

***Suitable Representation—
OAH Accommodation Rule: WAC 10-24-010***

September 30, 2020

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Background

1990: The Americans with Disabilities Act
([ADA](#))

Chapter [49.60](#) RCW: Washington law
Against Discrimination

January 2018: The Office of
Administrative Hearing (OAH)
implemented a new accommodation
rule. [WAC 10-24-010](#)

Legal Framework

- ▶ **Americans with Disabilities Act (ADA)**
 - Title II applies to state and local governments
 - Guarantees access to public services
- ▶ **Washington Law Against Discrimination (WLAD)**
 - Broader and more protective than the ADA
- ▶ ***Tennessee v. Lane*, 541 U.S. 509 (2004)**
 - ADA applies to judicial branch and state governments
 - Courts have extended to state administrative hearings
- ▶ **Washington Courts General Rule (GR) 33**
 - Adopted in 2007; the accommodation process in WA courts
 - “Accommodation” includes “representation by counsel”

WAC 10-24-010 Background

- ▶ June 2016: Petition for Rulemaking
 - ▶ From C.B., a Washington resident with disabilities, Seattle University Law School Fred Korematsu Center for Law & Equality, and Disability Rights Washington
- ▶ 2016-2017: Two stakeholder workgroups
 - ▶ Draft new rule
 - ▶ Implement new rule

WAC 10-24-010

WAC 10-24-010 went into effect January 1, 2018.

- ▶ **Sections 1-2:** Purpose and Definitions
- ▶ **Section 3:** Referral by ALJ
- ▶ **Sections 4-7:** Assessment by ADA Coordinator
- ▶ **Sections 8-9:** Decision on appropriate accommodations by ADA Coordinator
- ▶ **Sections 10-11:** Factors for appointment considered by ADA Coordinator
- ▶ **Sections 12-16:** Appointment by Chief ALJ; notices of appearance and withdrawal by the Suitable Representative; termination of appointment
- ▶ **Section 17:** Network of Suitable Representatives established
- ▶ **Sections 18-20:** Mandatory training of all OAH staff and of Suitable Representatives
- ▶ **Sections 21-22:** Data and evaluation for two-year period through 2019

WAC 10-24-010(1) - (3)

SR accommodation is for:

- ▶ A party to an OAH hearing
- ▶ Who is self-represented
- ▶ Who disabled as defined by the ADA
- ▶ Who asks for a SR
 - ▶ In request for hearing
 - ▶ Via online, telephone, email, letter
 - ▶ Asks ALJ at hearing
- ▶ Who is referred by the ALJ on-the-record

WAC 10-24-010 Assumptions

- ▶ OAH approves the minimum necessary accommodation to effectively address the needs of the party
- ▶ Other accommodations may meet a party's needs
- ▶ Parties do not need a lawyer to represent them in OAH hearings: the SR can be a non-lawyer
 - ▶ [RCW 34.12.010](#): Conduct hearings with the “greatest degree of informality consistent with fairness and the nature of the proceeding.”
- ▶ The party must be able to consent to the appointment

Advisory Committee

- ▶ Gave input to the Chief ALJ
 - Implementation plan and assessment criteria
 - Development of training curriculum for SRs
- ▶ Connected ADA Coordinator & Chief ALJ with community resources to try to build SR network
- ▶ Presented at continuing legal education
- ▶ Gave suggestions on challenges encountered and specific cases
- ▶ Helped conduct feedback surveys

Two-Year Assessment

- ▶ August 2020: Two-Year Report
- ▶ Highlights:
 - ▶ Half of the 136 requests were from parties (rest referred by ALJs or department reps)
 - ▶ 10 persons received a SR
 - ▶ Online, self-paced training materials accessible
 - ▶ Lack of professional liability coverage is impediment to establishing a network of SRs

More Highlights

- ▶ Denied: 89 individuals
 - ▶ Not disabled under the ADA
 - ▶ No response to request for information
 - ▶ Approved for alternative accommodations, SR not necessary
 - ▶ Eligible, but rejected the SR or OAH could not find an SR

SR Network

A. Volunteer Attorneys

- ▶ Training Completion Certification

B. Volunteer Individuals

- ▶ APR Rule 6 Law Clerk (with one of the attorneys in (A) above)

C. Legal Services Organizations

- ▶ Northwest Justice Project
- ▶ Unemployment Law Project
- ▶ Solid Ground
- ▶ Thurston Volunteer Legal Clinic

Lawyer standard of care

- ▶ OAH lacks authority to appoint parties an attorney to represent them before OAH
- ▶ OAH has authority to appoint a suitable representative as an ADA accommodation
 - ▶ Object: Equal access to OAH's adjudicative process, as other non-disabled self-represented parties
- ▶ The conundrum: The Rules of Professional Conduct address lawyers duties to clients. Yet, with few exceptions non-lawyers are permitted to represent parties before OAH.
 - ▶ SR appointments accommodate equal access to a process where self-representation is the norm.

Lawyer standard of care

- ▶ Statement of Training
 - ▶ Module 1 required: Introduction to OAH and the Suitable Representative Accommodation
 - ▶ Other modules may be met through equivalent experience or training
 - ▶ Module 2: Advocating for People with Disabilities
 - ▶ Module 3: Adjudicative Proceedings-Procedural Rules
 - ▶ Module 4: Adjudicative Proceedings-Substantive Law
- ▶ A lawyer's standard of care under the RPC's (and their professional liability policy) is likely the same whether hired by the party or appointed as a SR accommodation.



Statement of Training

I, _____, have completed the uniform qualification training for suitable representatives offered online by the Office of Administrative Hearings, or have equivalent experience or training as shown below.

Name

Date

Suitable Representative Uniform Qualification Training--WAC 10-24-010

Introduction to OAH and the Suitable Representative Accommodation

Module 1

Please initial each item as you complete it.

- ___ Watch me first: [Introduction to Training](#) (13-18 min)
- ___ Read [Overview of New Accommodation Rule WAC 10-24-010](#) (2 pages)
- ___ Read [Suitable Representative Role and Responsibilities](#) (3 pages)
- ___ Watch [Scope of Duty](#) (11:25 min)
- ___ Watch [How to Participate in Your Hearing – OAH Brochures](#) (3-5 min)
- ___ Read one brochure
 - [Unemployment Insurance](#)
 - [Public Assistance](#)
 - [Child Support](#)
 - [Washington Apple Health](#)
 - [Licensing](#) (general brochure)
- ___ Watch [Overview of Common Forms and Pleadings](#) (optional for attorneys) (13:40)
- ___ (Optional) Read [Communicating with a Client through an Interpreter](#) (1 page)
- ___ (Optional) Read Costs and Requests for Reimbursement (1 page)

Module 2

Please initial each item as you complete it or to show you have equivalent experience or training.

- Read [Introduction to the ADA](#)
- Read [Strategies for Working with People who have Disabilities](#) (10 sections)
- Read [Communicating With and About People with Disabilities](#) (1 page)
- Read [Guide to Etiquette and Behavior for Working with People with Disabilities](#)
or Watch Northwest ADA Center video [Introduction to Respectful Interactions](#)
- Watch at least two [Northwest ADA Center videos](#)
 - Select from people who are [blind](#), have [speech disabilities](#), [use wheelchairs](#), are [deaf or hard of hearing](#), have [non-apparent disabilities](#), or use [service animals](#) (5-20 minutes)
- Read [Rules of Professional Conduct Preamble & Scope, 1.0A, 1.2, 1.3, 1.4, 1.6, 1.14, 2.1](#)
- Read [Respecting Choice and Preferences of the Client](#)
- (Optional) Take the [Disability Implicit Association Test](#)
 - This link is not to this specific test. You will need to “agree to proceed” and then select the Disability test from a list.

Or Equivalent experience or training (WSBA# _____ LLLT# _____ Describe other _____

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Costs for CY 2018 & 2019

- ▶ **Direct:** \$1540 paid for legal services
 - ▶ \$0 when legal service organizations
 - ▶ Accepted “community referrals” from OAH
 - ▶ Renewed a prior attorney-client relationship
 - ▶ \$0 when attorneys accepted SR appointments *pro bono*
 - ▶ \$1540 paid to two legal services organizations
- ▶ **Challenges:**
 - ▶ Courts & the BIIA pay about \$80 per hour under GR 33
 - ▶ Complex multi-day hearings may result in proposal for “low-bono” rate twice the Court’s GR 33 rate

Costs for CY 2018 & 2019

▶ Indirect:

- ▶ Time and impact of delay of proceedings to parties, OAH & the referring agencies
- ▶ Training time for OAH employees
- ▶ Time and effort by OAH staff to develop and implement program
 - ▶ ADA Coordinators
 - ▶ ALJs presenting at CLEs
 - ▶ Support staff monitoring pending SR requests for scheduling
 - ▶ IT staff technical enhancements to OAH case management system (PRISM)
 - ▶ Developing internal and external training materials
 - ▶ Community outreach to build SR network

Liability of Individuals Accepting SR Appointments

The State defends at no cost to the suitable representative *provided* the services rendered did not exceed the authorized scope of duty--the docket number in the appointment letter

- ▶ Most parties have multiple legal issues. Parties' disabilities often limit their ability to separate or distinguish issues.
- ▶ OAH decided to protect parties and candidates and limit appointments to individuals with professional liability coverage.

Liability of Individuals Accepting SR Appointments

- ▶ The Office of Civil Legal Aid funds professional liability coverage for volunteer legal service clinics
- ▶ OAH was unable to obtain liability coverage on a statewide basis for clinic volunteers
 - ▶ Each clinic is governed by an individual board
 - ▶ OAH and Thurston Co. VLS have an agreement for their territory
 - ▶ Other VLS boards had not adopted similar agreements

Liability of Individuals Accepting SR Appointments

- ▶ Non-lawyer professionals may have liability coverage but it usually does not cover advocacy in an administrative hearing.
 - ▶ For example, scope of coverage for clinical psychologists, social workers, physical therapists, occupational therapists, and mental health professionals generally does not include advocacy in a legal proceeding
- ▶ Ombuds and other advocates are often limited from legal advocacy by funding sources or by contract

Stories of Party's Requesting a Suitable Representative

▶ **Was SR Approved or Denied**

Approve or Deny a SR?

- ▶ Party 4 was a custodial parent in a child support hearing and received a disability benefit. Party contacted the ADA Coordinator and was approved for accommodations that worked in the Party's everyday life and in school. After the hearing, Party 4 contacted the ADA Coordinator to express thanks and confirm the ALJ implemented the accommodations. The hearing was not completed, and the ALJ set a second date. When the hearing reconvened, the noncustodial parent appeared with an attorney. The ALJ granted Party 4's request for a continuance.
- ▶ Party 4 asserted that OAH needed to appoint an SR on basis of fairness since the other parent had an attorney. Party 4 argued the superior court had appointed a GR33 attorney for the Party during contentious child custody proceedings in which noncustodial parent had the same attorney.

Approve or Deny a SR?

- ▶ Party B appealed Medicaid's denial of transportation to an out-of-town medical provider. Party B has felt put down and treated as "stupid" since childhood. Party B has a long history of mental health problems that resulted in inappropriate behaviors. Party B has a quick and sometimes disproportionate temper, especially when frustrated or feeling put down. Party B experiences a rush of anger that sometimes causes the Party to walk away if that is an option, or stay but "shut down" in silence. Party B is unable to effectively use the coping skills learned in therapy. Party B receives a disability benefit.
- ▶ Party B had multiple prior negative experiences with judges and prosecutors. Party B projected those negative experiences onto all judges. The Party's distrust of judges has caused such fear that the Party has defaulted. Party has not communicated effectively with the ALJ.

Approve or Deny a SR?

- ▶ In school, Party K received accommodations like extra time to take tests, and a distraction-free room. In adulthood, Party K raised a family, was a community volunteer, and was completing a paralegal degree before a car accident a year ago. Party K has a traumatic brain injury (TBI).
- ▶ The TBI impaired Party's K's comprehension skills. Party K has gaps in memory that can sometimes be filled when prompted by a photograph. Party K is unable to do any heavy lifting or physically demanding jobs or to work in cold conditions. Party K receives a disability benefit.
- ▶ Party K applied for work but was let go after a few days or weeks by several employers. Party K does not understand the reasons the jobs ended. Party K is confused about why the Employment Security Department sent overpayment notices. Party K has four late appeals.

Approve or Deny a SR?

- ▶ Party 5 is age 20, a long-term client of Developmental Disabilities Administration (DDA). Party 5 is mostly non-verbal and has Individualized Education Program (IEP) at school. Party 5 receives a disability benefit. Party 5 lives with a parent who was also the Party's paid caregiver. Party's eligibility for benefits has not changed. However, DDA disqualified the parent as a caregiver.
- ▶ DDA knew or should have known it's notice to Party 5 was received and read by the parent. DDA's notice informed the Party of the need to choose another caregiver. Party 5 did not request the hearing or know a hearing was occurring, or understand the caregiver disqualification issue, or choices to be made. The disqualified parent requested the hearing on Party 5's behalf. There was not another adult in the Party's life.
- ▶ The DDA representative reported a guardianship proceeding had been pending for some time. The court had not identified a guardian for appointment.

Approve or Deny a SR?

- ▶ Party 3 is a young adult, served since childhood by Developmental Disabilities Administration. The Party has multiple diagnoses of physical and mental disorders. Party 3 has no concept of dimes versus quarters. The Party has very poor verbal comprehension, and no knowledge that a parent had requested a hearing to challenge loss of benefits after the Party returned home from a residential placement. Party 3 was unable to authorize parent to be a power of attorney.
- ▶ Party 3's parent lacked time and resources to pursue a guardianship in the courts. The Parent could not afford an attorney. The parent was already a client of a legal services organization, which declined to represent Party 3 to avoid a conflict of interest. Party 3 did not have the capacity to consent to the SR process, and did not have the capacity to interact with a representative.

Approve or Deny a SR?

- ▶ Party 1 is the non-custodial parent. Party 1 has threatened to stop participating if OAH does not help the Party's children. The case is not about benefits. It's to establish the Party's obligation to pay support for five children. The Party lacked understanding that a default may result in establishment of a support obligation in the amount claimed.
- ▶ The department representative reported that Party 1 receives social security disability income. The Party denied having any disabilities, but confirmed receipt of social security disability income (but did not know the monthly amount). The nature and extent of any disability are unclear, but the claims officer and ALJ suspect a mental disability may prevent Party 1 from participating meaningfully in the hearing. The ALJ made a referral to the ADA coordinator.
- ▶ Party 1 has a long history of tribal court litigation. The children have been removed from the Party's custody. Party 1 is suspicious, distrusting, and confused. The Party is unable to distinguish the tribal court's broad authority over the children from OAH's limited authority to establish child support. The Party has memory problems and statements were often incoherent. Party 1 did not remember filing the appeal.

Conclusions

- ▶ There is a need for representational accommodation for a small group of unrepresented litigants in OAH hearings
 - ▶ Caseloads were child support, unemployment insurance, food assistance, special education, long-term care, Medicaid, and developmental disabilities.
- ▶ OAH needs to identify organizations or entities that are able to provide qualified SRs with professional liability coverage and few geographical limitations.
- ▶ OAH needs to secure and maintain designated funding to build and sustain a viable, reliable network from which the Chief ALJ can appoint SRs for parties with disabilities.

Questions

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Materials

Two-Year Assessment Report



ABA Judges'
Journal Article



Two-Year
Assessment Report



Bussing v DSHS



Weems v BIIA



OAH SR Inquiry
Process



Rulemaking
Petition June 2016



Franco-Gonzalez
v. Holder