

ADVISORY COMMITTEE NOTES

October 21, 2009

1. Introductions
2. Thank you(s) by PJ Clark
3. Selection of chair and note taker for each location
4. Update by PJ
 - a. Pilot project has ended due to budget issues. Results showed average cost of each case went up; while, percentage of cases settling at mediation went down.
 - b. PJ explained furloughs and how they impact the calendar. An explanation was provided regarding entire OAH being on furlough and closed first three Fridays each month beginning in October 2009.
 - c. Due to budget cuts, the outreach program has been suspended. OAH hopes this will change after the start of the next fiscal year.
 - d. OAH user guide is finished and available online for viewing or downloading. It provides not only valuable information about the special education due process hearing process, but is also a guide on how to present a case to OAH.
 - e. OAH is in the final stages of completing the OAH Brochure.
 - f. Online calendar is updated and is color coded, so as to provide a guide on OAH's availability. OAH will be dark for the week of ALJ training in November.
5. Discussion regarding inconsistency in details contained in PHC Orders. T. Brock explained that she has seen some PHC Orders that follow the outline of PHC statements and provide a detailed order that guides the parties, while other orders are sparse in detail or vague and therefore unhelpful to the parties. Members decided that T. Brock should submit a redacted copy of the PHC Order she feels is a model order and it can be compared to current templates used for PHC Orders.
6. Discussion regarding access to electronic recording of hearings before the ALJ issues a decision. Members expressed comments regarding purposes that such access may serve, such as assisting in the writing of closing briefs, as well as concerns regarding

how it may delay the time line for a decision and impact on costs for the parties.

Discussion regarding whether a party can ask for a written transcript after the decision if they asked for an electronic recording before the decision. S. Wyner expressed that the official record of the hearing is the transcript, not the electronic recording, so a party was not waiving its entitlement to the official record if it asked for a recording. OAH provides a copy of the recording when requested “at the end of the case” based upon a prior recommendation from the Advisory Committee. OAH considers the issuance of the decision to the “end of the case, .” while some attorneys and parties think the end of the case is the close of testimony. OAH asked for clarification regarding when recordings should be made available when requested. The Committee recommended that the recordings be available after the close of testimony.

7. The Committee discussed whether getting copies of recordings would delay decisions. PJ stated that it is OAH preference that decisions not be delayed waiting on a copy of a recording from the hearing. OAH stated it would take a few business days to make the electronic recordings available, though this can be delayed when judges move from case to case rather than returning to the office after a hearing. PJ stated that the costs to produce an electronic copy are nominal. The issue of the delay this may create in the time line for decisions was tabled.
8. Public members and committee members discussed possible ways for parties to make their own recordings during the hearing. OAH expressed that regardless of outcome of discussion, OAH will not allow parties to have access to the ALJ’s laptop for purposes of making copies of the recoding at hearing. Committee recommended that all parties be allowed to record due process hearings.
9. Considerable discussion was had on the issue of putting requests for more than one day of hearing in the hearing requests. Members discussed disparity in how different ALJs treat the one day that is set by notice. Some judges have told the parties to show up and do one day of hearing and reset the remainder to another time, other judges have turned the day into a trial setting. Some members suggested having trial setting conferences. OAH expressed concerns about returning to the trial setting conference format that was previously employed and did not work efficiently.

10. PJ MacMurray explained that given the heavy volume of cases in Southern California, her office favors a meet and confer between the parties to determine the length of the hearing and does not expect the initial day set by notice to be the hearing date. PJ Clark stated that OAH does not have a set policy and it is at the discretion of the ALJ, however if the committee wanted to recommend a position, OAH would consider it.
11. Several options were discussed. One suggestion was that the party filing the case indicate in the case how many days it expects, the other party be forced to file a response in which it indicate its position on the number of days, and if there is a disagreement a TSC be held. Another suggestion was that the party filing the case indicate that they want to proceed to hearing on the date set by notice and set out how many days they think are needed. If the responding party doesn't agree, they meet and confer, and if they still can't agree, they hold a TSC. Another member suggested the filing party specifically state that they want to move forward on the day noticed and indicate the number of days, or specifically request a TSC in their hearing request.
12. Some members and public stated that they are fine with the current system, they assume the noticed date is a phantom date, and only in special circumstances should a TSC be requested. One public commentator pointed out that while this makes sense to the attorneys, but an unrepresented parent would not know to follow such a procedure in their hearing request. A member suggested that OAH include the user guide in the OAH hearing request forms.
13. The Advisory Committee recommended that that parties should assume they will go to hearing on the day noticed and that the hearing will be completed in one day. If the parties believe they need more days, they should meet and confer regarding how many days and the dates, and notify OAH. If the parties cannot agree upon how many days or dates, they should request a TSC.
14. Discussion regarding difficulties witnesses are having identifying evidence binders while on the stand because they all look alike. Committee member suggested that each side have a binder color (Student use one color binder, District another.)

Discussion regarding utilizing designated colors for binders. Committee recommended that OAH not adopt color coding of evidence binders.

15. Discussion regarding access to internet at district locations. Some members expressed that parents found themselves to be on unequal footing at hearing because district staff had access to the internet and could communicate with each other as well as access information whereas parents could not. Members and public expressed concerns that district's had witness rooms where they could prep witnesses, take breaks to talk to witnesses, or send witnesses notes, while parents did not have the same ability. Discussion was steered back to the issue of access to the internet. A suggestion was made that parties take up the issue with the ALJ at hearing and ask the ALJ to instruct each party to not use the internet during the times the hearing is in process. Public members expressed concerns that an unrepresented parent would not know to ask for this. Advisory Committee did not make a recommendation regarding the Internet issue.
16. Discussion regarding closing briefs, in some cases parties are given page limits, in others they are not, in some cases they are asked to do written closings, in others they are asked to do oral closing. There is no set policy and the matter is left to each ALJ to decide on a case-by-case basis. Several members wanted a formal policy. Recommendation was made that there be a policy that the parties and ALJ discuss what type of closing will be utilized at the beginning of the hearing, so that the parties may prepare and present their case accordingly.
17. Discussion regarding continuity of mediators when a case has continued mediations or when a family has multiple filings on the same child. Members want OAH to assign the same mediator in these situations. PJ stated that OAH tries to schedule the same mediator on continuing mediations and on multiple filings, and will only assign a new mediator when the prior mediator is not available. OAH is open to parties asking for a particular mediator and will try to honor that request.
18. Discussion regarding changes in mediators and parties not finding out in advance. Some parties have invested time with the mediator prior to the day of mediation, only to find a new mediator, and to have to bring the mediator up to speed on things they

already told the original mediator. The calendaring doesn't always reflect that a mediator has been changed. Recommendation was made to have OAH inform parties when a mediator is changed before the mediation, so that they may change mediators if they wish.

19. Discussion regarding supervision of mediators. Some members expressed concerns that mediators were giving legal advice to represented and unrepresented parties. Some members expressed concerns that mediators were telling parties that they were going to lose the case if they went forward. Some members stated that they preferred mediators that gave their opinions and were interactive rather than ones that conducted only shuttle mediations.
20. Members discussed concerns that mediators were giving advice regarding waiver language to unrepresented parties. Waivers included waiver of claims beyond what was at issue in the case at hand. The issue was noted as one to raise at a later meeting wherein issues specific to unrepresented parties could be put on the agenda. Public comment that they don't understand waivers. Discussion was had regarding posing sample acceptable waiver language on OAH's website.
21. Members asked whether Pro Tems can be used to mediate cases on furlough and training days. PJ stated that OAH only assigns cases Pro Tems when ALJs are not available. Recommendation made to utilize Pro Tems on furlough and training days if parties agree.
22. Member questioned whether Pro Tems should be at trainings instead of being at mediations. PJ stated that Pro Tems are invited to trainings, but not required to attend all trainings. One member asked if that was because they were not being compensated for the trainings. PJ stated that they are compensated for certain trainings and not for others.
23. PJ provided details on how OAH is calendaring PHCs and mediations. OAH is calendaring things that previously used to be on Fridays (such as PHCs and TSCs) on Wednesdays and Mondays. OAH tries to avoid scheduling mediations on Mondays or Fridays, even the non-furlough Fridays, since Mondays are usually days of staff

meetings, trainings and OAH wants to give ALJs one day in the office to plan their week.

24. Members expressed a desire to be able to search the online calendar using district name. PJ stated that OAH would look into whether the calendar could have that function available to the public.
25. Discussion regarding new forms. Members recommended that mediation review forms be posted online in word format. Members recommended that FAQ section for user manual be separated from the user guide to allow for easier access and that it highlight points in the manual. The Advisory Committee provided a split recommendation that sample settlement language be available on the OAH website. (NorCal in favor, SoCal opposed.)
26. Motion was made regarding posting samples of settlement language online. The vote in Northern California was 5-2-1 in favor and abstention, while in Southern California it was 4-3-1 opposed and abstention.
27. Discussion regarding using fax and email for service of documents. OAH is seeking input from the committee regarding a system of fax/email service. One member suggested that after the initial filing, the parties can meet and confer on whether they will utilize fax/email service. Concerns were expressed regarding assurance that service would be simultaneous in such a system, especially with unrepresented parties. OAH will further explore FAX of documents and provide more information.
28. Public comment, including emails from public attending meeting via Webcast. Concerns expressed regarding the system being unfair and unjust towards parents; ALJS not being sufficiently trained; public sitting in on ALJ trainings. Comment regarding subpoena duces tecum (SDT) and how OAH can issue one for production of documents prior to hearing when IDEA does not allow for discovery. PJ stated it is a case by case basis and there is no set policy. Comment regarding public records request and FERPA and why OAH says it has no jurisdiction over FERPA issues. Comment regarding allowing a party to record a resolution session and the denial interfering with a party's ability to proceed with the case (matter asked to be put on agenda for next meeting).

29. Closing comments by PJ Clark. Members discussed possible dates for next meeting. Public commented that meetings should not be held on Wednesdays as that is a short day for many schools thus limiting public's ability to attend the meeting.