

WSR 23-08-086
PROPOSED RULES
OFFICE OF
ADMINISTRATIVE HEARINGS
[Filed April 5, 2023, 11:20 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-19-088.

Title of Rule and Other Identifying Information: WAC 10-24-010
Representation as an accommodation for a party with disabilities.

Some parties with disabilities may not be able to meaningfully participate in adjudicative proceedings before the office of administrative hearings (OAH). Such parties may require a disability accommodation that provides them with a representative. This rule describes a process for determining if a party qualifies for this accommodation. It also describes how the appointment of a suitable representative is made.

Hearing Location(s): On May 9, 2023, at 1:00 p.m., at the Office of Administrative Hearings, 2420 Bristol Court S.W., Olympia, WA 98502. For directions, call or go to our public website <https://oah.wa.gov>.

Date of Intended Adoption: June 6, 2023.

Submit Written Comments to: Sabiha Malikani Ahmad, P.O. Box 42488, Olympia, WA 98504-2488, email rulemaking@oah.wa.gov, fax 360-664-8721, by May 9, 2023.

Assistance for Persons with Disabilities: Contact Johnette Sullivan, deputy chief ALJ, ADA coordinator, phone 360-407-2700, fax 360-664-8721, TTY 711, email OAH_ADACoordinator@oah.wa.gov, by May 2, 2023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The changes are intended to improve clarity and readability. The proposal clarifies the records that are confidential under the Public Records Act. We have made certain other changes to improve the transparency of the process. Subsections that expired two years after implementation are being removed. OAH failed to establish a network of suitable representatives and that section is removed. The proposal does not change the eligibility requirements for the accommodation.

Reasons Supporting Proposal: The purpose serves to ensure that OAH's accommodation rule for people with disabilities is "clearly and simply stated, so that it can be understood by those required to comply," RCW 34.05.220(5). Furthermore, the transparent articulation of our current process as it has developed in the early years of this rule's implementation serves our mandate under the Public Records Act whereby "Each state agency shall separately state and currently publish in the Washington Administrative Code [...] (b) Statements of the general course and method by which its operations are channeled and determined, including the nature and requirements of all formal and informal procedures available; (c) Rules of procedure[.]" RCW 42.56.040.

Statutory Authority for Adoption: RCW 34.12.080, 34.05.250, and 34.12.030.

Statute Being Implemented: This rule implements the accommodation mandates under the Americans with Disabilities Act (ADA) and antidiscrimination mandates under the Washington law against discrimination (WLAD). OAH is obligated to ensure parties have access to its services under the ADA and WLAD. The OAH possesses obligations pertinent to

this rule under Title II of ADA as a state agency, as well as Title III of ADA as a place of public accommodation.

Rule is necessary because of federal law, ADA, 42 U.S.C. §§ 12131-12134, 12181-12189; The Rehabilitation Act of 1973 29 U.S.C. §701 *et seq.*

Name of Proponent: OAH, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Johnette Sullivan, Deputy Chief ALJ, 2420 Bristol Court S.W., Olympia, WA 98502, 360-407-2700.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328.

OAH's proposed amendment does not involve rules of any of the agencies identified in RCW 34.05.328(5) for which a cost-benefit analysis is required.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Citation of the specific federal statute or regulation and description of the consequences to the state if the rule is not adopted: "Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

"No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity." 28 C.F.R. § 35.130(a).

"A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130 (b)(7)(i).

"Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted a reasonable modification that was denied to an individual without a disability." 28 C.F.R. § 35.130(i).

"No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182.

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party; rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect; and rules adopt, amend, or repeal a procedure, practice, or requirement relating to agency hearings; or a filing or related

process requirement for applying to an agency for a license or permit.

Scope of exemption for rule proposal:
Is fully exempt.

April 5, 2023

Lorraine Lee

Chief Administrative Law Judge

OTS-4497.2

AMENDATORY SECTION (Amending WSR 17-17-079, filed 8/16/17, effective 1/1/18)

WAC 10-24-010 (~~(Accommodation.)~~) Representation as an accommodation for a party with disabilities. (1) (~~(Accommodation requests under the federal Americans with Disabilities Act (ADA) by a party to an office of administrative hearings adjudicative proceeding are handled pursuant to the office of administrative hearings' policy.)~~) **Purpose.** This section specifically applies to (~~(requests for)~~) representation as (~~(an)~~) a necessary accommodation in adjudicative proceedings before the office of administrative hearings (OAH). The appointment of a suitable representative may be an appropriate response in those cases where the party is unable to meaningfully participate in an adjudicative proceeding due to a disability. This section is intended to ensure that all requests for accommodation are addressed in accordance with the requirements of the Americans with Disabilities Act (ADA) and (~~(that any accommodation response is the minimum necessary to effectively address the needs of the party)~~) the Washington law against discrimination.

(2) **Definitions.**

(a) "Disability" as used in this section is defined under 42 U.S.C. Sec. 12102. (~~(Disability does not include factors such as lack of education, lack of English proficiency, or other nondisability factors.)~~)

(b) "Suitable representative" means an individual who is qualified under subsection (1) of this section to provide the assistance needed to enable (~~(an otherwise unrepresented)~~) a self-represented party with a disability to meaningfully participate in the adjudicative proceeding.

(c) "~~(Agency)~~ ADA coordinator" is an (~~(administrative law judge)~~) employee designated by the chief administrative law judge (~~(to make the assessment and accommodation determinations described in subsection (3) of this section)~~).

(3) (~~(If,~~) **Requests and referrals.** The representative accommodation process can begin by the party's own request or another person's referral.

(a) Requests. The party may request a representative accommodation verbally, online, in the hearing request form, or by contacting OAH. Requests should be made in advance whenever possible.

(b) Referrals by others. Other persons, including a party to the proceeding, may inform the ADA coordinator that the party may need accommodation. The ADA coordinator will contact the party.

(c) Referral by administrative law judge (ALJ). During any stage of an adjudicative proceeding, the ~~((administrative law judge or any party has a reasonable belief that an otherwise unrepresented party may be))~~ ALJ may believe that a self-represented party is unable to meaningfully participate in the adjudicative proceeding because of a disability ~~((, with that))~~. In forming this belief, the ALJ may refer to subsection (7) of this section. With the party's consent the ~~((ad-~~ministrative law judge)) ALJ shall refer the party to the ~~((agency))~~ ADA coordinator and delay ~~((commencing))~~ starting or resuming the adjudicative proceeding until the ~~((accommodation request is addressed by the))~~ ADA coordinator issues an accommodation determination.

(4) **Expedited process.** The ~~((agency))~~ ADA coordinator will expedite the assessment and accommodation process to the greatest extent practicable ~~((and consistent with the party's limitations.~~

~~(5) All records considered in the decision whether to appoint a suitable representative shall be kept confidential and held separately from the adjudicative proceeding record.~~

~~(6) Upon a party's request for a suitable representative or referral from the administrative law judge, the agency)) while minimizing undue burdens, fundamental alterations of process, and prejudice to parties.~~

(5) Confidentiality. OAH keeps confidential all health information from health care providers, health plans, and other covered entities under the federal Health Insurance Portability and Accountability Act and the state Health Care Information Access and Disclosure Act in chapter 70.02 RCW. However, all other records considered or created during the accommodation process may be subject to public disclosure under the state Public Records Act in chapter 42.56 RCW. The ADA coordinator will not add records to the adjudicative proceeding record unless at the self-represented party's request.

(6) Disability determination. The ADA coordinator must promptly review requests and referrals and determine whether the party ~~((is a person with))~~ has a disability. The ~~((agency))~~ ADA coordinator may require documentation from the party at the coordinator's discretion.

(7) Meaningful participation determination. If the party ~~((is a person with))~~ has a disability, the ~~((agency))~~ ADA coordinator must determine whether the party is unable to meaningfully participate in the adjudicative proceeding ~~((as a result of))~~ due to the disability. The existing assistance of a legal guardian, near relative, or friend shall not affect the ~~((agency))~~ ADA coordinator's determination of whether the party is able to meaningfully participate in the adjudicative proceeding. The ~~((agency))~~ ADA coordinator shall consider the following:

- (a) Whether the party has a rational and factual understanding of:
 - (i) The nature and object of the adjudicative proceeding;
 - (ii) The right of representation;
 - (iii) The right to present, examine, and object to evidence;
 - (iv) The right to cross-examine witnesses; and
 - (v) The right to appeal.
- (b) Whether the party has sufficient present ability to:
 - (i) Exercise the rights in (a) of this subsection;
 - (ii) Make informed decisions about whether to waive the rights in (a) of this subsection;
 - (iii) Physically participate in the adjudicative proceeding;
 - (iv) Respond to any allegations, issues, arguments, and evidence presented by other parties;

(v) Evaluate and coherently discuss arguments and defenses;
(vi) Present evidence relevant to eligibility for relief;
(vii) Present coherent testimony based upon adequate recall; and
(viii) Act upon instructions and information presented by other parties and the ((administrative law judge)) ALJ.

(c) Whether the party's spouse or registered domestic partner is their co-party in the adjudicative proceeding and the co-party can meaningfully participate without a suitable representative.

(8) **Accommodation determination.** If the party is unable to meaningfully participate in the adjudicative proceeding ((as a result of)) due to a disability, the ((agency)) ADA coordinator will ((commence an interactive process)) communicate with the party to determine the type of accommodation required to allow the party to meaningfully participate in the adjudicative proceeding, specifically:

(a) Whether an alternative accommodation can adequately address the party's specific disability-related limitations; or

(b) Whether a suitable representative is the most appropriate accommodation.

(9) **Accommodation denial.** If the ((agency)) ADA coordinator determines ((that appointment of)) a suitable representative is not ((the accommodation)) needed, the ((agency)) ADA coordinator will inform the party in writing((, or any other communication appropriate to the situation, of the denial of a suitable representative, including how to seek review of the decision under subsection (16))) of the reasons for denial and how to seek review of the decision under subsection (17) of this section.

(10) **No cost to party.** If the ((agency)) ADA coordinator determines that appointment of a suitable representative is the necessary accommodation ((necessary for a party's meaningful participation in an adjudicative proceeding)), the ((agency)) ADA coordinator will identify an individual to assist the party at no cost to the party.

(11) **Suitable representative factors.** To identify an individual, the ((agency)) ADA coordinator will consider the needs identified in the assessment under subsection (7) of this section and any other factors, including:

(a) The party's preferences;

(b) The knowledge, skills and abilities of the individual being considered, including:

(i) Knowledge of or the ability to timely attain knowledge of the procedural rules;

(ii) Knowledge of or ability to timely attain knowledge of the substance at issue;

(iii) Experience and training in advocating for people with disabilities; and

(iv) The individual's availability to meet the timelines and duration of the particular adjudicative proceeding.

~~((c) An individual is not eligible to be appointed as a suitable representative if the individual is employed by the office of administrative hearings, or is prohibited by law from representing the party.~~

~~(d))~~ **(12) Acceptance and appointment.** The ((agency)) ADA coordinator will inform the party with a disability that an individual has been identified to assist as the party's suitable representative. The party will show acceptance of the appointment in writing or in any other form consistent with the party's disability. The appointment of a suitable representative is made by the chief ALJ. The appointment is effective upon acceptance of the accommodation by the party with a disability.

~~(13) **Rejection.** The party has the right to reject the identified suitable representative. If the party disagrees with the appointment, the party will contact the ((agency)) ADA coordinator ((. The agency)) to request a new representative. If the request contains new disability or suitability-related information, the ADA coordinator ((will evaluate the party's reconsideration request, and)) may consider identifying another individual to be appointed as the party's suitable representative ((, if the request for reconsideration contains new disability or suitability related information.~~

~~(12) The appointment of a suitable representative is made by the chief administrative law judge. The appointment is effective upon acceptance of the accommodation by the party with a disability. The party has the right to reject the appointment of a suitable representative).~~

~~((13))~~ (14) Notice of appearance. Upon appointment the suitable representative will file a notice of appearance under WAC 10-08-083 or other applicable rule or law to inform all parties and representatives of record of the ((suitable representative's)) individual's name, address, and telephone number.

~~((14))~~ (15) End of appointment. The appointment under this section ends automatically when the time expires to file a petition for review of the ((administrative law judge's)) ALJ's initial or final order ((, unless earlier terminated by the party or the suitable representative)). Alternatively, the appointment may be terminated at any stage by the party or the suitable representative. The suitable representative will file a notice of withdrawal under WAC 10-08-083 or other applicable rule or law if the appointment is terminated prior to the deadline for the petition for review.

~~((15) In the event)~~ (16) In case of remand. If a higher authority remands the case to ((the office of administrative hearings, the agency)) OAH, the ADA coordinator will ((determine)) redetermine whether ((the party is able to meaningfully participate in the remanded adjudicative proceeding under subsection (7) of this section and the appropriate accommodation under subsection (8) of this section. If)) a suitable representative is still the most appropriate accommodation ((, the agency)). The ADA coordinator will ((determine)) verify if the individual previously appointed is available or will identify another individual to be the suitable representative. The party ((with a disability may state a preference for or disagree with an individual's appointment, or reject an appointment)) retains the right to accept or reject the identified suitable representative.

~~((16))~~ (17) Grievance. If the party is not satisfied with a decision by the ((agency)) ADA coordinator, the party may request review of the accommodation request by the chief ((administrative law judge)) ALJ, whose decision shall be final.

~~((17) The office of administrative hearings will establish a network of individuals who are able and available to be appointed by the chief administrative law judge as suitable representatives.~~

~~(18) The chief administrative law judge will ensure that all office of administrative hearings staff receive both initial and annual training commensurate with the scope of their duties. The training selected will include specific reference to the requirements of the ADA, as amended, as well as the Washington state law against discrimination, as they relate to the issues of reasonable accommodation throughout an adjudicative proceeding, with particular regard to the process for assessing and determining accommodations necessary to ensure meaningful participation in an adjudicative proceeding.~~

~~(19))~~ **(18) ADA coordinator training.** The ~~((agency))~~ ADA coordinator will ~~((also))~~ receive specialized training ~~((initially and thereafter))~~ as necessary to assure an adequate knowledge and understanding of ~~((the requirements of))~~ adjudicative proceedings and federal and state law requirements with respect to assessing the need for reasonable accommodations. The ~~((agency))~~ ADA coordinator will make recommendations to the chief ~~((administrative law judge))~~ ALJ regarding the necessary training for agency staff and for suitable representatives.

~~((20) Suitable representatives shall receive))~~ **(19) Suitable representative training.** Before serving as a suitable representative, an individual must complete uniform qualification training, or demonstrate equivalent experience or training, as established by the chief ~~((administrative law judge))~~ ALJ.

~~((21) The chief administrative law judge or his/her designee will develop routine reports that reflect the number of requests for accommodation pursuant to this section, the result of those requests, and the costs, if any, associated with any such accommodation. Personal health information and other confidential data will be redacted from reports in order to comply with relevant privacy laws.~~

~~(22) Two years following the effective date of this section the program will be reviewed and assessed for its effectiveness. The results of this assessment will be made available on the OAH public website for inspection and will also be provided to the office of financial management and all persons or organizations who express an interest in receiving the report. The assessment will include a review of:~~

~~(a) The timeliness of the process, including the suitable representative process and the impact on the scheduling of the adjudicative proceeding;~~

~~(b) The adjudicative proceeding outcome for parties with suitable representation, including how many cases resulted in: Settlement, orders affirming or reversing agency action, or defaults;~~

~~(c) The number of suitable representation requests granted and denied;~~

~~(d) The sources of referrals to the agency ADA coordinator;~~

~~(e) The number and outcome of appeals of denials to the chief administrative law judge; and~~

~~(f) Feedback from parties, the agency ADA coordinator, persons appointed as suitable representatives, administrative law judges, and referring agency representatives on how the provisions of this section may be improved.))~~

[Statutory Authority: RCW 34.12.080, 34.05.250, and 34.12.030. WSR 17-17-079, § 10-24-010, filed 8/16/17, effective 1/1/18.]