

WSR 22-10-057
PROPOSED RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
(Aging and Long-Term Support Administration)
[Filed May 2, 2022, 11:36 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 21-22-041.

Title of Rule and Other Identifying Information: The department is proposing a change to WAC 388-103-0001 What definitions apply to this chapter to include a definition of reckless as it pertains to abuse, and 388-103-0210 May a nursing assistant petition the department to have their name removed from the vulnerable adult abuse registry?, to include a clarification of when this rule applies.

Hearing Location(s): On June 7, 2022, 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 virtually. Due to the impacts of 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 June 8, 2022.

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. on June 7, 2022.

Assistance for Persons with Disabilities: Contact Shelley Tencza, DSHS rules consultant, phone 360-664-6036, fax 360-664-6185, TTY 711 relay service, email tencza@dshs.wa.gov [tencza@dshs.wa.gov], by 5:00 p.m. on May 24, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of the proposal is to implement changes to chapter 74.34 RCW in response to the passing of E2SHB 1320 in 2021 (chapter 215, Laws of 2021), as well as clarifying the implementation of 42 U.S.C. Sec. 1396r (g) (1) (D) and 1395i-3 (g) (1) (D).

Reasons Supporting Proposal: Reckless was added to the definition of abuse under RCW 74.34.020. Adult protective services (APS) has definitions for willful and intentional already listed in WAC 388-103-0001, and a definition of reckless is needed to ensure consistent interpretation as it relates to abuse. APS has a process for certified nurse aid (CNA) petitions for removal from the registry listed in WAC 388-103-0210. APS wants to clarify that this petition for removal applies only to CNAs with a single incident of neglect in skilled nursing facilities or nursing facilities, as outlined under 42 U.S.C. Sec. 1396r (g) (1) (D) and 42 U.S.C. Sec. 1395i-3 (g) (1) (D).

Statutory Authority for Adoption: RCW 74.34.068, 74.34.165; 42 U.S.C. Sec. 1396r (g) (1) (D) and 42 U.S.C. Sec. 1395i-3 (g) (1) (D).

Statute Being Implemented: RCW 74.34.068, 74.34.165; 42 U.S.C. Sec. 1396r (g) (1) (D) and 42 U.S.C. Sec. 1395i-3 (g) (1) (D).

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: Arielle Finney, P.O. Box 45600, Olympia, WA 98504, 360-485-7784.

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. All proposals are to (1) adopt or incorporate by reference without material change, federal statutes or regulations, Washington state statutes; (2) clarify language of a rule without changing its effect; or (3) are interpretive rules (chapter 215, Laws of 2021), 42 U.S.C. Sec. 1396r (g) (1) (D), and 42 U.S.C. Sec. 1395i-3 (g) (1) (D).

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.

Explanation of exemptions: Chapter 215, Laws of 2021, 42 U.S.C. Sec. 1396r (g) (1) (D), 42 U.S.C. Sec. 1395i-3 (g) (1) (D).

April 28, 2022
Katherine I. Vasquez
Rules Coordinator

SHS-4922.3

AMENDATORY SECTION (Amending WSR 21-11-108, filed 5/19/21, effective 7/1/21)

WAC 388-103-0001 What definitions apply to this chapter? In addition to the definitions found in chapter 74.34 RCW, the following definitions apply to this chapter:

(1) With respect to "abuse", the following definitions apply:

(a) Intentional. A person's action or inaction is intentional when the person's objective or purpose is to inflict injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult.

(b) Willful. Willful is synonymous to knowing. A person's action or inaction is knowing when the person is aware that his or her action or inaction would inflict injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult.

(c) Reckless. A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that his or her action or inaction is likely to inflict injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult, and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

~~((1))~~ (2) "Adult family home" is defined under chapter 70.128 RCW.

~~((2))~~ (3) "Alleged perpetrator" means the person who is alleged to have abandoned, abused, financially exploited, neglected, or misap-

propriated the property of, an alleged victim; and the department has received a report of, is investigating, or has made an initial substantiated finding about such allegation.

~~((3))~~ (4) "Alleged victim" means:

(a) The person who is alleged to have been abandoned, abused, financially exploited, neglected, or had their property misappropriated by an alleged perpetrator; and the department has received a report of, is investigating, or has made an initial substantiated finding about such allegation; or

(b) The person who is alleged to be neglecting themselves; and the department has received a report of, is investigating, or has made an initial substantiated finding about the self-neglect.

~~((4))~~ (5) "Assisted living facility" is defined under chapter 18.20 RCW.

~~((5))~~ (6) "Basic necessities of life" means food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication.

~~((6))~~ (7) "Facility" means a residence licensed or required to be licensed under:

(a) Chapter 18.20 RCW, assisted living facilities;

(b) Chapter 18.51 RCW, nursing homes;

(c) Chapter 70.128 RCW, adult family homes;

(d) Chapter 72.36 RCW, soldiers' homes;

(e) Chapter 71A.20 RCW, residential habilitation centers;

(f) Chapter 70.97 RCW, enhanced services facilities; or

(g) Any other facility licensed or certified by the department.

~~((7))~~ (8) "Final substantiated finding" means an initial substantiated finding of abandonment, abuse, financial exploitation, misappropriation of resident property, or neglect that:

(a) Has been upheld through the administrative hearing process described in WAC 388-103-0090 through 388-103-0160; or

(b) Is not timely appealed to the office of administrative hearings as required under WAC 388-103-0100.

~~((8))~~ (9) "Initial substantiated finding" means a finding by the department that, more likely than not, the alleged abandonment, abuse, financial exploitation, misappropriation of resident property, neglect, or self-neglect occurred.

~~((9))~~ (10) "Legal representative" means a guardian or conservator appointed under either chapter 11.88 RCW or chapter 11.130 RCW; or an agent granted authority under a power of attorney as described under chapter 11.125 RCW.

~~((10))~~ (11) "Nursing assistant" means as it is defined under chapter 18.88A RCW.

~~((11))~~ (12) "Nursing facility" means a nursing home, or any portion of a hospital, veterans' home, or residential habilitation center, that is certified to provide nursing services to medicaid recipients under section 1919(a) of the Social Security Act (42 U.S.C. Sec. 1396r).

~~((12))~~ (13) "Nursing home" means any facility licensed to operate under chapter 18.51 RCW.

~~((13))~~ (14) "Person with a duty of care," in the context of abandonment and neglect, includes:

(a) A guardian or conservator appointed under chapter 11.88 RCW or chapter 11.130 RCW;

(b) An agent granted authority under a power of attorney as described under chapter 11.125 RCW; or

(c) A person providing the basic necessities of life to a vulnerable adult where:

(i) The person is employed by or on behalf of the vulnerable adult; or

(ii) The person voluntarily agrees to provide, or has been providing, the basic necessities of life to the vulnerable adult on a continuing basis.

~~((14))~~ (15) "Skilled nursing facility" means a nursing home, a portion of a nursing home, or a long-term care wing or unit of a hospital that has been certified to provide nursing services to medicare recipients under section 1819(a) of the Social Security Act (42 U.S.C. Sec. 1395i-3).

~~((15))~~ (16) "Vulnerable adult abuse registry" means the registry, established and maintained by the department as required under RCW 74.39A.056, that contains identifying information about people who have final substantiated findings of abandonment, abuse, financial exploitation, misappropriation of resident property, or neglect of a vulnerable adult.

~~((16) "Willful." A person's action or inaction is willful when the person's action or inaction is intentional or knowing.~~

~~(a) INTENTIONAL. A person's action or inaction is intentional when the person's objective or purpose is to inflict injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult.~~

~~(b) KNOWING. A person's action or inaction is knowing when the person is aware that his or her action or inaction would inflict injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult.)~~

[Statutory Authority: RCW 74.34.068, 74.34.165; 42 U.S.C. Sec. 1396r (g) (1) (D), 42 U.S.C. Sec. 1395i3 (g) (1) (D). WSR 21-11-108, § 388-103-0001, filed 5/19/21, effective 7/1/21.]

AMENDATORY SECTION (Amending WSR 21-11-108, filed 5/19/21, effective 7/1/21)

WAC 388-103-0210 May a nursing assistant petition the department to have their name removed from the vulnerable adult abuse registry?

(1) This section implements 42 U.S.C. Sec. 1396r (g) (1) (D) and Sec. 1395i-3 (g) (1) (D) regarding a singular occurrence of neglect in a nursing facility or skilled nursing facility.

(2) A nursing assistant may petition the department to have their name removed from the vulnerable adult abuse registry, subject to the requirements of this section.

(3) Preliminary requirements for the department to accept a petition:

(a) At least one year must have elapsed between the date of the final substantiated finding and the date the department receives the petition;

(b) The final substantiated finding was a singular occurrence of neglect; ~~(and)~~

(c) The singular occurrence of neglect occurred in a nursing facility or skilled nursing facility; and

~~((e))~~ (d) The petition must be in writing and contain the following information:

(i) About the petitioner:

- (A) Name;
- (B) Date of birth;
- (C) Social security number;
- (D) Mailing address; and
- (E) Phone number;

(ii) The final substantiated finding;

(iii) All documents regarding any disciplinary action, or any other negative action, taken against the petitioner under chapter 18.88A RCW;

(iv) A background check through the Washington state patrol that was completed no earlier than (~~thirty~~) 30 days prior to the date the department accepts the petition;

(v) An affidavit stating why the petitioner believes the department should grant the petition. The statement must include whether the petitioner has abused or neglected a vulnerable adult since the final substantiated finding was entered;

(vi) A list of three references for the department to contact regarding the petitioner's employment and personal history, where two references must be professional references; and

(vii) Any other relevant information the petitioner wants the department to consider.

(4) Standard for removal.

(a) The department will accept a petition if the requirements of subsection (3) of this section are met.

(b) Once the petition is accepted, the petitioner must attend an in-person interview with the department. "In-person" means either physical presence with department personnel, or visual presence through electronic means.

(c) Once the petition is accepted and the interview is completed, the department will determine whether the petitioner's employment and personal history reflects a pattern of abusive behavior or neglect:

(i) If the department determines the petitioner's employment and personal history does not reflect a pattern of abusive behavior or neglect, the department approves the petition, and removes the petitioner's name from the vulnerable adult abuse registry.

(ii) If the department determines the petitioner's employment and personal history does reflect a pattern of abusive behavior or neglect, the department denies the petition.

(iii) If the department is unable to determine whether the petitioner's employment and personal history reflects a pattern of abusive behavior or neglect, the department denies the petition.

(5) Other information.

(a) The department will act with reasonable promptness upon receiving a petition that contains the information required under subsection (3) of this section, and make its decision within (~~sixty~~) 60 days of accepting a petition.

(b) If the department requires additional information to make its determination, a letter will be sent to the petitioner requesting the additional information. The petitioner has (~~ten~~) 10 business days to provide the information. If the department does not receive the requested information, it may be unable to determine whether petitioner's employment and personal history reflects a pattern of abusive behavior or neglect, and deny the petition.

(c) Decisions and other correspondence regarding the petition will be mailed to the petitioner. At the petitioner's request, correspondence may also be sent via email.

(d) A petitioner does not have a right to an administrative hearing regarding any department action taken on a petition.

[Statutory Authority: RCW 74.34.068, 74.34.165; 42 U.S.C. Sec. 1396r (g) (1) (D), 42 U.S.C. Sec. 1395i3 (g) (1) (D). WSR 21-11-108, § 388-103-0210, filed 5/19/21, effective 7/1/21.]