PETITION FOR ADOPTION, AMENDMENT, OR REPEAL OF A STATE ADMINISTRATIVE RULE

Print Form

In accordance with RCW 34.05.330, the Office of Financial Management (OFM) created this form for individuals or groups who wish to petition a state agency or institution of higher education to adopt, amend, or repeal an administrative rule. You may use this form to submit your request. You also may contact agencies using other formats, such as a letter or email.

The agency or institution will give full consideration to your petition and will respond to you within 60 days of receiving your petition. For more information on the rule petition process, see Chapter 82-05 of the Washington Administrative Code (WAC) at http://apps.leg.wa.gov/wac/default.aspx?cite=82-05.

CONTACT INFORMATION *(please type or print)*

Petitioner's Name: C.B., a resident of Washington state; Fred T. Korematsu Center for Law and Equality; et al

Name of Organization: Ronald A. Peterson Law Clinic

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COMPLETING AND SENDING PETITION FORM

- Check all of the boxes that apply.
- Provide relevant examples.
- Include suggested language for a rule, if possible.
- Attach additional pages, if needed.
- Send your petition to the agency with authority to adopt or administer the rule. Here is a list of agencies and their rules coordinators: http://www.leg.wa.gov/CodeReviser/Documents/RClist.htm.

INFORMATION ON RULE PETITION

Agency responsible for adopting or administering the rule: Office of Administrative Hearings

☒ **1. NEW RULE - I am requesting the agency to adopt a new rule.**

☒ The subject (or purpose) of this rule is: To provide an assessment for representational accommodations for appellants in administrative hearings

☒ The rule is needed because: Please see attached Memorandum in support of Petition for Rulemaking

☒ The new rule would affect the following people or groups: Administrative hearing appellants with disabilities affecting their ability to self represent

☐ **2. AMEND RULE - I am requesting the agency to change an existing rule.**

List rule number (WAC), if known: _____

☐ I am requesting the following change: _____

☐ This change is needed because: _____

☐ The effect of this rule change will be: _____

☐ The rule is not clearly or simply stated: _____

☐ **3. REPEAL RULE - I am requesting the agency to eliminate an existing rule.**

List rule number (WAC), if known: _____

(Check one or more boxes)

☐ It does not do what it was intended to do.

☐ It is no longer needed because: _____

☐ It imposes unreasonable costs: _____

☐ The agency has no authority to make this rule: _____

☐ It is applied differently to public and private parties: _____

☐ It conflicts with another federal, state, or local law or rule. List conflicting law or rule, if known: _____

☐ It duplicates another federal, state or local law or rule. List duplicate law or rule, if known: _____

☐ Other (please explain): _____

BEFORE THE WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

In re:

C.B., a Washington State resident;

The Fred T. Korematsu Center at Seattle University School of Law; and

Disability Rights Washington;

Petitioners.

MEMORANDUM IN SUPPORT OF PETITION FOR RULEMAKING PROVIDING FOR AN ASSESSMENT FOR A REPRESENTATIONAL ACCOMMODATION IN ADMINISTRATIVE HEARINGS

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I. INTRODUCTION

C.B., the Fred T. Korematsu Center at Seattle University School of Law, and Disability Rights Washington (DRW)[1] petition the Washington State Office of Administrative Hearings (OAH) to promulgate a new rule to ensure that appellants like C.B. with disabilities affecting their ability to self-represent have the reasonable accommodations they need and are entitled to under the Americans with Disabilities Act (ADA) and the Washington Law Against Discrimination (WLAD). Under these laws, OAH is required to do an individualized and fact-specific evaluation of the effects of an appellant's disability on the ability to represent him or herself at hearing. If OAH finds that the appellant's disability prevents her from putting on her case, then it is required by law to provide a reasonable accommodation to ensure the appellant has meaningful access to the hearing process. In the context of administrative or judicial hearing procedures, representation is the primary means by which people unable to represent themselves due to their disabilities should be accommodated. Because OAH has neither a system in place to do this evaluation nor trained representatives readily available to appoint if this accommodation is deemed necessary, this rule is required for appellants with disabilities to have a fair chance to put on their case.

Petitioners request that OAH adopt the *Model Agency Rule on Representational Accommodation in Administrative Agency Hearings* developed by the Washington State Access

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[1] C.B. is a client of the Seattle University Ronald A. Peterson Law Clinic who has been an appellant in OAH Health Care Authority hearings; the Fred T. Korematsu Center at Seattle University School of Law advances justice and equality through research, advocacy, and education and seeks to combat discrimination, help communities advocate for themselves, and train the next generation of social justice advocates; Disability Rights Washington is a private non-profit organization that protects the rights of people with disabilities statewide and has a mission to advance the dignity, equality, and self-determination of people with disabilities.

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to Justice Board's Justice Without Barriers Committee.[2] This Model Rule was included in *Ensuring Equal Access for People with Disabilities, A Guide for Washington Administrative Proceedings,* which was endorsed by OAH in the publication. This rule or a substantially similar one will meet the accommodation needs of appellants with disabilities limiting self-representation.

C.B.'s own experience with the hearing process shows why this rule is critical. She lives with multiple severe disabilities including anxiety, bi-polar disorder, PTSD, stroke, and a chronic gastrointestinal disorder. She depends on the Washington Health Care Authority (WHCA) COPES program to provide her with the personal care provider hours she needs to maintain her health, independence, and dignity. When those hours of in-home care were erroneously reduced by WHCA, Ms. B. had to go through the OAH administrative adjudicative process to pursue her meritorious claim. As a result of her disabilities, Ms. B. could not have represented herself in the adjudicative process. Fortunately, she was able to obtain assistance from a legal advocate at Northwest Justice Project (NJP). Without that legal assistance, Ms. B. would have had to forgo her appeal altogether because her disabilities precluded her from self-representation, and any attempt at self-representation would have adversely impacted her health.

This memorandum shows why a rule that allows for the provision of a trained representative as a reasonable accommodation for disability in administrative hearings is essential to accommodate appellants like Ms. B., and would also be simple to implement, result

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[2] Ensuring Equal Access for People with Disabilities, A Guide for Washington Administrative Proceedings (May 2011) http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Access-to-Justice-Board/ATJBLC/~/media/73292065DB15413D865E7AB3426806F4.ashx. Appendix A.

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in little cost and increased efficiency for OAH, and provide for a fair and just administrative hearing system.

II. SUMMARY OF PETITION MEMORANDUM ARGUMENTS

This Petition Memorandum is organized as follows:

Part A sets out the relevant background of the Petitioner C.B. and shows how this rule would provide equal access to the administrative hearing process essential for Ms. B. and others like her to maintain benefits necessary for independence, health, and dignity.

Part B demonstrates that this rule is legally necessary to ensure meaningful access to the administrative hearing process. The current OAH policy of refusing to assess a disabled person's request for a representational accommodation violates the ADA, the WLAD, and the Due Process Clause of Washington's Constitution. Washington state courts, federal courts and the federal immigration agency have recognized the legal obligation to provide for a representational accommodation in the judicial and administrative courts, and have adopted rules that allow for the assessment and provision of representational accommodations when necessary. This section also demonstrates that, in light of the extensive law supporting the adoption of this rule, it would be arbitrary and an abuse of agency discretion to deny this petition for rulemaking.

Part C shows how this rule benefits both appellants with disabilities and the OAH fair hearing system. Along with improved access to administrative hearings, this rule will increase the efficiency of the administrative hearing process and decrease the number of frivolous appeals.

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Part D addresses potential costs and floodgates concerns that the State may raise regarding the implementation of a rule that provides for representational accommodations, and shows that those concerns are unlikely to occur.

III. ARGUMENTS

A. Ms. B. and others like her need a new rule to ensure that people with disabilities have equal access to the administrative court when challenging the denial of critical needs benefits.

C.B.'s story provides a vivid example of why this new rule is needed. She is a current participant in the Medicaid COPES program, which provides her with a trained paid caregiver in her home, allowing her to live there safely rather than in a restrictive and more expensive institutional placement. Ms. B. depends on these personal care hours to meet her basic needs because she suffers from multiple severe disabilities, some resulting from a disabling stroke in 2013. Ms. B.'s disabilities include seizures, bipolar disorder, hypertension, gastrointestinal problems, severe anxiety, and agoraphobia, which greatly impact her ability to function independently.

In October 2013, Ms. B.'s Medicaid-covered hours of care were reduced by the WHCA because of a misunderstanding between her and her case manager. Ms. B. and her care provider were told that the only way to reinstate the hours on which she was so dependent was to file an appeal and to make her case in an administrative hearing. She was also told that her son, who was compensated by COPES to provide care, could not represent her in the proceedings because, as her care provider, he was a paid Washington State employee.

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Self-representation in an administrative trial-like hearing requires an appellant to do a variety of complex tasks: to present facts in the form of exhibits and witnesses in support of the appeal, to examine and cross-examine witnesses and experts, to find and argue law, and to make and respond to objections.[3] While these tasks are difficult for any lay person, they are impossible when the appellant has a disability that either impacts her ability to focus on or comprehend the tasks, or deprives her of the stamina necessary to do the tasks.[4]

Here, Ms. B. could not accomplish the tasks required to resolve her case because her severe anxiety and agoraphobia worsens under the most mundane of stress inducements. Her anxiety disorder and the impacts of the stroke resulted in her inability to focus or respond in any coherent way to the proceedings at the hearing challenging her care reduction. Even with the assistance of an advocate from NJP, Ms. B.'s health significantly deteriorated after enduring the stress of an administrative hearing. During the hearing, Ms. B. frantically paced the hearing room while listening to testimony. It took her almost a month to regain some semblance of composure and she will never return to the level of stability she had before the hearing process. If not for NJP's representation, Ms. B. would have had no other choice but to abandon all efforts to pursue her appeal challenging the reduction in care hours—solely because her severe disabilities would have prevented her from putting on her case.[5]

Ms. B. is not the only appellant who would benefit from a rule providing for an individualized evaluation to determine if a representational accommodation is needed to access

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[3] Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings,* 32 N.Y.U. Rev. of L. and Soc. Change 131, 149 (2008).
[4] *Id.*
[5] Interviews with C.B., her son/caregiver, and her NJP representative; and a review of the OAH hearing file.

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the administrative hearing system. This rule would give access to people with disabilities severe enough that they would be precluded from performing the tasks needed to put on a case—e.g., appellants with significant cognitive disabilities, severe anxiety or depression, dementia, or extreme weakness from congestive heart failure.

To deny Ms. B. and OAH appellants like her the right even to receive an assessment of their need for this accommodation, and then the provision of a representational accommodation when necessary to access the administrative adjudicative process, is fundamentally unjust and a violation of the law. The following sections show why this new accommodation rule is required by law and why the new rule will result in a more efficient, low cost, and just system of challenging an agency's denial of "brutal needs"[6] benefits to the citizens of Washington State.

B. This new rule is legally necessary.

1. Washington courts have long recognized the legal right to representation as a reasonable accommodation under the ADA and WLAD.

Each court and administrative tribunal in Washington State must protect persons with disabilities from discrimination in judicial proceedings.[7] For example, the ADA requires that courts and administrative agencies be physically accessible to litigants who use wheelchairs; they may not require these litigants to crawl up the courthouse steps.[8] And, when a litigant like Petitioner C.B. with crippling anxiety resulting from a stroke cannot put on a case for her claim for COPES personal care benefits as a result of her disabilities, Washington law recognizes that a

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[6] *Goldberg v. Kelly*, 397 U.S. 254, 261, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (describing food, clothing, shelter, income, and health care as "brutal needs" and finding that the constitutional right to procedural due process includes the right to a fair hearing when access to such resources is denied).

[7] *See* 42 U.S.C. § 12131-12134 (Title II of the ADA); RCW 49.60 (WLAD).

[8] *See Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 820 (2004).

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lawyer may be required in its judicial branch courts as a reasonable accommodation to access that justice system.[9] Washington court rules affirm the ADA's requirement that an individualized assessment of the need for accommodation of physical and cognitive disabilities could result in the provision of *both* an elevator/wheelchair lift and a representational accommodation.[10]

Unfortunately, the Washington State OAH recognizes only the possibility of the former and not the latter accommodation. This disparity in recognition of the full scope of accommodations necessary to effectively access the administrative court highlights the dire need for a new rule. While the state judicial branch courts recognize and evaluate all parties' requests for *representational* accommodations, the OAH refuses to conduct an individualized assessment of this need, and locks many disabled appellants out of the hearing room in the same way as if they lacked mobility and were refused an elevator to access the second floor hearing room. OAH's failure to provide for a representational accommodation both violates the ADA and WLAD and stands in stark contrast to the policies and practices of the Washington judicial branch courts. Further, it conflicts with a growing number of federal courts interpreting the ADA and Rehabilitation Act as requiring a representational accommodation when found as necessary to access administrative and judicial branch courts.[11]

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[9] Gen. R. 33(a)(1)(C): (a) Definitions. The following definitions shall apply under this rule:
(1) "Accommodation" means measures to make each court service, program, or activity, when viewed in its entirety, readily accessible to and usable by an applicant who is a qualified person with a disability, and may include but is not limited to: …
(C) *as to otherwise unrepresented parties to the proceedings, representation by counsel, as appropriate or necessary to making each service, program, or activity, when viewed in its entirety, readily accessible to and usable by a qualified person with a disability.* (emphasis added).

[10] *See* Gen. R. 33.

[11] *See* 42 USC §§12131-12615 (Title II of the ADA); RCW 49.60 (WLAD); Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a) (Rehabilitation Act); Franco-Gonzalez v. Holder, 767 F. Supp.2d 1034 (C.D. Cal. 2010) (preliminary injunction); 2013 U.S. Dist. LEXIS 186258 (C.D. Cal. 2013) (partial summary judgment)

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Under the ADA and WLAD, executive branch agencies are required to provide all persons who have qualifying disabilities with reasonable accommodations to access all adjudicative services.[12] The ADA and WLAD apply equally to both administrative agency courts and judicial branch courts because state agencies that hold administrative hearings are, by definition, "public entities" under the ADA.[13] Washington's judicial branch courts are required to do a fact-specific and individualized assessment to determine if a person qualifies for a representational accommodation to access the justice system.[14] It is sound logic to apply the same requirement to administrative adjudications.

The Washington State Supreme Court recognizes the need for a representational accommodation when a litigant has a disability that prevents him or her from meaningfully accessing the judiciary.[15] In 2007, the Supreme Court adopted, with the Washington State Bar Association and the Access to Justice Board's approval, GR 33, which codified the fundamental right to present one's case regardless of the type of disability or the accommodation needed. Washington State's administrative system has failed to adopt a rule parallel to GR 33. As a result, people with developmental disabilities, traumatic brain injuries, mental illness and other disabilities that prohibit them from meaningfully accessing the hearing process through self-representation are effectively denied due process or are forced to abandon meritorious claims, as was almost the case with Ms. B.

(http://www.clearinghouse.net/chDocs/public/IM-CA-0067-0009.pdf).

[12] 28 C.F.R. §§35.102(a).

[13] 42 U.S.C. § 12131(1).

[14] Gen. R. 33

[15] Id.

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This grave disparity between accessing the judicial branch courts and the administrative hearing system was brought into stark relief in the case of *Weems v. Board of Industrial Insurance Appeals*.[16] In 2007, the Board of Industrial Insurance Appeals (BIIA) denied Dale Weems's application to reopen his claim for worker's compensation benefits, due to his worsening injuries caused by a 1973 accident on the job. The BIIA denied the application and Mr. Weems, acting *pro se*, appealed the denial to an agency hearing. Mr. Weems could not find an attorney to represent him, but he told the administrative hearing judge that he was unable to represent himself due to his brain injury.[17] The judge denied Mr. Weems's request for a representational accommodation as well as his request to reopen his worker's compensation benefit claim.[18]

Mr. Weems sought judicial review of the BIIA's order, and the state superior court found that "Weems currently suffers from a mental health condition that [a]ffects his ability to fully and effectively represent himself and prosecute his [Worker's Compensation] case."[19] The superior court appointed counsel as a reasonable accommodation pursuant to GR 33 and the ADA.[20] After counsel's briefing, the superior court reversed the BIIA's administrative hearing decision and remanded for a new hearing.[21] In the reopened case, Mr. Weems was *again* denied a representational accommodation by the agency.[22] The industrial appeals judge entered a decision affirming the BIIA's denial of Mr. Weems' application, and Mr. Weems, again, had to file a

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[16] *Weems v. Bd. of Ind. Ins. Appeals,* No. 44713-4-II, 2014 WL 3362056 (2014).
[17] *Id.* at *1.
[18] *Id.* at *2.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at *3

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petition for review of the decision in superior court.[23] And, again, pursuant to GR 33, the superior court provided Mr. Weems with counsel as a representational accommodation. Mr. Weems's counsel argued that denial of his representational accommodation at the administrative hearing prevented him from meaningfully accessing the proceeding. However, on reconsideration, the court affirmed the agency decision stating there was no legal basis to order the agency to pay for counsel.[24]

Mr. Weems appealed to the Court of Appeals on the issue of whether the BIIA erred in failing to appoint counsel in the agency hearing as a reasonable accommodation under the ADA and WLAD.[25] After briefing and oral argument, the Court of Appeals remanded the case to superior court to make specific findings of fact on Mr. Weems's need for a representational accommodation under the ADA, indicating its agreement that the ADA requires such an individualized evaluation.[26] On remand, the superior court found that, under the ADA, the agency had violated its affirmative obligation to conduct a fact-finding inquiry to determine whether Mr. Weems was a person with a disability, and if so, to provide a reasonable accommodation of that disability. The reasonable accommodation required by the facts was appointment of counsel at public expense.[27]

This new rule would put in place a procedure for doing exactly what the *Weems* courts found is required by the ADA. A rule is needed so that hearing appellants are not required to have multiple hearings and appeals in order to access this legally required accommodation.

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[23] *Id.* at *4-5.
[24] *Id.* at *4.
[25] *Id.* at *1.
[26] *Id.* at *8.
[27] *Id.* at *7.

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2. *After a favorable court decision, the federal government now recognizes the right to representation as a reasonable accommodation in the Immigration administrative courts.*

The federal government now recognizes the right to representational accommodations in administrative proceedings.[28] In *Franco-Gonzales v. Holder*, the United States District Court held that a class of disabled immigration detainees was entitled to appointment of a "qualified representative" under Section 504 of the Rehabilitation Act.[29] The court found that, without this representational accommodation, disabled detainees could not meaningfully participate in the immigration court administrative hearing proceedings,[30] including the right to examine the evidence against the immigrant, to present evidence on the immigrant's own behalf, and to cross-examine witnesses presented by the government.[31] In this case, the detainees' abilities to exercise their rights was hindered by their cognitive disabilities; thus, providing representation was the only means by which they could invoke their rights.[32] Both the federal district court and now Immigration and Customs Enforcement have agreed section 504 of the Rehabilitation Act, the law on which the ADA is modeled, requires federal agencies to assess and provide for a representational accommodation. Following the landmark decision in *Franco-Gonzales*,

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[28] *Franco-Gonzalez v. Holder*, 767 F. Supp.2d 1034 (C.D. Cal. 2010) (preliminary injunction); 2013 U.S. Dist. LEXIS 186258 (C.D. Cal. 2013) (partial summary judgment) (http://www.clearinghouse.net/chDocs/public/IM-CA-0067-0009.pdf).

[29] *Id.*

[30] The federal Immigration Court at issue in the *Franco-Gonzales* class action is an administrative agency court that is part of the Department of Justice's Executive Office for Immigration Review (EOIR). EOIR primarily decides whether foreign-born individuals charged by the Department of Homeland Security with violating immigration law should be ordered removed from the United States. The agency employs approximately 235 immigration judges nationwide who conduct these important administrative court proceedings.

[31] *Franco-Gonzales,* 767 F. Supp. 2d at 1034.

[32] *Id.*

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Immigration Law Administrative Judges now must assess detainees with disabilities and appoint counsel when necessary for the detainee to access the system.[33]

Title II of the ADA seeks to enforce the constitutional right of due process by requiring, when necessary, accommodations of disabilities in judicial proceedings.[34] Whether an unrepresented claimant can confront and present evidence undoubtedly depends on his ability to read, reason, comprehend, communicate, and regulate emotions. When there is evidence suggesting a lack of ability to perform these basic functions, an ALJ must inquire into a party's capacity for self-representation. Only by engaging in such an inquiry and removing the structurally imposed obstacles to a litigant's full participation may a judge be assured that he/she will be able to fairly and accurately resolve the legal claims.[35]

In summary, the adoption of GR 33 in Washington, the *Weems* litigation, and the *Franco-Gonzales* decision suggest that OAH must do an individualized determination of a disabled person's need for accommodation to access both the agency and judicial branch courts, and if a representational accommodation is found to be appropriate, require the provision of a suitable representative. This new rule creating that process is required by law.

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[33] *See,* Dep't of Justice, *Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions* (Apr. 22, 2013) http://nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf.

[34] *Tennesse v. Lane*, 541 U.S. 509, 532, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004).

[35] *See, e.g., In Re Meade*, 103 Wn.2d 374, 381, 693 P.2d 713 (1985).

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3. *Because this new rule is legally required, a denial of this Petition for Rulemaking could be found to be arbitrary and capricious by a reviewing court.*

A decision by OAH not to proceed with this rulemaking petition would be subject to judicial review.[36] An agency decision not to adopt a rule may be overturned when the agency had a statutory duty to adopt the rule or if its decision not to act was arbitrary and capricious.[37] Under the judicial review provisions of the Administrative Procedure Act, relief will be granted to "persons aggrieved by the performance of an agency action, including the exercise of discretion" when the court determines that the agency action is "(i) Unconstitutional; (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law; (iii) Arbitrary or capricious..."[38] Agency action is arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[39]

Because the possibility of a representational accommodation is required by both the ADA and WLAD to allow people with disabilities equal access to the agency hearing system, and without this new rule OAH still has no process in place to review requests for this legally mandated accommodation, a reviewing court is likely to find OAH's refusal to promulgate this rule to be

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[36] RCW 34.05.570(4)(b) ("A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance").
[37] *Rios*, 145 Wn.2d at 493, 505; *accord Northwest Ecosystem Alliance v. Wash. Forest Practices Bd.*, 149 Wn.2d 67, 66 P.3d 614 (2003).
[38] RCW 34.05.570(4)(c).
[39] *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

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"implausible" given its mandatory statutory duty. In two analogous cases, reviewing courts have come to just that conclusion.

The Washington Supreme Court ordered a state agency to initiate rulemaking when supported by the most current research.[40] In *Rios v. Washington Department. of Labor and Industries*, the agency was held to have acted arbitrarily when it denied a petition for rulemaking brought by pesticide handlers in 1997.[41] The agency denied the petition for rulemaking to establish a cholinesterase monitoring program for pesticide handlers,[42] despite the fact the agency's own report on the issue had a heading that termed cholinesterase monitoring "the most well developed and feasible method among available worker monitoring approaches for cholinesterase-inhibitor exposure."[43] The court held that, in light of this "most current research," the agency denial was "willful and unreasoning and taken without regard to the attending facts or circumstances."[44]

Similarly, *Tummino v. Hamburg* supports the proposition that a failure to grant this petition would be arbitrary and capricious.[45] The Federal District Court for the Eastern District of New York reviewed an FDA denial of a citizens' petition requesting that the contraceptive, Plan B, be made available to all women and girls without an age restriction. The FDA denied the petition despite overwhelming support from the medical community, including its own medical review team, that there was no health related basis for the age restriction on access to Plan B.

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[40] RCW 34.05.574(1) ("In a review under RCW 34.05.570, the court may . . . (b) order an agency to take action required by law").
[41] *Rios v. Wash.Dep't of Labor & Indus.*,145 Wn.2d 483, 507, 39 P.3d 961 (2002).
[42] *Id.* at 487.
[43] *Id.*
[44] *Id.citing Hillis v. Dep't of Ecology,* 131 Wash.2d 373, 383, 932 P.2d 139 (1997).
[45] *Tummino v. Hamburg,* 936 F. Supp. 162 (E.D. N.Y. 2013).

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The federal court concluded that "the agency's decision cannot withstand any degree of scrutiny . . . because of its disregard for the scientific evidence that the FDA had before it."[46]

The *Tummino* and *Rios* decisions suggest that a denial of this petition will be found to be arbitrary and capricious by a reviewing court. Here, OAH has a clear statutory duty to comply with the ADA and WLAD by individually evaluating and acting on reasonable accommodation requests. A continuing failure to act on this duty by denying this rulemaking petition is arbitrary and capricious because the agency would still lack any method to evaluate the ability of a disabled appellant to represent him or herself, and still fail to provide a representational accommodation when a disability precludes an appellant from self-representation in an administrative hearing. That decision would be "willful and unreasoning" and "disregard(ing) of …evidence before it" given the clarity of the legal duty to individually assess appellants' needs for accommodation and the availability of this same reasonable accommodation in the Washington state judicial branch courts.

C. This rule benefits both appellants with disabilities and the OAH fair hearing system.

1. *Other courts' implementation of a representational accommodation shows that this rule is easy to administer and will increase the efficiency of the administrative hearing process.*

Under the ADA, an agency must grant a request for a reasonable accommodation unless it is "unreasonable" and unnecessary. A requested accommodation is only unreasonable if it poses an undue financial or administrative burden or fundamentally alters the nature of the

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[46] *Id.* at 26; *see also* Linda Greenhouse, *Of Judges and Judging*, N.Y. Times Opinionator (Apr. 17, 2013), http://opinionator.blogs.nytimes.com/2013/04/17/of-judges-and-judging/?ref=opinion.

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program or services provided.[47] The experiences of Washington State Courts with the GR 33 representational accommodation and the federal immigration agency courts with the implementation of the *Franco-Gonzales* order demonstrate that providing counsel to those in need is not an undue burden and in fact provides for greater efficiencies in the hearing system.

a. *Washington State courts' administration of GR 33*

In Washington, judicial branch courts have managed to implement GR 33 without undue difficulty or expense in the nine years since its adoption. Pierce County Superior Court's GR 33 accommodation requirements process is illustrative of the state trial court's experience of implementing a representational accommodation.[48] If a request for an ADA accommodation for appointment of counsel is made by a party to a civil proceeding, the ADA coordinator there uses the following simple test to determine if the person qualifies for a representational accommodation:

> 1) Psychological or neurological impairments, documented by a qualified expert, which interfere with the applicant's ability to comprehend the proceedings and/or communicate with the court; and
>
> 2) The cognitive interference is to a degree that the applicant is functioning at a level that is substantially below that of an average *pro se* litigant[49]

Thurston County provides a simple form to request any ADA accommodation, including representational accommodation.[50] The Supreme Court has created a set of forms for the state

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[47] 28 CFR § 35.150(a)(3); RCW 49.60.
[48] Americans with Disabilities Act Information. Pierce County Superior Court procedure forms available at https://www.co.pierce.wa.us/index.aspx?nid=1027
[49] Attached as Appendix B.

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courts to use when evaluating and deciding on requests for reasonable accommodations.[51] Over the past nine years, state courts at all levels have administered GR 33 without significant administrative barriers.

b. Washington State Access to Justice Board's Model Rule

In May of 2011, the Washington State Access to Justice Board's Justice Without Barriers Committee published *Ensuring Equal Access for People with Disabilities, A Guide for Washington Administrative Proceedings*.[52] This comprehensive manual for administrative agency courts describes in detail the best practices for evaluating the need for a representational accommodation. It also provides a model rule for initiating, facilitating, and deciding on whether a representational accommodation is necessary. Petitioner is requesting that this Model Rule be adopted by OAH here.

c. Implementation of representational accommodation assessments in immigration courts.

The federal administrative agency Immigration Court system has also implemented a straight-forward policy to assess the need for counsel as an accommodation.[53] An Immigration

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[50]GR 33 REQUESTS FOR ACCOMMODATION UNDER THE ADA
(b) **Process for Requesting Accommodation.**
(1) Requests for accommodation under GR 33 shall be presented to either the Superior Court Administrator or the Assistant Superior Court Administrator, provided, that a need for accommodation that arises less than 48 hours before a scheduled hearing, may be presented to the judicial officer scheduled to hear the proceeding. Thurston County Superior Court, Local Rules 2015 (Sept. 1, 2015) http://www.co.thurston.wa.us/superior/Local%20Court%20Rules/Thurston%20Co%20LCR%202015.pdf.

[51] Washington Courts, Court Forms: General Rule 33 Request for Reasonable Accommodation, https://www.courts.wa.gov/forms/?fa=forms.contribute&formID=71 (last visited Jun. 2, 2016).

[52] Ensuring Equal Access for People with Disabilities, A Guide for Washington Administrative Proceedings (May 2011) http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Access-to-Justice-Board/ATJBLC/~/media/73292065DB15413D865E7AB3426806F4.ashx. Appendix A.

[53] Dep't of Justice, *supra* note 33.

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Administrative Law Judge (IALJ) is required to initiate a hearing "when it comes to [the judge's] attention through documentation, medical records, or other evidence that an unrepresented detained alien appearing before [him/her] may have a serious mental disorder or condition that may render him or her incompetent" to self-represent.[54] The following guidance has been provided to IALJs in determining one's ability to self-represent: (1) assessing the individual's right to present, examine, and object to evidence and cross-examine witnesses; (2) the individual's ability to file an appeal; (3) the individual's ability to make decisions about asserting and waiving rights; (4) the individual's ability to respond to allegations and charges in the proceeding, present information, and respond to questions relevant to the eligibility for relief.[55]

An individualized assessment of the need for counsel is not difficult and is not an undue burden on administrative agencies. Ascertaining whether assistance of counsel is appropriate for an appellant with a brain injury should be no more cumbersome than ascertaining whether an American Sign Language interpreter is appropriate for a party who is deaf or a personal reader is appropriate for a claimant with a visual impairment. The OAH should follow the lead of state courts and the federal immigration agency in assessing the need for a representational accommodation in state agency proceedings.

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[54] *Id.* It should be noted that Petitioners do not agree that the ADA requires only a "serious mental disorder" in order to provide a representational accommodation. The agency is required to assess all types of disabilities to determine need for a particular accommodation.

[55] Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders, https://dl.dropboxusercontent.com/u/27924754/EOIR%20Protections.pdf (last visited Jun. 2, 2016).

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2. *Representational accommodations would also improve the efficiency and fairness of the administrative hearing process.*

The benefits of representational accommodation flow not only to the disabled appellant but also to the administrative hearing courts, which would become more efficient and fair in their adjudication processes. A disabled appellant gains through a representational accommodation an advocate who can "delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient," which the disabled appellant would not be able to perform herself.[56] Such functions do not hamper the hearing process.[57] To the contrary, given the complexity of the administrative hearing process, it is likely that the hearing progresses more quickly, efficiently, and *fairly* when a party who is physically or mentally unable to present a case has a trained representative there to accommodate that need.[58] Indeed, fairness is the supporting pillar upon which American jurisprudence is built.[59]

In fact, providing representational accommodation to those in need significantly benefits the justice system. In 2010, the ABA Coalition for Justice surveyed judges on the impact of the rising number of *pro se* litigants on representation in the courts. An overwhelming 86 percent of the respondents felt that courts would be more efficient if the parties were represented.[60] The

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[56] *Goldberg*, 397 U.S. at 271.
[57] *Id* (noting the benefits of retaining counsel in regards to VA hearings).
[58] Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon,* 2 Seattle U. L. Rev., 621 (2004).
[59] *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (noting that "from the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals).
[60] ABA Coalition for Justice, *Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts* (Preliminary) (July 12, 2010)

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survey's results are illustrative of just some of the burdens that *pro se* litigants with disabilities present for the courts:

> ·56% of the judges thought that the court is negatively impacted when there is not a fair representation of the facts.
>
> ·42% of judges were concerned that, when aiding a pro se litigant, they compromised the impartiality of the court in order to prevent injustice.
>
> ·62% said that parties are negatively impacted when not represented.
>
> ·78% said the court is negatively impacted.
>
> ·71% of judges who thought the court is negatively impacted were concerned by the time staff spent assisting self-represented parties.[61]

These court concerns are exponentially greater when the *pro se* party has a disability that prevents self-representation.

Moreover, studies suggest that access to representation may lead to more accurate adjudications.[62] Fairness is established before proceedings even begin, as studies also show that there are fewer lost claims filed in jurisdictions with representational accommodations.[63] All of these benefits create improved efficiency and decrease cost while at the same time providing appellants with disabilities impacting self-representation meaningful access to the adjudicative process.

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http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.authcheckdam.pdf.

[61] *Id.*

[62] Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51 (2010).

[63] *Id.*

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D. The potential costs and "floodgates" concerns that state agencies using the OAH hearing process may raise in opposition to the implementation of a representational accommodation rule are unlikely to occur.

This proposed rule will not open the floodgates for requests for representation from disabled appellants in the administrative hearing process. The state courts' experience with GR 33 is instructive. For example, since the implementation of GR 33 in 2008, the highly populous Pierce County approved only an average of 14.75 representational accommodations in superior court per year.[64] Given that Pierce County Superior Court reported 15,743 civil case filings in 2012 (second in number only to King County),[65] an average of 15 counsel accommodations from that high caseload suggests that the number of representational accommodations granted and concomitant costs would likely be very low at OAH. And, while cost should not be dispositive of whether a person is entitled to a reasonable accommodation under law, the costs associated with providing representational accommodations will likely be small. Looking again at Pierce County's GR 33 data, the average cost for providing representational accommodations to eligible parties was only $25,767 per year.[66]

According to information from OAH, there had only been *six requests* for representational accommodations from appellants over the two year period that data was collected from 2013 - 2014.[67] In 2015, OAH implemented a new software system and reports that there has only been one request for a representational accommodation since the system was

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[64] Attached Appendix C.
[65] Washington Courts, Pierce County Civil Caseload Report 2012, http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=civil&fileID=civfilyr (last visited Jun. 2, 2016).
[66] *See* attached Appendix C.
[67] Information collected and presented orally at a meeting with appellant advocates in August 2015 from Assistant Deputy Chief Administrative Law Judge for the Washington OAH, Hon. Jane Habegger.

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implemented.[68] While the number of requests may increase once a new rule is in place and more appellants are aware of it, the experience of the Pierce County superior court with GR 33 suggests that the number of requests made to agencies will be manageable.

Some agency officials have expressed concerns that any appellant with a developmental disability would automatically qualify for representation in agency hearings at the State's expense. While the high cost of reasonable accommodations alone do not legally allow an agency to deny the accommodation,[69] statistics from OAH regarding the number of DDA hearings show that this concern is unfounded.[70] First, a representational accommodation would only be appropriate for appellants with developmental disabilities who have been assessed as needing one and who have no other preferred person to represent them. Second, the number of DDA hearings has decreased dramatically in the past few years. Since 2011, OAH has held a high of 81 DDA hearings and a low of 20 per year. So far in 2016, only two DDA hearings have been held.[71] Given the critical importance of developmental disability benefits to those with cognitive impairments, it is essential that those relatively few people in need of representation receive this accommodation if their cases go to hearing.

Furthermore, this rule might have less financial impact than GR 33 because there is no requirement for advocates to hold a bar license in the administrative adjudicative process.[72] Representation could be contracted out and performed by a trained paralegal or advocate. Legal

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[68] Information provided upon request from Chief ALJ Lorraine Lee on April 7, 2016.
[69] 42 U.S.C.A.§ 12132
[70] Attached Appendix D showing the number of Developmental Disabilities hearing requests and hearings held from 2007 through April 2016.
[71] *Id.*
[72] RCW 34.05.428

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aid organizations such as NJP or Columbia Legal Services already have advocates at the ready, including paralegals, who are trained in administrative law and could perform the duties of representation for relatively low cost under a contract with OAH.

Some administrative costs are inherent to the proper administration of justice, and that cost is not a valid justification for denying the right to accommodation under the ADA and WLAD to litigants with disabilities preventing self-representation. "While integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole." H.Rep. 485(III), 101st Cong., 2d Sess. 50 (1990) U.S. Code Cong. & Admin. News 1990, 473.

III. CONCLUSION

A representational accommodation for people with disabilities like Ms. B. is already being implemented by courts in Washington State and in federal immigration administrative courts nationally. Processes are in place to conduct individualized assessments that do not impose an undue burden. The benefits of providing representation in adjudicative hearings to both the appellants and to the administrative courts are numerous. Petitioner asks OAH to grant this rulemaking petition and promulgate the Model Rule providing for an assessment for a representational accommodation when an appellant's disability prevents self-representation and

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precludes him or her from accessing the administrative hearing system.

RESPECTFULLY SUBMITTED in the State of Washington.

DATED this ____ day of June, 2016.

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Attorney for Petitioner

Lisa Brodoff, WSBA No. 11454

Erik Ben-Zekry, Legal Intern

Whitney Hill, Legal Intern

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DECLARATION OF SERVICE

LISA BRODOFF DECLARES: I caused to be served this document, **Petition and Memorandum in Support of Petition for Rulemaking**, upon the following parties:

BARB CLEVELAND RULES COORDINATOR OFFICE OF ADMINISTRATIVE HEARINGS P.O. BOX 42488 OLYMPIA, WA 98504-2488 PHONE (360)407-2711 FAX (360)664-8721	☐ U.S. Mail, Postage Prepaid ☐ Overnight Mail (via FedEx) ☐ Facsimile Transmission ☐ ECF Filing/E-Mail Transmission

I declare under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this __23 rd____ day of __June_____ 2016, at Seattle, King County, Washington.

Lisa Brodoff

LISA BRODOFF
Attorney for Petitioners

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Appendix A

Model Agency Rule

Model Agency Rule on Representational Accommodation in Administrative Agency Hearings

The Authority of an Adjudicative Proceedings Presiding Over

In cases where the party requests the appointment of a suitable representative, and in cases where the PRESIDING OFFICER has a reasonable basis to believe that, because of a physical and/or mental disability/impairment, a party is unable to understand the administrative proceedings or meaningfully participate in the proceeding, the PRESIDING OFFICER must conduct an inquiry into the party's ability to understand and participate before proceeding to the merits of the case.

1. (a) If the PRESIDING OFFICER determines that the party does not have a physical and/or mental impairment making he/she unable to meaningfully participate in the proceedings, the PRESIDING OFFICER may then proceed with a hearing on the merits. Where the PRESIDING OFFICER denies the request of a party to appoint a suitable representative, the PRESIDING OFFICER shall inform the party that she/he may appeal the decision.

2. (b) If the PRESIDING OFFICER determines that the party does have a physical and/or mental impairment making him/ her unable to meaningfully participate in the proceedings, the PRESIDING OFFICER shall:

    1. Seek the consent of the party to appoint a suitable representative to represent the interests of the party in the hearing on the merits as an accommodation of the party's disability;
    2. If consent is given, appoint a suitable representative for the party at agency expense and at no cost to the party;
    3. If consent is refused, proceed with the hearing on the merits.

3. (c) If, due to a physical/mental impairment, the party is unable to give or refuse consent to the appointment of a suitable representative, the PRESIDING OFFICER shall appoint an administrative hearing facilitator to assist the party in making an informed decision whether to consent or refuse to consent to the appointment of a suitable representative. Where the party is unable to make an informed decision despite the assistance of the administrative hearing facilitator, the PRESIDING OFFICER has the discretionary authority to require the agency to seek appointment in a court of competent jurisdiction of a Guardian ad litem as

the appropriate representative, however, the PRESIDING OFFICER may determine that someone other than a GAL would be a suitable representative.

4. "Suitable representative" is denied as an attorney, or other legal representative qualified to practice before the agency who is specially trained in the substance and procedure of that agency's hearings.

(d) "Administrative hearing facilitator" is denied as an individual with experience and demonstrated competency in supporting effective communication with individuals with disabilities, appointed by PRESIDING OFFICERS for the purpose of assisting parties who cannot consent or refuse the appointment of a suitable representative due to limitations on capacity resulting from a physical or mental impairment.

(e) The PRESIDING OFFICER shall initiate the inquiry at whatever stage of the proceedings he or she becomes aware of facts that support a reasonable belief that the party in unable to understand and meaningfully participate in the proceedings.

(f) The record of the proceedings of the inquiry, and any supplementary documents generated in the course of the inquiry, shall be con den al, and shall be held as separate record apart from the hearing record.

(g) Following appointment, the suitable representative shall serve un l the administrative case is concluded, or the 39 party no longer consents to representation.

(h) All PRESIDING OFFICERS shall receive training on the implementation of this rule, which shall include information on the following:

1. common disability-related limitations on communication, listening, hearing, auditory processing, reasoning, and other attributes crucial to effective participation in a hearing;
2. stereotypes and misconception related to disability;
3. accommodation for disability-related limitations and removal of barriers in administrative proceedings.

Appendix B

Pierce County Superior Court

Assessment Qualifications Statement
(For determining ADA Accommodation Requests for Attorneys)

When a request for appointment of an attorney at court expense is made by a person with a disability, the following criteria will be used as a guideline during the assessment process in determining whether the requestor qualifies for the appointment of an attorney under GR-33:

The person with a disability is a party to the proceeding and the following factors exist:

Severe Cognitive or Neurological impairments, documented by a qualified expert diagnosis, which significantly interferes with the applicant's ability to comprehend the proceedings and/or communicate with the court.

AND

The comprehension and/or communication interference is to a degree of seriousness to where the applicant is functioning at a level that is substantially below that of an average pro se litigant.

Appendix C

PIERCE COUNTY SUPERIOR COURT - REPORT OF GR-33
ADA ATTORNEY CASES AND COSTS BY YEAR

Year	2008	2009	2010	2011	2012	2013	2014	2015	2016
Costs	$11,960.81	$28,035.43	$22,047.73	$35,992.28	$32,883.65	$32,138.82	$21,449.76	$21,625.84	$3,948.65

GRAND TOTAL SPENT THROUGH 03-22-16: $211,512.73

Date of this Report is 03-23-16 (Compiled by Bruce S. Moran, Deputy Court Administrator and ADA Coordinator)

NOTE: GR-33 was adopted by the Washington State Supreme Court effective 09-01-07, although Pierce County Superior Court had no attorney appointments or expenses in 2007.

Appendix D

Developmentally Disabled Cases– 2007- April 2016

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Totals
Hearing Request	1254	1238	1642	1597	1229	466	492	688	445	106	9157
Legal Representation	301	277	404	397	292	113	119	286	321	90	2600
Hearings Held	91	80	116	97	65	38	20	68	81	2	658
Appealed to BOA	17	21	31	23	18	9	N/A	N/A	N/A	N/A	128
Judicial Review	7	5	7	5	7	1	N/A	N/A	N/A	N/A	34

NOTE: Our new case management system is no longer accessed or used by the Board of Appeals (BOA) as of 2015. We are unable to query the data for cases that were appealed to BOA or for cases that went to Superior Court for 2013 - 2016. *Also, all results are based on the year the appeal as filed.

4/22/2016- RHeiberg