

Special Education Advisory Committee
OAH Response to October 2008 Recommendations

The Office of Administrative Hearing's (OAH) Advisory Committees met October 15, 2008, in Los Angeles, and October 22, 2008, in Oakland. Each Committee followed set of agenda items and were asked to compile a list of recommendations at the end of each meeting. Below are the responses from OAH to the Advisory Committee recommendations.

RECOMMENDATIONS FOR CHANGES TO THE CALENDARING SYSTEM

The Committee recommended improving the training and abilities of the calendar clerks. In order to enhance the understanding of the calendaring system and improve the work product issued by calendar staff, OAH conducted a special training for all calendar staff in December 2008 that outlined the hearing process and parental rights. OAH has also added additional staff in order to reduce the current case load calendar staff handle and focus more on the details of each case.

The Committee also asked OAH to provide a detailed explanation of the calendaring process that OAH uses. This has been published on the OAH website and will be included in the parent manual.

The Committee recommended that OAH reinstitute the use of telephonic trial setting conferences (TSCs) when requested by the parties. OAH has considered the recommendation and declines to adopt it at this time. OAH has found that requiring the parties to meet and confer about dates to continue the matter is a more efficient use of resources for the parties and for OAH. The regulations that govern OAH require that the parties meet and confer and in circumstances where the parties do not agree, the parties must submit dates in which they are unavailable and OAH will select the dates for the parties. OAH has instituted a form that is available online that should simplify the process for continuing matters.

Finally, the Committee asked that OAH research the calendar system used by other administrative bodies, as well as the California Courts. OAH is conducting that research. Further discussion about ways to improve the calendaring system will be conducted at the next Committee meeting.

GOOD CAUSE STANDARD FOR A CONTINUANCE

The Committee requested that OAH publish its continuance guidelines. OAH's explanation has been published along with the calendar guidelines outlined above and is available on the website and will be included in the parent manual.

USING COURT REPORTERS

OAH shares the Committees' position that court reporting is cost prohibitive. OAH has invested a substantial amount of money in the digital recording system it currently uses. This same system is used by many courts throughout the country and

has proven to be a cost effective and an efficient way to establish a record of the proceedings.

The Committee asked if there was a way to playback recordings from the digital recording during the hearing. OAH has determined that the digital recording equipment it uses does have the ability to playback recordings during the hearings. However, there are limitations. For example, when a portion of the recording is being played back, the system cannot record that playback. In December 2008, all of the ALJs received training on how to use this feature. While this feature is available, whether a particular circumstance warrants playback during the hearing is an issue within the ALJ's discretion based on the particular issues in each hearing.

OAH was also asked to collect data on the number of recordings that have missing information and report back in January. OAH has asked each of the Committee members to provide case numbers for those cases that have missing information in the recording. OAH also contacted the members of the public who reported this as a problem to the Committee. The information received is being evaluated and a further update will be provided at the advisory meeting. OAH has conducted further training with its administrative law judges to ensure that the equipment is being used properly and that all portions of the hearing are being recorded.

The Committee suggested that OAH include in the parent manual advice to parents that they may record the hearing themselves, although it will not be the official record. This information is being included in the parent manual.

Finally, the Committee asked whether CDs or thumb drives could be used to obtain a copy of the record at the hearing. OAH is working with CDE to determine whether the law allows parents and/or school districts to be provided with a digital copy of the hearing at the time the hearing is completed.

HEARINGS HELD AT A NEUTRAL LOCATION

The Committee generally recommended that there be clear guidelines on the type of hearing room that OAH requires and the process for requesting a change of location. The Committee also indicated that Parents would like OAH to ensure that wherever the hearing is located there is a private place for the parents to meet and confer with their attorney and/or witnesses.

OAH is providing additional training to its ALJs to ensure that the issue of proper space and privacy are addressed at the Prehearing conference. The general rule is that the hearing room should be able to accommodate a courtroom setting with the ALJ's table, adjacent to a separate table for witnesses, and facing one table for each party set up parallel to each other.

RECORDING PREHEARING CONFERENCES (PHCs)

The Committee recommended that all PHCs be recorded. OAH concurs with this recommendation and starting January 1, 2009, all PHCs will be recorded. The Committee also recommended that with proper notice the parties should also be allowed to make their own recording of the PHC. The determination as to whether a party can record a PHC is one that rests with the individual Administrative Law Judge (ALJ) hearing the matter. However, the recording of telephonic PHCs may not be feasible for those attending unless a speaker phone is used by the parties. If a party wishes to make their own recording of the PHC, notice must be provided to the other parties and the request should be addressed to the ALJ hearing the matter.

ACCESS TO WITNESSES

The Committee recommended that OAH include in the parent manual instructions as to how a party can obtain and serve a subpoena. OAH agrees with that recommendation and will include this information in the parent manual. In addition, the Committee recommended that the ALJ conducting the PHC should have a discussion with the parties about which witnesses will be made available without a subpoena. OAH agrees with this recommendation and is providing additional training to its ALJs to address this issue.

ETIQUETTE/DECORUM POLICY FOR PARTICIPANTS

The Committee recommended that OAH adopt a civility/decorum policy similar to that issued by the Northern District of California and that contained in the Administrative Procedures Act (APA). The Committee also recommended that all PHC orders include the rules of civility and decorum. Based on these recommendations, OAH has reminded its ALJs to discuss the civility/decorum expectations at the PHC. OAH will also include the civility/decorum expectations in the parent manual.

EXHIBIT TAB DESIGNATIONS

The Committee recommended that OAH adopt a process that requires all exhibit binder tabs to be numbered tabs with a designation of "S" for student exhibits and "D" for District exhibits. OAH accepts this recommendation and training will be provided to the ALJs to conform to this rule. This standard will also be added to the scheduling orders and parent manual.

INTRODUCTION OF EVIDENCE AT HEARING

The Committee recommended that OAH adopt a policy that all of the exhibits are admitted at the start of the hearing rather than having to admit each item individually. The Committee also recommended that where there is an objection to an exhibit, that objection is raised when that document is discussed at the hearing. In the alternative,

the Committee recommended that the OAH adopt a policy to admit only those evidentiary items that are not opposed.

At this time, OAH declines to adopt a policy requiring evidence be admitted in a set manner. Each case heard by OAH is considered on a case by case basis. As such, the ALJ hearing the matter has the discretion to admit evidence in a manner consistent with the needs of the case and consistent with providing the parties due process. If a particular case lends itself to the admission of evidence as a whole rather than admitting individual items, the ALJ has the discretion to make such decision. Rather than remove that discretion, OAH will provide training to the ALJs on the various practices regarding the admission of evidence in due process hearings. OAH will also include in the parent manual information on the admission of evidence at hearing. The parties may also raise the method of introduction of evidence with the ALJ hearing the matter.

A secondary recommendation raised by the Committee was to require parties to meet and confer regarding exhibits to be admitted at hearing. As discussed above, a blanket rule requiring parties to meet and confer would not be beneficial to the parties in due process hearings. The ALJ has the authority to make such an order and may exercise that jurisdiction depending on the specific facts in a particular case. OAH declines to adopt a blanket meet and confer policy regarding exhibits at this time.

SUBPOENA DUCES TECUMS

The committee recommended that OAH have an application process for SDTs that requires parties to demonstrate the necessity of a subpoena rather than allowing parties to fill out and issue the SDTs themselves. OAH has reviewed its current forms and process for requesting SDTs. OAH has identified some problems with the SDT form; specifically it includes reference to sections of the Government Code that do not apply to special education hearings. OAH believes the problems identified by the Committee can be addressed by revising the form to address the specific code sections that apply to special education due process hearings. Rather than change the procedure for requesting an SDT, OAH will revise the SDT form and ask the committee to revisit this issue in six months.

NOI

The Committee is concerned that there is the appearance that student filed complaints are held to a higher standard than district filed complaints. OAH does not understand why there is that appearance, since OAH follows the IDEA standard for ruling on NOIs. To ensure compliance with this standard, OAH will conduct further training with the ALJs to ensure a consistent legal approach is used when ruling on NOIs. OAH will also ensure each NOI is reviewed by a Presiding Judge or their designee to verify the standard set forth in the IDEA is followed.

SERVICE OF COMPLAINTS

The Committee recommended that OAH refuse to accept any due process complaint which does not have a proof of service and that the timelines for hearing, etc., should not commence until a due process complaint is properly served. OAH accepts the first recommendation raised by the Committee and will review each complaint to ensure it has a valid proof of service. If a valid proof of service is not attached, OAH will contact the filing party and advise that the matter cannot be opened until a proper proof of service is provided. OAH will include information about the proof of service requirements in the parent manual.

OAH cannot adopt the Committee's recommendation that the timelines do not commence until proper service is made. The IDEA specifically states that the timelines commence when the complaint is filed with OAH. Consequently, OAH must issue a decision within the requisite timeframe of the date the complaint is filed with OAH.

IMPROVEMENTS TO ALJ AND MEDIATOR TRAINING

The Committee made several training recommendations. Specifically, the Committee recommended that

- All trainings should include both perspectives to avoid bias.
- ALJs receive training on the difference between intensive and non-intensive needs
- ALJs attend IEP meetings to see the process in action.

OAH has always ensured that its trainings are balanced by providing trainings from a variety of perspectives. OAH will continue to seek out trainings and trainers that provide a balanced perspective. OAH is investigating trainers/trainings that could provide a session on the difference between intensive and non-intensive needs and will provide that training to ALJs at a future date. OAH is also working with Seattle University's IDEA College to provide a training that includes access for ALJs to view IEP meetings.

The Committee also recommended that ALJs be required to pass a test designed by the Committee before they can hear a case and that an outside entity evaluates the training provided to the ALJs. OAH declines to accept the recommendation that the ALJs pass a test designed by the Committee. The interagency agreement between OAH and CDE outlines the extensive training requirements for the ALJs. OAH follows those extensive requirements and its adherence to those requirements is monitored by CDE. The Committee's second recommendation, that OAH training be evaluated by an outside entity, has already been completed. The Bureau of State Audits recently completed an extensive audit of the special education program operated by OAH. Part of the audit was a review of the training provided by OAH. Those audit results indicate that OAH's record keeping needed some improvements and OAH has already

implemented procedures to improve its record keeping related to trainings provided to the ALJS.

Finally, the Committee recommended that the OAH website include all of the training ALJs have received. OAH would like to include the ALJ trainings on its website but currently is unable to do so. OAH is researching databases that would interact with its website and could provide that information on an ongoing basis. OAH will report back to the Committee its database research findings in six months. OAH reminds the Committee and the public that the specific training provided to an ALJ is available through a public records act request at any time. OAH will include in the parent manual information on how to obtain the training records for a specific ALJ.

ATTORNEYS/ADVOCATES LIST

The Committee recommended that OAH revise the application form for inclusion on the list of free or reduced costs attorneys/advocates to include a box for “free or low cost” with a disclaimer indicating the parties to call the attorney to determine what that means. OAH adopts this recommendation and is revising the form. The new form will be available on the OAH website in 30 days. All lists that are issued and maintained by OAH regarding free or reduced cost attorneys/advocates will include the following notice:

“OAH is required to maintain a list of free or low cost attorneys and advocates and make that list available to the public. The attorneys or advocates listed on this list self certify that they are free or low cost. You should contact the individual attorney or advocate and determine what free or low cost services they provide. OAH does not represent that the individuals placed on the list offer free or low cost services. It is important that if you choose to use the list that you contact the attorneys and advocates to discuss their fees.”

OAH WEB-BASED SEARCH ENGINE

The Committee recommended that OAH improve its web search engine. The Committee’s preference is to have drop down menus that search only special education decisions to make the search function easier. OAH has improved its web search engine by providing a more specific search engine tool that will include fields that allow to search by keyword, judge, case number and school district. This new search will only search special education decisions.

The Committee also recommended that OAH include all orders on its website. OAH adopts this recommendation and beginning February 1, 2009, will include redacted orders on its website. However, standard form continuance orders and preemptory challenge order will not be included on the website.

TRANSLATIONS OF FORMS, DECISIONS, AND ORDERS

The Committee recommended that OAH should ensure that orders are made available in the native language both orally and in writing as soon as they are issued. OAH has always provided English versions of orders to the participants upon issuance. Translated versions are provided as soon as the translation is received. OAH will continue to provide timely translations when it is aware that such a translation is necessary.

PARENT PAMPHLET THAT CAN BE DISTRIBUTED TO PARENTS AT IEP MEETINGS

The Committee recommended that a pamphlet about OAH services be designed and provided to parents at IEP meetings. Pursuant to its interagency agreement with CDE, OAH is creating a pamphlet that will be provided to parents upon request and will also be sent out to school districts and other educational agencies. The pamphlet will be completed no later than July 2009.

SEPARATE CORE OF MEDIATORS AND ALJS

Over the past three years, there has been much discussion about whether there should be a separate core of ALJ mediators (those who only conduct mediations) and a separate core of ALJ hearing officers (those who only conduct hearings). OAH has considered the pros and cons of all of the reasons for such a split and the recommendations on how to accommodate such a request.

Beginning January 1, 2009, the Special Education Division will commence a pilot project that assigns its Special Education Division ALJs into two core groups: one to handle due process hearings and one to handle mediations. This means that for the next year, one group of ALJs will be solely assigned to mediate due process matters and the other group will be solely assigned to hear due process matters. The pilot project will last one year, from January 1, 2009, through December 31, 2009, after which OAH will review the project.

The project is designed to help OAH evaluate whether resources have been allocated in a manner that will best serve children with special needs who utilize the services offered by OAH. Further, OAH will be examining the question of whether it can better meet those needs by having specially designated judges or whether overlapping duties works best. The project will include regular data collection such as travel hours and costs, settlement rate, number of hearing days and length of mediation and case life. Comments and feedback from the community will be important as well, and OAH welcomes your input during this project.

The ALJs who are designated as mediators will handle the Notice of Insufficiency rulings and all mediations, including convening and confirming calls. The ALJs designated as hearing officers will handle all hearing related matters included

prehearing motions, prehearing conferences, hearing preparation, hearings, and decision writing. The presiding judges will assist with both mediations and hearings on an as needed basis.

STATUS OF JOINT LEGISLATIVE AUDIT

The Audit conducted by the Bureau of State Auditors has been completed. The results were published in December 2008 and are available on the BSA website at <http://www.bsa.ca.gov/pdfs/reports/2008-109.pdf>

NOTIFICATION TO PARENTS OF THE ADVISORY MEETING

The Committee asked how notification of the meeting was being provided to the public. Notice of the meeting is posted on the OAH website and sent to anyone in the public who has requested notice. In addition, OAH has sent notice of the meeting with every order mailed from its office in the 2 months preceding the meeting.

HEARING TRANSCRIPTS AVAILABLE ON DISK AND HARD COPY

The Committee asked whether copies of the hearing transcript could be made available on a thumb drive or disk. OAH is working with CDE to determine what constitutes the parents free copy of the record. OAH will have further clarification available at the January 2009 advisory meeting.