

WSR 22-18-010
PROPOSED RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
(Developmental Disabilities Administration)
[Filed August 25, 2022, 2:28 p.m.]

Supplemental Notice to WSR 22-05-014 and 22-07-077.

Preproposal statement of inquiry was filed as WSR 21-24-062 and 22-01-024.

Title of Rule and Other Identifying Information: WAC 388-101D-0030 Staffing requirements, 388-101D-0070 Background checks—National fingerprint background checks, 388-101D-0075 Background checks—Requirements for service providers, and 388-101D-0080 Background checks—Provisional hire—Pending results.

Hearing Location(s): On October 11, 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 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 October 12, 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 October 11, 2022.

Assistance for Persons with Disabilities: Contact Shelley Tencza, rules consultant, phone 360-664-6036, fax 360-664-6185, TTY 711 relay service, email tenczsa@dshs.wa.gov, by 5:00 p.m. on September 27, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The developmental disabilities administration (DDA) is amending WAC 388-101D-0030 to allow providers to hire an employee without a high school diploma or GED. DDA is amending WAC 388-101D-0070 to remove subsection (3). DDA is amending WAC 388-101D-0075 and 388-101D-0080 to correct broken cross references.

Reasons Supporting Proposal: Amendments to WAC 388-101D-0030 align with the education qualifications for direct support professionals in chapter 388-112A WAC and chapter 74.39A RCW, which do not require a GED or high school diploma.

Amendments to WAC 388-101D-0070 align it with WAC 388-101D-0075 and 28 C.F.R. Section 20.33(d). WAC 388-101D-0070(3) was too broad in how long it allowed a fingerprint result to remain valid. Removing subsection (3) aligns this rule with federal regulations. Additionally, the FBI audit guide for noncriminal justice access to criminal history record information (CHRI) has determined that reuse of CHRI is permitted for the "same purpose" but only "within a relatively short period of time." Amendment to WAC 388-101D-0080 is to correct broken cross references.

Statutory Authority for Adoption: RCW 71A.12.030.

Statute Being Implemented: RCW 71A.12.040, 71A.12.110, and 74.39A.056.

Rule is necessary because of state court decision, 28 C.F.R. Section 20.33(d).

Name of Proponent: DSHS, DDA, governmental.

Name of Agency Personnel Responsible for Drafting: Chantelle Diaz, P.O. Box 45310, Olympia, WA 98504-5310, 360-407-1500; Implementation and Enforcement: Megan Kwak, P.O. Box 45310, Olympia, WA 98504-5310, 360-764-9909.

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 360-407-1500, fax 360-407-0955, TTY 1-800-833-6388, 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(5).

Explanation of exemptions: The proposed amendments impose no costs on small businesses.

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.

Small Business Economic Impact Statement (SBEIS)

Chapter 19.85 RCW, The Regulatory Fairness Act, requires that the economic impact of proposed regulations be analyzed in relation to small businesses. This statute outlines information that must be included in an SBEIS. Preparation of an SBEIS is required when a proposed rule has the potential of placing more than a minor impact on a business.

RCW 19.85.020 defines a "small business" as "any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that is owned and operated independently from all other businesses, and that has 50 or fewer employees."

DDA analyzed these proposed rules and concludes that the proposed changes may impact providers who are small businesses, but do not impose costs to any providers.

EVALUATION OF PROBABLE COSTS AND PROBABLE BENEFITS: Since the proposed amendments "make significant amendments to a policy or regulatory program" under RCW 34.05.328 (5)(c)(iii), DDA has determined the proposed rules to be "significant" as defined by the legislature.

As required by RCW 34.05.328 (1)(d), DDA has analyzed the probable costs and probable benefits of the proposed amendments, taking into account both the qualitative and quantitative benefits and costs.

DDA has analyzed the proposed rule amendments and concludes that they will impose no new costs on small businesses because the department pays for the fingerprinting required by the subsection proposed for removal (WAC 388-101D-0070(3)). The preparation of a comprehensive SBEIS is not required.

Costs: As described below, DDA's analysis revealed that there are no new costs imposed:

- It is optional for a provider to hire a person using the education exemption in WAC 388-101D-0030.
- DDA pays for the fingerprinting required by amendments to the background check sections.

Benefits: Many benefits will result from the adoption of the proposed amendments. These benefits include:

- Helping providers to address staffing difficulties.

- Enabling providers to meet client health and safety needs with increased staffing.
- Alignment with federal regulations and guidance from the FBI.
- Simplified language for easier compliance.

CONCLUSION: DDA concludes that the benefits of these regulations exceed any possible cost. DDA has complied with the appropriate sections of the Administrative Procedure Act and is prepared to proceed with the rule filing.

A copy of the detailed cost calculations may be obtained by contacting Chantelle Diaz, P.O. Box 45310, Olympia, WA 98504-5310, phone 360-407-1500, fax 360-407-0955, TTY 1-800-833-6388, email chantelle.diaz@dshs.wa.gov.

August 24, 2022
Katherine I. Vasquez
Rules Coordinator

SHS-4931.1

AMENDATORY SECTION (Amending WSR 16-14-058, filed 6/30/16, effective 8/1/16)

WAC 388-101D-0030 Staffing requirements. (1) The ((service)) provider must ensure each ((staff meets the following minimum requirements)) of its employees:

((1) Have) (a) Has a high school diploma or GED equivalent, unless the ((employees were)) employee was hired before September 1, 1991 or is exempt under subsection (2) of this section;

((2) Be at least eighteen years of) (b) Is age 18 or older when employed as a direct ((care staff, or at least twenty-one years of age or older when employed as an administrator)) support professional who provides support services to a client;

(c) Is age 21 or older when employed as an administrator;

((3) Have) (d) Has a clear understanding of job responsibilities and knowledge of individual support plans and client needs; and

((4) Passed the department background check as required by WAC 388-101-3250) (e) Satisfies department background check requirements under chapter 388-825-WAC.

(2) The provider may hire a person without a high school diploma or GED if while working directly with clients the employee has access to another employee or a volunteer who:

(a) Has a high school diploma or GED; or

(b) Was hired before September 1, 1991.

(3) If the provider hires a person under subsection (2) of this section, the provider must have a written plan that states when and how the person must contact another employee for assistance.

[WSR 16-14-058, recodified as § 388-101D-0030, filed 6/30/16, effective 8/1/16. Statutory Authority: Chapter 71A.12 RCW. WSR 08-02-022, § 388-101-3200, filed 12/21/07, effective 2/1/08.]

AMENDATORY SECTION (Amending WSR 17-03-062, filed 1/10/17, effective 2/1/17)

WAC 388-101D-0070 Background checks—National fingerprint background checks. (1) ~~((Administrators and all caregivers who are))~~ An applicant as defined in WAC 388-113-0010 hired on or after January 1, 2016, ~~((and are))~~ who is not disqualified by the Washington state name and date of birth background check, must complete a national fingerprint background check and follow department procedures.

(2) After receiving the results of the national fingerprint background check the ~~((service))~~ provider must ~~((not employ, directly or by contract,))~~ prevent an administrator, employee, volunteer, student, or subcontractor ~~((who has a disqualifying criminal conviction or pending charge for a disqualifying crime under chapter 388-113, or that is a disqualifying negative action under WAC 388-78A-2470 or WAC 388-76-10180.))~~ from having unsupervised access to a client if the person has a:

(a) Disqualifying criminal conviction or pending charge for a disqualifying crime under chapter 388-113 WAC; or

(b) Disqualifying negative action under WAC 388-78A-2470 or WAC 388-76-10180.

~~((3) The service provider may accept a copy of the national fingerprint background check results letter and any additional information from the department's background check central unit from an individual who previously completed a national fingerprint check through the department's background check central unit, provided the national fingerprint background check was completed after January 7, 2012.))~~

[WSR 17-03-062, recodified as § 388-101D-0070, filed 1/10/17, effective 2/1/17. Statutory Authority: Chapters 71A.12, 74.34, and 74.39A RCW. WSR 16-18-040, § 388-101-3202, filed 8/30/16, effective 9/30/16.]

AMENDATORY SECTION (Amending WSR 17-03-062, filed 1/10/17, effective 2/1/17)

WAC 388-101D-0075 Background checks—Requirements for service providers. (1) Service providers must follow the background check requirements described in chapter 388-113 WAC and in this chapter. In the event of an inconsistency, this chapter applies.

(2) The service provider must obtain background checks from the department for all administrators, employees, volunteers, students, and subcontractors who may have unsupervised access to clients.

(3) The service provider must not allow the following persons to have unsupervised access to clients until the service provider receives the department's background check results:

- (a) Administrators;
- (b) Employees;
- (c) Volunteers or students; and
- (d) Subcontractors.

(4) If the department's background check results show that an administrator, employee, volunteer, student, or subcontractor has any of the following, then the service provider must prevent that person from having unsupervised access to clients:

(a) A disqualifying conviction or pending criminal charge under chapter 388-113 WAC; or

(b) A disqualifying negative action under chapter 388-113 WAC (~~(388-101-3090)~~).

(5) If the background check results show any of the following, then the service provider must conduct a character, suitability, and competence review before allowing the person unsupervised access to clients:

(a) The person has a conviction or pending criminal charge, but the conviction or criminal charge is not disqualifying under chapter 388-113 WAC (~~(388-113-0020)~~);

(b) The person has a conviction or pending criminal charge that meets one of the exceptions listed in WAC (~~(388-113-0040)~~) 388-113-0025; or

(c) Any of the circumstances described in WAC 388-101-3080 apply to the individual.

(6) When a service provider receives the results of a person's background check, the service provider must:

(a) Inform the person of the results of the background check;

(b) Inform the person that they may request a copy in writing of the results of the background check. If requested, a copy of the background check results must be provided within (~~(ten)~~) 10 working days of the request; and

(c) Notify the department and other appropriate licensing or certification agency of any person resigning or terminated as a result of having a conviction record.

(7) The service provider must renew the Washington state background check for each administrator, employee, volunteer, student, or subcontractor of a service provider. The service provider must at least every (~~(thirty-six)~~) 36 months keep current background check results for each administrator, employee, volunteer, student, or subcontractor of a service provider.

(8) Licensed assisted living facilities or adult family homes must adhere to the current regulations in this chapter and in the applicable licensing laws.

(9) All applicants for certification must have a background check.

[WSR 17-03-062, recodified as § 388-101D-0075, filed 1/10/17, effective 2/1/17. Statutory Authority: Chapter 71A.12 RCW. WSR 14-14-030, § 388-101-3250, filed 6/24/14, effective 7/25/14. Statutory Authority: RCW 71A.12.030 and [71A.12].080. WSR 12-02-048, § 388-101-3250, filed 12/30/11, effective 1/30/12. Statutory Authority: RCW 71A.12.080, chapter 74.39A RCW. WSR 10-16-084, § 388-101-3250, filed 7/30/10, effective 1/1/11. Statutory Authority: RCW 71A.12.080. WSR 10-03-065, § 388-101-3250, filed 1/15/10, effective 2/15/10. Statutory Authority: Chapter 71A.12 RCW. WSR 08-02-022, § 388-101-3250, filed 12/21/07, effective 2/1/08.]

AMENDATORY SECTION (Amending WSR 17-03-062, filed 1/10/17, effective 2/1/17)

WAC 388-101D-0080 Background checks—Provisional hire—Pending results. (~~(Persons identified in WAC 388-101-3250 and who have)~~) Each

provider applicant or employee who has lived in Washington state less than three years, or who ((are)) is otherwise required to complete a national fingerprint-based background check, may be hired for a ((one hundred twenty)) 120-day provisional period when:

- (1) The person is not disqualified based on the initial results of the background check from the department; and
- (2) A national fingerprint-based background check is pending.

[WSR 17-03-062, recodified as § 388-101D-0080, filed 1/10/17, effective 2/1/17. Statutory Authority: Chapter 71A.12 RCW. WSR 14-14-030, § 388-101-3255, filed 6/24/14, effective 7/25/14. Statutory Authority: RCW 71A.12.030 and [71A.12].080. WSR 12-02-048, § 388-101-3255, filed 12/30/11, effective 1/30/12. Statutory Authority: RCW 71A.12.080, chapter 74.39A RCW. WSR 10-16-084, § 388-101-3255, filed 7/30/10, effective 1/1/11.]