



Welcome to the
Administrative Law Section's
E-Newsletter!

We hope you enjoy
our newsletter and
encourage your feedback.

Please forward our newsletter
to your colleagues and encourage
them to join the Section if they
find the newsletter informative!
We also welcome your suggestions
for topics for future newsletters.

CONTACT US

Section Chair
Bill Pardee
Bill.Pardee@bta.wa.gov
Newsletter Submissions
Edward Pesik
edward.pesik@oah.wa.gov

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2021 Frank Homan Award Goes to John Gray, Administrative Law Judge

By Edward Pesik

At a reception held on Dec. 13, 2021, at Mercato Ristorante in Olympia, the Frank Homan Award/CLE Committee Chair Lea Dickerson presented the Homan Award for 2021 to John Gray, retired administrative law judge for the Office of Administrative Hearings. The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or applications of administrative law. John's family, friends, and many colleagues were in attendance at the evening event (albeit masked and socially distant).



ZOOM photos
courtesy of
Lea Dickerson

The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law.

Congratulations, John!

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*Non-voting member

The Administrative Law Section welcomes articles and items of interest for publication. The editors and Executive Committee reserve discretion whether to publish submissions.

Send submissions to: Edward Pesik (edward.pesik@oah.wa.gov).

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association or its officers or agents.

Layout • Sutherland Design Works
brittsutherland@comcast.net

Legislative News: Another PRA Bill

The legislative session review article in our last newsletter did not mention **House Bill 1108**. That bill concerns a program in which lenders notify the Department of Commerce of residential property foreclosures. It added a new section to the PRA—RCW 42.56.680—that exempts this information from disclosure. The effective date was July 25, 2021.

OAH Style Manual

The Washington State Office of Administrative Hearings (OAH) is an executive-branch agency created by the legislature in 1981 to be the independent state agency responsible for conducting impartial administration hearings for state agencies and the public. RCW 34.12.010, the enabling statute, provided that “(h)earings shall be conducted with the greatest degree of informality consistent with fairness and the nature of the proceeding.”

Over the years since, OAH has grown into an agency with over 135 senior, lead, line and pro tem administrative law judges who conduct hearings and issue written orders, usually within a tight time frame with deadlines specified by statute, regulation, or interagency agreement. In the first 11 months of the calendar year 2021, OAH ALJs issued over 34,000 written decisions. With that many different ALJs issuing that many orders over a wide variety of different programs, it would be easy to imagine how individually-created styles and formats might vary among authoring judicial officers, programs, or even local field offices.

In an effort to ensure an agency-wide standard, the chief judge has authorized the creation of an OAH style manual designed to foster clear and precise communication for the two principal audiences for the decisions: the interested parties affected by the written order and the appellate tribunals who review them. ALJs are required to use the style manual, but there is no present requirement for hearing participants to utilize these guidelines, so the manual will for now remain largely a matter of “professional interest” for practitioners, as opposed to something that the administrative law bar at large will have to absorb and implement. It should also be noted that you may be seeing some orders still being issued in an older format; this is likely due to the fact that OAH has hundreds of templates and it will take some time to adjust all of them to the new manual requirements.

That said, the manual does utilize the common resource guides for judicial orders and other OAH documents, such as the *Washington State Supreme Court Office of the Reporter of Decisions Style Sheet* (which incorporates *The Bluebook: A Uniform System of Citation*; the *Chicago Manual of Style*; and *Webster's Third New International Dictionary*).

The manual adopts a uniform font and type size (Franklin Gothic Book with 12 point size for the text other than footnotes) and provides the agency with guidance for any text which is to be presented in a language other than English. There are also several appendices that provide further instructions for citations, additional style references, guidance for ALJs in the use of gender-neutral writing, and sample document formats.

To review the most recently revised OAH Style Manual, please [click here](#).

JOIN OUR SECTION!

We encourage you to become an active member of the Administrative Law Section.

Benefits include a subscription to this newsletter and networking opportunities in the field.

[Click here to join!](#)

The Section also has six committees whose members are responsible for planning CLE programs, publishing this newsletter, tracking legislation of interest to administrative law practitioners, and more.

Feel free to contact the chair of any committee you have an interest in or for more information.

Committee chairpersons are listed on page two of this newsletter, and on the Section's website.

Announcing Our New Mentorship Program

The WSBA Admin Law Section invites you to participate in its first annual mentorship program. The mentorship program pairs experienced administrative law attorneys with either new/young attorneys or those beginning careers in administrative law and is designed to provide general career advice and guidance to mentees through a provided curriculum. **The program runs 10 months from March 2, 2022 - Dec. 31, 2022 and we ask that applicants commit at least two (2) hours per month with their paired mentor/mentee.**

The application window is now open! Apply as a mentor or a mentee by completing the linked form and emailing it to alexis@dynamicclawgroup.com on or before Jan. 30, 2022.

This is an excellent opportunity to network and earn free CLE credits.



[APPLY TODAY!](#)

Help us Make this Newsletter MORE RELEVANT to Your Practice.

If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please email Bill Pardee at Bill.Pardee@bta.wa.gov.

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WSBA Sections

Case Law Update

Sarepta Therapeutics, Inc. v. State of Washington, Health Care Authority, et. al, 497 P.3d 545 (2021)

By Eileen Keiffer

In late October 2021, the Washington Court of Appeals, Division II, issued a decision regarding Administrative Procedure Act (APA) standing, holding that Sarepta Therapeutics, Inc. (Sarepta) lacked standing to appeal under the APA and dismissed Sarepta's petition challenging HCA's medical necessity and hierarchy of evidence rules for the Medicaid program.

The Washington State Health Care Authority (HCA) has been delegated authority by the Legislature to administer Washington's Medicaid program. As part of that delegated authority, the HCA has promulgated regulations in the Washington Administrative Code establishing an "evidence-based prior authorization program from health care services and equipment, including prescription drugs." More granularly, HCA determines whether services or equipment are medically necessary and thus subject to reimbursement, per WAC 182-500-0070. Such determinations are made based upon the submission of medical evidence and utilizing the hierarchy of evidence rule.

In 2019, HCA received requests for prior authorizations for Exondys (a drug manufactured by Sarepta) for three Medicaid patients. The HCA denied each request because HCA determined Exondys was not medically necessary for the patients. Sarepta filed a petition for judicial review to the superior court under the APA, seeking declaratory judgment invalidating the HCA's hierarchy of evidence rule in its application to Medicaid reimbursement for Exondys. Sarepta also later amended its petition to include a challenge to the validity of the medical necessity rule.

HCA filed a motion to dismiss, arguing Sarepta lacked APA standing, which the superior court denied. However, the superior court also denied Sarepta's petition for review on its merits. Both parties cross appealed to the Court of Appeals.

The Court of Appeals, Division II, examined the APA's provisions with respect to standing. APA standing requires a petitioner to demonstrate three conditions: 1) that the agency action appealed has prejudiced or is likely to prejudice the party petitioning for review, 2) that the petitioner's asserted interests are among those the agency was required to consider when it engaged in the challenged action, and 3) that a judgment in favor of the petitioner would substantially eliminate or redress the demonstrated prejudice to the petitioner that was caused or likely to be caused by the challenged action. RCW 34.05.530(1)-(3).

The court explained that conditions 1 and 3 of the APA standing test are referred to as the "injury-in-fact" test. These conditions require an invasion of an interest protected by law. Further, for injuries that are threatened (not existing), such threat of injury must be immediate, concrete, and specific, rather than conjectural or hypothetical.

The case turned, however, on the second condition of the standing test—also referred to as the zone of interests test. HCA argued Sarepta did not meet its burden to show the zone of interests was satisfied. Specifically, HCA argued that the legislature did not intend to protect the financial interests of drug manufacturers in establishing the administration of the Washington State Medicaid program. Sarepta argued that federal Medicaid law conflicted with Washington's rules.

The court agreed with HCA, finding initially that the Washington Legislature clearly did not intend to protect the interests of drug manufacturers when it directed HCA to develop a prescription drug program based on medical evidence under RCW 70.14.050. "Based on the plain language of the statute, the legislature's intent was for the HCA to balance controlling costs with ensuring quality of care. The legislature did not intend for the HCA to protect Sarepta's financial interests when making rules to administer the prescription drug program. Therefore, Sarepta has failed to satisfy the zone of interests test under the Washington statutes."

The court also rejected Sarepta's argument that federal Medicaid law created a protected interest for drug manufacturers. The court interpreted the federal law as not establishing that coverage for prescription drugs requires payment for prescription drugs but rather that covered drugs are merely eligible for reimbursement/payment under Medicaid. The court found Sarepta incorrectly interpreted the federal law, as that program provides no guarantee of payment for prescription drugs.

The court further rejected Sarepta's alternative argument that the federal law creates a protected interest because drug manufacturers agree to provide rebates in exchange for a guarantee that Medicaid covers their drugs. But the court again explained there is a difference between coverage and payment. "[T]o the extent that a rebate agreement is akin to a contract, drug manufacturers enter into rebate agreements in exchange for their drugs being eligible for Medicaid coverage, not to guarantee payment for their drugs."

Having rejected Sarepta's arguments and having found Sarepta lacked APA standing, the court reversed the superior court's order denying HCA's motion to dismiss for lack of standing and dismissed Sarepta's appeal. ■