



Northwest Justice Project

500 W. 8th Street, Suite 275
Vancouver, WA 98660
(360) 693-6130 Phone
1-888-201-1020 Toll Free
(360) 693-6352 Fax
www.nwjustice.org

César E. Torres
Executive Director

VIA EMAIL & MAIL

May 27, 2017

Ed Pesik
Deputy Chief Administrative Law Judge
Office of Administrative Hearings
PO Box 42488
Olympia, WA 98504-2488

Re: Comments on WSR 17-09-084

Dear Deputy Chief ALJ Pesik:

Northwest Justice Project (NJP) appreciates the opportunity to comment on the Office of Administrative Hearings' (OAH's) proposed procedure for providing accommodations to appellants with disabilities in OAH's administrative hearings.

Introduction

NJP is a private, nonprofit law firm with regional offices throughout the State of Washington. NJP is funded to provide free legal services in civil matters to low-income individuals and seniors. Many of our clients are individuals with disabilities. Since its inception, NJP has been representing individuals in OAH's administrative proceedings, including public benefits matters. NJP is unable, however, to provide legal assistance to all who need it, including many who have meritorious claims presented to OAH. We offer the comments below because of the significant impact the proposed rule will have on our client-eligible community, particularly low-income individuals with disabilities.

Comments

NJP supports OAH's efforts to implement a procedure to meet its obligation to uphold the fundamental right of equal access to justice embodied in the Due Process Clause of the Fourteenth Amendment, the Americans with Disabilities Act (ADA), and the Washington Law Against Discrimination (WLAD).¹ Establishment of a uniform process by which an

¹ Each Washington state agency must comply with the standards and requirements set out in WLAD (RCW 49.60) and the ADA. The proposed rule does not specify that WLAD is also a legal basis for granting a reasonable accommodation of disability. We presume OAH did not intend to omit this standard.

agency endeavors to adhere to the mandate and purpose of these laws is an essential component of a properly functioning judicial system. Only through such a mechanism may an agency ensure each appellant has a real opportunity to challenge adverse government actions, which is especially critical in public benefits and other matters administered by the Departments of Social and Health Services and Employment Security, and the Health Care Authority that are essential to meeting an individual's most basic human needs.

1. The Rule is Necessary.

As the proposed rule reflects, each appellant who appears in an OAH hearing is entitled to a meaningful opportunity to be heard, which means an opportunity to present one's claims "at a meaningful time and in a meaningful manner [before] an impartial decision maker, [with] an opportunity to confront all the evidence adduced against him and present his own evidence." *Jarvis v. Janney*, 876 F. Supp.2d 1204, 1216 (E.D. WA, 2012) (citations omitted). The "opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 268–69, 90 S. Ct.1022 (1970). Title II of the ADA seeks to enforce this constitutional right of due process by requiring, when necessary, accommodations of disabilities in adjudicatory proceedings. *See Tennessee v. Lane*, 541 U.S. 509, 532 (2004) (quotations omitted). The ADA specifically obligates state agencies to identify and eliminate barriers to equal access to the agencies' services.²

An often insurmountable barrier to equal access is lack of representation for an individual who, by virtue of a disability, is unable to adequately represent his/her interests in an adversarial adjudicatory proceeding. When an appellant is unable to adequately comprehend information, present and confront evidence, or adduce information necessary to establish an adequate record upon which an ALJ can make a fully informed and impartial decision, the risk of erroneous deprivation of essential public benefits is high. Representational accommodations guard against such deprivation and promote the proper administration of justice.

In 2015, the Thurston County Superior Court recognized the inextricable link between representational accommodations and the proper administration of justice when it held:

Access to justice is a fundamental and well-recognized right, afforded all citizens of our State, whether disabled or non-disabled. The [agency]...must provide all claimants a reasonable accommodation of disability. The [agency] has an affirmative obligation, upon request, or when the need for accommodation is obvious, to conduct a fact-finding [assessment] to determine what that accommodation entails. A reasonable accommodation of [this claimant's] disability...is appointment of counsel at public expense.

² The ADA directs each agency to: 1) evaluate its processes for statutory and regulatory compliance; 2) establish a procedure by which to accomplish the goals of the ADA; and 3) publicize, implement and adhere to that procedure. *See* 28 CFR 35.105-107.

Findings of Fact, Conclusions of Law, May 21, 2015, Thurston County Superior Court, Case No. 12-2-00382-1.³

If properly implemented, the proposed procedure, through which OAH will conduct individualized assessments and provide individualized accommodations, including representational accommodations when necessary, should successfully carry out the ADA's mandate.

2. The Rule is Beneficial.

As the petitioners explained in their petition for rulemaking, a procedure for providing representational and other accommodations is not only compulsory, it will greatly improve OAH's hearings processes and Washington's judicial system. The proposed procedure will introduce judicial and administrative efficiencies at the administrative and court levels by streamlining assessments, educating staff, and providing qualified representatives. If properly implemented, the procedure should result in fewer unnecessary hearings, erroneous administrative decisions, and appeals.

Among other things, qualified representatives should be able to: 1) help appellants better understand the strengths and weaknesses of various claims and reach settlements when appropriate, thereby obviating the need for a hearing; 2) reduce hearing and decision-making time by more efficiently presenting and rebutting evidence and legal arguments; and 3) assist the ALJs to swiftly process evidence, administer proceedings, and render fair and accurate decisions on the merits.

3. OAH Training Recommendations.

NJP applauds OAH's proposed mandatory training of staff in disability rights laws and procedures. Appropriate education in these areas will strengthen OAH's ability to meet its mission and the objectives of anti-discrimination laws.

NJP encourages OAH to also provide training to its staff regarding: 1) the nature and severity of physical and mental impairments and their impact on functional abilities, such as communication, comprehension, maintaining focus and stamina, and managing behavior; and 2) implicit bias and overcoming assumptions related to, and stigmatization of, mental health, cognitive and developmental disabilities.

NJP also agrees that provision of uniform training to representatives to meet the qualification factors enumerated in Section 11 of the rule is critical. NJP recommends, however, a modest change to Section 21 to allow OAH to appoint individuals who can

³ In that case, an appeal of a Worker's Compensation benefits denial, the litigant had significant mental and cognitive disabilities that prevented him from being able to adequately comprehend documents and witness testimony, present evidence or follow instructions. By not granting the litigant's request for appointment of counsel, the Board of Industrial Insurance Appeals deprived him of his fundamental right to be heard, and was unable to develop a sufficient record upon which to accurately decide whether the litigant had been unlawfully deprived of important Worker's Compensation benefits.

demonstrate adequate experience and training without having received OAH's uniform training. The potential pool of suitable representatives will include advocates who already have extensive training and experience in OAH proceedings and with appellants. NJP assumes that it is not OAH's intention to exclude those advocates as representatives and thus recommends that OAH revise subsection (21) to state: "Persons selected by the agency ADA coordinator as suitable representatives must also have received uniform qualification training or demonstrate equivalent experience or training as established by the chief ALJ."

4. Monitoring and Evaluating the Procedure's Efficacy.

NJP believes that implementation of the rule should be carefully monitored on a regular and ongoing basis to ensure the rule is accomplishing the objective of equal access to OAH services at every stage in the process. OAH should periodically share the results of the evaluation, including data, with stakeholders and revisit training or policy as needed to increase effective implementation. Among other things, an evaluation should consider whether:

1. OAH makes timely and accurate decisions regarding accommodation requests;
2. Appointed representatives are qualified to meet appellants' disability-created needs, i.e., competent, effective, and suitable;
3. OAH implements the claimant's preferred accommodation and does not substitute its judgment for that of individuals with a disability and/or their medical provider(s) regarding the nature and severity of medical conditions and attendant functional limitations.⁴

In conclusion, because the rule is legally necessary and beneficial to participants in OAH proceedings, NJP supports adoption of the rule without further delay. Thank you for considering our comments.

Sincerely,



Northwest Justice Project
Amy McCullough, Attorney
amym@nwjustice.org

⁴ See, e.g., *Duvall v Kitsap County*, 260 F.3d 1124, 1139 (9th Cir. 2001). In *Duvall*, the court made clear that an adjudicatory tribunal is not free to impose its belief as to what accommodation will best meet a litigant's disability-created needs. The individual with a disability is in the best position to know what will meet his/her needs.