STATE OF WASHINGTON
HEALTH CARE AUTHORITY
626 8th Avenue, SE • P.O. Box 45502 • Olympia, Washington 98504-5502

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 Suitable Representative Proposed Rule

Dear Chief Lee:

Thank you for the opportunity to provide comments on your proposed model rule. The Health Care Authority (HCA) is committed to providing high quality health care through innovative health policies and purchasing strategies to create a healthier Washington. Our core values stress putting people first, stewardship, service excellence, and public service.[1] We are proud to provide health care services to more than 2.2 million Washington residents through Apple Health (Medicaid) and the Public Employees Benefits Board (PEBB) program. Our clients are diverse and the range of assistance needs vary based on the individuals we serve. HCA offers accommodations across all of our programs to ensure that our clients can access the services we offer.

HCA contracts with the Office of Administrative Hearings (OAH) to provide quasi-judicial proceedings for most of HCA's programs. HCA is responsible for ensuring the access, integrity, and fairness of our hearing system, whether these duties are performed directly by HCA or through our contract with OAH. We believe providing timely, fair, and accessible hearings is important to ensure the people we serve receive the benefits that they are entitled to under the law.

We are writing these comments today to express serious concerns about the OAH's proposed rule, WAC 10-08-055, regarding the appointment of a suitable representative for persons in administrative hearings under OAH's interpretation of the Americans with Disabilities Act (ADA). As I've shared with you in the past, we do not believe the ADA mandates appointment of a legal representative in an administrative hearing as an accommodation for someone with a disability. Even assuming OAH's interpretation of the ADA is accurate, HCA has a number of concerns regarding the proposed rule as written. HCA's concerns fall into the following categories:

- The rule is not necessary;
- The rule erroneously favors one type of accommodation;
- OAH has not developed a legal mechanism to fund this new program and failure to do so violates state law;
- The rule will likely create unlawful delays of Medicaid hearings; and
- The rule encourages the unlawful practice of law.

[1] For complete listing of HCA's mission, vision, and values, please visit: https://www.hca.wa.gov/about-hca/our-mission-vision-and-values

The proposed rule is not necessary.

HCA, for the most part, does not follow OAH's model hearing rules; rather, HCA has its own hearing rules to carry out the responsibilities mandated by federal law.[2] HCA's Medicaid-related hearing rules are codified in Chapter 182-526 WAC. These rules provide an entire spectrum of accommodations to make the process accessible to all parties including:

1. Relaxed evidentiary standards. Evidence is admitted by both parties on the "reasonable person" standard;

2. Allowing the administrative law judge (ALJ) to ask the witnesses questions to ensure that a complete record is developed;

3. Allowing the ALJ to request documents or independently call additional witnesses to ensure that a complete administrative record is developed;

4. Allowing lay representatives to assist the individual;

5. The assistance of HCA agency staff to provide copies of relevant laws or rules;

6. The role of the HCA hearings staff. HCA employees are trained to provide help to applicants and recipients, which is a different role than a typical adverse party in a civil trial. HCA staff may provide referrals to community legal resources and assist the appellant in obtaining additional information. All HCA hearing representatives are strongly encouraged to meet with the appellant before the hearing to determine whether there might be additional information that should be considered by HCA in resolving the case; and

7. Access to a legislatively funded civil legal law firm such as Northwest Justice Project.

Given the myriad of accommodations that HCA already offers to parties – including the right to be represented by a lay representative, the relaxed evidentiary rules that allow a lay representative to be effective, and the authority of the ALJ to elicit evidence needed to development a complete administrative record, it seems unlikely that the ADA, if applicable, would ever require the appointment of a legal representative as a legally appropriate accommodation.

The proposed rule erroneously favors one type of accommodation.

Sections 1 and 2 of the proposed rule makes a request for a suitable representative different from all other requests for accommodation singling out one type of accommodation to the exclusion of other possible accommodations. Other requests for accommodation are handled under OAH's internal Americans with Disabilities Act (ADA) policy, but requests for suitable representatives would unnecessarily be handled separately under this new rule. This is a serious flaw to the proposed rule and could potentially violate the requirements of the ADA as it sets up a situation where the go-to accommodation in the state regulation is predetermined (appointing a representative).

[2] *See* 42 CFR 431 Part E for the Medicaid-related federal hearing rules.

Specifically, the proposed rule contemplates that anything less than the appointment of a representative is considered a "denial" by OAH. Again, this fails to take into account the many accommodations already in place as stated above. Under the ADA, not granting a person a suitable representative is not a "denial" so long as the agency has provided an appropriate reasonable accommodation for that person. But the proposed rule as currently written, creates a process for specifically requesting the appointment of a hearing representative; anything less than that appointment will be treated as the denial of an accommodation.

OAH has not developed a mechanism to fund this new program and it is unlawful for state agencies pay.

This proposed rule violates state law. RCW 34.05.428(2) provides that a party may be advised and represented in a hearing governed by the Administrative Procedure Act "at the party's own expense." Agencies must follow statutory directives. This state statute prohibits state agencies from paying for any representative (attorney or non-attorney) for the other party. This is not something HCA, as an agency that contracts with OAH, can pay.

The proposed rule will create unlawful delays of Medicaid hearings.

Federal regulations (42 CFR 431.244(f)(1)) require that, in most cases, the administrative hearing must be completed within 90 days from the date the agency receives the request for hearing. HCA is rightfully concerned about any new process or program established by OAH that might create barriers for clients to receive timely final orders.

The administrative processes set forth in this proposed rule creates an appealable issue when an appointed representative is denied. Section 17 of the proposed rule erroneously implies that the Chief ALJ's decision "shall be final," rather than what it really will be: a final agency action subject to judicial review. What happens when someone petitions for judicial review of the Chief ALJ's decision denying appointment of counsel? Will the review be interlocutory (and the substantive hearing delayed)? Or, will the OAH hearing proceed, and then have to be repeated if OAH's decision denying counsel is overturned by a superior court?

Section 17 states that "[t]he 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 hearing process." How does this play out? Will the ADA coordinator be assessing the legal guardian, near relative, or friend to determine if they are a suitable representative? If not, how could OAH discount the assistance of a legal guardian, near relative, or friend? This rule is supposed to apply only to unrepresented persons. If someone already has someone capable of serving as a lay representative (such as a guardian, relative, or friend), there is no need to evaluate whether a representative should be appointed.

Unlawful Practice of Law

Related to Sections 17 and 18 of the proposed rule, HCA informally asked OAH whether OAH's appointment of a non-attorney to represent the public in administrative hearings has been approved by the Washington State Bar Association or the Supreme Court. This interaction is important to ensure that this process will not be considered the unlawful practice of law. Although Washington General Rule 24 allows lay representatives to represent a party in an administrative hearing, HCA believes there is a significant distinction between an agency allowing people to use the assistance of a chosen lay representative versus OAH appointing and paying a non-attorney to represent someone while also certifying that the person is "suitable" to represent an individual. OAH should formally respond during the rule-making process and provide insight regarding any discussions that have occurred with the Washington State Bar Association or the Supreme Court on this issue.

HCA will be unable to adopt the proposed rule for the cases that HCA contracts with OAH to handle because of the concerns noted in this public comment. HCA would like to continue partnering with OAH to ensure that the hearings OAH conducts for HCA are timely, fair, and accessible to the clients of our programs. If OAH is seeking to develop a program to offer hearing representatives to parties using its services, OAH should seek statutory changes and legislatively appropriated funding for such a program.

Sincerely,

/s/ Annette Schuffenhauer

Annette Schuffenhauer
Assistant Director
Division of Legal Services