

WSR 23-16-106
PERMANENT RULES
OFFICE OF
ADMINISTRATIVE HEARINGS

[Filed July 31, 2023, 3:32 p.m., effective August 31, 2023]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The amendment to the rule improves clarity and readability. The existing rule did not state how a party can request, and other persons can refer the party for, a suitable representative accommodation. The amended rule clarifies which records are confidential under the Public Records Act. Other changes improve procedural transparency. The office of administrative hearings (OAH) removed the reporting requirements that expired December 31, 2019, and some training requirements that are now in OAH policy. OAH failed to establish a network of individuals who were available to be appointed as suitable representatives and removed creation of a network in the amended rule.

Citation of Rules Affected by this Order: Amending WAC 10-24-010.

Statutory Authority for Adoption: RCW 34.12.030 and 34.12.[0]80.

Adopted under notice filed as WSR 23-08-086 on April 5, 2023.

Changes Other than Editing from Proposed to Adopted Version:

There are no substantial differences between the proposed rule and the adopted rule. The differences reflect OAH response to comments about plain language, excess verbiage, grammar, and consistent use of terms. When comments expressed confusion about language in the existing rule that OAH proposed be deleted, the adopted rule reinstated the existing language. The adopted rule clarified that as a result of a disability a self-represented party may need alternative accommodations in addition to a suitable representative accommodation.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 1, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: July 31, 2023.

Lorraine Lee
Chief Administrative Law Judge

OTS-4497.3

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) Purpose. The office of admin-

istrative hearings (OAH) addresses all accommodation requests under OAH policy, 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)), and the Washington law against discrimination (WLAD). This section ((specifically)) applies to requests and referrals for representation as ((an)) a necessary accommodation in adjudicative proceedings before ((the office of administrative hearings. The appointment of)) OAH. A suitable representative may be an appropriate ((response in these cases where the)) accommodation where a party is unable to meaningfully participate in an adjudicative proceeding as a result of a disability. ((This section is intended to ensure that all requests for accommodation are addressed in accordance with the requirements of the ADA and that any accommodation response is the minimum necessary to effectively address the needs of the party.))

(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)) appointed under subsection ((11)) (12) 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)) (ALJ).

(3) ((If, 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)) **Requests and referrals.**

(a) Requests. The party may request a suitable representative accommodation in the hearing request form or by contacting OAH:

- (i) By telephone;
- (ii) By fax;
- (iii) By mail;
- (iv) Using the OAH online accommodation request form;
- (v) Directly asking the ALJ.

Requests should be made in advance whenever possible.

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

(c) Referral by administrative law judge (ALJ). If the ALJ believes that a self-represented party may be unable to meaningfully participate in the adjudicative proceeding ((because)) as a result of a disability, ((with that)) the ALJ will ask the party to consent to referral to the ADA coordinator. With the party's consent the ((administrative law judge shall refer the party to the agency ADA coordinator and delay commencing)) ALJ will delay starting or resuming the adjudicative proceeding until the accommodation request is addressed by the ADA coordinator.

(4) **Expedited process.** The ((agency)) ADA coordinator will ((expedite)) hasten 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)) as quickly as practical.~~

(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))~~ will 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))~~ will determine whether as a result of the disability the party is unable to meaningfully participate in the adjudicative proceeding ~~((as a result of 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))~~ will 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 a disability, the ~~((agency))~~ ADA coordinator will ~~((commence an interactive process))~~ communicate with the party to determine the types of accommodations ~~((required))~~ the party requires to allow the party to

meaningfully participate in the adjudicative proceeding (~~(, specifically)~~). The ADA coordinator will determine:

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

(b) If alternative accommodations do not adequately address the party's needs, whether a suitable representative accommodation is ~~((the most appropriate accommodation))~~ necessary. The ADA coordinator may determine that the party needs a suitable representative accommodation in addition to alternative accommodations.

(9) **Representative 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)))~~ 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.** After the ~~((agency))~~ ADA coordinator has identified an individual to be the party's suitable representative, the 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 party or the suitable representative may end the appointment at any stage. 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))~~ ends 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))~~ necessary 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 representative accommodation 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))~~ will 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 uniform)) (19)~~
Suitable representative training. Before serving as a suitable representative, an individual must complete 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.]