



PROPOSED RULE MAKING

CR-102 (June 2024) (Implements RCW 34.05.320) Do NOT use for expedited rule making

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STATE OF WASHINGTON
FILED

DATE: May 21, 2024

TIME: 1:25 PM

WSR 24-11-137

Agency: Department of Social and Health Services, Aging and Long-Term Support Administration- HCS

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

- Preproposal Statement of Inquiry was filed as WSR 23-24-046 ; 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) The department is proposing new rules to implement provisions of Engrossed Second Substitute Senate Bill 5440, (chapter 453, laws of 2023) by adding new sections in chapter 388-106 WAC. The new sections include:

- WAC 388-106-2000 What definitions apply to the civil transitions program?
- 388-106-2005 Who is eligible to apply to receive services under the civil transitions program?
- 388-106-2010 What services may I receive under the civil transitions program if I am not functionally or financially eligible for long-term services and supports?
- 388-106-2015 What services may I receive under the civil transitions program if I am functionally and financially eligible for long-term services and supports?
- 388-106-2020 What conditional services may I receive under the civil transitions program?
- 388-106-2025 Who can provide long term services and supports when I am eligible for the civil transitions program conditional services?
- 388-106-2030 Where can I receive civil transitions program conditional services?
- 388-106-2035 When will the department authorize my civil transitions program conditional services?
- 388-106-2040 When will my civil transitions program conditional services end?
- 388-106-2045 Do I have a right to an administrative hearing on civil transitions program conditional services? and
- 388-106-2050 Can an exception to the rule (ETR) be granted for civil transitions program conditional services?

Hearing location(s):

Date:	Time:	Location: (be specific)	Comment:
June 25, 2024	10:00 AM	Virtually via Teams or Call in	Hearings are held virtually, see the DSHS website at https://www.dshs.wa.gov/sesa/rpau/proposed-rules-and-public-hearings for the most current information.

Date of intended adoption: Not earlier than June 26, 2024 (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
 Beginning (date and time) noon on May 22, 2024
 By (date and time) 5:00 p.m. on June 25, 2024

Assistance for persons with disabilities:

Contact DSHS Rules Consultant
 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 June 11, 2024

Purpose of the proposal and its anticipated effects, including any changes in existing rules: The department is proposing new rules to implement provisions of Engrossed Second Substitute Senate Bill 5440 (chapter 453, laws of 2023). The Department of Social and Health Services (department) is adding new sections in 388-106 WAC to support the new civil transitions program created because of E2SSB 5440. These sections include 388-106-2000 to 388-106-2050. The proposed rules describe eligibility for the civil transitions program, and the package of services provided for individuals who are referred by the Behavioral Health Administration who have been found incompetent to stand trial due to dementia, traumatic brain

injury, or intellectual or developmental disability and not functionally or financially eligible for long-term services and supports. The rules will describe services and duration.

Reasons supporting proposal: See Purpose statement

Statutory authority for adoption: RCW 10.77.202, 74.08.090, and 74.09.520

Statute being implemented: RCW 74.09.520, Chapter 453, laws of 2023

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

Name of proponent: (person or organization) Department of Social and Health Services

Type of proponent: Private. Public. Governmental.

Name of agency personnel responsible for:

	Name	Office Location	Phone
Drafting	Phyllis Moffatte-Clark	P.O. Box 45600 Olympia, WA 98504	360-764-0481
Implementation	Phyllis Moffatte-Clark	P.O. Box 45600 Olympia, WA 98504	360-764-0481
Enforcement	Lateisha De Lay	P.O. Box 45600 Olympia, WA 98504	206- 503-4432

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 Phyllis Moffatte-Clark
Address P.O. Box 45600 Olympia, WA 98504
Phone 360-764-0481
Fax
TTY
Email Phyllis.Moffatte-Clark@dshs.wa.gov
Other

No: Please explain:

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:

- 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:
 - [RCW 34.05.310](#) (4)(b) (Internal government operations)
 - [RCW 34.05.310](#) (4)(c) (Incorporation by reference)
 - [RCW 34.05.310](#) (4)(d) (Correct or clarify language)
 - [RCW 34.05.310](#) (4)(e) (Dictated by statute)
 - [RCW 34.05.310](#) (4)(f) (Set or adjust fees)
 - [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 [34.05.328\(5\)\(b\)\(vii\)](#).

Explanation of how the above exemption(s) applies to the proposed rule: These rules are exempt as allowed under RCW 34.05.328(5)(b)(vii) which states in part, "[t]his section does not apply to...rules of the department of social and health services relating only to client medical or financial eligibility and rules concerning liability for care of dependents.

(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:

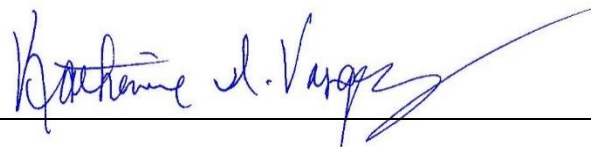
- Name
- Address
- Phone
- Fax
- TTY
- Email
- Other

Date: May 16, 2024

Name: Katherine I. Vasquez

Title: DSHS Rules Coordinator

Signature:



NEW SECTION

WAC 388-106-2000 What definitions apply to the civil transitions program? "Aging and long-term support administration (AL TSA)" is an administration within the department of social and health services that promotes choice, independence, and safety through innovative services and partnerships with tribes, advocates, providers, and care-givers to support seniors, and people with disabilities so they can live with good health, independence, dignity, and control over decisions that affect their lives.

"Behavioral health administration (BHA)" is an administration within the department of social and health services that supports sustainable recovery, independence, and wellness. This is done by funding and supporting effective prevention and intervention services for youth and family, and treatment and recovery support for youth and adults with addiction and mental health conditions (also known as behavioral health). BHA operates three state psychiatric hospitals and the office of forensic mental health services that deliver high quality services to adults and children with complex needs.

"Civil transitions program" is a program implemented according to Engrossed Second Substitute Senate Bill 5440 to provide support services to individuals recently subject to criminal charges and found incompetent to stand trial due to an intellectual or developmental disability, traumatic brain injury, or dementia.

"Competency evaluation" is an assessment of the ability of a defendant to understand and rationally participate in a court process under the United States criminal justice system.

"Conditional services" is a term that describes the services available under the civil transitions program for an individual who does not meet functional eligibility criteria under medicaid personal care level of care under WAC 388-106-0210 or nursing facility level of care under WAC 388-106-0355 or is not financially eligible for Washington apple health, or is not functionally or financially eligible.

"Dementia" is a general term for loss of memory, language, problem-solving, and other thinking abilities that are severe enough to interfere with daily life. The term "dementia" is no longer used to refer to the etiological subgroups for which it is standard, but it is instead included under the newly titled term significant neurocognitive disease. For consistency, the term "dementia" is still used in the DSM-5 and can be applied in situations where patients and doctors are familiar with it. The phrase neurocognitive disorder is commonly used, while dementia is the standard word for illnesses such as the degenerative dementias that typically impact older persons (DSM-5-TR).

Neurocognitive disorder is characterized by the progressive and persistent deterioration of cognitive function. Cognitive deficits are sufficient to interfere with independence, do not occur exclusively in the context of a delirium, and are not attributable to another mental disorder (e.g. major depressive disorder, schizophrenia).

Specific major neurocognitive diagnosis, primary diagnosis:

- (a) Major neurocognitive disorder due to Alzheimer's disease;
- (b) Major frontotemporal neurocognitive disorder (Pick's);
- (c) Major neurocognitive disorder with Lewy bodies;
- (d) Major vascular neurocognitive disorder (Vascular);
- (e) Major neurocognitive disorder due to traumatic brain injury;
- (f) Substance or medication-induced major neurocognitive disorder (alcohol-related);

- (g) Major neurocognitive disorder due to HIV infection;
- (h) Major neurocognitive disorder due to Prion disease;
- (i) Major neurocognitive disorder due to Parkinson's disease;
- (j) Major neurocognitive disorder due to Huntington's disease.

"Not Competent" means a legal determination has been made by a court that a defendant is unable to stand trial based on being diagnosed with a mental disease or defect which prevents them from understanding court proceedings or being able to rationally assist in their own defense per chapter 10.77 RCW.

"Not Restorable" means a court has found that a person lacks the capacity to have competency restored via inpatient or outpatient treatment.

"Office of forensic mental health services (OFMHS)" is a division of the department of social and health services' behavioral health administration that oversees the state's adult forensic mental health system.

"Washington apple health" means the public health insurance programs for eligible Washington residents defined in WAC 182-500-0120. Washington apple health or apple health is the name used in Washington state for medicaid, the children's health insurance program (CHIP), and state-only funded health care programs.

NEW SECTION

WAC 388-106-2005 Who is eligible to apply to receive services under the civil transitions program? You are eligible to apply for services under the civil transitions program if you:

- (1) Are referred to ALTSA from the BHA starting December 1, 2023;
- (2) Have been determined by a court as not competent to stand trial due to a diagnosis of dementia, a traumatic brain injury, or an intellectual or developmental disability, and your competency is not restorable;
- (3) Complete an assessment of your functional eligibility using the comprehensive assessment reporting evaluation (CARE) tool under WAC 388-106-0050 to determine if you are functionally eligible for:
 - (a) Nursing facility level of care under WAC 388-106-0355; or
 - (b) Medicaid personal care level of care under WAC 388-106-0210;and
- (4) File an application for Washington apple health so the department can determine if you are financially eligible for medicaid-funded long-term services and supports. The application process is described in WAC 182-503-0005.

NEW SECTION

WAC 388-106-2010 What services may I receive under the civil transitions program if I am not functionally and financially eligible for long-term services and supports? (1) If you meet the criteria in WAC 388-106-2005 but are not functionally eligible for medicaid personal care level of care under WAC 388-106-0210 or nursing facility level of care under WAC 388-106-0355, or you are not financially eli-

gible for Washington apple health, you may receive conditional services, subject to available funds, under the civil transitions program.

(2) If you meet the criteria in WAC 388-106-2005 but have yet to complete a CARE assessment and are, or at risk of becoming a "homeless person" as defined in RCW 43.185C.010, you may receive supportive housing services under the civil transitions program, as funding allows.

(3) Conditional services are described in WAC 388-106-2020.

NEW SECTION

WAC 388-106-2015 What services may I receive under the civil transitions program if I am functionally and financially eligible for long-term services and supports? If you are referred to AL TSA for services under the civil transitions program and you are both functionally eligible for long-term services and supports under chapter 388-106 WAC and financially eligible for medicaid-funded long-term services and supports, you are eligible for any service offered by AL TSA based on your assessment and identified in your plan of care. Financial eligibility criteria for long-term services and supports is determined under chapters 182-513 and 182-515 WAC.

NEW SECTION

WAC 388-106-2020 What conditional services may I receive under the civil transitions program? The legislature has appropriated specific funding for the civil transitions program for the provision of conditional services. If you meet the criteria in WAC 388-106-2005 you are eligible for conditional services as described below, subject to available funding.

(1) If you do not meet medicaid personal care level of care under WAC 388-106-0210 or nursing facility level of care under WAC 388-106-0355, and you are not financially eligible for Washington apple health, you can receive the following conditional services:

- (a) Community transition or sustainability services; and
- (b) Supportive housing as defined in WAC 388-106-1705.

(2) If you are determined functionally eligible for medicaid personal care level of care under WAC 388-106-0210, but you are not financially eligible for Washington apple health, you may receive the following conditional services if they are included in your plan of care:

- (a) Personal care services as defined in WAC 388-106-0010;
- (b) Community transition or sustainability services; and
- (c) Supportive housing as defined in WAC 388-106-1705.

(3) If you are determined functionally eligible for nursing facility level of care under WAC 388-106-0355 but you are not financially eligible for Washington apple health, you may receive the following conditional services if they are included in your plan of care:

- (a) Personal care services as defined in WAC 388-106-0010;
- (b) Nurse delegation as defined in WAC 388-106-0270;

- (c) Personal emergency response system (PERS) as defined in WAC 388-106-0270;
 - (d) Assistive technology as defined in WAC 388-106-0270;
 - (e) Supportive housing as defined in WAC 388-106-1705;
 - (f) Community transition services as defined in WAC 388-106-0270;
- and
- (g) Community transition or sustainability services.

NEW SECTION

WAC 388-106-2025 Who can provide long-term services and supports when I am eligible for the civil transitions program conditional services? The following types of providers can provide conditional services under the civil transitions program:

- (1) Individual providers (IPs) who provide services to clients in their own home as defined in WAC 388-106-0040 and 388-106-0010.
- (2) Home care agencies that provide services to clients in their own home. Home care agencies must be licensed under chapter 70.127 RCW and chapter 246-335 WAC and be contracted with the department of social and health services.
- (3) Providers who are contracted with the department to provide goods and services.
- (4) Durable medical equipment vendors that have a core provider agreement with the health care authority.
- (5) Supportive housing providers as defined in WAC 388-106-1715 or 182-559-200.

NEW SECTION

WAC 388-106-2030 Where can I receive civil transitions program conditional services? You can receive conditional services under the civil transitions program:

- (1) In your own home as defined in WAC 388-106-0030, or an interim setting while you secure permanent housing; and
- (2) While you are out of your home accessing the community or working while:
 - (a) within the state of Washington; or
 - (b) in a recognized out of state bordering city as defined in WAC 182-501-0175.

NEW SECTION

WAC 388-106-2035 When will the department authorize my civil transitions program conditional services? Within available funds, the department will authorize conditional services under the civil transitions program when you have:

(1) Completed an assessment of your functional eligibility using the comprehensive assessment reporting evaluation (CARE) tool under WAC 388-106-0050;

(2) Applied for Washington apple health;

(3) Been found eligible for conditional services under WAC 388-106-2010 and 388-106-2020;

(4) Given consent for services and approved your care plan; and

(5) Chosen a DSHS qualified provider per WAC 388-71-0510.

NEW SECTION

WAC 388-106-2040 When will my civil transitions program conditional services end? (1) If, at the time of your initial assessment you were found ineligible for medicaid-funded long-term services and supports, your civil transitions program conditional services, except supportive housing, will end the earlier of:

(a) The date you are found both functionally and financially eligible for medicaid-funded long-term services and supports;

(b) Six months from the start date of your services; or

(c) When the department has exhausted available funds.

(2) For conditional supportive housing services, your eligibility will be reviewed in six-month increments based upon available funding, up to a maximum of 24 months.

NEW SECTION

WAC 388-106-2045 Do I have a right to an administrative hearing on civil transitions program conditional services? You have a right to an administrative hearing if you disagree with a decision made by the department about your eligibility for services under the civil transitions program. The department will notify you in writing of the right to contest a decision and provide you with information on how to request a hearing.

NEW SECTION

WAC 388-106-2050 Can an exception to rule (ETR) be granted for civil transitions program conditional services? If you receive conditional services under the civil transitions program, an exception to rule under WAC 388-440-0001 will not be granted.