

## ADVISORY COMMITTEE NOTES

April 20, 2010

1. Introductions
2. Selection of chairs and note taker. Jonathan Read will chair the Southern California section, Roberta Savage will chair the Northern California section, and Christian Knox will be the note taker.
3. Updates by PJ Clark
  - a. An update was provided regarding ongoing furloughs. The furloughs are still in effect, at least through June 30, 2010. The Office of Administrative Hearings (OAH) is closed on the first through third Friday of each month. Filings on furlough Fridays are not processed until the following business day.
  - b. Prehearing Conferences (PHCs), Trial Setting Conferences (TSCs) & Mediations: OAH is scheduling PHCs and TSCs on Mondays and Wednesdays. Mediations are being scheduled on Tuesdays, Wednesdays and Thursdays. PJ Clark explained that the purpose of this scheduling was to allow the Administrative Law Judges (ALJs) at least one day per week to be in the office to catch up on their office tasks and schedule travel for the week.
  - c. The Laguna Hills OAH office will be closing as of the end of December 2010. The ALJs from Laguna Hills will either be assigned to Van Nuys or San Diego. The decision has not been made at this point. One member expressed concerns regarding OAH's ability to handle the high volume of cases in Orange County. PJ Clark addressed how OAH is able to handle the cases geographically; OAH will continue to look at the issue and will ensure that hearings are scheduled in Orange County as needed.
  - d. PJ Clark informed the members of staff changes at OAH. Laura Gutierrez continues to be the supervisor for special education staff. Christina Borrego is the new supervisor for the general jurisdiction staff. Cheryl Hill is also supervising support staff manager for the special education staff.
  - e. Since the last committee meeting in October 2009, there are five new ALJs. Lisa O'Brien, Troy Taira and Adeniyi Ayoade (Wale Ayoade) are the new ALJs in the

Sacramento office. Adrienne Krikorian and June Lehrman are the new ALJs in the Van Nuys office.

4. Concerns were expressed regarding the ability of OAH equipment and staff to handle large size faxes. PJ Clark stated that faxes that are 35 or 50 pages do not pose a problem, however OAH is receiving faxes that are over 100 pages. Members expressed concerns about the parties' ability to respond to such lengthy motions.

There was discussion that OAH employ a pleading page limit of 25 pages maximum, similar to some federal courts, but there was concern that this limit not apply to declarations and attachments. Another suggestion was to limit the number of pages per facsimile transmission, but a concern was expressed about the logistical problems raised by one motion being faxed in batches. PJ Clark stated that it is not a frequent problem; however, it is occurring at enough of a frequency to warrant discussion.

PJ Clark stated that currently OAH does not employ an e-filing system; however, it is something that is being considered. Concerns were expressed regarding being able to file documents near the end of the business day and being delayed because someone else may be sending a large fax.

A discussion followed regarding the difficulty and desirability of dealing with large motions. Suggestions were made regarding sending documents to OAH via Faxnation, but agreeing to utilize emails amongst the parties for service of documents. A public comment suggested OAH set guidelines for motions and allow parties to send documents directly to the ALJ assigned. PJ Clark stated that documents have to be processed by staff. Concerns were expressed regarding utilizing a complicated system of service of process and whether unrepresented parties would be able to understand such a process. PJ Clark stated OAH has sufficient fax lines; however, the size of a document can make it hard for staff to process and respond to the document. Public comment suggested sending documents in Portable Document Format directly to the staff assigned to the case. The committee did not make a recommendation.

5. Concerns were expressed with OAH's ability to properly calendar motions that are being filed at the end of the work day or at the end of the work week. Public comment was made that parents are working and may not be able to fax motions until

near the end of the work day or work week and therefore, the public commenter did not see a need to change the filing deadline. PJ Clark stated that any filings after 5:00 p.m. are processed the following business day. PJ MacMurray stated that a problem arises when motions are filed after the close of the business day or business week and an ALJ has to attend a hearing the following work day without being aware that a motion to continue was filed.

A public comment suggested OAH set up a dedicated phone line where parties can call in when an emergency continuance is requested and alert OAH that a motion was filed via facsimile. One member suggested that a service cut-off time be established because she is being served at her home as late as 11:00 p.m. and documents sent via facsimile are not necessarily picked up for a few days. Another member suggested an ex parte motion rule be set up for emergency motions requiring that they be filed three days prior to hearing due to the difficulty of having to respond to motions to continue when they are filed at 4:00 p.m. the day before hearing. Another member suggested that if a motion may affect the first day of a hearing that parties be required to inform OAH and the parties that an emergency motion has been made and that the parties contact and inform the staff member assigned to the case, including informing OAH staff via email. PJ MacMurray stated that motions to continue should not be a surprise to either party due to the meet and confer requirement.

A member stated that until a motion is ruled upon, the parties should assume the case is moving forward. PJ Clark stated the concern for OAH is that it receives notice in time to best use its resources. The earlier OAH is notified, the better OAH can respond. A public comment stated that information regarding continuances should be posted to the OAH website.

A question was raised as to whether the after hours settlement telephone line is being sufficiently utilized as a way to address the late filing of continuance requests. PJ Clark stated that the settlement line was being used more than in the past. PJ MacMurray stated that the settlement does not help with the problem created by the filing of last minute motions to continue. A member suggested that when continuance requests are filed

shortly before the hearing is to start, OAH allow the other parties 24 hours to respond and then go ahead and rule on the motion. The committee did not make a recommendation.

6. A member expressed the concern that the public is unclear on whether the addition of a new party to a case is considered a motion to add parties or a motion to amend the complaint. The committee requested OAH set forth a clear guideline on how the addition of a party is treated. PJ Clark gave the example of a student filed case where the respondent asks to add a party – how does this request affect the time line? PJ Clark stated that the committee’s question involves legal issues and therefore OAH cannot have a set policy on how the issue of adding a party is treated.

Another member stated that even when school districts are not opposing motions to add parties or motions to consolidate, OAH is taking a long time to rule on the motion. PJ Clark stated that OAH will give the parties three days to respond to motions, then they are ruled upon and it should not take such a long time. OAH will look into the matter.

Another member asked how OAH treats the request to add a new party and whether it is treated as a new complaint, resetting the time lines. PJ Clark stated the ALJ decides on an individual motion basis. Concerns were expressed concerns that the rulings may deny the third party being added to the case, rights such as the right to hold a resolution session. A public comment stated that if a responding party is seeking to add a party it should not be considered an amended complaint as the party seeking to add a new party did not file the complaint. The committee did not make a recommendation.

7. PJ Clark stated that OAH assigns the same judge who will conduct the due process hearing (DPH) to the PHC unless the judge is unavailable. A member inquired whether the ALJ listens to the recording of the PHC if they did not conduct the PHC. PJ Clark stated that the written order following the PHC guides the ALJ at DPH. A public member stated that in their hearing the PHC tape was lost and the ALJ could not review the PHC proceedings. Another member expressed concerns stating that in one case she had four different ALJs prior to the DPH. The ALJ who held the DPH would not follow things the parties had agreed to in the PHC and stated to the parties that it was too bad if something had been previously agreed to at the PHC and conflicted with the ALJ’s current ruling.

Members expressed concerns regarding the parties' ability to utilize peremptory challenges. An example was given of a judge stating during the PHC that they would not be the DPH judge and then showing up as the assigned DPH judge, resulting in the parties losing their ability to use the peremptory challenge. A member suggested that PHCs be moved to accommodate the availability of the DPH judge.

Another member stated that unforeseen things happen and when the DPH judge is different than the PHC judge, the parties should be allowed to reopen the PHC and reargue issues adversely ruled upon in the prior PHC, while a different member suggested that parties be bound by the order following PHC even if the ALJ for the DPH is different. A public member stated that there were three PHCs in their case and each time the new ALJ changed the rulings of the prior ALJ, therefore, OAH needs to have consistency in the system. Another member stated that ALJs need to be bound by the ruling in the order following PHC, unless good cause is established to change the ruling. Use of a peremptory challenge is covered by the statutes and regulations and it may not be something the committee can change. The committee discussed that the peremptory challenge is something that parties should use carefully as each party is entitled to only one peremptory challenge.

S. Rosenbaum made a motion which was seconded. The recommendation was that PHC rulings shall be the ruling when the DPH begins, unless a party gives appropriate notice and the parties are given time to argue the issue. In Northern California there were five votes in favor and three in opposition. In Southern California there were six votes in favor and zero in opposition.

T. Brock made a motion which was seconded. The recommendation was that a party be allowed to use a peremptory challenge after the PHC if there is no judge assigned to the DPH at the time of the PHC or if the judge changes between the PHC and the DPH. In Northern California there were four votes in favor, three in opposition and one in abstention. In Southern California there was one vote in favor, two in opposition and three in abstention.

8. The current policy is that parties are not allowed to record mediations. A consensus of the members expressed concerns with allowing parties to record mediations,

stating that parties will be reluctant to participate and he would not attend such mediations. One member stated that settlement agreements use language that is ambiguous and the written settlement agreement often looks very different than what the parties had agreed to prior to the agreement being drafted and that that recording should be allowed because the final agreement often does not reflect the actual agreement and gave an example of a written agreement that incorrectly documented the type of assessment the parties had agreed to during negotiations. A member suggested parties carefully read the agreement before signing it and another member suggested that accommodations could be provided to parents during mediations. A public comment questioned what was wrong with allowing parties to record all meetings.

Other members expressed concerns regarding allowing parties to record mediations. A motion was made and seconded. The recommendation was to continue the current policy of not allowing parties to record mediations. In Northern California the votes were six in favor and two in opposition. In Southern California the votes were five in favor and one in opposition.

9. The committee was informed that parties can use the continuance request form even if all parties do not agree.

10. An attorney member expressed concerns regarding attorneys issuing SDTs themselves and that the process is being abused as attorneys are threatening third parties with criminal prosecution for disobeying the SDT. She stated that only ALJs should be allowed to issue SDTs. A parent expressed that in her case the SDT process was used abusively to the point that a private service provider had to hire an attorney to deal with the SDT. Another attorney member stated that attorneys are changing the OAH forms and requiring records to be delivered to their office more than five business days before a hearing, thus turning SDTs into a discovery tool. She further stated that parents are routinely denied SDTs on the grounds that they are asking for more than the “educational records” permitted under the IDEA. Another commenter stated that frequently the SDT is not served on the parent or parent’s attorney so they are unaware that an SDT has been issued.

Another member stated that parents' attorneys are utilizing the same tactics, while another stated that subpoenas are being served via facsimile which is not in compliance with the legal requirements for service of subpoenas. One member stated that SDTs for medical records are hard to stop as those records are usually "relevant." However, the process is being used to put undue pressure on parents, but did not agree with the statement that only ALJs should be allowed to issue SDTs. However, he felt school districts were having an easier time enforcing SDTs and it was not appropriate for parties to obtain documents via SDT prior to the hearing as it violated the no discovery rule.

Some members expressed concerns regarding inconsistencies in how ALJs are handling the issue. Two attorney members stated that in a recent case the ALJ quashed the SDT because it had been issued by an attorney rather than an ALJ. PJ Clark stated that OAH will examine the issue regarding inconsistent orders and will tighten up the process. OAH will follow the law. PJ Clark stated that OAH will expedite its review of the subpoena process, but for now, parties should continue to abide by the statutes and regulations. Another attorney member stated that under the Government Code, unrepresented parties have to ask OAH to issue the subpoenas and that creates an issue of equity as attorneys can issue their own subpoenas at a faster pace. He recommended a process to expedite unrepresented parties' subpoena requests. The committee did not make a recommendation.

11. PJ Clark asked the members how they feel about the advisory committee process, particularly about the idea of holding general discussions versus making recommendations. One member stated that people like the idea of discussions and making recommendations, however, the recommendations need to be followed through by OAH. Another member agreed and stated that voting is a good tool to get a sense of how much support an idea may have. Most members agreed with the concept of voting on recommendations. One member added that recommendations were necessary; otherwise OAH has nothing to act upon after the advisory committee meeting.

A public commenter stated that the advisory committee meetings were too infrequent and inquired about providing written input in between meetings. PJ Clark stated that the public can send input to his attention or can send questions to the committee through the

OAH website. PJ Clark also stated that there is a link from the advisory page allowing the public to send questions or comments to OAH. The goal is to improve the process for everyone. Meetings are held twice a year because that is the requirement under the contract with CDE.

A public commenter suggested that the advisory committee use Roberts Rules to govern the meetings because it provides for a formal process of making motions and having them seconded. The issue of whether the advisory committee is required to use Roberts Rules was discussed again later in the meeting, with the public commenter recommending the committee utilize an independent law firm to conduct the meeting. The committee members stated that they would look into the matter further. No recommendation was made.

A public commenter thanked the members for their time and stated that without the committee making recommendations the meeting was akin to a coffee club. The commenter also recommended that the agenda should be posted on the OAH website ahead of time for comment. The need to make formal recommendations to OAH was important. The commenter felt the room should be bigger and the committee needed to take a break and not make quick decisions. Another member agreed in part and felt that it was important for OAH to respond to the committee's recommendations. A member pointed out that the committee needs to make the recommendation from both the Northern and Southern meetings because in the past there have been times when OAH has not taken action because Southern California section of the committee did not make a recommendation even though one was made by the Northern California section.

The committee discussed whether the current schedule of holding the meeting from 10:00 a.m. to 2:00 p.m. allowed sufficient time. Members and the public made several comments. Some like the current schedule. Some wanted the meeting to start at 9:00 a.m., while some felt such a start time would impede the attendance of parents who have to drop children off at school. Others felt an earlier start would affect the ability to people to travel to the meeting through rush hour traffic. One individual suggested a two day meeting with an opportunity to email the committee overnight. Some suggested a lunch break. One person requested the Northern California meetings be held in Oakland

or San Francisco as well, through video conferencing. PJ Clark stated that OAH will look into the possibility of adding other locations. PJ Clark proposed the committee could take a lunch during the future meetings. In the end, the consensus was that 10 a.m. was the best start time for the meeting.

The committee discussed term limits for members. The members discussed staggered terms of two years for each member. PJ Clark suggested two year terms and then the member could reapply.

12. All emailed comments from the public were read. The public commented on various subjects. One email questioned whether witnesses need to agree to continuances. PJ Clark stated that only parties need to agree to continuances, however, if a witness has a conflict they should provide input and let the ALJ decide the continuance.

There were emails that expressed frustration with the system, stating that it was unfair towards parents and denied them equal access. Another email stated that OAH is not following the IDEA 2004 changes regarding promoting maximum self-sufficiency. An email expressed frustration that in the decisions, free appropriate public education is being determined based upon the four corners of the document rather than taking into consideration the child's past and future potential. A member of the California Department of Education Advisory Committee (CDEAC) was in attendance and commented that she was concerned with what she had heard. Another email recounted the parent's frustration with the hearing process and repeated hearings involving the regional center, including the cost of the litigation even though the parent prevailed. The CDEAC member invited the public to attend their advisory committee meetings. PJ Clark stated that OAH has a link to the CDE website on the OAH website.

Some expressed frustration in the ability of parties to get PHCs continued when they had reached or were anticipating reaching settlement. PJ Clark stated that parties should send a letter indicating their agreement to continue the PHC.

Another email stated that school districts are postponing hearings by using repeated individualized education program (IEP) meetings as an excuse. One email asked if there was a legal hotline to provide legal advice on procedural questions similar to the Association of Realtors. PJ Clark stated that OAH will provide the assistance of a

mediator to draft a complaint after it has been found insufficient. Another email questioned why time lines were faster, up to one-third the normal time, when district filed the case. PJ Clark explained that those time lines are set out by statute. An email commented that OAH should stop using LRP or Perry Zerkel to conduct trainings for its ALJs as they are biased towards school districts. Instead OAH should use Steve Wyner or the legal team from the Forrest Grove case. Another email stated that the commenter believed the Brown Act applied to the advisory committee. Some public members agreed that they believed the Brown Act applied.

Another public comment expressed frustration that children lose and that the public education agencies waste money in litigation. A public comment stated that there was an OAH policy to deny prospective placements. PJ Clark stated that OAH did not have such a policy. Another comment stated that ALJs should come to an IEP team meeting. ALJs have never stepped into a special education classroom. A member of the San Francisco Advisory Committee stated that “maximum self-sufficiency” was the law and questioned why OAH does not follow that standard.

Another email expressed frustration that parents are unable to obtain legal representation for low or no cost and that attorneys on the OAH list for low cost are charging parents. A member responded saying that parents can’t do what attorneys can do and he takes pro bono cases but can’t afford to handle all cases for no fees. Another member who works for nonprofit legal aid organizations pointed out that low cost does not mean free and parents have to be below the poverty line in order to qualify for their agency’s services.

13. Agenda Item Suggestions:

a. The IDEA requires school districts to respond to a complaint within 10 days. School districts are not following the statute.

b. What does it mean that OAH will not apply the technical rules of evidence when many technical rules of evidence are applied in the ALJs decision.

c. Why are parties not allowed to present evidence of what placement looks like. Why are school district not showing their track record of children moving from special day classes to general education and what happens when kids exit special education.

14. The next meeting will be in October 2010. PJ Clark acknowledged and thanked everyone for their input and attendance. He stated that OAH is doing its best to get the process correct. He thanked the parties, the parents and those on the webcast. Some issues are bigger than those that OAH can resolve and OAH will take the ideas that will help to improve OAH.