

NO. 39807-9-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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PUGET SOUND MEDICAL SUPPLY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES,

Respondent.

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**BRIEF OF RESPONDENT**

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BY AMJ  
DEPUTY

STATE OF WASHINGTON

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DIVISION II

01-22-2 WJ

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## I. INTRODUCTION

Puget Sound Medical Supply (PSM) administratively appealed a Department of Social and Health Services determination that it had erroneously billed and received nearly \$2 million in Medicaid reimbursements. After a five-day hearing, the Administrative Law Judge agreed that the Department's assessed overpayment was substantially correct.

PSM sought review of the assessed Medicaid overpayment from the Department's Board of Appeals, but its petition for review was untimely. When asked for justification, PSM said the failure to file a timely petition was due to the holidays and personnel changes in its attorney's office, resulting in a failure to calendar the appeal deadline. PSM asked the Board to find these factors justified the late appeal. The Board of Appeals rejected Puget Sound's request and further denied a subsequent motion for reconsideration. The Board concluded that, under either a "good reason" or "good cause" standard, the late filed appeal was not justified and denied review. PSM sought judicial review of this Board of Appeals decision. The superior court affirmed the Board of Appeals, and that decision is before this court in a separate case, Court of Appeals No. 39169-4-II.

Facing the fact that it had not timely sought administrative review, PSM petitioned for judicial review of the ALJ's initial order directly to Superior Court (first in Pierce County and then re-filed in Thurston County). The Department filed a motion to dismiss for failure to exhaust administrative remedies, which the Superior Court granted.

PSM now appeals the dismissal of its petition for judicial review of the ALJ's initial order. PSM argues that the untimely request for review at the Board of Appeals exhausts administrative remedies because it was filed prior to filing the petition for review in Superior Court. However, PSM's Petition for Judicial Review seeks review of an initial order where PSM did not exhaust administrative remedies and, therefore, it was properly dismissed.<sup>1</sup>

## II. COUNTERSTATEMENT OF THE ISSUE

Was the Department of Social and Health Services' Motion to Dismiss properly granted when PSM sought judicial review of an agency order but failed to exhaust the available administrative remedy because it did not timely seek administrative review by the Board of Appeals?

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<sup>1</sup> The Appellant's assignment of error incorrectly states that further administrative review was "filed and denied prior to filing the petition for judicial review." *Appellant's Brief* at 1. The denial of administrative review from the Board of Appeals occurred 24 days after the Appellant had already filed the Amended Petition for Judicial Review in this case. Administrative Record (AR) at 19.

Does the fact that PSM filed an untimely petition for administrative review before the Board of Appeals constitute an exhaustion of administrative remedies where the Board of Appeals did not reach the merits of the petition for administrative review because it was untimely?

### **III. COUNTERSTATEMENT OF THE CASE**

Puget Sound Medical Supply sells durable medical equipment and medical supplies. If the product is sold to a Medicaid-eligible client, PSM bills the Department of Social and Health Services for the product and the Department pays for the product directly to PSM. The Department conducts periodic audits of Medicaid payments made to PSM and other Medicaid providers.

After an audit of a sample of PSM's Medicaid billings and supporting documentation, the Department found overpayments and, based on extrapolation, assessed PSM an overpayment of more than \$1.8 million.<sup>2</sup> Administrative Record (AR) at 55. After five days of testimony, and after reviewing more than 750 exhibits, the ALJ modified the Department's decision and upheld the overpayment. AR at 54-75.

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<sup>2</sup> Extrapolation is a standard and well-known statistical technique used to generalize data from a sample to a known universe. AR at 67.

The ALJ's initial order, which was mailed December 24, 2007, AR at 54, explained PSM's right to appeal and the procedure for doing so:

**NOTICE TO PARTIES:** THIS ORDER BECOMES FINAL ON THE DATE OF MAILING UNLESS WITHIN 21 DAYS OF MAILING OF THIS ORDER A PETITION FOR REVIEW IS RECEIVED BY THE DSHS BOARD OF APPEALS, PO BOX 45803, OLYMPIA, WA 98504-5803. A PETITION FORM AND INSTRUCTIONS ARE ENCLOSED.

AR at 73.

The enclosed petition form stated, "**Deadline: Received on or before 21 days from mail date of Initial Decision**" in large, bold print.

AR at 74. The enclosed instructions stated:

**DEADLINE for Appeal:** The Board of Appeals **must receive** your appeal within twenty-one (21) calendar days from the date stamped on the enclosed hearing decision. **If you miss the deadline, you may lose all right to appeal the decision.**

AR at 75 (emphasis in original).

PSM's appeal request was received by the Board of Appeals on January 15, 2008, one day after the 21-day deadline. AR at 51. The Board of Appeals requested that PSM file a statement of good cause for late filing. AR at 50. PSM filed a statement claiming good cause for the late filing on January 29, 2008. AR at 42-49.

On February 12, 2008, PSM filed a Petition for Judicial Review in Pierce County Superior Court attempting to appeal the ALJ's initial order directly to Superior Court. On February 13, 2008, PSM filed the same case as an Amended Petition for Review in Thurston County Superior Court.<sup>3</sup>

The Department filed a motion to dismiss the Thurston County case for failure to exhaust administrative remedies. The Superior Court granted the Department's motion to dismiss in a letter opinion on September 11, 2008. Clerk's Papers (CP) at 70. An order was entered on September 4, 2009. CP at 71-72.

The sole issue in this appeal is therefore whether the February 13, 2008, Amended Petition for Review should have been dismissed for failure to exhaust administrative remedies where PSM failed to timely obtain administrative review by the Board of Appeals as required by WAC 388-02-0560(2007).

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<sup>3</sup> On March 7, 2008, the Board of Appeals entered an order denying review, finding PSM failed to provide a good reason for its late filing of the Petition for Review of the Initial Decision. AR at 19-32. The Board of Appeals also denied a subsequent motion for reconsideration because PSM did not demonstrate that it had a good reason for late filing, and the reasons given did not satisfy the good cause standard under Department rule. AR at 1-7. The Board's decision to deny review was appealed to Superior Court, which upheld the Board's decision. PSM has appealed that decision to this court in a separate proceeding that is currently set for oral argument on March 30, 2010. Court of Appeals No. 39169-4-II.

#### IV. ARGUMENT

##### A. A Petitioner Must Exhaust Administrative Remedies Before Seeking Judicial Review

The APA states that “[a] person may file a petition for judicial review . . . only after exhausting all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review.” RCW 34.05.534. Thus, even if a person has standing to challenge an administrative action, resort to a court may be premature if the agency can provide relief, and barred where the person fails to utilize the available administrative appeal process. These exhaustion requirements reflect the requirement that the agency must first be given a chance to resolve the matter. As “a general rule, when an adequate administrative remedy is provided, it must be pursued before the courts will intervene.” *Orion Corp. v. State*, 103 Wn.2d 441, 456, 693 P.2d 1369 (1985). Consequently, unless narrow exceptions apply,<sup>4</sup> the petitioner’s failure to exhaust administrative remedies will result in dismissal. *Ackerley Commc’ns, Inc. v. City of Seattle*, 92 Wn.2d 905, 908-909, 602 P.2d 1177 (1979), *cert. denied*, 449 U.S. 804 (1980).

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<sup>4</sup> Exceptions include that exhaustion of administrative remedies would be futile. No such exceptions have been claimed in this case.

Remedies are exhausted when the issues that can be resolved by the agency are resolved. *Stevedoring Servs. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 42-43, 914 P.2d 737 (1996). This resolution usually means a final agency decision. *See, e.g., Hayes v. City of Seattle*, 131 Wn.2d 706, 715-716, 934 P.2d 1179 (1997). A petitioner fails to exhaust administrative remedies when it fails to timely invoke an available procedure, even if such an appeal is one day late. *Ward v. Bd. of Skagit Cy. Comm'rs*, 86 Wn. App. 266, 272-273, 936 P.2d 42 (1997). This is the exhaustion requirement that controls this case.

PSM concedes that it did not obtain administrative review of the initial order of the Administrative Law Judge from the Department's Board of Appeals, which is the final decision making body of the agency for this type of case. *See* WAC 388-02-0215(4)(2007) and WAC 388-02-0530(2)(2007).<sup>5</sup> The Superior Court therefore properly dismissed the Amended Petition for Judicial Review because PSM had not completed the agency's administrative review process. In the absence of the Board's final review of the initial order in this case, PSM may not seek review by subsequent courts and, consequently, the courts are without power to hear the matter.

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<sup>5</sup> The 2007 edition of WAC 388-02, the Department hearing rules, is attached at Appendix A.

**B. The Department's Rules Do Not allow Puget Sound To Avoid A Level Of Administrative Review**

The Appellant does not dispute that failure to exhaust administrative remedies should result in the dismissal of this case. Instead, the Appellant's basic contention is that there was no requirement that the Board of Appeals review this appeal and the initial order from the Office of Administrative Hearings should be considered the final order for this appeal to Superior Court. Not only is this position counter to every notice that PSM received with the initial decision in this case, AR at 73-75, it does not accurately reflect the specific requirements for appealing a provider overpayment and does not consider the Department's hearing rules as a whole, which delegate which tribunal issues final orders for different appeals.

**1. The Department's Rules Require That Provider Overpayments Be Appealed To The Board Of Appeals**

Department rules require that certain types of administrative appeals be appealed from the Office of Administrative Hearings to the Department's Board of Appeals; these cases include provider overpayment appeals. Former WAC 388-02-0560(2)(2007) states "If a party disagrees with an initial order for a case listed in WAC 388-02-0215(4) and wants it changed, the party must request review by [Board of Appeals] . . . ." Provider overpayment cases, like PSM's appeal, are

listed in WAC 388-02-0215(4)(cc)(2007) as a type of case that requires Board of Appeals review. This follows from the fact that in the cases listed in WAC 388-02-0215(4)(2007), the Office of Administrative Hearings only has authority to issue an initial order, not a final order that is required for judicial review. See WAC 388-02-0215(4)(2007), WAC 388-02-0524(2007) (*Repealed by Wash. St. Reg. 08-21-144*), and WAC 388-02-0640.

In contrast, for other types of cases that are not listed in WAC 388-02-0215(4)(2007), the Office of Administrative Hearings has the authority to issue final orders, and is required to do so. WAC 388-02-0215(5)(2007), WAC 388-02-0527 (*Repealed by Wash. St. Reg. 08-21-144*). The Board of Appeals does not review cases where the order issued from the Office of Administrative Hearings is already the final order. WAC 388-02-0530(3)(2007). Therefore, in cases where the Office of Administrative Hearings has authority to issue a final order, those cases are appealable directly to Superior Court without Board of Appeals review. WAC 388-02-0645(2). PSM's case does not fit into this category and, instead, it includes the additional administrative remedy of review by the Board of Appeals.

PSM points out that some of the Department's rules state that final orders are entered from either the Office of Administrative Hearings or the Board of Appeals and are appealable to Superior Court. *Appellant's Brief* at 7-8. These rules simply reflect that both the Office of Administrative Hearings and the Board of Appeals, as discussed above, enter final orders. However, the rules do not support the proposition that Puget Sound is allowed to proceed to court without exhausting administrative remedies. The more specific rules control this issue, and specify which appeals need to be pursued in the Board of Appeals. *Knowles v. Holly*, 82 Wn.2d 694, 702, 513 P.2d 18, 23 (1973) (where a statutory provision deals with a subject in a general way and another deals with the same subject in a specific manner, the latter will prevail).

**2. PSM Cannot Skip A Level Of Agency Review By Failing To Timely Appeal**

PSM also seems to contend that their initial order became a "final order" 21 days after it was mailed – regardless of whether it took steps to seek review from Board of Appeals. They erroneously rely on WAC 388-02-0525 for this claim. *Appellant's Brief* at 7.<sup>6</sup>

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<sup>6</sup> WAC 388-02-0525 states, "If no one requests review of the initial order or if the request for review is dismissed, the initial order is final twenty one calendar days after it is mailed."

The rule does not support PSM's argument for several reasons. First, it is illogical to construe the finality that accompanies an unappealed initial order with relieving a party from its duty to exhaust administrative remedies, including petitioning the Board of Appeals for review. Here, the rule establishes when an initial order becomes final for enforcement purposes – not for purposes of appeal eliminating an available administrative remedy. Second, PSM demonstrated that it did not consider the OAH order “final” and appealable. This case was filed after PSM requested review at the Board of Appeals.<sup>7</sup>

PSM cites to no authority to support its claim that, when an initial order is “final” because no one has appealed it, it becomes an appealable “final order” that eliminates the statutory obligation to exhaust remedies. Under the appellant's theory, exhaustion of administrative remedies could be circumvented by parties simply not appealing to the next level of administrative review; this is not consistent with the requirement that appellants avail themselves of the administrative procedures that are available to them.

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<sup>7</sup> This case was also filed before the Board of Appeals denied review because of the missed deadline. The rule does not even apply to the time period when the Amended Petition for Review in this case was filed.

*See Ward v. Bd. of Skagit Cy. Comm'rs*, 86 Wn. App. at 272-273.

PSM's attempt to make an initial order a final, appealable order by failing to go to the next step in the administrative review process is also not supported by other Department hearing rules. These rules require the Office of Administrative Hearings or the Board of Appeals to take an affirmative action to either enter or send an order. For example, the rule regarding the timelines for seeking judicial review state that a petition for judicial review must be filed thirty days "after BOA or OAH mails its final order." WAC 388-02-0645 (emphasis added). Under the Appellant's theory, there would be no mail date because no final order would be mailed.<sup>8</sup>

The OAH order becomes final – enforceable and non-appealable –after 21 days when the parties do not move to the next level of administrative review or if review is denied. Such an OAH order, however, cannot be the subject of judicial review because the petitioner would have, by definition, failed to exhaust an available administrative remedy.

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<sup>8</sup> Even if this Court entertains PSM's theory, if the initial order somehow becomes the final order, then setting the judicial review deadline by the date the initial decision was mailed (December 24, 2007) would mean that the deadline for a petition for judicial review would be several weeks before the petition was filed in this case.

If further review is desired, there must be a timely petition for review to the BOA in order to exhaust administrative remedies. For this type of case in WAC 388-02-0215(4)(2007), only the Board of Appeal's final order is reviewable by the superior court.

**3. WAC 388-02-0645(2) Does Not Allow Puget Sound To Avoid Board Of Appeals Review**

The appellant also contends that the first sentence of WAC 388-02-0645(2) contemplates that judicial review may be requested without completing the administrative process. *Appellant's Brief* at 8. That is a mistaken and incomplete interpretation. WAC 388-02-0645(2) states, in full, that

Generally, you may file a petition for judicial review only after you have completed the administrative hearing process. However, you do not need to file a request for reconsideration of a final order before requesting judicial review.

For the most part, this rule simply states the basic principle of exhaustion of administrative remedies: Prior to petitioning for judicial review the administrative process should be completed. With the inclusion of the second sentence, it becomes clear that, to the extent this rule contemplates not completing the administrative hearing process, the only portion of that process that is not required is the filing of a request "for reconsideration" of a final order before requesting judicial review.

Reconsideration is distinct from the process of asking the Board to review an order. Compare WAC 388-02-0560(2007) to WAC 388-02-0610. Read in context, WAC 388-02-0645(2) does not support PSM's position.

The Department's rules do not allow PSM to skip a step in the process. Rather, the rules that PSM cites account for the fact that some cases must be appealed to the Board of Appeals and some cases do not. As evidenced by the Appellant's untimely appeal to the Board of Appeals, PSM knew that the instant case was one that needed to be appealed to the Board of Appeals. It was only after the Board of Appeals requested an explanation for the delay in filing the appeal that the Amended Petition for Judicial Review was filed. Rather than directly address that issue, which is already being litigated in a separate case before this court, PSM is attempting to skip a layer of the administrative process through this appeal. This case should be dismissed.

#### **IV. CONCLUSION**

PSM was required to request review from the Board of Appeals before seeking judicial review of an appeal of a provider overpayment. The Petition to the Board of Appeals was not timely, and the petition that this case is based on was filed before Board of Appeals' review was

even denied, this court should uphold the Superior Court's dismissal of this case.

RESPECTFULLY SUBMITTED this 22nd day of February, 2010.

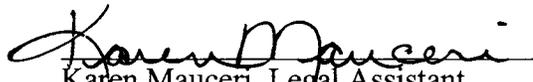
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**CERTIFICATE OF SERVICE**

I certify that I mailed a copy of the foregoing Brief of Respondent to Thomas L. Dickson, Attorney for Appellant, at Dickson Steinacker LLP, 1201 Pacific Avenue, Ste. 1401, Tacoma, WA 98402, postage prepaid, on February 22, 2010.

  
Karen Mauceri, Legal Assistant

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APPENDIX A  
WAC 388-02 (2007)

(2) DSHS may release public records to its offices and to outside agencies when the information relates to the administration of DSHS programs unless exempt by 45 C.F.R. 205.50 or other law.

(3) If an outside agency requests a public record for reasons other than information that relates to the administration of DSHS programs, the outside agency must have the individual's written authorization.

(4) Outside agencies receiving information are subject to applicable disclosure confidentiality laws.

[Statutory Authority: RCW 42.17.250 and 34.05.220. 99-15-065, § 388-01-170, filed 7/19/99, effective 8/19/99.]

**WAC 388-01-180 Who should be contacted to review an interpretive or policy statement index, or to get a copy of the documents?** DSHS issues administrative policy statements that apply to the whole department. Administrations may issue policies and interpretive statements that relate to their own programs. See RCW 34.05.010.

(1) To receive a copy of a DSHS administrative policy, send a written request to: Office of Legal Affairs, Rules and Policies Assistance Unit, P.O. Box 45850, Olympia, Washington: 98504-5850.

(2) To receive a copy or review a specific administration's policies or interpretive statements, send a written request to the administration.

[Statutory Authority: RCW 42.17.250 and 34.05.220. 99-15-065, § 388-01-180, filed 7/19/99, effective 8/19/99.]

**WAC 388-01-190 How can an individual get an index of DSHS' significant decisions?** (1) The DSHS board of appeals reviews and selects orders and creates an index of significant decisions that substantially affect DSHS performance (see RCW 42.17.260).

(2) The index:

- (a) Is divided into program categories;
- (b) Contains a copy or synopsis of the order; and
- (c) Is updated, as needed.

(3) An individual can inspect or request a copy of the index by contacting the board of appeals located at:

Board of Appeals  
Blake Office Park  
4500 - 10th Avenue Southeast  
Lacey, WA 98503-5803  
(360) 664-6100

Mailing address:  
Board of Appeals  
P.O. Box 45803  
Olympia, WA 98503-5803

(4) An individual may ask the board of appeals to index an order as a significant decision by sending a written request with a copy of the order to the mailing address.

[Statutory Authority: RCW 42.17.250 and 34.05.220. 99-15-065, § 388-01-190, filed 7/19/99, effective 8/19/99.]

**WAC 388-01-200 How are petitions for declaratory orders filed?** (1) First, read the information on declaratory orders in RCW 34.05.240 and WAC 10-08-250, 10-08-251, and 10-08-252.

(2007 Ed.)

(2) Next, file the petition with the Rules and Policies Assistance Unit; DSHS; P.O. Box 45850; Olympia, WA 98504-5850.

[Statutory Authority: RCW 42.17.250 and 34.05.220. 99-15-065, § 388-01-200, filed 7/19/99, effective 8/19/99.]

**Chapter 388-02 WAC**  
**DSHS HEARING RULES**  
(Formerly chapter 388-08 WAC)

**WAC**

**GENERAL**

- 388-02-0005 What is the purpose and scope of this chapter?
- 388-02-0010 What definitions apply to this chapter?
- 388-02-0015 How do the terms in the Administrative Procedure Act (APA) compare to this chapter?
- 388-02-0020 What does good cause mean?

**ADDRESSES**

- 388-02-0025 Where is the office of administrative hearings located?
- 388-02-0030 Where is the board of appeals located?

**DEADLINES**

- 388-02-0035 How are days counted when calculating deadlines for the hearing process?

**FILING AND SERVING PAPERS**

- 388-02-0040 How do parties send documents?
- 388-02-0045 What is service?
- 388-02-0050 How does a party serve someone?
- 388-02-0055 When must a party serve someone?
- 388-02-0060 When is service complete?
- 388-02-0065 How does a party prove service?
- 388-02-0070 What is filing?
- 388-02-0075 How does a party file documents?

**RESOLUTION OF DISPUTES**

- 388-02-0080 What are your options for resolving a dispute with DSHS?

**HEARING RIGHTS AND REQUESTS**

- 388-02-0085 Do you have a right to a hearing?
- 388-02-0090 Who may request a hearing?
- 388-02-0095 What if you have questions about requesting a hearing?
- 388-02-0100 How do you request a hearing?
- 388-02-0105 What information do you give when requesting a hearing?
- 388-02-0110 What happens after you request a hearing?
- 388-02-0115 May you withdraw your hearing request?

**INTERPRETERS**

- 388-02-0120 Do you have the right to an interpreter in the hearing process?
- 388-02-0125 What definitions apply to limited English proficient (LEP) parties?
- 388-02-0130 What requirements apply to notices for limited English speaking parties?
- 388-02-0135 What requirements apply to interpreters?
- 388-02-0140 May you waive interpreter services?
- 388-02-0145 What requirements apply to the use of interpreters?
- 388-02-0150 What requirements apply to hearing decisions involving limited English speaking parties?

**REPRESENTATION DURING THE HEARING PROCESS**

- 388-02-0155 Who represents you during the hearing process?
- 388-02-0160 If a DSHS employee cannot represent you, can they assist you during the hearing process?
- 388-02-0165 What if you would like to be represented by an attorney but you cannot afford one?
- 388-02-0170 Who represents DSHS during the hearing?

**PREHEARING MEETING WITH A DSHS REPRESENTATIVE**

- 388-02-0175 What is a prehearing meeting?
- 388-02-0180 What happens during a prehearing meeting?
- 388-02-0185 What happens after a prehearing meeting?

[Title 388 WAC—p. 173]

388-02-0190	What happens if you do not participate in a prehearing meeting?	388-02-0430	What may a party do if they disagree with an exhibit?
		388-02-0435	When should an ALJ receive proposed exhibits for a telephone hearing?
	<b>PREHEARING CONFERENCE WITH AN ADMINISTRATIVE LAW JUDGE</b>	388-02-0440	What is judicial notice?
388-02-0195	What is a prehearing conference?	388-02-0445	How does the ALJ respond to requests to take judicial notice?
388-02-0200	What happens during a prehearing conference?		
388-02-0205	What happens after a prehearing conference?		<b>WITNESSES</b>
388-02-0210	What happens if a party does not attend a prehearing conference?	388-02-0450	What is a witness?
	<b>ADMINISTRATIVE LAW JUDGES</b>	388-02-0455	Who may be a witness?
388-02-0215	What is the authority of the ALJ?	388-02-0460	How do witnesses testify?
388-02-0220	What rules and laws must an ALJ and review judge apply when making a decision?	388-02-0465	May the parties cross-examine a witness?
388-02-0225	May an ALJ or review judge decide that a DSHS rule is invalid?	388-02-0470	May witnesses refuse to answer questions?
388-02-0230	When is the ALJ assigned to the hearing?		<b>PROOF</b>
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388-02-0260	May DSHS amend a notice?	388-02-0500	What may an ALJ do before the record is closed?
388-02-0265	May you amend your hearing request?	388-02-0505	When is the record closed?
388-02-0270	Must you tell DSHS and OAH when your mailing address changes?	388-02-0510	What happens when the record is closed?
	<b>CONTINUANCES</b>		<b>HEARING DECISIONS</b>
388-02-0275	What is a continuance?	388-02-0515	What happens after the record is closed?
388-02-0280	Who may request a continuance?	388-02-0520	What information must the ALJ include in the decision?
	<b>DISMISSALS</b>	388-02-0524	In what cases does the ALJ enter the hearing decision as an initial order?
388-02-0285	What is an order of dismissal?	388-02-0525	When do initial orders become final?
388-02-0290	If your hearing is dismissed, may you request another hearing?	388-02-0527	In what cases does the ALJ enter the hearing decision as a final order?
388-02-0295	Where do you send a request to vacate an order of dismissal?	388-02-0530	What if a party disagrees with the ALJ's decision?
388-02-0300	What is the deadline for vacating an order of dismissal?		<b>CLERICAL ERRORS IN ALJ DECISIONS</b>
388-02-0305	How does an ALJ vacate an order of dismissal?	388-02-0540	How are clerical errors in ALJ decisions corrected?
	<b>STAYS</b>	388-02-0545	How does a party ask for a corrected ALJ decision?
388-02-0310	May a party request a stay of DSHS action?	388-02-0550	How much time do the parties have to ask for a corrected ALJ decision?
	<b>SUBPOENAS</b>	388-02-0555	What happens when a party requests a corrected ALJ decision?
388-02-0315	May a party require witnesses to testify or provide documents?		<b>REQUESTS FOR BOA REVIEW OF INITIAL ORDERS FOR CASES LISTED IN WAC 388-02-0215(4)</b>
388-02-0320	Who may prepare a subpoena?	388-02-0560	What is review?
388-02-0325	How is a subpoena served?	388-02-0565	What evidence does the review judge consider in a decision?
388-02-0330	May the ALJ quash a subpoena?	388-02-0570	Who may request review?
388-02-0335	Do you have to pay for a subpoena?	388-02-0575	What must a party include in the review request?
	<b>HEARING METHODS</b>	388-02-0580	What is the deadline for requesting review of cases listed in WAC 388-02-0215(4)?
388-02-0340	How is your hearing held?	388-02-0585	Where does a party send a request to review a case listed in WAC 388-02-0215(4)?
388-02-0345	Is an ALJ present at your hearing?		How does a party respond to the review request?
388-02-0350	Is your hearing recorded?	388-02-0590	What happens after the response deadline?
388-02-0355	Who may attend your hearing?	388-02-0595	
388-02-0360	May a party convert how a hearing is held?		<b>REVIEW JUDGES</b>
388-02-0365	How does a party convert how a hearing is held or how the witnesses or parties appear?	388-02-0600	What is the authority of the review judge?
388-02-0370	How are documents submitted for a telephone conference?		<b>REQUESTS FOR RECONSIDERATION OF FINAL ORDERS ENTERED BY OAH AND BOA</b>
388-02-0375	What happens at your hearing?	388-02-0605	What if a party does not agree with a final order entered by OAH or BOA?
388-02-0380	What is a group hearing?	388-02-0610	What is reconsideration?
388-02-0385	May a party withdraw from a group hearing?	388-02-0615	What must a party include in the reconsideration request?
	<b>EVIDENCE</b>	388-02-0620	What is the deadline for requesting reconsideration?
388-02-0390	What is evidence?	388-02-0625	Where does a party send a reconsideration request?
388-02-0395	When may the parties bring in evidence?	388-02-0630	How does a party respond to a reconsideration request?
388-02-0400	What evidence may the parties present during the hearing?	388-02-0635	What happens after a party requests reconsideration?
388-02-0405	What is a stipulation?		<b>REQUESTS FOR JUDICIAL REVIEW OF FINAL ORDERS</b>
388-02-0410	After the parties agree to a stipulation, may they change or reject it?	388-02-0640	What is judicial review?
388-02-0415	What are proposed exhibits?	388-02-0645	When must you ask for judicial review?
388-02-0420	Do the parties mark and number their proposed exhibits?	388-02-0650	How do you serve your petition for judicial review?
388-02-0425	Who decides whether to admit proposed exhibits into the record?		

**DISPOSITION OF SECTIONS FORMERLY  
CODIFIED IN THIS CHAPTER**

388-02-0535 Who may ask for a change in a decision? [Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0535, filed 9/1/00, effective 10/2/00.] Repealed by 02-21-061, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211.

**GENERAL**

**WAC 388-02-0005** What is the purpose and scope of this chapter? This chapter describes the general procedures that apply to the resolution of disputes between you and the various programs within the department of social and health services (DSHS). The rules of this chapter are intended to supplement for DSHS both the Administrative Procedure Act (APA), chapter 34.05 RCW, and the model rules, chapter 10-08 WAC, adopted by the office of administrative hearings (OAH).

(1) This chapter:

(a) Establishes rules encouraging informal dispute resolution between DSHS and persons or entities who disagree with its actions;

(b) Regulates all hearings involving DSHS; and

(c) Consolidates most DSHS hearing procedural rules into one chapter.

(2) Nothing in this chapter is intended to affect the constitutional rights of any person or to limit or change additional requirements imposed by statute or other rule. Other laws or rules determine if you have a hearing right, including the APA and DSHS program rules or laws.

(3) Specific DSHS program hearing rules prevail over the rules in this chapter.

[Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0005, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0010** What definitions apply to this chapter? The following definitions apply to this chapter:

**"Administrative law judge (ALJ)"** means an impartial decision-maker who is an attorney and presides at an administrative hearing. The office of administrative hearings (OAH), which is a state agency, employs the ALJs. ALJs are not DSHS employees or DSHS representatives.

**"BOA"** means the DSHS board of appeals.

**"Business days"** means all days except Saturdays, Sundays and legal holidays.

**"Calendar days"** means all days including Saturdays, Sundays and legal holidays.

**"Deliver"** means giving a document to someone in person.

**"Documents"** means papers, letters, writings, or other printed or written items.

**"DSHS"** means the department of social and health services.

**"DSHS representative"** means an employee of DSHS, a DSHS contractor, or an assistant attorney general authorized to represent DSHS in an administrative hearing. DSHS representatives include, but are not limited to, claims officers and fair hearing coordinators.

**"Final order"** means an order that is the final DSHS decision.

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**"Hearing"** means a proceeding before OAH that gives a party an opportunity to be heard in disputes about DSHS programs. For purposes of this chapter, hearings include administrative hearings, adjudicative proceedings, and any other similar term referenced under chapter 34.05 RCW, the Administrative Procedure Act, Title 388 of the Washington Administrative Code, chapter 10-08 WAC, or other law.

**"Initial order"** is a hearing decision made by an ALJ that may be reviewed by a review judge pursuant to WAC 388-02-0215(4).

**"Mail"** means placing the document in the mail with the proper postage.

**"OAH"** means the office of administrative hearings, a separate state agency from DSHS.

**"Party"** means a person or entity:

(1) Named in a DSHS action;

(2) To whom a DSHS action is directed; or

(3) Allowed to participate in a hearing to protect an interest as authorized by law or rule.

(4) DSHS is also a party.

**"Prehearing conference"** means a proceeding scheduled and conducted by an ALJ in preparation for a hearing.

**"Prehearing meeting"** means an informal voluntary meeting that may be held before any prehearing conference or hearing.

**"Program"** means a DSHS organizational unit and the services that it provides, including services provided by DSHS staff and through contracts with providers. Organizational units include, but are not limited to, administrations and divisions.

**"Record"** means the official documentation of the hearing process. The record includes tape recordings or transcripts, admitted exhibits, decisions, briefs, notices, orders, and other filed documents.

**"Review"** means the act of reviewing initial orders and making the final agency decision as provided by RCW 34.05.464.

**"Review judge"** means an attorney employed by the DSHS board of appeals (BOA) who is the reviewing officer in RCW 34.05.464 for cases listed in WAC 388-02-0215(4).

**"Rule"** means a state regulation. Rules are found in the Washington Administrative Code (WAC).

**"Stay"** means an order temporarily halting the DSHS decision or action.

**"You"** means any individual or entity that has a right to be involved with the DSHS hearing process, which includes a party or a party's representative. "You" does not include DSHS or its representative.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211, 02-21-061, § 388-02-0010, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0010, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0015** How do the terms in the Administrative Procedure Act (APA) compare to this chapter? To improve clarity and understanding, the rules in this chapter may use different words than the APA or the model rules. Following is a list of terms used in those laws and the terms as used in these rules:

[Title 388 WAC—p. 175]

Chapter 34.05 RCW Chapter 10-08 WAC	Chapter 388-02 WAC
Adjudicative proceeding	Different terms are used to refer to different stages of the hearing process, and may include prehearing meeting, prehearing conference, hearing, review, reconsideration and the entire hearing process
Agency	DSHS
Application for adjudicative proceeding	Request a hearing
Enter	Make, send
Presiding officer	ALJ or review judge
Reviewing officer	Review judge

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0015, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0015, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0020 What does good cause mean? (1)** Good cause is a substantial reason or legal justification for failing to appear, to act, or respond to an action. To show good cause, the ALJ must find that a party had a good reason for what they did or did not do, using the provisions of Superior Court Civil Rule 60 as a guideline.

(2) Good cause may include, but is not limited to, the following examples.

(a) You ignored a notice because you were in the hospital or were otherwise prevented from responding; or

(b) You could not respond to the notice because it was written in a language that you did not understand.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0020, filed 9/1/00, effective 10/2/00.]

#### ADDRESSES

**WAC 388-02-0025 Where is the office of administrative hearings located? (1)(a)** The office of administrative hearings (OAH) headquarters location is:

Office of Administrative Hearings  
2420 Bristol Court SW, 1st Floor  
P.O. Box 42488  
Olympia WA 98504-2488  
(360) 664-8717  
(360) 664-8721 (fax)

(b) The headquarters office is open from 8:00 am to 5:00 p.m. Mondays through Friday, except legal holidays.

(2) OAH field offices are at the following locations:

**Olympia**  
Office of Administrative Hearings  
2420 Bristol Court SW, 3rd Floor  
P.O. Box 42489  
Olympia, WA 98504-2489  
(360) 753-2531  
1-800-583-8271  
fax: (360) 586-6563

#### Seattle

Office of Administrative Hearings  
1904 3rd Ave., Suite 722  
Seattle, WA 98101-1100  
(206) 464-6322  
1-800-583-8270  
fax: (206) 587-5136

#### Everett

Office of Administrative Hearings  
2722 Colby, Suite 610  
Everett, WA 98201-3571  
(425) 339-1921  
1-800-583-8261  
fax: (425) 339-3907

#### Vancouver

Office of Administrative Hearings  
5300 MacArthur Blvd., Suite 100  
Vancouver, WA 98661  
(360) 690-7189  
1-800-243-3451  
fax: (360) 696-6255

#### Spokane

Office of Administrative Hearings  
Old City Hall Building, 5th Floor  
221 N. Wall Street, Suite 540  
Spokane, WA 99201  
(509) 456-3975  
1-800-366-0955  
fax: (509) 456-3997

#### Yakima

Office of Administrative Hearings  
32 N 3rd Street, Suite 320  
Yakima, WA 98901-2730  
(509) 575-2147  
1-800-843-3491  
fax (509) 454-7281

(3) You should contact the Olympia field office, under subsection (2), if you do not know the correct field office.

(4) You can obtain further hearing information at the OAH web site: [www.oah.wa.gov](http://www.oah.wa.gov)

[Statutory Authority: RCW 34.05.020 and chapter 34.05 RCW, Parts IV and V. 05-22-076, § 388-02-0025, filed 10/31/05, effective 12/1/05. Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0025, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0025, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0030 Where is the board of appeals located? (1)** The mailing address of the DSHS board of appeals (BOA) is:

DSHS Board of Appeals  
P.O. Box 45803  
Olympia, WA 98504-5803;

(2) The general telephone numbers of the BOA are:

(360) 664-6100  
1-877-351-0002 (toll free)  
(360) 664-6178 (TTD)  
(360) 664-6187 (fax);

(3) The physical location of the DSHS Board of Appeals (BOA) is:

Blake Office Bldg. East, 2nd Floor  
4500 10th Ave. SE  
Lacey, WA 98503

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0030, filed 9/1/00, effective 10/2/00.]

**DEADLINES**

**WAC 388-02-0035 How are days counted when calculating deadlines for the hearing process?** (1) When counting days to find out when a hearing deadline ends under DSHS rules or statutes:

(a) Do not include the day of the action, notice, or order. For example, if a hearing decision is mailed on Tuesday and you have twenty-one days to request a review, start counting the days with Wednesday.

(b) If the last day of the period ends on a Saturday, Sunday or legal holiday, the deadline is the next business day.

(c) For periods of seven days or less, count only business days. For example, if you have seven days to respond to a review request that was mailed to you on Friday, May 10, the response period ends on Tuesday, May 21.

(d) For periods over seven days, count every day, including Saturdays, Sundays, and legal holidays.

(2) The deadline ends at 5:00 p.m. on the last day.

(3) If you miss a deadline, you may lose your right to a hearing or appeal of a decision.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0035, filed 9/1/00, effective 10/2/00.]

**FILING AND SERVING PAPERS**

**WAC 388-02-0040 How do parties send documents?**

(1) When the rules in this chapter or in other law asks a party to send copies of documents to other parties, the party must mail or deliver copies to the DSHS representative and to all other parties or their representatives.

(2) When sending documents to OAH or BOA, you must mail or deliver the documents to one of the locations listed in WAC 388-02-0025(2) for OAH or in WAC 388-02-0030 for BOA.

(3) When sending documents to your assigned field office, you may use the address listed at the top of your notice of hearing. If a field office has not been assigned, all written communication about your hearing must be sent to the OAH Olympia field office which sends the communication to the correct office.

(4) Documents may be sent by giving them to someone in person, placing them in the mail with proper postage, or by fax or e-mail if the party mails a copy on the same day.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0040, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0045 What is service?** Service gives the party notice. When a document is given to the party, the party is considered served with official notice of the contents of the document.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0045, filed 9/1/00, effective 10/2/00.]

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**WAC 388-02-0050 How does a party serve someone?** Unless otherwise stated in law, a party may serve someone by:

- (1) Personal service (hand delivery);
- (2) First class, registered, or certified mail;
- (3) Fax if the party mails a copy of the document the same day;
- (4) Commercial delivery service; or
- (5) Legal messenger service.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0050, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0055 When must a party serve someone?** A party must serve all other parties and their representatives whenever the party files a pleading, brief or other document with OAH or BOA, or when required by law.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0055, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0060 When is service complete?** Service is complete when:

- (1) Personal service is made;
- (2) Mail is properly stamped, addressed and deposited in the United States mail;
- (3) Fax produces proof of transmission;
- (4) A parcel is delivered to a commercial delivery service with charges prepaid; or
- (5) A parcel is delivered to a legal messenger service with charges prepaid.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0060, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0065 How does a party prove service?** A party may prove service by providing any of the following:

- (1) A sworn statement;
- (2) The certified mail receipt signed by the recipient;
- (3) An affidavit or certificate of mailing;
- (4) A signed receipt from the person who accepted the commercial delivery service or legal messenger service package; or
- (5) Proof of fax transmission.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0065, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0070 What is filing?** (1) Filing is the act of delivering documents to OAH or BOA.

(2) The date of filing is the date documents are received by OAH or BOA.

(3) Filing is complete when the documents are received by OAH or BOA during office hours.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0070, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0075 How does a party file documents?**

(1) A party may file documents by delivering them to OAH or BOA by:

- (a) Personal service (hand delivery);
- (b) First class, registered, or certified mail;
- (c) Fax transmission if the party mails a copy of the document the same day;
- (d) Commercial delivery service; or

[Title 388 WAC—p. 177]

- (e) Legal messenger service.
- (2) A party cannot file documents by e-mail.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0075, filed 9/1/00, effective 10/2/00.]

### RESOLUTION OF DISPUTES

**WAC 388-02-0080 What are your options for resolving a dispute with DSHS?** (1) If you disagree with a DSHS decision or action, you have several options for resolving your dispute, which may include the following:

- (a) Any special prehearing alternative or administrative process offered by the program;
- (b) Prehearing meeting;
- (c) Prehearing conference; and
- (d) Hearing.

(2) Because you have a limited time to request a hearing, you must request a hearing within the deadline on the notice of DSHS action to preserve your hearing right.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0080, filed 9/1/00, effective 10/2/00.]

### HEARING RIGHTS AND REQUESTS

**WAC 388-02-0085 Do you have a right to a hearing?**

(1) You have a right to a hearing only if a law or DSHS rule gives you that right. If you are not sure, you should request a hearing to protect your right.

(2) Some DSHS programs may require you to go through an informal administrative process before you can request or have a hearing. The notice of DSHS action sent to you should include information about this requirement if it applies.

(3) You have a limited time to request a hearing. The deadline for your request varies by the DSHS program involved. You should submit your request right away to protect your right to a hearing, even if you are also trying to resolve your dispute informally.

(4) If you request a hearing, one is scheduled.

(5) If DSHS or the ALJ questions your right to a hearing, the ALJ decides whether you have that right.

(6) If the ALJ decides you do not have a right to a hearing, your request is dismissed.

(7) If the ALJ decides you do have a right to a hearing, the hearing proceeds.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0085, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0090 Who may request a hearing?**

Either you or your representative may request a hearing.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0090, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0095 What if you have questions about requesting a hearing?** If you have questions about how, when, and where to request a hearing, you should:

- (1) Contact the DSHS program involved, OAH, or BOA;
- (2) Review the notice sent to you of the DSHS action or decision; or
- (3) Review the applicable law or DSHS rule.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0095, filed 9/1/00, effective 10/2/00.]

[Title 388 WAC—p. 178]

**WAC 388-02-0100 How do you request a hearing?**

(1) You may request a hearing in writing or orally, depending upon which program is involved. The DSHS notice and applicable laws and rules should tell you whether the request must be in writing or may be made orally.

(2) If you are allowed to make an oral request, you may do so to a DSHS or OAH employee in person or by telephone or voice mail.

(3) You may send a written request by mail, delivery service, personal service, or by fax if you mail a copy the same day. You should send written requests to the location on the notice or to OAH at the location specified in WAC 388-02-0025(2).

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0100, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0105 What information do you give when requesting a hearing?** (1) Your hearing request must contain enough information to identify you and the DSHS action. You should include:

- (a) Your name, address, and telephone number;
- (b) A brief explanation of why you disagree with the DSHS action;
- (c) Your client identification or case number, contract number, or any other information that identifies your case or the program involved; and
- (d) Any assistance you need, including a foreign or sign language interpreter or any other accommodation for a disability.

(2) You should also refer to a program's specific rules or the notice to see if additional information is required in your request.

(3) OAH may not be able to process your hearing request if it cannot identify or locate you and determine the DSHS action involved.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0105, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0110 What happens after you request a hearing?** (1) After you request a hearing, OAH sends the parties a notice containing the hearing date, time, and place. This document is called the notice of hearing. For certain types of hearings, the parties may receive a written notice of a prehearing conference.

(2) Before your hearing is held:

(a) DSHS may contact you and try to resolve your dispute; and

(b) You are encouraged to contact DSHS and try to resolve your dispute.

(3) If you do not appear for your hearing, an ALJ may enter an order of default or an order dismissing your hearing according to WAC 388-02-0285.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0110, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0115 May you withdraw your hearing request?** (1) You may withdraw your hearing request for any reason and at any time by contacting DSHS or OAH in writing or orally with the ALJ and the other parties. After your request for withdrawal is received, your hearing is cancelled and OAH sends an order dismissing the hearing. If you with-

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draw your request you may not be able to request another hearing on the same DSHS action.

(2) If you withdraw your hearing request, you may only set aside the dismissal according to WAC 388-02-0290.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0115, filed 9/1/00, effective 10/2/00.]

### INTERPRETERS

**WAC 388-02-0120 Do you have the right to an interpreter in the hearing process?** If you need an interpreter because you or any of your witnesses are a person with limited English proficiency, OAH will provide an interpreter at no cost to you.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0120, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0125 What definitions apply to limited English proficient (LEP) parties?** The following definitions apply to LEP parties:

"Hearing impaired person" means a person who, because of a hearing or speech impairment, cannot readily speak, understand or communicate in spoken language.

"Intermediary interpreter" means an interpreter who:

- (1) Is a certified deaf interpreter (CDI); and
- (2) Is able to assist in providing an accurate interpretation between spoken and sign language or between types of sign language by acting as an intermediary between a hearing impaired person and a qualified interpreter.

"Limited English proficient (LEP)" includes limited English speaking persons or other persons unable to communicate in spoken English because of a hearing impairment.

"Limited English-speaking (LES) person" means a person who, because of non-English speaking cultural background or disability, cannot readily speak or understand the English language.

"Qualified interpreter" includes qualified interpreters for a limited English-speaking person or a person with a hearing impairment.

"Qualified interpreter for a limited English-speaking person" means a person who is readily able to interpret or translate spoken and written English communications to and from a limited English-speaking person. If an interpreter is court certified, the interpreter is considered qualified.

"Qualified interpreter for a person with a hearing impairment" means a visual language interpreter who is certified by the registry of interpreters for the deaf or National Association of the Deaf and is readily able to interpret or translate spoken communications to and from a hearing impaired person.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0125, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0130 What requirements apply to notices for limited English-speaking parties?** If OAH is notified that you are a limited English-speaking person, all hearing notices, decisions and orders for you must:

- (1) Be written in your primary language; or
- (2) Include a statement in your primary language:
  - (a) Indicating the importance of the notice; and

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(b) Telling you how to get help in understanding the notice and responding to it.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0130, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0135 What requirements apply to interpreters?** (1) OAH must provide a qualified interpreter to assist any person who:

- (a) Has limited English proficiency; and
- (b) Is a party or witness in a hearing.

(2) OAH may hire or contract with persons to interpret at hearings.

(3) Relatives of any party and DSHS employees may not be used as interpreters.

(4) The ALJ must determine, at the beginning of the hearing, if an interpreter can accurately interpret all communication for the person requesting the service. To do so, the ALJ considers the interpreter's:

- (a) Ability to meet the needs of the hearing impaired person or limited English speaking person;
- (b) Education, certification and experience;
- (c) Understanding of the basic vocabulary and procedures involved in the hearing; and
- (d) Ability to be impartial.

(5) The parties or their representatives may question the interpreter's qualifications and ability to be impartial.

(6) If at any time before or during the hearing the interpreter does not provide accurate and effective communication, the ALJ must provide another interpreter.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0135, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0140 May you waive interpreter services?** (1) If you are limited English proficient, you may ask to waive interpreter services.

(2) You must make your request in writing or through a qualified interpreter on the record.

(3) The ALJ must determine if your waiver has been knowingly and voluntarily made.

(4) You may withdraw your waiver at any time before or during the hearing.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0140, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0145 What requirements apply to the use of interpreters?** (1) Interpreters must:

(a) Use the interpretive mode that the parties, the hearing impaired person the interpreter and the ALJ consider the most accurate and effective;

(b) Interpret statements made by the parties and the ALJ;

(c) Not disclose information about the hearing without the written consent of the parties; and

(d) Not comment on the hearing or give legal advice.

(2) The ALJ must allow enough time for all interpretations to be made and understood.

(3) The ALJ may video tape a hearing and use it as the official transcript for hearings involving a hearing impaired person.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0145, filed 9/1/00, effective 10/2/00.]

[Title 388 WAC—p. 179]

**WAC 388-02-0150** What requirements apply to hearing decisions involving limited English-speaking parties? (1) When an interpreter is used at a hearing, the ALJ must explain that the decision is written in English but that a party using an interpreter may contact the interpreter for an oral translation of the decision at no cost to you.

(2) Interpreters must provide a telephone number where they can be reached. This number must be attached to any decision or order mailed to the parties.

(3) OAH or BOA must mail a copy of a decision or order to the interpreter for use in oral translation.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0150, filed 9/1/00, effective 10/2/00.]

#### REPRESENTATION DURING THE HEARING PROCESS

**WAC 388-02-0155** Who represents you during the hearing process? (1) You may represent yourself or have anyone represent you, except a DSHS employee.

(2) Your representative may be a friend, relative, community advocate, attorney, or paralegal.

(3) You should inform DSHS or OAH of your representatives name, address, and telephone number.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0155, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0160.** If a DSHS employee cannot represent you, can they assist you during the hearing process? Although DSHS employees cannot represent you during the hearing process, they may assist you by:

(1) Acting as a witness;

(2) Referring you to community legal resources;

(3) Helping you get nonconfidential information; or

(4) Informing you about or providing copies of the relevant laws or rules.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0160, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0165** What if you would like to be represented by an attorney but you cannot afford one? (1) Neither DSHS nor OAH will pay for an attorney.

(2) If you want an attorney to represent you and cannot afford one, community resources may be available to assist you. These legal services may be free or available at a reduced cost. DSHS or OAH can tell you who to contact for legal assistance.

(3) Information about legal assistance can also be found at [www.oah.wa.gov](http://www.oah.wa.gov).

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0165, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0170** Who represents DSHS during the hearing? (1) A DSHS employee, DSHS contractor, or the office of the attorney general represents DSHS during the hearing. The DSHS representative may or may not be an attorney.

(2) An ALJ is independent and does not represent DSHS or any other party.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0170, filed 9/1/00, effective 10/2/00.]

[Title 388 WAC—p. 180]

#### PREHEARING MEETING WITH A DSHS REPRESENTATIVE

**WAC 388-02-0175** What is a prehearing meeting? (1) A prehearing meeting is an informal meeting with a DSHS representative that may be held before any prehearing conference or hearing.

(2) A DSHS representative may contact you before the scheduled hearing to arrange a prehearing meeting. You may also contact DSHS to request a prehearing meeting.

(3) A prehearing meeting is voluntary. You are not required to request one and you are not required to participate in one.

(4) The prehearing meeting includes you and/or your representative, the DSHS representative, and any other party. An ALJ does not attend a prehearing meeting.

(5) The prehearing meeting gives the parties an opportunity to:

(a) Clarify issues;

(b) Exchange documents and witness statements;

(c) Resolve issues through agreement or withdrawal; and

(d) Ask questions about the hearing process and the laws and rules that apply.

(6) A prehearing meeting may be held or information exchanged:

(a) In person;

(b) By telephone conference call;

(c) Through correspondence; or

(d) Any combination of the above that is agreeable to the parties.

(7) If a prehearing conference is required by the program or rule, a prehearing meeting may not be an option available to you.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0175, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0180** What happens during a prehearing meeting? During a prehearing meeting:

(1) A DSHS representative:

(a) Explains the role of the DSHS representative in the hearing process;

(b) Explains how a hearing is conducted and the relevant laws and rules that apply;

(c) Explains your right to representation during the hearing;

(d) Responds to your questions about the hearing process;

(e) Identifies accommodation and safety issues;

(f) Distributes copies of the DSHS documents to be presented during the hearing;

(g) Provides, upon request, copies of relevant laws and rules;

(h) Identifies additional documents or evidence you may want or be required to present during the hearing;

(i) Tells you how to obtain documents from your file;

(j) Clarifies the issues; and

(k) Attempts to settle the dispute, if possible.

(2) You should explain your position and provide documents that relate to your case. You also have the right to consult legal resources.

(2007 Ed.)

(3) You and the DSHS representative may enter into written agreements or stipulations, including agreements that settle your dispute.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0180, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0185 What happens after a prehearing meeting?** (1) If you and DSHS resolve the dispute during the prehearing meeting and put it in writing or present the agreement to an ALJ, your agreement may be legally enforceable.

(2) Any agreements or stipulations made at the prehearing meeting must be presented to an ALJ before or during the hearing, if you want the ALJ to consider the agreement.

(3) If all of your issues are not resolved in the prehearing meeting, you may request a prehearing conference before an ALJ or go to your scheduled hearing. The ALJ may also order a prehearing conference.

(4) You may withdraw your hearing request at any time if DSHS agrees to some action that resolves your dispute, or for any other reason. If you withdraw your hearing request, the hearing is not held and the ALJ sends a written order of dismissal.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0185, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0190 What happens if you do not participate in a prehearing meeting?** You are not required to participate in a prehearing meeting. If you do not participate, it does not affect your right to a hearing.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0190, filed 9/1/00, effective 10/2/00.]

**PREHEARING CONFERENCE WITH AN ADMINISTRATIVE LAW JUDGE**

**WAC 388-02-0195 What is a prehearing conference?** (1) A prehearing conference is a formal meeting conducted by an ALJ to prepare for a hearing.

(2) Either the ALJ or a party may request a prehearing conference, but the ALJ decides whether to hold a prehearing conference. OAH sends notice of the conference to all parties.

(3) An ALJ may conduct the conference in person, by telephone conference call, by electronic means, or in any other manner acceptable to the parties. Your attendance is mandatory.

(4) A party may lose the right to participate during the hearing if that party does not attend the prehearing conference.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0195, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0200 What happens during a prehearing conference?** During a prehearing conference the parties and the ALJ may:

(1) Simplify or clarify the issues to be decided during the hearing;

(2) Agree to the date, time and place of the hearing;

(3) Identify accommodation and safety issues;

(4) Agree to postpone the hearing;

(2007 Ed.)

(5) Allow the parties to make changes in their own documents, including the DSHS notice or the hearing request;

(6) Agree to facts and documents to be entered during the hearing;

(7) Set a deadline to exchange names and phone numbers of witnesses and documents before the hearing;

(8) Schedule additional prehearing conferences;

(9) Resolve the dispute;

(10) Consider granting a stay if authorized by law or DSHS rule; or

(11) Determine any other procedural issues raised by the parties.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0200, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0205 What happens after a prehearing conference?** (1) After the conference ends, the ALJ must send a prehearing order describing:

(a) The actions taken;

(b) Any changes to the documents; and

(c) Any agreements reached.

(2) A party may object to the prehearing order by notifying the ALJ in writing within ten days after the mailing date of the order. The ALJ must issue a ruling on the objection.

(3) If no objection is made to the prehearing order, the order determines how the hearing is conducted, including whether the hearing will be in person or held by telephone conference or other means, unless the ALJ changes the order for good cause.

(4) The ALJ may take further appropriate actions to address other concerns.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0205, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0210 What happens if a party does not attend a prehearing conference?** (1) All parties are required to attend a prehearing conference.

(2) If you do not attend, you may not be allowed to participate in the hearing. The ALJ may dismiss your hearing request or enter an order of default against you.

(3) If DSHS does not attend, the ALJ may dismiss or reverse the action DSHS took against you.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0210, filed 9/1/00, effective 10/2/00.]

**ADMINISTRATIVE LAW JUDGES**

**WAC 388-02-0215 What is the authority of the ALJ?** (1) The ALJ must hear and decide the issues de novo (anew) based on what is presented during the hearing.

(2) As needed, the ALJ may:

(a) Determine the order for presenting evidence;

(b) Issue subpoenas or orders directing witnesses to appear or bring documents;

(c) Rule on objections, motions, and other procedural matters;

(d) Rule on an offer of proof made to admit evidence;

(e) Admit relevant evidence;

(f) Impartially question witnesses to develop the record;

(g) Call additional witnesses and request exhibits to complete the record;

[Title 388 WAC—p. 1811]

(h) Give the parties an opportunity to cross-examine witnesses or present more evidence against the witnesses or exhibits;

(i) Keep order during the hearing;

(j) Allow or require oral or written argument and set the deadlines for the parties to submit argument or evidence;

(k) Permit others to attend, photograph or electronically record hearings, but may place conditions to preserve confidentiality or prevent disruption;

(l) Allow a party to waive rights given by chapters 34.05 RCW or 388-02 WAC, unless another law prevents it;

(m) Decide whether a party has a right to a hearing;

(n) Issue protective orders;

(o) Consider granting a stay if authorized by law or DSHS rule; and

(p) Take any other action necessary and authorized under these or other rules.

(3) The ALJ administers oaths or affirmations and takes testimony.

(4) The ALJ enters an initial order in those cases where the parties may request review of an initial order by a review judge. Cases where the parties may request review of an initial order by a review judge are those relating to:

(a) Adult family home licenses under chapter 388-76 WAC;

(b) Boarding home licenses under chapter 388-78A WAC;

(c) Resident protection program findings under WAC 388-97-077;

(d) Nursing home licenses under WAC 388-97-550 through 388-97-695;

(e) DSHS findings of abandonment, abuse, financial exploitation or neglect under chapters 74.34, 74.39, 74.39A RCW and chapters 388-71 and 388-101 WAC;

(f) Where the client has requested a hearing under WAC 388-71-0560, the termination of a provider for placing clients in imminent jeopardy under RCW 74.39A.095(7) and WAC 388-71-0551;

(g) Where the client has requested a hearing under WAC 388-71-0560, the termination of a provider due to inadequate performance or inability to deliver quality care under RCW 74.39A.095(7) and WAC 388-71-0540 and 388-71-0551;

(h) Where the client has requested a hearing under WAC 388-71-0560, the denial of a contract to a provider due to inability of the provider to appropriately meet the care needs of clients under RCW 74.39A.095(8) and WAC 388-71-0546;

(i) Where the client has requested a hearing under WAC 388-71-0560, the denial or termination of a contract and subsequent denial of payment to a provider due to a disqualifying crime or lack of character, competence, or suitability to maintain the health, safety, and well-being of clients under RCW 43.20A.710(5) and WAC 388-71-0540 (3) through (5);

(j) Social service eligibility under chapter 388-71 WAC, and under chapter 388-106 WAC, except for financial eligibility requirements;

(k) Domestic violence perpetrator treatment program certification under chapter 388-60 WAC;

(l) Licensing or certification of homes, programs, facilities, providers, and agencies serving children, juveniles, expectant mothers and developmentally disabled persons

under chapter 74.15 RCW and chapters 388-140, 388-145, 388-147, 388-148 and 388-160 WAC;

(m) Child protective services findings of abuse and neglect under RCW 26.44.125 and chapter 388-15 WAC;

(n) Adoption support under WAC 388-27-0120 through 388-27-0390, for which a hearing has been held under WAC 388-27-0365;

(o) Child day care licenses under chapter 74.15 RCW and chapters 388-150, 388-151, 388-155, 388-295 and 388-296 WAC;

(p) Background checks of protective payees under WAC 388-460-0025, for which a hearing has been held under WAC 388-460-0070;

(q) Background checks of child care providers and other persons under WAC 388-290-0143, for which a hearing has been held under WAC 388-290-0260 as part of the working connections child care program;

(r) Background checks of persons acting in the place of a parent under WAC 388-454-0006, for which a hearing has been held under WAC 388-472-0005 (1)(j);

(s) Claims of good cause for not cooperating with the division of child support under WAC 388-422-0020;

(t) Parent address disclosure under WAC 388-14A-2114 through 388-14A-2140;

(u) Chemical dependency treatment provider certification under chapter 388-805 WAC;

(v) Community residential services and support certification under chapter 388-101 WAC;

(w) Denial or termination of eligibility for services under WAC 388-825-030 and 388-825-035, for which a hearing has been held under WAC 388-825-120 (1)(a);

(x) Development or modification of an individual service plan under WAC 388-825-050, for which a hearing has been held under WAC 388-825-120 (1)(b);

(y) Authorization, denial, reduction, or termination of services under WAC 388-825-055, for which a hearing has been held under WAC 388-825-120 (1)(c);

(z) Licensed community facilities under RCW 74.15.210 and WAC 388-730-0090;

(aa) Community mental health and involuntary treatment program licenses under WAC 388-865-0480;

(bb) Medical, dental, or transportation services, for which a hearing has been held under WAC 388-526-2610;

(cc) Medical provider overpayments, for which a hearing has been held under WAC 388-502-0230(5) or 388-502-0240(17); or

(dd) Background checks under WAC 388-06-0110 that result in denial of authorization for unsupervised access to children or to individuals with developmental disabilities, for which a hearing has been held under WAC 388-06-0240(1); or

(ee) Cases for which a right to a hearing existed, if the request for a hearing was received by OAH or DSHS on or before November 14, 2002, and WAC 388-740-0060 and 388-891-0275 did not apply.

(5) The ALJ makes the final decision and enters the final order in all cases except those cases set forth in subsection (4) of this section.

(6) A review judge has the same authority as an ALJ when presiding at a hearing.

[Statutory Authority: RCW 34.05.020, 34.05.220 and chapter 34.05 RCW, Parts IV and V, 06-16-008, § 388-02-0215, filed 7/20/06, effective 8/20/06. Statutory Authority: RCW 34.05.020 and chapter 34.05 RCW, Parts IV and V, 05-02-018, § 388-02-0215, filed 12/27/04, effective 1/27/05; 03-13-046, § 388-02-0215, filed 6/11/03, effective 7/12/03. Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371, § 211, 02-21-061, § 388-02-0215, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0215, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0220 What rules and laws must an ALJ and review judge apply when making a decision?** (1) ALJs and review judges must first apply the DSHS rules adopted in the Washington Administrative Code.

(2) If no DSHS rule applies, the ALJ or review judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington state constitutions, statutes, regulations, and court decisions.

[Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0220, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0225 May an ALJ or review judge decide that a DSHS rule is invalid?** (1) Neither an ALJ nor a review judge may decide that a DSHS rule is invalid or unenforceable. Only a court may decide this issue.

(2) If the validity of a DSHS rule is raised during the hearing, the ALJ or review judge may allow argument for court review.

[Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0225, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0230 When is the ALJ assigned to the hearing?** OAH assigns an ALJ at least five business days before the hearing. A party may ask which ALJ is assigned to the hearing by calling or writing the OAH field office listed on the notice of hearing.

[Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0230, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0235 May a party request a different judge?** A party may file a motion of prejudice against an ALJ under RCW 34.12.050. A party may also request that an ALJ or review judge be disqualified under RCW 34.05.425.

[Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0235, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0240 How does a party file a motion of prejudice?** (1) A party may request a different ALJ by sending a written motion of prejudice at least three business days before the hearing, or before the ALJ rules on a discretionary issue in the case. A motion of prejudice must include an affidavit or statement that a party does not believe that the ALJ can hear the case fairly.

(2) The party must send the request to the OAH field office where the ALJ works.

(3) The first timely request for a different ALJ is automatically granted. Any later request may be granted or denied by the chief ALJ or a designee.

[Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0240, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0245 May an ALJ or review judge be disqualified?** (1) An ALJ or review judge may be disquali-

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fied for bias, prejudice, or conflict of interest, or if one of the parties or a party's representative has an ex parte contact with the ALJ or review judge.

(2) Ex parte contact means a written or oral communication with the ALJ or review judge about something related to the hearing when the other parties are not present. Procedural questions are not considered an ex parte contact. Examples of procedural questions include clarifying the hearing date, time, or location or asking for directions to the hearing location.

(3) To ask to disqualify an ALJ or review judge a party must send a written petition for disqualification. A petition for disqualification is a written explanation to request assignment of a different ALJ or review judge. A party must promptly make the petition upon discovery of possible bias, conflict of interest or an ex parte contact.

(4) A party must send or deliver the petition to the ALJ or review judge assigned to the case. That ALJ or review judge must decide whether to grant or deny the petition and must state the facts and reasons for the decision.

[Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0245, filed 9/1/00, effective 10/2/00.]

## NOTICES

**WAC 388-02-0250 What happens after you request a hearing?** (1) After you request a hearing, OAH sends a notice of hearing to all parties and their representatives. OAH sends the notice of hearing at least seven business days before the hearing date.

(2) OAH may schedule a prehearing conference. OAH sends a notice of prehearing conference at least seven business days before the prehearing conference date.

(3) You may ask for a prehearing meeting even after you have requested a hearing.

[Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0250, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0255 What information must OAH include in the notice of hearing?** (1) A notice of hearing is a written notice that must include:

(a) The names of all parties who receive the notice and, if known, the names and addresses of their representatives;

(b) The name, mailing address, and telephone number of the ALJ, if known;

(c) The date, time, place, and nature of the hearing;

(d) The legal authority and jurisdiction for the hearing;

and

(e) The date of the hearing request.

(2) OAH also sends you information with your notice of hearing telling you the following:

(a) If you fail to attend or participate in a prehearing conference or a hearing, you may lose your right to a hearing. Then the ALJ may send:

(i) An order of default against you; or

(ii) An order dismissing the hearing.

(b) If you need a qualified interpreter because you or any of your witnesses are persons with limited English proficiency, OAH will provide an interpreter at no cost to you.

(c) If the hearing is to be held by telephone or in person, and how to request a change in the way it is held.

[Title 388 WAC—p. 183]

(d) How to indicate any special needs for yourself or your witnesses, including the need for an interpreter in a primary language or for sensory impairments.

(e) How to contact OAH if a party has a safety concern.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0255, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0260 May DSHS amend a notice? (1)**

The ALJ must allow DSHS to amend (change) the notice of a DSHS action before or during the hearing to match the evidence and facts.

(2) DSHS must put the change in writing and give a copy to the ALJ and the other parties.

(3) The ALJ must offer to continue or postpone the hearing to give the parties more time to prepare or present evidence or argument if there is a significant change from the earlier DSHS notice.

(4) If the ALJ grants a continuance, OAH must send, a new hearing notice at least seven business days before the hearing date.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0260, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0265 May you amend your hearing request? (1)** The ALJ may allow you to amend your hearing request before or during the hearing.

(2) The ALJ may postpone the hearing to give the other parties more time to prepare or present evidence or argument because of a significant change in the hearing request.

(3) If the ALJ grants a continuance, OAH must send a new hearing notice at least seven business days before the hearing date.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0265, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0270 Must you tell DSHS and OAH when your mailing address changes? (1)** You must tell DSHS and OAH, as soon as possible, when your mailing address changes.

(2) If you do not notify DSHS and OAH of a change in your mailing address and they continue to send notices and other important papers to your last known mailing address, the ALJ may assume that you received the documents.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0270, filed 9/1/00, effective 10/2/00.]

## CONTINUANCES

**WAC 388-02-0275 What is a continuance?** A continuance is a change in the date or time of a prehearing conference, hearing or the deadline for other action.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0275, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0280 Who may request a continuance?**

(1) Any party may request a continuance either orally or in writing.

(2) Before contacting the ALJ to request a continuance, a party should contact the other parties, if possible, to find out if they will agree to a continuance. If you are unable to con-

[Title 388 WAC—p. 184]

tact the parties, OAH or DSHS must assist you in contacting them.

(3) The party making the request for a continuance must let the ALJ know whether the other parties agreed to the continuance.

(a) If the parties agree to a continuance, the ALJ grants it unless the ALJ finds that good cause for a continuance does not exist.

(b) If the parties do not agree to a continuance, the ALJ sets a hearing to decide whether there is good cause to grant or deny the continuance.

(4) If a continuance is granted, OAH sends notice of the changed time and date of the hearing.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0280, filed 9/1/00, effective 10/2/00.]

## DISMISSALS

**WAC 388-02-0285 What is an order of dismissal? (1)**

An order of dismissal is an order sent by the ALJ to end the hearing. The order is made because the party who requested the hearing withdrew the request, failed to appear, or refused to participate, resulting in a default.

(2) If your hearing is dismissed because you did not appear or refused to participate, the DSHS decision stands.

(3) If the hearing is dismissed due to a written agreement between the parties, the parties must follow the agreement.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0285, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0290 If your hearing is dismissed, may you request another hearing? (1)** If the ALJ sends an order dismissing your hearing, you may ask that the ALJ vacate (set aside) the order of dismissal.

(2) If the order of dismissal is vacated, your hearing is reinstated, which means you get another opportunity to have a hearing on your initial request for hearing.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0290, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0295 Where do you send a request to vacate an order of dismissal?** You must send your request to vacate an order of dismissal to BOA or OAH. You should specify in your request why the order of dismissal should be vacated. BOA forwards any request received to OAH to schedule a hearing. OAH sends you a notice of the hearing on the request to vacate the order of dismissal.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0295, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0300 What is the deadline for vacating an order of dismissal? (1)** You must send your request to vacate an order to OAH or BOA twenty-one calendar days after the date the order of dismissal was mailed to you. If no request is received within that deadline, the dismissal order becomes a final order.

(2) You may make a late request to vacate the order of dismissal for up to one year after it was mailed but you must show good cause according to WAC 388-02-0020 for the late request to be accepted and the dismissal to be vacated.

(2007 Ed.)

(3) If you ask to vacate more than one year after the order was mailed, the ALJ may vacate the order of dismissal if the DSHS representative and any other party agrees to waive (excuse) the deadline.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0300, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0305 How does an ALJ vacate an order of dismissal?** (1) If your request was received more than twenty-one days, but less than one year after the dismissal order was mailed, the ALJ first must decide if you have good cause according to WAC 388-02-0020.

(2) If your request was timely or you show good cause for missing the deadline, the ALJ will receive evidence and argument at a hearing from the parties on whether the order of dismissal should be vacated.

(3) The ALJ vacates an order of dismissal and reinstates the hearing if you show good cause or if the DSHS representative agrees to waive the deadline. You will then be allowed to present your case about your original request for hearing, either at the same time or at a later date if a continuance is granted.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0305, filed 9/1/00, effective 10/2/00.]

## STAYS

**WAC 388-02-0310 May a party request a stay of DSHS action?** A party may request that an ALJ or review judge stay (stop) a DSHS action until there is a decision entered by the ALJ or review judge. An ALJ or review judge decides whether to grant the stay.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0310, filed 9/1/00, effective 10/2/00.]

## SUBPOENAS

**WAC 388-02-0315 May a party require witnesses to testify or provide documents?** A party may require witnesses to testify or provide documents by issuing a subpoena. A subpoena is an order to appear at a certain time and place to give testimony, or to provide books, documents, or other items.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0315, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0320 Who may prepare a subpoena?** (1) ALJs, DSHS, and attorneys for the parties may prepare subpoenas. If an attorney does not represent you, you may ask the ALJ to prepare a subpoena on your behalf. The ALJ may schedule a hearing to decide whether to issue a subpoena.

(2) An ALJ may deny a request for a subpoena. For example, an ALJ may deny a request for a subpoena when the ALJ determines that a witness has no actual knowledge regarding the facts or that the documents are not relevant.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0320, filed 9/1/00, effective 10/2/00.]

(2007 Ed.)

**WAC 388-02-0325 How is a subpoena served?** (1) Any person who is at least eighteen years old and not a party to the hearing may serve a subpoena.

(2) Service of a subpoena is complete when the server:

(a) Gives the witness a copy of the subpoena; or

(b) Leaves a copy at the residence of the witness with a person over the age of eighteen.

(3) To prove that a subpoena was served on a witness, the person serving the subpoena must sign a written, dated statement including:

(a) Who was served with the subpoena;

(b) When the subpoena was served;

(c) Where the subpoena was served; and

(d) The name, age, and address of the person who served the subpoena.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0325, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0330 May the ALJ quash a subpoena?** (1) A party may request that an ALJ quash (set aside) or change the subpoena request at any time before the deadline given in the subpoena.

(2) An ALJ may set aside or change a subpoena if it is unreasonable.

(3) Witnesses with safety or accommodation concerns should contact OAH.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0330, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0335 Do you have to pay for a subpoena?** There is no cost to prepare a subpoena, but you may have to pay for:

(1) Serving a subpoena;

(2) Complying with a subpoena; and

(3) Witness fees according to RCW 34.05.446(7).

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0335, filed 9/1/00, effective 10/2/00.]

## HEARING METHODS

**WAC 388-02-0340 How is your hearing held?** (1) Hearings may be held in person or by telephone conference.

(2) An in-person hearing is where:

(a) The parties appear face-to-face with the ALJ; or

(b) The parties appear by video conference.

(3) Whether a hearing is held in person or by telephone conference, the parties have the right to see all documents, hear all testimony and question all witnesses.

(4) Parties or witnesses may appear in person or by telephone conference at the discretion of the ALJ.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0340, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0345 Is an ALJ present at your hearing?** (1) If your hearing is scheduled as an in-person hearing, an ALJ is physically or visually present.

(2) If your hearing is scheduled as a telephone conference, an ALJ is present by telephone.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0345, filed 9/1/00, effective 10/2/00.]

[Title 388 WAC—p. 185]

**WAC 388-02-0350 Is your hearing recorded?** An ALJ must tape record or provide a record or transcript of the hearing.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0350, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0355 Who may attend your hearing?**

(1) All parties and their representatives may attend the hearing.

(2) Witnesses may be excluded from the hearing if the ALJ finds good cause.

(3) The ALJ may also exclude other persons from all or part of the hearing.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0355, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0360 May a party convert how a hearing is held?** (1) The parties have the right to request that:

(a) A hearing be converted (changed) to an in-person hearing or a telephone conference; or

(b) A witness appear in person or by telephone conference. OAH must advise you of the right to request a change in how a witness appears.

(2) In all DSHS cases, except public assistance cases, a party requesting a change in how a hearing is held must show good cause. A party must also show good cause to change the way a witness appears (in-person or by telephone conference). Some examples of good cause are:

(a) A party does not speak or understand English well.

(b) A party wants to present a significant number of documents during the hearing.

(c) A party does not believe that one of the witnesses or another party is credible, and wants the ALJ to have the opportunity to see the testimony.

(d) A party has a disability or communication barrier that affects their ability to present their case.

(e) A party believes that the personal safety of someone involved in the hearing process is at risk.

(3) In public assistance cases, a party has the right to request that a hearing be changed without showing good cause to the ALJ. Public assistance programs include:

(a) Temporary assistance for needy families (TANF);

(b) General or medical assistance;

(c) Food stamps; and

(d) Refugee assistance.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0360, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0365 How does a party convert how a hearing is held or how the witnesses or parties appear?** (1) If a party wants to convert the hearing or change how their witnesses or other parties appear, the party must contact OAH to request the change.

(2) The ALJ may schedule a prehearing conference to determine if the request should be granted.

(3) If the ALJ grants the request, the ALJ reschedules the hearing or changes how the witness or party appears.

(4) If the ALJ denies the request, the ALJ must issue a written order that includes findings of fact supporting why the request was denied.

[Title 388 WAC—p. 186]

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0365, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0370 How are documents submitted for a telephone conference?** (1) When a hearing is conducted by telephone, an ALJ may order the parties to provide the hearing documents at least five days before the hearing, so all parties have an opportunity to view them during the hearing.

(2) DSHS may be able to help you copy and send your documents to the ALJ and any other parties.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0370, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0375 What happens at your hearing?**

At your hearing:

(1) The ALJ:

(a) Explains your rights;

(b) Marks and admits or rejects exhibits;

(c) Ensures that a record is made;

(d) Explains that a decision is mailed after the hearing;

(e) Notifies the parties of appeal rights;

(f) May keep the record open for a time after the hearing if needed to receive more evidence or argument; and

(g) May take actions as authorized according to WAC 388-02-0215.

(2) The parties may:

(a) Make opening statements to explain the issues;

(b) Offer evidence to prove their positions, including oral or written statements of witnesses;

(c) Question the witnesses presented by the other parties; and

(d) Give closing arguments about what the evidence shows and what laws apply.

(3) At the end of the hearing if the ALJ does not allow more time to send in evidence, the record is closed.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0375, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0380 What is a group hearing?** (1) A group hearing may be held when two or more parties request a hearing about similar issues.

(2) Hearings may be combined at the request of the parties or the ALJ.

(3) All parties participating in a group hearing may have their own representative.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0380, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0385 May a party withdraw from a group hearing?** (1) A party may withdraw from a group hearing by asking the ALJ for a separate hearing.

(2) If a party asks to withdraw from a group hearing before the ALJ makes a discretionary ruling or the hearing begins, the ALJ must give the party a separate hearing.

(3) If a party later shows good cause, the ALJ may give the party a separate hearing at any time during the hearing process.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0385, filed 9/1/00, effective 10/2/00.]

(2007 Ed.)

**EVIDENCE**

**WAC 388-02-0390 What is evidence?** (1) Evidence includes documents, objects, and testimony of witnesses that parties give during the hearing to help prove their positions.

(2) Evidence may be all or parts of original documents or copies of the originals.

(3) Parties may offer statements signed by a witness under oath or affirmation as evidence, if the witness cannot appear.

(4) Testimony given with the opportunity for cross-examination by the other parties may be given more weight by the ALJ.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0390, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0395 When may the parties bring in evidence?** (1) The parties may bring evidence to any prehearing meeting, prehearing conference, or hearing, or may send in evidence before these events.

(2) The ALJ may set a deadline before the hearing for the parties to provide proposed exhibits and names of witnesses. If the parties miss the deadline, the ALJ may refuse to admit the evidence unless the parties show:

- (a) They have good cause for missing the deadline; or
- (b) That the other parties agree.

(3) If the ALJ gives the parties more time to submit evidence, the parties may send it in after the hearing. The ALJ may allow more time for the other parties to respond to the new evidence.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0395, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0400 What evidence may the parties present during the hearing?** The parties may bring any documents and witnesses to the hearing to support their position. However, the following provisions apply:

(1) The other parties may object to the evidence and question the witnesses;

(2) The ALJ determines whether the evidence is admitted and what weight (importance) to give it;

(3) If the ALJ does not admit the evidence the parties may make an offer of proof to show why the ALJ should admit it;

(4) To make an offer of proof a party presents evidence and argument on the record to show why the ALJ should consider the evidence; and

(5) The offer of proof preserves the argument for appeal.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0400, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0405 What is a stipulation?** (1) A stipulation is an agreement among two or more parties that certain facts or evidence is correct or authentic.

(2) If an ALJ accepts a stipulation, the ALJ must enter it into the record.

(3) A stipulation may be made before or during the hearing.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0405, filed 9/1/00, effective 10/2/00.]

(2007 Ed.)

**WAC 388-02-0410 After the parties agree to a stipulation, may they change or reject it?** (1) A party may change or reject a stipulation after it has been made.

(2) To change or reject a stipulation, a party must show the ALJ that:

(a) The party did not intend to make the stipulation or was mistaken when making it; and

(b) Changing or rejecting the stipulation does not harm the other parties.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0410, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0415 What are proposed exhibits?** Proposed exhibits are documents or other objects that a party wants the ALJ to consider when reaching a decision. After the document or object is accepted by the ALJ, it is admitted and becomes an exhibit.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0415, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0420 Do the parties mark and number their proposed exhibits?** (1) DSHS representatives must mark and number their proposed exhibits and provide copies to the other parties as far ahead of the hearing as possible.

(2) The ALJ may request that you mark and number your proposed exhibits before the hearing. You should bring enough copies of your proposed exhibits for all parties. If you do not bring enough copies, you must make your proposed exhibits available for copying.

(3) If you cannot afford to pay for copies of proposed exhibits, either DSHS or OAH must make the copies for you.

(4) The ALJ may require proof that you are unable to pay.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0420, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0425 Who decides whether to admit proposed exhibits into the record?** (1) The ALJ decides whether or not to admit a proposed exhibit into the record and also determines the weight (importance) of the evidence.

(2) The ALJ admits proposed exhibits into the record by marking, listing, identifying, and admitting the proposed exhibits.

(3) The ALJ may also exclude proposed exhibits from the record.

(4) The ALJ must make rulings on the record to admit or exclude exhibits.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0425, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0430 What may a party do if they disagree with an exhibit?** (1) A party may object to the authenticity or admissibility of any exhibit, or offer argument about how much weight the ALJ should give the exhibit.

(2) Even if a party agrees that a proposed exhibit is a true and authentic copy of a document, the agreement does not mean that a party agrees with:

(a) Everything in the exhibit or agrees that it should apply to the hearing;

(b) What the exhibit says; or

[Title 388 WAC—p. 187]

(c) How the ALJ should use the exhibit to make a decision.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0430, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0435** When should an ALJ receive proposed exhibits for a telephone hearing? (1) Parties should send their proposed exhibits to the ALJ and the other parties at least five days before the telephone hearing. In some cases, the ALJ may require that the parties send them earlier.

(2) Sending the proposed exhibits to the ALJ before the telephone hearing allows all parties to use them during the hearing.

(3) For a telephone hearing, DSHS may help you send copies of your proposed exhibits to the ALJ and the other parties if you cannot afford to do so.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0435, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0440** What is judicial notice? (1) Judicial notice is evidence that includes facts or standards that are generally recognized and accepted by judges, government agencies, or national associations.

(2) For example, an ALJ may take judicial notice of a calendar, a building code or a standard or practice.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0440, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0445** How does the ALJ respond to requests to take judicial notice? (1) The ALJ may consider and admit evidence by taking judicial notice.

(2) If a party requests judicial notice, or if the ALJ intends to take judicial notice, the ALJ may ask the party to provide a copy of the document that contains the information.

(3) If judicial notice has been requested, or if the ALJ intends to take judicial notice, the ALJ must tell the parties before or during the hearing.

(4) The ALJ must give the parties time to object to judicial notice evidence.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0445, filed 9/1/00, effective 10/2/00.]

## WITNESSES

**WAC 388-02-0450** What is a witness? (1) A witness is any person who makes statements or gives testimony that becomes evidence in a hearing.

(2) One type of witness is an expert witness. An expert witness is qualified by knowledge, experience, and education to give opinions or evidence in a specialized area.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0450, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0455** Who may be a witness? (1) A witness may be:

- (a) You or the DSHS representative; or
- (b) Anyone you, the ALJ, or the DSHS representative asks to be a witness, including DSHS employees.

(2) The ALJ decides who may testify as a witness.

[Title 388 WAC—p. 188]

(3) Unless DSHS agrees, a former DSHS employee may not be an expert witness against DSHS if that employee was actively involved in the case while working for DSHS.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0455, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0460** How do witnesses testify? All witnesses:

(1) Must affirm or take an oath to testify truthfully during the hearing.

(2) May testify in person or by telephone.

(3) May request interpreters from OAH at no cost to you.

(4) May be subpoenaed and ordered to appear according to WAC 388-02-0315.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0460, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0465** May the parties cross-examine a witness? (1) The parties have the right to cross-examine (question) each witness.

(2) If a party has a representative, only the representative, and not the party, may question the witness.

(3) The ALJ may also question witnesses.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0465, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0470** May witnesses refuse to answer questions? Witnesses may refuse to answer questions. However, if a witness refuses to answer, the ALJ may reject all of the related testimony of that witness.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0470, filed 9/1/00, effective 10/2/00.]

## PROOF

**WAC 388-02-0475** What evidence does an ALJ consider? (1) The ALJ may only consider admitted evidence to decide the case.

(2) Admission of evidence is based upon the reasonable person standard. This standard means evidence that a reasonable person would rely on in making a decision.

(3) The ALJ may admit and consider hearsay evidence. Hearsay is a statement made outside of the hearing used to prove the truth of what is in the statement. The ALJ may only base a finding on hearsay evidence if the ALJ finds that the parties had the opportunity to question or contradict it.

(4) The ALJ may reject evidence, if it:

- (a) Is not relevant;
  - (b) Repeats evidence already admitted; or
  - (c) Is from a privileged communication protected by law.
- (5) The ALJ must reject evidence if required by law.

(6) The ALJ decides:

(a) What evidence is more credible if evidence conflicts; and

(b) The weight given to the evidence.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0475, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0480** What does burden of proof mean? The party who has the burden of proof is the party

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who has the responsibility to provide evidence to persuade the ALJ that a position is correct.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0480, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0485 What is the standard of proof?**

Standard of proof refers to the amount of evidence needed to prove a party's position. Unless the rules or law states otherwise, the standard of proof in a hearing is a preponderance of the evidence. This standard means that it is more likely than not that something happened or exists.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0485, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0490 How is a position proven at hearing?** The ALJ decides if a party has met the burden of proof. The ALJ writes a decision based on the evidence presented during the hearing and consistent with the law.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0490, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0495 What is equitable estoppel? (1)**

Equitable estoppel is a legal doctrine defined in case law that may prevent DSHS from taking some action against you, such as collecting an overpayment.

(2) There are five elements of equitable estoppel. The standard of proof is clear and convincing evidence. You must prove all of the following:

(a) DSHS made a statement or took action or failed to take action, which is inconsistent with a later claim or position by DSHS. For example, DSHS gave you money based on your application, then later tells you that you received an overpayment and wants you to pay the money back based on the same information.

(b) You relied on DSHS' original statement, action or failure to act. For example, you believed DSHS acted correctly when you received money.

(c) You will be injured to your detriment if DSHS is allowed to contradict the original statement, action or failure to act. For example, you did not seek help from health clinics or food banks because you were receiving benefits from DSHS and you would have been eligible for these other benefits.

(d) Equitable estoppel is needed to prevent a manifest injustice. For example, you cannot afford to repay the money to DSHS, and you gave DSHS timely and accurate information when required but did not know that DSHS made a mistake.

(e) The exercise of government functions is not impaired. For example, the overpayment was not your fault and it was caused solely by a DSHS mistake.

(3) If the ALJ concludes that you have proven all of the elements of equitable estoppel in subsection (2) of this section with clear and convincing evidence, DSHS is stopped or prevented from taking action or enforcing a claim against you.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0495, filed 9/1/00, effective 10/2/00.]

(2007 Ed.)

## RECORD CLOSURE

**WAC 388-02-0500 What may an ALJ do before the record is closed?** Before the record is closed, the ALJ may:

- (1) Set another hearing date;
- (2) Enter orders to address limited issues if needed before writing and mailing a hearing decision to resolve all issues in the proceeding; or
- (3) Give the parties more time to send in exhibits or written argument.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0500, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0505 When is the record closed?** The record is closed:

- (1) At the end of the hearing if the ALJ does not allow more time to send in evidence or argument; or
- (2) After the deadline for sending in evidence or argument is over.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0505, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0510 What happens when the record is closed?** No more evidence may be taken without good cause after the record is closed.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0510, filed 9/1/00, effective 10/2/00.]

## HEARING DECISIONS

**WAC 388-02-0515 What happens after the record is closed?** (1) After the record is closed, the ALJ must write a hearing decision and send copies to the parties.

(2) The maximum time an ALJ has to send a decision is ninety calendar days after the record is closed, but many DSHS programs have earlier deadlines. Specific program rules may set the deadlines.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0515, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0520 What information must the ALJ include in the decision?** The ALJ must include the following information in the decision:

- (1) Identify the hearing decision as a DSHS case;
- (2) List the name and docket number of the case and the names of all parties and representatives;
- (3) Find the facts used to resolve the dispute based on the hearing record;
- (4) Explain why evidence is credible when the facts or conduct of a witness is in question;
- (5) State the law that applies to the dispute;
- (6) Apply the law to the facts of the case in the conclusions of law;
- (7) Discuss the reasons for the decision based on the facts and the law;
- (8) State the result and remedy ordered;
- (9) Explain how to request changes in the decision and the deadlines for requesting them;
- (10) State the date the decision becomes final according to WAC 388-02-0525; and

[Title 388 WAC—p. 189]

(1) Include any other information required by law or DSHS program rules.

[Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0520, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0524** In what cases does the ALJ enter the hearing decision as an initial order? The ALJ must enter the hearing decision as an initial order in cases set forth in WAC 388-02-0215(4).

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211, 02-21-061, § 388-02-0524, filed 10/15/02, effective 11/15/02.]

**WAC 388-02-0525** When do initial orders become final? If no one requests review of the initial order or if a review request is dismissed, the initial order is final twenty-one calendar days after it is mailed.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211, 02-21-061, § 388-02-0525, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0525, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0527** In what cases does the ALJ enter the hearing decision as a final order? In cases not covered by WAC 388-02-0215(4), the ALJ must enter the hearing decision as a final order.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211, 02-21-061, § 388-02-0527, filed 10/15/02, effective 11/15/02.]

**WAC 388-02-0530** What if a party disagrees with the ALJ's decision? (1) If a party disagrees with an ALJ's initial or final order because of a clerical error, the party may ask for a corrected decision from the ALJ as provided in WAC 388-02-0540 through 388-02-0555.

(2) If a party disagrees with an initial order for a case listed in WAC 388-02-0215(4) and wants it changed, the party must request review by BOA as provided in WAC 388-02-0560 through 388-02-0595.

If a party wants to stay the DSHS action until review of the initial order is completed, the party must request a stay from a review judge.

(3) Final orders may not be reviewed by BOA.

(4) If a party disagrees with an ALJ's final order, the party may request reconsideration as provided in WAC 388-02-0605 through 388-02-0635. You may also petition for judicial review of the final order as stated in WAC 388-02-0640 through 388-02-0650. You do not need to file a request for reconsideration of the final order before petitioning for judicial review. DSHS may not request judicial review.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211, 02-21-061, § 388-02-0530, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0530, filed 9/1/00, effective 10/2/00.]

#### CLERICAL ERRORS IN ALJ DECISIONS

**WAC 388-02-0540** How are clerical errors in ALJ decisions corrected? (1) A clerical error is a mistake that does not change the intent of the decision.

(2) The ALJ corrects clerical errors in hearing decisions by issuing a second decision referred to as a corrected deci-

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sion or corrected order. Corrections may be made to initial orders and final orders.

(3) Some examples of clerical error are:

(a) Missing or incorrect words or numbers;

(b) Dates inconsistent with the decision or evidence in the record such as using May 3, 1989, instead of May 3, 1998; or

(c) Math errors when adding the total of an overpayment or a child support debt.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211, 02-21-061, § 388-02-0540, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0540, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0545** How does a party ask for a corrected ALJ decision? (1) A party may ask for a corrected ALJ decision by calling or writing the OAH office that held the hearing.

(2) When asking for a corrected decision, please identify the clerical error you found.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211, 02-21-061, § 388-02-0545, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0545, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0550** How much time do the parties have to ask for a corrected ALJ decision? The parties must ask OAH for a corrected decision on or before the tenth calendar day after the order was mailed.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211, 02-21-061, § 388-02-0550, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0550, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0555** What happens when a party requests a corrected ALJ decision? (1) When a party requests a corrected initial or final order, the ALJ must either:

(a) Send all parties a corrected order; or

(b) Deny the request within three business days of receiving it.

(2) If the ALJ corrects an initial order and a party does not request review, the corrected initial order becomes final twenty-one calendar days after the original initial order was mailed.

(3) If the ALJ denies a request for a corrected initial order for a case listed in WAC 388-02-0215(4) and the party still wants the hearing decision changed, the party must request review from BOA.

(4) Requesting a corrected initial order for a case listed in WAC 388-02-0215(4) does not automatically extend the deadline to request review of the initial order by BOA. A party may ask for more time to request review when needed.

(5) If the ALJ denies a request for a corrected final order and you still want the hearing decision changed, you must request judicial review.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211, 02-21-061, § 388-02-0555, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020, 00-18-059, § 388-02-0555, filed 9/1/00, effective 10/2/00.]

(2007 Ed.)

**REQUESTS FOR BOA REVIEW OF INITIAL ORDERS FOR CASES LISTED IN WAC 388-02-0215(4)**

**WAC 388-02-0560 What is review?** (1) Review occurs when a party disagrees or wants a change in an initial order, other than correcting a clerical error.

(2) A party must request review of an initial order for a case listed in WAC 388-02-0215(4) from the BOA.

(3) The review judge considers the request, the initial order, and record, before deciding if the initial order may be changed.

(4) Review does not include another hearing by the BOA.

(5) BOA may not review final orders.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0560, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0560, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0565 What evidence does the review judge consider in a decision?** (1) The review judge, in most cases, only considers evidence given at the original hearing.

(2) The review judge may allow the parties to make oral argument on review.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0565, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0570 Who may request review?** (1) Any party may request BOA to review an initial order for a case listed in WAC 388-02-0215(4).

(2) If more than one party requests review, each request must meet the deadlines in WAC 388-02-0580.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0570, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0570, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0575 What must a party include in the review request?** A party must make the review request in writing and clearly identify the:

(1) Parts of the initial order with which the party disagrees; and

(2) Evidence supporting the party's position.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0575, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0575, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0580 What is the deadline for requesting review of cases listed in WAC 388-02-0215(4)?** (1) BOA must receive the written review request on or before the twenty-first calendar day after the initial order was mailed.

(2) A review judge may extend the deadline if a party:

(a) Asks for more time before the deadline expires; and

(b) Gives a good reason for more time.

(3) A review judge may accept a review request after the twenty-one calendar day deadline only if:

(a) The BOA receives the review request on or before the thirtieth calendar day after the deadline; and

(b) A party shows good reason for missing the deadline.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0580, filed 10/15/02, effective

(2007 Ed.)

11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0580, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0585 Where does a party send a request to review a case listed in WAC 388-02-0215(4)?**

(1) A party must send a request to review a case listed in WAC 388-02-0215(4) to BOA at the address given in WAC 388-02-0030. A party should also send a copy of the review request to the other parties.

(2) After receiving a party's review request, BOA sends a copy to the other parties, OAH, and representatives giving them time to respond.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0585, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0585, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0590 How does a party respond to the review request?** (1) A party does not have to respond to the review request. A response is optional.

(2) If a party responds, that party must send the response so that BOA receives it on or before the seventh business day after the date the review request was mailed to the party by BOA.

(3) The party must send a copy of the response to any other party or representative.

(4) If a party needs more time to respond, the party must contact BOA by the deadline in subsection (2) of this section and give a good reason.

(5) A review judge may accept and consider a party's response even if it is received after the deadline.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0590, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0595 What happens after the response deadline?** (1) After the response deadline, the record on review is closed unless there is a good reason to keep it open.

(2) A review judge is assigned to the review after the record is closed. To find out which judge is assigned, call BOA.

(3) After the record is closed, the assigned review judge:

(a) Reviews the case; and

(b) Enters a final order that affirms, changes, dismisses or reverses the initial order; or

(c) Remands (returns) the case to OAH for further action.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0595, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0595, filed 9/1/00, effective 10/2/00.]

**REVIEW JUDGES**

**WAC 388-02-0600 What is the authority of the review judge?** (1) A review judge may only review the cases listed in WAC 388-02-0215(4). A review judge has the same decision-making authority as an ALJ in the following cases, but must consider the ALJ's opportunity to observe the witnesses:

(a) Licensing, certification and related civil fines;

(b) Rate-making proceedings; and

(c) Parent address disclosure.

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(2) In all other cases, a review judge may only change the hearing decision if:

(a) There are irregularities, including misconduct of a party or misconduct of the ALJ or abuse of discretion by the ALJ, that affected the fairness of the hearing;

(b) The findings of fact are not supported by substantial evidence based on the entire record;

(c) The decision includes errors of law;

(d) The decision needs to be clarified before the parties can implement it; or

(e) Findings of fact must be added because the ALJ failed to make an essential factual finding. The additional findings must be supported by substantial evidence in view of the entire record and must be consistent with the ALJ's findings that are supported by substantial evidence based on the entire record.

(3) Review judges have the authority to enter final orders for the cases listed in WAC 388-02-0215(4).

(4) Review judges may remand cases listed in WAC 388-02-0215(4) to the ALJ for further action.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0600, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0600, filed 9/1/00, effective 10/2/00.]

#### REQUESTS FOR RECONSIDERATION OF FINAL ORDERS ENTERED BY OAH AND BOA

**WAC 388-02-0605 What if a party does not agree with a final order entered by OAH or BOA?** (1) If a party does not agree with the final order and wants it reconsidered, the party must:

(a) Ask the ALJ to reconsider the decision, if the final order was entered by an ALJ; or

(b) Ask the review judge to reconsider the decision, if the final order was entered by a review judge.

(2) The final order or the reconsideration decision is the final agency decision. If you disagree with that decision, you must petition for judicial review to change it.

(3) You may ask the court to stay or stop the DSHS action after filing the petition for judicial review.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0605, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0605, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0610 What is reconsideration?** (1) Reconsideration is:

(a) Asking an ALJ to reconsider a final order entered by the ALJ because the party believes the ALJ made a mistake; and

(b) Asking a review judge to reconsider a final order entered by a review judge because the party believes the review judge made a mistake.

(2) If a party asks for reconsideration of the final order, the reconsideration process must be completed before you request judicial review. However, you do not need to request reconsideration of a final order before you request judicial review.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0610, filed 10/15/02, effective

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11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0610, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0615 What must a party include in the reconsideration request?** The party must make the request in writing and clearly state why the party wants the final order reconsidered.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0615, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0615, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0620 What is the deadline for requesting reconsideration?** (1) If OAH entered the final order, OAH must receive a written reconsideration request on or before the tenth calendar day after the final order was mailed.

(2) If BOA entered the final order, BOA must receive a written reconsideration request on or before the tenth calendar day after the final order was mailed.

(3) If a reconsideration request is received after the deadline, the final order will not be reconsidered and the deadline to ask for superior court review continues to run.

(4) OAH or BOA may extend its deadline if a party:

(a) Asks for more time before the deadline expires; and

(b) Gives a good reason for the extension.

(5) If a party does not request reconsideration or ask for an extension within the deadline, the final order may not be reconsidered and it becomes the final agency decision.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0620, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0620, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0625 Where does a party send a reconsideration request?** (1) A party must send a written reconsideration request to OAH, if OAH entered the final order, or to BOA, if BOA entered the final order.

(2) After receiving a reconsideration request, OAH or BOA sends a copy to the other parties and representatives giving them time to respond.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0625, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0625, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0630 How does a party respond to a reconsideration request?** (1) A party does not have to respond to a request. A response is optional.

(2) If a party responds, that party must send a response to OAH, if OAH entered the final order, or to BOA, if BOA entered the final order, by or before the seventh business day after the date OAH or BOA mailed the request to the party.

(3) A party must send a copy of the response to any other party or representative.

(4) If a party needs more time to respond, OAH or BOA may extend its deadline if the party gives a good reason within the deadline in subsection (2) of this section.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0630, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0630, filed 9/1/00, effective 10/2/00.]

(2007 Ed.)

**WAC 388-02-0635 What happens after a party requests reconsideration?** (1) After OAH or BOA receives a reconsideration request, an ALJ or review judge has twenty calendar days to send a reconsideration decision unless OAH or BOA sends notice allowing more time.

(2) After OAH or BOA receives a reconsideration request, the ALJ or review judge must either:

- (a) Write a reconsideration decision; or
- (b) Send all parties an order denying the request.

(3) If the ALJ or review judge does not send an order or notice granting more time within twenty days of receipt of the reconsideration request, the request is denied.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0635, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0635, filed 9/1/00, effective 10/2/00.]

**REQUESTS FOR JUDICIAL REVIEW OF FINAL ORDERS**

**WAC 388-02-0640 What is judicial review?** (1) Judicial review is the process of appealing a final order to a court.

(2) You may appeal a final order by filing a written petition for judicial review that meets the requirements of RCW 34.05.546. DSHS may not request judicial review.

(3) You must consult RCW 34.05.510 to 34.05.598 for further details of the judicial review process.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0640, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0640, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0645 When must you ask for judicial review?** (1) You must file your petition for judicial review with the superior court within thirty calendar days after OAH or BOA mails its final order.

(2) Generally, you may file a petition for judicial review only after you have completed the administrative hearing process. However, you do not need to file a request for reconsideration of a final order before requesting judicial review.

[Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0645, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0645, filed 9/1/00, effective 10/2/00.]

**WAC 388-02-0650 How do you serve your petition for judicial review?** (1) You must file and serve the petition for judicial review of a final order within thirty days after the date it was mailed. You must file your petition for judicial review with the court. You must serve copies of your petition on DSHS, the office of the attorney general, and all other parties.

(2) To serve DSHS, you must deliver a copy of the petition to the secretary of DSHS or to BOA. You may hand deliver the petition or send it by mail that gives proof of receipt. The physical location of the secretary is:

DSHS Office of the Secretary  
 OB-2, 4th Floor  
 Mail Stop 45010  
 14th and Jefferson  
 Olympia, WA 98504-5010

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The mailing address of the secretary is:

DSHS Office of the Secretary  
 P.O. Box 45010  
 Olympia, WA 98504-5010

The physical and mailing addresses for BOA are in WAC 388-02-0030.

(3) To serve the office of the attorney general and other parties, you may send a copy of the petition for judicial review by regular mail. You may send a petition to the address for the attorney of record to serve a party. You may serve the office of the attorney general by hand delivery to:

Office of the Attorney General  
 7141 Cleanwater Drive S.W.  
 Tumwater, Washington 98501

The mailing address of the attorney general is:

Office of the Attorney General  
 P.O. Box 40124  
 Olympia WA 98504-0124

[Statutory Authority: RCW 34.05.220. 06-24-072, § 388-02-0650, filed 12/4/06, effective 1/4/07. Statutory Authority: RCW 34.05.020, chapter 34.05 RCW, Parts IV and V, 2002 c 371 § 211. 02-21-061, § 388-02-0650, filed 10/15/02, effective 11/15/02. Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0650, filed 9/1/00, effective 10/2/00.]

**Chapter 388-03 WAC**

**RULES AND REGULATIONS FOR THE CERTIFICATION OF DSHS SPOKEN LANGUAGE INTERPRETERS AND TRANSLATORS**

**WAC**

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