



PROPOSED RULE MAKING

CR-102 (July 2022)
(Implements RCW 34.05.320)
Do **NOT** use for expedited rule making

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FILED

DATE: July 31, 2023

TIME: 3:06 PM

WSR 23-16-103

Agency: Department of Social and Health Services - Developmental Disabilities Administration

- Original Notice**
- Supplemental Notice to WSR** _____
- Continuance of WSR** _____

- Preproposal Statement of Inquiry was filed as WSR 23-08-057 ; or**
- Expedited Rule Making--Proposed notice was filed as WSR _____; or**
- Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or**
- Proposal is exempt under RCW _____.**

Title of rule and other identifying information: (describe subject) WAC 388-823-1095, *What are a person's rights as a DDA client or eligible person?*, and 388-823-1096, *What requirements must a home or community-based service setting meet?*

Hearing location(s):

| Date: | Time: | Location: (be specific) | Comment: |
|-------------------|------------|------------------------------|---|
| September 5, 2023 | 10:00 a.m. | Virtual via Teams or Call in | Hearings are being held virtually. Please see the DSHS website for the most up to date information. |

Date of intended adoption: Not earlier than September 6, 2023 (Note: This is **NOT** the **effective** date)

Submit written comments to:

Name: DSHS Rules Coordinator
 Address: PO Box 45850, Olympia WA 98504
 Email: DSHSRPAURulesCoordinator@dshs.wa.gov
 Fax: 360-664-6185
 Other:
 By (date) 5:00 p.m. on September 5, 2023

Assistance for persons with disabilities:

Contact Shelley Tencza
 Phone: 360-664-6036
 Fax: 360-664-6185
 TTY: 711 Relay Service
 Email: shelley.tencza@dshs.wa.gov
 Other:
 By (date) 5:00 p.m. on August 22, 2023

Purpose of the proposal and its anticipated effects, including any changes in existing rules: DDA is amending WAC 388-823-1096 to add the federal Medicaid requirements for integrated settings directly into DDA's rules. DDA is amending WAC 388-823-1095 to clarify that the integrated settings requirements establish rights in addition to those established under by Chapter 71A.26 RCW.

Reasons supporting proposal: These amendments are intended to distinguish more clearly between client rights guaranteed by Washington Statute (codified in WAC 388-823-1095) and federal Medicaid requirements (codified in WAC 388-823-1096) for delivering home and community-based services in integrated settings.

Statutory authority for adoption: RCW 71A.12.030 and 71A.26.040

Statute being implemented: RCW 71A.26.010

Is rule necessary because of a:

- Federal Law? Yes No
- Federal Court Decision? Yes No
- State Court Decision? Yes No

If yes, CITATION:

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters: None

Type of proponent: Private Public Governmental

Name of proponent: (person or organization)

| Name of agency personnel responsible for: | | | |
|---|----------------|--|--------------|
| | Name | Office Location | Phone |
| Drafting: | Chantelle Diaz | P.O. Box 45310, Olympia, WA 98504-5310 | 360-790-4732 |
| Implementation: | Ryan Hilton | P.O. Box 45310, Olympia, WA 98504-5310 | 360-407-1500 |
| Enforcement: | Ryan Hilton | P.O. Box 45310, Olympia, WA 98504-5310 | 360-407-1500 |

Is a school district fiscal impact statement required under [RCW 28A.305.135](#)? Yes No

If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:

Name:
Address:
Phone:
Fax:
TTY:
Email:
Other:

Is a cost-benefit analysis required under [RCW 34.05.328](#)?

Yes: A preliminary cost-benefit analysis may be obtained by contacting:
Name:
Address:
Phone:
Fax:
TTY:
Email:
Other:

No: Please explain: These rules incorporate a state statute and a federal regulation without material change.

Regulatory Fairness Act and Small Business Economic Impact Statement
 Note: The [Governor's Office for Regulatory Innovation and Assistance \(ORIA\)](#) provides support in completing this part.

(1) Identification of exemptions:
 This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see [chapter 19.85 RCW](#)). For additional information on exemptions, consult the [exemption guide published by ORIA](#). Please check the box for any applicable exemption(s):

This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.061](#) because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.
 Citation and description: 42 C.F.R. 441.301

This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by [RCW 34.05.313](#) before filing the notice of this proposed rule.

This rule proposal, or portions of the proposal, is exempt under the provisions of [RCW 15.65.570](#)(2) because it was adopted by a referendum.

This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.025](#)(3). Check all that apply:

| | |
|---|---|
| <input type="checkbox"/> RCW 34.05.310 (4)(b) (Internal government operations) | <input checked="" type="checkbox"/> RCW 34.05.310 (4)(e) (Dictated by statute) |
| <input type="checkbox"/> RCW 34.05.310 (4)(c) (Incorporation by reference) | <input type="checkbox"/> RCW 34.05.310 (4)(f) (Set or adjust fees) |
| <input type="checkbox"/> RCW 34.05.310 (4)(d) (Correct or clarify language) | <input type="checkbox"/> RCW 34.05.310 (4)(g) (i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit) |

This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.025](#)(4) (does not affect small businesses).

This rule proposal, or portions of the proposal, is exempt under RCW _____.

Explanation of how the above exemption(s) applies to the proposed rule:

(2) Scope of exemptions: *Check one.*

- The rule proposal is fully exempt (*skip section 3*). Exemptions identified above apply to all portions of the rule proposal.
- The rule proposal is partially exempt (*complete section 3*). The exemptions identified above apply to portions of the rule proposal, but less than the entire rule proposal. Provide details here (consider using [this template from ORIA](#)):
- The rule proposal is not exempt (*complete section 3*). No exemptions were identified above.

(3) Small business economic impact statement: *Complete this section if any portion is not exempt.*

If any portion of the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

- No Briefly summarize the agency's minor cost analysis and how the agency determined the proposed rule did not impose more-than-minor costs. _____
- Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses and a small business economic impact statement is required. Insert the required small business economic impact statement here:

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

Name:

Address:

Phone:

Fax:

TTY:

Email:

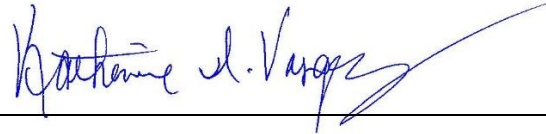
Other:

Date: July 25, 2023

Name: Katherine I. Vasquez

Title: DSHS Rules Coordinator

Signature:



WAC 388-823-1095 What are a person's rights as a DDA client or eligible person? (1) The following definitions apply to this section:

(a) "Administration" means the division of the department responsible for providing services to eligible persons, but does not include the division of the department responsible for the licensing and certification of services and facilities for eligible persons.

(b) "Assessment" has the same meaning as defined in RCW 71A.10.020.

(c) "Client" means a person who has a developmental disability as defined in RCW 71A.10.020 and has been determined to be eligible to receive services under chapter 71A.16 RCW.

(d) "Department" means the department of social and health services.

(e) "Developmental disabilities ombuds" means the office created under chapter 43.382 RCW.

(f) "Eligible person" has the same meaning as defined in RCW 71A.10.020.

(g) "Legal representative" means a parent of a client under age ((eighteen)) 18, a court-appointed guardian or limited guardian under Title 11 RCW if the subject matter is within the scope of the guardianship order, or any other person authorized by law to act for the client.

(h) "Necessary supplemental accommodation representative" means an individual who receives copies of administration correspondence to help a client or eligible person understand the documents and exercise the client or eligible person's rights. The necessary supplemental accommodation representative is identified by the client or eligible person when the client or eligible person does not have a legal guardian and is requesting or receiving services from the administration.

(i) "Provider" means an individual, a facility, or an agency that is one or more of the following: Licensed, certified, contracted by the department, or state operated to provide services to administration clients.

(j) "Restraint" includes:

(i) Physical restraint, which is a manual method, obstacle, or physical or mechanical device, material, or equipment attached or adjacent to the client's body that restricts freedom of movement or access to the client's body, is used for discipline or convenience, and is not required to treat the client's medical symptoms; and

(ii) Chemical restraint, which is a psychopharmacologic drug that is used for discipline or convenience and is not required to treat the client's medical symptoms.

(k) "Restriction" means a limitation on the client's use or enjoyment of property, social activities, or engagement in the community.

(1) "Service plan" means any plan required by the department to deliver the services authorized by the administration to the client.

(2) The rights set forth in this section are the minimal rights guaranteed to all clients of the administration, and are not intended to diminish rights set forth in other state or federal laws that may contain additional rights.

(3) The administration must notify the individual and the individual's legal representative or necessary supplemental accommodation

representative of the rights set forth in this section upon determining the individual is an eligible person. The notification the administration provides must be in written form. The administration must document the date that the notification required in this subsection was provided.

(4) The administration must notify a client and a client's legal representative or necessary supplemental accommodation representative of the rights set forth in this section upon conducting a client's assessment. The notification the administration provides must be in written form. The administration must document the date it provided the notification required in this subsection.

(5) The client has the right to exercise autonomy and choice free from provider interference. This includes the client's right to:

(a) Be free from sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion;

(b) Be free from discrimination based on race, color, creed, national origin, religion, sex, age, disability, marital and family status, gender identity, or sexual orientation;

(c) Make choices regarding the type of food available within the client's resources and service plan;

(d) Have visitors at the client's home and associate with persons of the client's choosing and subject to limitations as negotiated with the client's housemates;

(e) Control the client's schedule and choose activities, schedules, and health care that meet the client's needs;

(f) Information about the treatment ordered by the client's health care provider and help plan how the treatment will be implemented;

(g) Be free from unnecessary medication, restraints, and restrictions;

(h) Vote, participate in the democratic process, and help people with getting elected to office;

(i) Manage the client's money or choose a person to assist;

(j) Be part of the community;

(k) Make choices about the client's life;

(l) Choose the clothes and hairstyle the client wears;

(m) Furnish and decorate the client's bedroom to the client's preferences or furnish and decorate the client's home to the client's preferences subject to agreement with the client's housemates;

(n) Seek paid employment;

(o) Receive the services that the client agrees to receive;

(p) Decide whether or not to participate in research after the research has been explained to the client, and after the client or the client's legal representative gives written consent for the client to participate in the research; and

(q) Be free from financial exploitation.

(6) The client has the right to participate in the administration's service planning. This includes the client's right to:

(a) Be present and provide input on the client's service plans written by the administration and providers;

(b) Have meaningful opportunities to lead planning processes;

(c) Have the client's visions for a meaningful life and the client's goals for education, employment, housing, relationships, and recreation included in the planning process;

(d) Choose an advocate to attend the planning processes with the client; and

(e) Have access to current and accurate information about recreation, education, and employment opportunities available in the client's community.

(7) The client has the right to access information about services and health care. This includes the client's right to:

(a) View a copy of all of the client's service plans;

(b) Possess full copies of the client's current service plans;

(c) Review copies of the policies and procedures for any service the client receives, at any time. This includes policies and procedures about how the client may file a complaint to providers and the department;

(d) Examine the results of the department's most recent survey or inspection conducted by state surveyors or inspectors, statements of deficiency, and plans of correction in effect with respect to the client's provider and the client's residence. The client's service provider must assist the client with locating and accessing this information upon the client's request; and

(e) Receive written notification of enforcement actions taken by the department against the client's provider. The administration's case manager or designee must provide notification to the client and the client's legal representative or necessary supplemental accommodation representative within (~~twenty~~) 20 days, excluding weekends and holidays, of the date of enforcement. For purposes of this subsection, a "provider" means an entity that provides residential services received by a client that is operated by or contracted through the administration. An enforcement action that requires this notification includes:

(i) Conditions placed on the provider certification or license;

(ii) Suspension or limited suspension of referrals or admissions;

(iii) Imposition of provisional certification or decertification;

or

(iv) Denial, suspension, or revocation of a license or certification.

(8) The client has the right to file complaints and grievances, and to request appeals. This includes the client's right to:

(a) Appeal any decision by the department that denies, reduces, or terminates the client's eligibility, services, or choice of provider as defined in federal medicaid law and state public assistance laws;

(b) Submit grievances to the client's provider about the client's services or other concerns. This includes, but is not limited to, concerns about the behavior of other people where the client lives. The provider must maintain a written policy on the grievance process that includes timelines and possible remedies. If a grievance is unresolved, the provider must provide the client with information on how to submit the grievance to the department;

(c) File complaints and grievances, and request appeals without penalty or retaliation by the department or providers; and

(d) Receive information about how to obtain accommodation for disability in the appeal process.

(9) The client has the right to privacy and confidentiality. This includes the client's right to:

(a) Personal privacy and confidentiality of the client's personal records;

(b) Communicate privately, including the right to send and receive mail and email, and the right to use a telephone in an area where calls can be made without being overheard; and

(c) Meet with and talk privately with the client's friends and family.

(10) The client has rights during discharge, transfer, and termination of services as set forth in this subsection.

(a) Clients who are residents of a long-term care facility that is licensed under chapter 18.20, 72.36, or 70.128 RCW have the rights set forth in RCW 70.129.110.

(b) Clients who receive certified community residential services have the right to:

(i) Remain with the client's provider. Services must not be terminated unless the provider determines and documents that:

(A) The provider cannot meet the needs of the client;

(B) The client's safety or the safety of other individuals in the facility or residence is endangered;

(C) The client's health or the health of other individuals in the facility or residence would otherwise be endangered; or

(D) The provider ceases to operate.

(ii) Receive written notice from the provider of any potential termination of services at least (~~(thirty)~~) 30 days before such termination, except when there is a health and safety emergency that requires termination of service, in which case notice must be provided at least (~~(seventy-two)~~) 72 hours before the date of termination. The notice must be provided to the client and the client's legal representative or necessary supplemental accommodation representative. The notice must include:

(A) The reason for termination of services; and

(B) The effective date of termination of services.

(iii) Receive a transition plan at least two days before the effective date of the termination of services, or if the termination was based on a health and safety emergency receive a transition plan within two days of the administration's receipt of notice for emergency termination. The administration must provide the client and the client's legal representative or necessary supplemental accommodation representative with the plan. The plan must include:

(A) The location where the client will be transferred;

(B) The mode of transportation to the new location; and

(C) The name, address, and telephone number of the developmental disabilities ombuds.

(c) A provider that provides services to clients in a residence owned by the provider must exhaust the procedures for termination of services prior to the commencement of any unlawful detainer action under RCW 59.12.030.

(11) The client has the right to access advocates. The client has the right to receive information from agencies acting as client advocates, and be afforded the opportunity to contact these agencies. The provider must not interfere with the client's access to any of the following:

(a) Any representative of the state;

(b) The resident's individual physician;

(c) The developmental disabilities ombuds; or

(d) Any representative of the organization designated to implement the protection and advocacy program pursuant to RCW 71A.10.080.

(12) If a client is subject to a guardianship order pursuant to chapter (~~(11.88)~~) 11.130 RCW, the rights of the client under this section are exercised by the client's guardian if the subject matter is within the scope of the guardianship order.

(13) In addition to the rights in this section, clients who receive home and community-based services are entitled to receive those services in an integrated setting as described in WAC 388-823-1096.

AMENDATORY SECTION (Amending WSR 18-10-071, filed 4/30/18, effective 5/31/18)

WAC 388-823-1096 What requirements must ((my)) a home or community-based service setting meet? ~~((If you receive home or community-based services under 42 C.F.R. Section 440.180, the setting must meet requirements under 42 C.F.R. Section 441.301 (e)(4).))~~

(1) **Home and Community-Based Settings.** Home and community-based settings must have all of the following qualities based on the needs of the HCBS participant as indicated in their person-centered service plan:

(a) The setting is integrated in and supports full access of HCBS participants receiving home and community-based services under 42 C.F.R. Section 440.180 ("HCBS") to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as people not receiving HCBS.

(b) The setting is selected by the HCBS participant from among setting options including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service plan and are based on the HCBS participant's needs, preferences, and, for residential settings, resources available for room and board.

(c) Ensures the HCBS participant's rights of privacy, dignity and respect, and freedom from coercion and restraint.

(d) Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact.

(e) Facilitates individual choice regarding services and supports, and who provides them.

(2) **Provider-owned or controlled residential settings.** In a provider-owned or controlled residential setting, in addition to the qualities under subsection (1) of this section, the following additional conditions must be met:

(a) The unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the HCBS participant, and the HCBS participant has, at a minimum, the same responsibilities and protections from eviction that tenants have under the Washington State Residential Landlord-Tenant Act, and other applicable county or city tenant protections. For settings in which landlord tenant laws do not apply, the state must ensure that a lease, residency agreement, or other form of written agreement will be in place for each HCBS participant, and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

(b) Each HCBS participant has privacy in their sleeping or living unit:

(i) Units have entrance doors lockable by the HCBS participant, with only appropriate staff having keys to doors.

(ii) HCBS participants sharing units have a choice of roommates in that setting.

(iii) HCBS participants have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.

(c) HCBS participants have the freedom and support to control their own schedules and activities, and have access to food at any time.

(d) HCBS participants are able to have visitors of their choosing at any time.

(e) The setting is physically accessible to the HCBS participant.

(3) **Modifications.** Any modification of the additional conditions, under subsection (2)(a) through (2)(d) of this section, must be supported by a specific assessed need and justified in the person-centered service plan. The following requirements must be documented in the person-centered service plan:

(a) A specific and individualized assessed need.

(b) The positive interventions and supports used prior to any modifications to the person-centered service plan.

(c) Less intrusive methods of meeting the need that have been tried but did not work.

(d) A clear description of the condition that is directly proportionate to the specific assessed need.

(e) Regular collection and review of data to measure the ongoing effectiveness of the modification.

(f) Established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.

(g) The informed consent of the HCBS participant.

(h) An assurance that interventions and supports will cause no harm to the HCBS participant.

(4) **Settings that are not Home and Community-Based.** Home and community-based settings do not include the following:

(a) A nursing facility;

(b) An institution for mental diseases;

(c) An intermediate care facility for individuals with intellectual disabilities;

(d) A hospital; or

(e) Any other locations that have qualities of an institutional setting as determined by the Centers for Medicare and Medicaid Services (CMS). Any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, or in a building on the grounds of, or immediately adjacent to, a public institution, or any other setting that has the effect of isolating HCBS participants from the broader community of people not receiving HCBS will be presumed to be a setting that has the qualities of an institution unless CMS determines through heightened scrutiny, based on information presented by the State or other parties, that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings.