing, shelter, or health care~~) has the same meaning as defined in RCW 74.34.020.

(2) **"Abuse"** (~~means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment of a vulnerable adult~~) has the same meaning as defined in RCW 74.34.020.

~~((In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish.~~

~~Abuse includes sexual abuse, mental abuse, physical abuse, and personal exploitation of a vulnerable adult, and improper use of restraint against a vulnerable adult which have the following meanings:~~

~~(1) **"Sexual abuse"** means any form of nonconsensual sexual conduct, including but not limited to unwanted or inappropriate touching, rape, sodomy, sexual coercion, sexually explicit photographing, and sexual harassment. Sexual abuse also includes any sexual conduct between a staff person, who is not also a resident or client, of a facility or a staff person of a program authorized under chapter 71A.12 RCW, and a vulnerable adult living in that facility or receiving service from a program authorized under chapter 71A.12 RCW, whether or not it is consensual.~~

~~(2) **"Physical abuse"** means the willful action of inflicting bodily injury or physical mistreatment. Physical abuse includes, but is~~

~~not limited to, striking with or without an object, slapping, pinching, choking, kicking, shoving, or prodding.~~

~~(3) "**Mental abuse**" means a willful verbal or nonverbal action that threatens, humiliates, harasses, coerces, intimidates, isolates, unreasonably confines, or punishes a vulnerable adult. Mental abuse may include ridiculing, yelling, or swearing.~~

~~(4) "**Personal exploitation**" means an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another.~~

~~(5) "**Improper use of restraint**" means the inappropriate use of chemical, physical, or mechanical restraints for convenience or discipline or in a manner that:~~

~~(a) Is inconsistent with federal or state licensing or certification requirements for facilities, hospitals, or programs authorized under chapter 71A.12 RCW;~~

~~(b) Is not medically authorized; or~~

~~(c) Otherwise constitutes abuse under this section.)~~

~~(3) "**Associated with the applicant**" means any person listed on the application as a partner, officer, director, or majority owner of the applying entity, or who is the spouse or domestic partner of the applicant.~~

~~(4) "**Case manager**" means the ((division of)) developmental disabilities administration case resource manager or social worker assigned to a client.~~

~~(5) "**Certification**" means a process used by the department to determine if an applicant or service provider complies with the requirements of this chapter and is eligible to provide certified community residential services and support to clients.~~

~~(6) "**Chaperone agreement**" means a plan or agreement that describes who will supervise a community protection program client when service provider staff is not present. This plan or agreement is negotiated with other agencies and individuals who support the client, including the client's legal representative and family.~~

~~(7) "**Chemical restraint**" ((means the administration of any drug to manage a vulnerable adult's behavior in a way that reduces the safety risk to the vulnerable adult or others, has a temporary effect of restricting the vulnerable adult's freedom of movement, and is not standard treatment for the vulnerable adult's medical or psychiatric condition)) has the same meaning as defined in RCW 74.34.020.~~

~~(8) "**Client**" means a person who has a developmental disability as defined in RCW 71A.10.020(4) and has been determined eligible to receive services by the ((division of)) developmental disabilities administration under chapter 71A.16 RCW. For purposes of informed consent and decision making requirements, the term "client" includes the client's legal representative to the extent of the representative's legal authority.~~

~~(9) "**Client services**" means instruction and support services that service providers are responsible to provide as identified in the client's individual support plan.~~

~~(10) "**Consent**" means express written consent granted after the vulnerable adult or their legal representative has been fully informed of the nature of the services to be offered and that the receipt of services is voluntary.~~

~~(11) "**Crisis diversion**" means temporary crisis residential services and supports provided to clients at risk of psychiatric hospital-~~

ization and authorized by the ~~((division of))~~ developmental disabilities administration.

(12) "**Crisis diversion bed services**" means crisis diversion that is provided in a residence maintained by the service provider.

(13) "**Crisis diversion support services**" means crisis diversion that is provided in the client's own home.

"**Department**" means the Washington state department of social and health services.

(14) "**Financial exploitation**" ~~((means the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person's or entity's profit or advantage other than the vulnerable adult's profit or advantage. Some examples of financial exploitation are given))~~ has the same meaning as defined in RCW 74.34.020.

(16) "**Functional assessment**" means a comprehensive evaluation of a client's challenging behavior(s). This evaluation is the basis for developing a positive behavior support plan.

(17) "**Group home**" means a residence that is licensed as either an assisted living facility or an adult family home by the department under chapter 388-78A or 388-76 WAC. Group homes provide community residential instruction, supports, and services to two or more clients who are unrelated to the provider.

(18) "**Group training home**" means a certified nonprofit residential facility that provides full-time care, treatment, training, and maintenance for clients, as defined under RCW 71A.22.020(2).

(19) "**Immediate**" or "**immediately**" means within twenty-four hours for purposes of reporting abandonment, abuse, neglect, or financial exploitation of a vulnerable adult.

(20) "**Immediate risk,**" "**immediate threat,**" or "**imminent danger**" means serious physical harm to or death of a client or serious threat to a client's life, health, or safety.

(21) "**Individual financial plan**" means a plan describing how a client's funds will be managed when the service provider is responsible for managing any or all of the client's funds.

(22) "**Individual instruction and support plan**" means a plan developed by the service provider and the client. The individual instruction and support plan:

~~((1))~~ (a) Uses the information and assessed needs documented in the individual support plan to identify areas the client would like to develop;

~~((2))~~ (b) Includes client goals for instruction and support that will be formally documented during the year; and

~~((3))~~ (c) Must contain or refer to other applicable support or service information that describes how the client's health and welfare needs are to be met (such as, individual financial plan, positive behavior support plan, cross system crisis plan, individual support plan, individual written plan, client-specific instructions).

(23) "**Individual support plan**" means a document that authorizes and identifies the ~~((division of))~~ developmental disabilities administration paid services to meet a client's assessed needs.

(24) "**Instruction**" means goal oriented teaching that is designed for acquiring and enhancing skills.

(25) "**Instruction and support services staff**" means long-term care workers of the service provider whose primary job function is the provision of instruction and support services to clients. Instruction and support services staff must also include employees of the service provider whose primary job function is the supervision of instruction

and support services staff. In addition, both applicants, prior to initial certification, and administrators, prior to assuming duties, who may provide instruction and support services to clients must be considered instruction and support services staff for the purposes of the applicable training requirements.

(26) "**Legal representative**" means a person's legal guardian, limited guardian when the subject matter is within the scope of the limited guardianship, attorney at law, attorney in fact, or any other person who is authorized by law to act for another person.

(27) "**Long-term care workers**" include all persons who provide paid, hands-on personal care services for the elderly or persons with disabilities, including but not limited to individual providers of home care services, direct care workers employed by home care agencies, providers of home care services to persons with developmental disabilities under Title 71A RCW, all direct care workers in state-licensed assisted living facilities, adult family homes, respite care providers, direct care workers employed by community residential service businesses, and any other direct care worker providing home or community-based services to the elderly or persons with functional disabilities or developmental disabilities.

(28) "**Managing client funds**" means that the service provider:

- (1) Has signing authority for the client;
- (2) Disperses the client's funds; or
- (3) Limits the client's access to funds by not allowing funds to be spent.

(29) "**Mechanical restraint**" means any device attached or adjacent to the vulnerable adult's body that they cannot easily remove that restricts freedom of movement or normal access to their body. "Mechanical restraint" does not include the use of devices, materials, or equipment that are medically authorized and used in a manner that is consistent with federal or state licensing or certification requirements for facilities, hospitals, or programs authorized under chapter 71A.12 RCW.

(30) "**Medication administration**" means the direct application of a prescribed medication whether by injection, inhalation, ingestion, or other means, to the body of the client by an individual legally authorized to do so.

(31) "**Medication assistance**" means assistance with self-administration of medication rendered by a nonpractitioner to a client receiving certified community residential services and supports in accordance with chapter 69.41 RCW and chapter 246-888 WAC.

(32) "**Medication service**" means any service provided by a certified community residential services and support provider related to medication administration or medication assistance provided through nurse delegation and medication assistance.

(33) "**Minimal**" means a violation that results in little or no negative outcome or little or no potential harm for a client.

(34) "**Moderate**" means a violation that results in negative outcome or actual or potential harm for a client.

(35) "**Negative outcome**" includes any negative effect on the client's physical, mental, or psychosocial well-being, including but limited to the client's safety, quality of life, or quality of care.

(36) "**Neglect**" (~~means:~~

~~(1) A pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that fails to~~

~~avoid or prevent physical or mental harm or pain to a vulnerable adult; or~~

~~(2) An act or omission by a person or entity with a duty of care that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100)) has the same meaning as defined in RCW 74.34.020.~~

(37) "Physical intervention" means the use of a manual technique intended to interrupt or stop a behavior from occurring. This includes using physical restraint to release or escape from a dangerous or potentially dangerous situation.

(38) "Physical restraint" means the application of physical force without the use of any device, for the purpose of restraining the free movement of a vulnerable adult's body. "Physical restraint" does not include briefly holding without undue force a vulnerable adult in order to calm or comfort them, or holding a vulnerable adult's hand to safely escort them from one area to another.

(39) "Psychoactive" means possessing the ability to alter mood, anxiety level, behavior, cognitive processes, or mental tension, usually applied to pharmacological agents.

(40) "Psychoactive medications" means medications prescribed to improve or stabilize mood, mental status or behavior. Psychoactive medications include antipsychotics/neuroleptics, atypical antipsychotics, antidepressants, stimulants, sedatives/hypnotics, and antimania and antianxiety drugs.

(41) "Qualified professional" means a person with at least three years' experience working with individuals with developmental disabilities and as required by RCW 71A.12.220(12).

(42) "Recurring" or "repeated" means that the department has cited the service provider for a violation of licensing laws or rules and one or more of the following is present:

~~((1))~~ (a) The department previously imposed an enforcement remedy for a violation of the same law, rule, or for substantially the same problem within the preceding twenty-four months; or

~~((2))~~ (b) The department cited a violation of the same law, rule, or for substantially the same problem on two occasions within the preceding twenty-four months.

(43) "Restrictive procedure" means any procedure that restricts a client's freedom of movement, restricts access to client property, requires a client to do something they do not want to do, or removes something the client owns or has earned.

(44) "Risk assessment" means an assessment done by a qualified professional and as required by RCW 71A.12.230.

(45) "Serious" means a violation that results in one or more negative outcomes and significant actual harm to a client that does not constitute imminent danger. It also means there is reasonable predictability of recurring actions, practices, situations, or incidents with potential for causing significant harm to a client.

(46) "Severity" means the seriousness of a violation as determined by the actual or potential negative outcomes for clients and subsequent actual or potential for harm. Negative outcomes include any negative effect on the client's physical, mental, or psychosocial well-being (such as, safety, quality of life, quality of care).

(47) "Service provider" means a person or entity certified by the department who delivers services and supports to meet a client's iden-

tified needs. The term includes the state operated living alternative (SOLA) program.

(48) **"Support"** means assistance a service provider gives a client based on needs identified in the individual support plan.

(49) **"Supported living"** means instruction, supports, and services provided by service providers to clients living in homes that are owned, rented, or leased by the client or their legal representative.

(50) **"Treatment team"** means the program participant and the group of people responsible for the development, implementation, and monitoring of the person's individualized supports and services. This group may include, but is not limited to, the case manager, therapist, service provider, employment/day program provider, and the person's legal representative or family, provided the person consents to the family member's involvement.

(51) **"Uncorrected deficiency"** means the department has cited a violation of WAC or RCW following any type of certification evaluation or complaint investigation and the violation remains uncorrected at the time the department makes a subsequent inspection for the specific purpose of verifying whether such violation has been corrected.

(52) **"Vulnerable adult"** (~~includes a person:~~

~~(1) Sixty years of age or older who has the functional, mental, or physical inability to care for themselves;~~

~~(2) Found incapacitated under chapter 11.88 RCW;~~

~~(3) Who has a developmental disability as defined under RCW 71A.10.020;~~

~~(4) Admitted to any facility;~~

~~(5) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or~~

~~(6) Receiving services from an individual provider)) has the same meaning as defined in RCW 74.34.020.~~

[Statutory Authority: Chapters 71A.12 and 74.34 RCW. WSR 18-07-061, § 388-101-3000, filed 3/15/18, effective 4/15/18. Statutory Authority: Chapters 71A.12, 74.34, and 74.39A RCW. WSR 16-18-040, § 388-101-3000, filed 8/30/16, effective 9/30/16. Statutory Authority: RCW 71A.12.030 and [71A.12].080. WSR 14-10-028, § 388-101-3000, filed 4/28/14, effective 5/29/14; WSR 12-02-048, § 388-101-3000, filed 12/30/11, effective 1/30/12. Statutory Authority: RCW 71A.12.080, chapter 74.39A RCW. WSR 10-16-084, § 388-101-3000, filed 7/30/10, effective 1/1/11. Statutory Authority: Chapter 71A.12 RCW. WSR 08-02-022, § 388-101-3000, filed 12/21/07, effective 2/1/08.]

AMENDATORY SECTION (Amending WSR 14-10-028, filed 4/28/14, effective 5/29/14)

WAC 388-101-3020 Compliance. The service provider must be in compliance with:

(1) All the requirements of this chapter(~~(-)~~) and chapter 388-101D WAC, except that(~~(-)~~) the licensing requirements for adult family homes and assisted living facilities supersede (~~(this chapter)~~) these chapters if the requirements under respective chapters 388-76 and 388-78A WAC conflict with (~~(this chapter)~~) these chapters;

(2) The laws governing this chapter, including chapter 71A.12 (~~(and)~~), 71A.22, and 71A.26 RCW;

(3) The requirements of chapter 74.34 RCW;

(4) The department's residential services contract. Except that, the requirements of this chapter supersede any conflicting requirements with the contract, or appendices to the contract; and

(5) Other relevant federal, state and local laws, requirements, and ordinances.

[Statutory Authority: RCW 71A.12.030 and [71A.12].080. WSR 14-10-028, § 388-101-3020, filed 4/28/14, effective 5/29/14. Statutory Authority: Chapter 71A.12 RCW. WSR 08-02-022, § 388-101-3020, filed 12/21/07, effective 2/1/08.]