

NEW SECTION

WAC 10-08-055 Reasonable Accommodation ~~Suitable representa-~~

~~tion.~~ (1) Accommodation requests under the federal Americans with Disabilities Act (ADA) are handled pursuant to the office of administrative hearings' policy and this rule. This rule applies to requests for ~~representation as an accommodations~~ in ~~adjudicative proceedings~~ administrative hearings before the office of administrative hearings. ~~The appointment of a suitable representative may be an appropriate response in those cases where the party is unable to meaningfully participate in the administrative hearing process.~~ This rule 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 ~~appellant~~ person requesting an accommodation.

(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.

Comment [SA(1)]: HCA generally concurs with the legal questions and concerns already submitted to OAH by DSHS and will not restate those concerns in our response.

If OAH believes that rulemaking is necessary to better explain its implementation of the ADA, then this model rule should be rewritten to address how OAH handles all ADA requests instead of creating a rule for a singular outcome, which is a highly unlikely outcome, of a person qualifying for appointment of a representative.

(b) "Suitable representative" means an individual who is qualified under subsection (11) of this section to provide the assistance needed to enable an otherwise unrepresented party with a disability to meaningfully participate in the proceeding administrative hearing.

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

(3) If, during any stage of an administrative proceeding hearing, ~~either the administrative law judge, the referring agency or its representative, or the appellant or any party~~ has a reasonable belief that ~~an otherwise unrepresented~~ a party may be unable to meaningfully participate in the proceeding because of a disability, with that party's consent the administrative law judge shall refer the party to the agency ADA coordinator and delay commencing or resuming the proceeding until the accommodation request is addressed so long as delaying the administrative hearing does not conflict with any law requiring timeliness of the administrative hearing.

(4) The agency ADA coordinator will expedite the assessment and accommodation process to the greatest extent practicable and consistent with the party's limitations while assuring adherence to any

state or federal timeliness requirement for the administrative hearing process-

(5) All records pertaining to the decision whether to grant ~~to appoint a suitable representative~~ an accommodation shall be kept confidential and held separately from the hearing record.

(6) Upon a party's request for an accommodation ~~suitable representative~~ or referral from the administrative law judge, the agency ADA coordinator must determine whether the party is a person with a disability. The agency ADA coordinator may require documentation from the party at the coordinator's discretion.

(7) If the party is a person with a disability, the agency ADA coordinator must ~~next~~ determine whether the party is unable to meaningfully participate in the hearing process as a result of the disability and the type of accommodation needed. 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 hearing process but may be used in determining the type of accommodation most appropriate. ~~In making this determination,~~ 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 proceeding;

(ii) The ~~privilege of~~right of representation that may be available in the particular administrative hearing by counsel or other suitable representative;

(iii) The right to present, examine, and object to evidence;

(iv) The right to ~~cross-examine~~ask questions of witnesses; and

(v) The right to appeal.

(b) Whether the party has sufficient present ability to:

(i) Physically participate in the process;

(ii) Exercise the rights in (a) of this subsection;

(iii) Make informed decisions about whether to waive the rights in (a) of this subsection;

(~~iii~~iv) Respond to any allegations, issues, arguments, and evidence presented by other parties;

(~~iv~~v) Evaluate and ~~coherently~~ discuss ~~legal~~ arguments and defenses;

(vi) Present information ~~and evidence~~ relevant to eligibility for relief;

(vii) Present ~~rational and coherent~~ testimony based upon adequate recall; and

(viii) Act upon instructions and information presented by other parties and the administrative law judge.

~~(c) Whether the party has sufficient energy and stamina to participate in the proceeding and if doing so could jeopardize the party's health.~~

(8) If the party is unable to meaningfully participate in the hearing process as a result of a disability, the agency ADA coordinator will commence an interactive process with the party to determine the type of accommodation required to allow the party to meaningfully participate in the hearing process; ~~whether an alternative accommodation can adequately address the party's specific disability related limitations, or whether a suitable representative is the most appropriate accommodation.~~

(9) If the agency ADA coordinator determines that ~~appointment of a suitable representative is an~~ not the accommodation is not 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 (17) of this section.

(10) If the agency ADA coordinator determines that appointment of a suitable representative is the accommodation necessary for a party's meaningful participation in an adjudicative proceeding, the agency ADA coordinator will identify an agency, organization or individual to assist the party at no cost to the party, so long as such appointment does not violate any state or federal law or regulation.

(11) To identify an agency, individual, or organization set forth in subsection (10) of this rule as a suitable representative, 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 attain knowledge of the procedural rules;

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

~~(iii) Education;~~

~~(iv) Certifications or licenses in good standing;~~

~~(v) Experience and training in advocating for others;~~ and

~~(iii)~~ The individual's availability to meet the timelines and duration of the particular proceeding; and

(iv) The commitment to adhere to confidentiality standards and willingness to sign an agreement preventing disclosure of any confidential information-

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

(d) 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, so long as such appointment does not violate any state or federal law or regulation. The party will show acceptance of the appointment in writing or in any other form consistent with the party's disability. If the party disagrees with the appointment, the party will contact the agency ADA coordinator. No party shall be required to disclose confidential information or accept appointment of a representative without explicit written consent. ~~The agency ADA coordinator shall 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) 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 name, address, and telephone number.

~~(14) If a suitable representative files a petition for review for a party with a disability, the suitable representative may ask for continuing representational accommodation with the reviewing agency's ADA coordinator or pursuant to Washington rules of court general rule 33.~~

(15) The appointment under this rule ends when the time expires to file a petition for review, unless earlier terminated by the party or the suitable representative.

(16) In the event a higher authority remands the case to the office of administrative hearings, the agency ADA coordinator will de-

termine if ~~the individual previously appointed is available or will identify another individual to be the suitable representative~~ an accommodation is required. ~~The party with a disability may state a preference for or disagree with an individual's appointment, or reject an appointment.~~

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

(18) 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 free of charge to state agencies using the services of the office of administrative hearings.

(19) The chief administrative law judge will ensure that all office of administrative hearings staff receive both initial and annual ~~refresher~~ 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 the administrative hearing process, with particular

regard to the process for assessing and determining accommodations necessary to ensure meaningful participation in an administrative hearing.

(20) 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 federal and state law with respect to assessing the need for reasonable accommodations. The agency ADA coordinator will make recommendations to the chief administrative law judge regarding the necessary training for agency staff and for suitable representatives.

(21) Persons selected by the agency ADA coordinator as suitable representatives must also have received uniform qualification training established by the chief administrative law judge.

Comment [SA(2)]: This provision conflicts with subsection (12) which states it's the Chief ALJ that makes the appointment, not the ADA coordinator.

(22) The chief administrative law judge or his/her designee will develop routine reports that reflect the number of requests for accommodation pursuant to this rule, 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.

(23) Two years following the effective date of this rule the program will be reviewed and assessed for its effectiveness. The re-

sults 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 shall include a review of:

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

(b) The hearing 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 ADA Coordinator;

(e) The number and outcome of appeals of denials to the Chief Administrative Law Judge; and

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

[]