



STATE OF WASHINGTON  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES  
P.O. Box 45115, Olympia, Washington 98504-5115

May 26, 2017

The Honorable Lorraine Lee  
Chief Administrative Law Judge  
Office of Administrative Hearings  
PO Box 2488  
Olympia, WA 98504-2488

**SUBJECT: OAH CR -102 HEARING**

Dear Chief Lee:

Thank you for the opportunity to provide our written comments and concerns regarding this draft rule.

**Legal Authority Concerns**

The Department remains fully committed to providing all necessary services to individuals in need; however, we cannot support the OAH interpretation of Americans with Disabilities Act (ADA) requirements. Despite thorough research, the Department has been unable to find any appellate case law holding that the ADA requires the appointment of legal representation in an administrative hearing. Rather, the ADA requires fact-specific inquiries on a case-by-case basis and requires public entities to make reasonable accommodations for disabled persons.<sup>1</sup> The ADA does not mention legal representation.<sup>2</sup> The ADA does not require public entities to provide services that are not offered to others.<sup>3</sup>

The Department has systems to assist individuals who may need accommodation throughout their services and interactions with the Department. This assistance continues to be available to individuals should they appeal a Department decision. In addition, the Department already has procedures and services in place to allow appellants to meaningfully participate in administrative hearings. The Department's hearing rules allow all appellants to be represented by a lay representative, such as a family member or friend.<sup>4</sup> The Department's hearing rules allow for the

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<sup>1</sup> *Welfare of H.S. v. DSHS*, 94 Wn.App. 511, 521 (1999), citing *in re Welfare of A.J.R. v. DSHS*, 78 Wn.App. 222, 229-230 (1995) and 42 U.S.C. § 12132; *See also, Leocata v. Wilson-Coker*, 343 F. Supp. 2d 144, 155-56 (D. Conn. 2004); quoting, *Doe v. Pfrommer*, 148 F.3d 73, 83 (2<sup>nd</sup> Cir. 1998); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 282 (2<sup>nd</sup> Cir. 2003); *Rodriguez v. City of New York*, 197 F.3d 611, 618 (2<sup>nd</sup> Cir. 1999); *In re Rubenstein*, 637 A.2d 1131, 1137 (Del. 1994), quoting, *D'Amico v. New York State Bd. Of Law Examiners*, 813 F.Supp. 217, 221 (W.D.N.Y. 1993), *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979); *See also, Kornblau v. Dade County*, 86 F.3d 193, 194 (11<sup>th</sup> Cir. 1996).

<sup>2</sup> 42 USC §§ 12131 *et seq.*; *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9<sup>th</sup> Cir. 2004); *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 808 (9<sup>th</sup> Cir. 1999).

<sup>3</sup> *Id.*

<sup>4</sup> WAC 388-02-0155.

admission of evidence under a highly relaxed standard, allowing a non-attorney representative to be effective. For example, the Administrative Law Judge (ALJ) admits evidence on the “reasonable person standard,” including when deciding whether or not to admit hearsay statements.<sup>5</sup> As an additional safeguard, if the ALJ believes additional information not solicited by the parties is needed, the ALJ has the authority to call additional witnesses, request exhibits, question witnesses, and issue subpoenas.<sup>6</sup> (WAC 388-02-0215.) Under WAC 388-865-0262, the Department provides ombudsman services (independent of service providers) to assist mental-health clients through grievances and administrative hearings. And under WAC 365-18-090(2), residents of long-term care facilities may be entitled to representation by the Long-Term Care Ombuds.

DSHS, through its Administrative Policy No. 18.81 Nondiscrimination in Direct Client Services, fulfills the legal obligations of all relevant law, and confirms the Department’s commitment to provide direct services to clients without discrimination. Under the current law and rules, if a DSHS appellant demonstrates that she does not understand the administrative hearing process, she may have a lay representative, will benefit from a highly-relaxed evidentiary standard, and may receive additional assistance in developing the complete administrative record from the ALJ (who has authority to call additional witnesses and ask questions to witnesses). The Department’s hearing process is structured to enable a lay representative to be effective; disabled clients have the equal opportunity to utilize lay representatives as any other appellant.

**RCW 34.05.428(2) states that “any party may be advised and represented at the party’s own expense by counsel or, if permitted by law, other representative.”**

The plain reading of this statute is that the State is prohibited in a hearing governed by the Administrative Procedure Act from paying for a party’s representative. The Department has a hearing rule, WAC 388-02-0165, aligned with this state statute prohibiting either DSHS or OAH from paying for an appellant’s attorney. OAH’s proposed rule contradicts RCW 34.05.428(2) and WAC 388-02-0165 because OAH’s proposed rule states that a representative will be appointed “at no cost to the party.”

OAH’s proposed rule fails to identify who will pay for the party’s representation; it only states that the appointment will not be at the party’s expense in conflict with RCW 34.05.428(2). OAH’s proposed rule also fails to address who will pay for the costs associated with representatives, assessments, and separate hearings, including representative fees, travel, administrative costs, and costs associated with training. As held by the Washington Supreme Court in *Washington Public Ports Ass’n v. Dept. of Revenue*, administrative agencies do not have the authority to promulgate rules that would amend or change a legislative directive.<sup>7</sup>

While the ADA does require fact-specific inquiries on a case-by-case basis to determine if a person is disabled and, if yes, what a reasonable accommodation would be, this proposed rule by OAH targets one specific accommodation (appointment of a representative) when there are many possible accommodations that may be reasonable for the specific person. By singling out the appointment of legal representation as the only ADA accommodation authorized by rule, OAH is creating a

<sup>5</sup> WAC 388-02-0475.

<sup>6</sup> WAC 388-02-0215.

<sup>7</sup> *Washington Public Ports Ass’n v. Dept of Revenue*, 148 Wn.2d 637, 645 (2003).

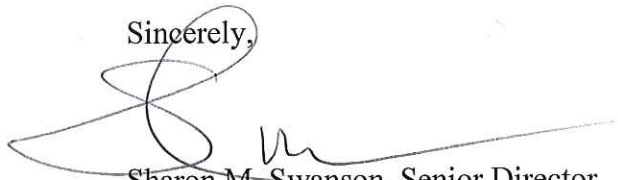
situation where both appellants and ALJs may view the appointment of legal representation as the selected or preferred accommodation, rather than focusing on OAH's ADA Policy and the myriad of accommodations that are already built into the Department's hearing rules, including the ability of the appellant to select a lay representative and the ability of the ALJ to ask witness questions and demand evidence necessary to develop a complete administrative record.

The proposed rule also does not adequately address how the hearing ALJ will be screened from learning the outcome of the ADA evaluation, especially in cases where the primary substantive issue to be decided at the administrative hearing is whether or not the client is disabled (and thus eligible for certain Department services). The proposed rule also fails to address questions such as: How is the existence of the disability going to be certified? What qualifications does OAH coordinator have to make such a diagnosis? How will OAH reflect certification of the disability by an objective professional, qualified to make such an assessment? How will OAH determine that the appellant does not have any family member, friend, guardian, or community resource available to act as a representative?

If the intent of this rule making is to provide publicly paid for representation for individuals in OAH hearings, then statutory change is the appropriate and necessary mechanism for this change and additional funding is needed to cover these new costs.

Thank you for this opportunity to state our concerns regarding this proposed rule.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sharon M. Swanson', with a large, stylized flourish above the name.

Sharon M. Swanson, Senior Director  
Office of Policy & External Relations

cc: Ed Pesik, Deputy Chief Administrative Law Judge, OAH