

Disability Rights Legal Center

DRLC

Protecting the possibilities since 1975

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December 1, 2008

Hon. Sherianna Laba
Administrative Law Judge
Office of Administrative Hearings
2349 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833

Via facsimile and email

(916) 376-6319

Re: Disability Rights Legal Center's Comments to the Office of Administrative Hearing's Parent Manual

Dear Judge Laba:

Enclosed please find the Disability Rights Legal Center's comments to the Office of Administrative Hearing's draft Parent Manual. Thank you for the opportunity to provide comments on the Manual. If you have any questions about the DRLC's comments and suggested edits, please feel free to contact me at (213) 736-1195.

Thank you.

Sincerely,

DISABILITY RIGHTS LEGAL CENTER



Deborah A. Dorfman, Esq.
Deputy Director

Enclosure

**Disability Rights Legal Center Comments to OAH's Draft Parent Manual
December 1, 2008**

Submitted by Deborah A. Dorfman, Esq., Deputy Director

The Disability Rights Legal Center (DRLC) respectfully submits the following comments to the Office of Administrative Hearing's (OAH) draft Parent Manual (Manual). The DRLC is a non-profit organization that promotes the rights of people with disabilities and the public interest in and awareness of those rights by providing legal and related services. DRLC accomplishes this mission through several programs, including the Cancer Legal Resource Center (a joint program with Loyola Law School), Education Advocacy Project, Options Counseling, Lawyer Referral Service, and Civil Rights Litigation Project. Since 1975, DRLC has handled disability rights cases, including, but not limited to, numerous special education cases, under California and federal civil rights laws. The Disability Rights Legal Center writes amicus briefs in this subject area, litigates cases to address systemic reform issues in juvenile court schools and within school districts that have historically deprived students of their rights to obtain special education and related services. The attorneys at the DRLC also teach special education law at Loyola Law School, University of La Verne, College of Law, and at Loyola Marymount University. We provide free monthly parent workshops in Spanish and English, and as such, have a broad range of exposure and experience with students with disabilities and their legal rights. It is in light of these experiences and our background that we provide these comments.

I. Overall comments:

In addition to comments and suggested modifications to language in specific sections of the draft Manual, the DRLC has several overarching concerns and comments with regard to the Manual that are specifically set forth below in this section of the comments.

A. Failure to provide information to parents with disabilities on how to request a reasonable accommodation or file a grievance.

The Manual does not include information for parents with disabilities as to how to request a reasonable accommodation in order to participate in the complaint process, including, but not limited to, filing and participating in the mediation and due process proceedings, and the resolution meeting process. Under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 as well as relevant California state law, OAH is obligated to ensure that

complaint process is accessible to people with disabilities. See *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004), *Memmer v. Marin County Courts*, 169 F. 3d 630 (9th Cir. 1999). As such, OAH must provide a process to parents with disabilities to request individualized reasonable accommodations in order to participate in the Complaint process, notice of this process, and a designated employee to carry out the responsibilities of OAH under Title II of the ADA. 28 C.F.R. §§35.106 and 35.107(a). Such accommodations may include, but are not limited to, rescheduling hearings to take place at alternative times of the day or for multiple shorter periods for a person with a psychiatric or cognitive disability, the provision of a sign language interpreter for a person who is deaf or hard of hearing, modification of the place and/or time of the hearing for a parent who has a disability that causes them to be unable to travel, or provide documents digitally or in large print for a person who is blind or has another visual impairment.

It is also incumbent upon OAH to adopt a grievance procedure and provide notice of this procedure to interested individuals as to how to request a reasonable accommodation and how to file a grievance if a person believes that he or she or a third party has been discriminated against by OAH because of their disability. 28 C.F.R. § 35.107(b).

This information is crucial for parents with disabilities in need of reasonable accommodations to participate in the complaint process with OAH. This essential information should be included in the parent Manual.

B. The Manual must be made available in alternative formats so that it is reasonably accessible to people with disabilities.

There is no statement in the Manual indicating that it is available in alternative formats for people with disabilities in need of such alternatives. OAH should ensure that such alternative formats are available and provide notice to parents and other interested parties of these alternative formats and how to obtain them.

Additionally, the type-face of the Manual should be changed from Times New Roman to Arial in order to make it easier to read and more accessible to people with visual and other disabilities.

C. The overall tone of the Manual must be neutral and not dissuade parents from exercising their rights under the law.

The tone of the Manual is frightening and appears to be written to dissuade parents from exercising their legal rights under the special education laws. This is contrary to the intent of the IDEIA. The Manual should reflect that these are the rules and obligations that apply to all parties in a mediation, the school district and the parents.

D. The Manual is need of some additional sections.

As discussed more fully below in Section II, several additional sections should be added to the Manual including:

- 1) a definitions section;
- 2) a table of contents;
- 3) a section providing parents information on how to file an answer in the event a school district files a Request for a Due Process Hearing against them and also explaining what they should expect in terms of an Answer from a school district against which the parents have filed a Request for a Due Process Hearing; and
- 4) a section informing parents that they may file a Request for a Due Process Hearing against the District if one is filed against the parents of students with disabilities.

II. DRLC's Comments and Edits to Specific Sections of the Draft Manual

The following are the DRLC's proposed edits to specific language in the Manual. These proposed edits are indicated by the underlined text and strike-outs in the existing text on the pages and sections indicated.

INTRODUCTION p.1:

Comment: In the first paragraph of this section the reference to the Individuals with Disabilities Education Act (IDEA) should be changed to the Individuals with Disabilities Education Improvement Act (IDEIA).

How to Find Information on an Administration Law Judge (ALJ) or Mediator p. 6.

Information about mediators should be added in this section.

WHAT IS THE DIFFERENCE BETWEEN MEDIATION-ONLY AND A DUE PROCESS HEARING? p. 8

The first and second paragraphs of this section should be modified as follows:

Mediation is a voluntary, confidential, informal meeting at which the parties and experienced, impartial mediator attempt to resolve the dispute in a cooperative, non-adversarial atmosphere. The mediator does not provide advocacy or legal advice to either side, but instead facilitates communication between the parties. The participation of the neutral mediator makes it more likely that the parties will reach a mutually

satisfactory resolution. Over 70 % of mediations successfully resolve the dispute.

In "Mediation-Only," this is a mediation that takes place without requesting a due process hearing. The purpose of the mediation-only is to resolve the dispute without initiating what is in essence a lawsuit against the district. The law specifically excludes attorneys and advocates from attending a mediation-only by excluding attorneys and advocates, the mediator can facilitate the mediation process in a truly non-adversarial setting, and provide a forum for non-adversarial resolution. Nothing, however, prevents a parent or school district from consulting with an advocate or attorney to prepare to go to the mediation.

When you file a request for due process hearing, you have, in essence, instituted a Lawsuit against the school district. While more formal than a mediation, a due process is an informal administrative law hearing. ~~It is a more formal, trial-like legal proceeding~~ in which all parties are given a chance to present evidence and arguments before impartial ALJ. The ALJ then issues a written decision which resolves the matter.

WHO MAY FILE A COMPLAINT REQUEST FOR MEDIATION OR A DUE PROCESS HEARING p. 8.

A parent or legal guardian, or another person who holds education rights of a student who has a disability (or suspected of having a disability) may request a hearing or mediation. A school district or other educational agency, such as the county mental health department, may also make such a request. In some cases, the student may make the request. Each side of the disagreement is referred to as a "party."

Comment: the term "party" is used above yet it is not defined until this section. It should be defined the first time it is used or alternatively, and preferably, in a "definitions" section that should be added at the beginning of the Manual.

Comment: an explanation as to when a student can file a request for mediation or due process should be added.

HOW DO I MAKE A COMPLAINT REQUEST FOR MEDIATION OR A DUE PROCESS HEARING? P. 8

WHAT INFORMATION MUST BE INCLUDED IN A REQUEST FOR MEDIATION OR DUE PROCESS ? P. 9

- The name and residence of the child, and the name of the school ~~the~~ at which the child attends. ~~ings~~

WHAT DO I DO WITH THE COMPLETED FORM? (pp. 9-10)

Last paragraph in this section on p. 10:

If you mail the form, you may want to consider sending the form with a return receipt requested or sending it by certified mail so that you have a record (document) showing that the other party received your complaint. Always keep a copy of everything that you are sending for your records.

Comment: This section does not adequately address a request for mediation, although at the beginning of this section there is language referencing both due process requests and mediation-only requests

WHAT IF THE DISTRICT HAS FILED A COMPLAINT AGAINST MY CHILD REQUEST FOR A DUE PROCESS OR MEDIATION ? p. 10

Comment: The heading for this section as drafted by OAH is unnecessary, misleading and potentially frightening to parents and their children. The implication is that the child has done something wrong and is in some sort of trouble. This language could chill a parent from disagreeing with a school district about their child's education for fear that the district might "file a complaint against [a] child." DRLC urges OAH to modify this language and instead use DRLC's suggested language as set forth above.

CHAPTER 2-THE RESOLUTION MEETING

DO I HAVE TO PARTICIAPTE IN THE RESOLUTION SESSION? p. 11

Comment: The second paragraph of this section omits the school district's responsibilities with regard to timely participation at the resolution session. This is another example, where the Manual is misleading and unbalanced because it is written in a way that intimidates and chills parents. Instead, language should be added to clarify that if a school district fails or refuses to timely participate in the resolution session, it to will be subject to consequences.

IS THERE A WAY TO CANCEL THE RESOLUTION SESSION? p. 11

Comment: Rewrite the second sentence in this section for clarity.

PURPOSE OF A RESOLUTION SESSION p. 12

First paragraph in this section:

The purpose of the resolution meeting is for you and the school district to discuss the due process complaint and supporting facts so that the parties can try to resolve the issues(e) raised.

Comment: Rewrite the second paragraph in this section for clarity.

CAN I BRING MY ATTORNEY TO THE RESOLUTION SESSION? p. 12

Comment: This section should be written to be more straightforward. The answer to the question posed is “yes”. That should be the first statement made in this section in response to the question. As written, it appears to be an attempt to dissuade parents from bringing an attorney to the resolution session.

IS THERE A COST FOR THE RESOLUTION SESSION? p. 12

Comment: This section is written in a manner that is misleading and again appears to be an attempt to chill parents from bringing an attorney with them to the resolution session by emphasizing the notion that if parent bring counsel they will have to pay for the resolution session. While some parents retaining private counsel may have to pay, other parents who obtain counsel from the DRLC, legal services attorneys or the protection and advocacy system may well not incur any costs. This section should be rewritten so as to remedy the above-mentioned problems.

WHO ATTENDS THE RESOLUTION SESSION? p. 14

Comment: The term “IEP” is used above in earlier sections, yet is not defined until this section. It needs to be defined the first time that is used or alternatively in a definitions section.

Additionally, the last sentence of this section should be rewritten to clarify that a parent may have an advocate or an attorney attend the meeting.

HOW DO I PREPARE FOR THE MEETING? p. 14

First paragraph of this section:

There is no required agenda for a resolution meeting. The school district, ~~however, is likely to~~ may take the lead in the discussion, so it is very important that you prepare for the meeting in advance. You may, however, take the lead in the discussion if you wish.

Comment: It should be clarified that parents should also prepare their questions for the school district as part of their preparation for the resolution meeting.

CHAPTER 3-MEDIATION p. 15

WHEN IS MEDIATION AVAILABLE? P. 15

There are two situations when mediation is available to you: (1) when you have filed a request for mediation-only; and (2) when you have filed a request for a due process hearing.

WHAT IS MEDIATION-ONLY? p. **

Comment: The second paragraph of this section is misleading because it inaccurately suggests that there is no way to appeal the ALJ's decision. This section should be rewritten to clearly state that a party can appeal the ALJ's decision by filing a lawsuit in federal district court.

HOW CAN I RESCHEDULE THE MEDIATION DATE IF I CANNOT ATTEND ON THE DATE IT IS SCHEDULED? p. **

Comment: This section needs to include language advising a parent what he or she can do if all of the parties do not agree about rescheduling the mediation.

CHAPTER 5-THE PREHEARING CONFERENCE

WHAT IS DISCUSSED AT THE PREHEARING CONFERENCE? p. 25

Comment: This entire section should be rewritten to clarify that all of the provisions discussed herein regarding requirements of the pre-hearing conference are equally applicable to all parties.

The proposed ~~resolutions~~ remedies

Exhibits:

Comment: This section as currently written to make it more clear and balanced. Specifically, it should be rewritten to clarify that each party must provide the other with the exhibits that they will be using at the due process hearing.

WHAT IS A PREHEARING CONFERENCE ORDER? p. 26

Comment: This entire section should be rewritten to clarify that all of the provisions discussed herein regarding requirements of the pre-hearing conference order are equally applicable to all parties. We suggest the following modifications:

~~You~~ The parties are required to comply with the orders that are contained in the ~~your~~ Prehearing Conference Order. If ~~you~~ a party does ~~do~~ not comply with the orders, the ALJ may impose sanctions (penalties) against the noncompliant party ~~you~~. For example, if a party you does not provide ~~your~~ their exhibits to the other parties five (5) business days prior to the due process hearing, the ALJ may not allow ~~you~~ the noncompliant party to introduce ~~your~~ their exhibits during the due process hearing.

CHAPTER 6-PREPARING FOR THE DUE PROCESS HEARING AND OTHER THINGS YOU NEED TO KNOW BEFORE THE DUE PROCESS HEARING

Comment: This entire chapter should be rewritten to clarify that all of the provisions discussed herein regarding requirements for preparation for the pre-hearing conference are equally applicable to all parties

WHAT IF THE SCHOOL DISTRICT DOES NOT GIVE ME THE RECORDS? p. 29.

Comment: The acronym “CDE” should be defined. Preferably, a “definitions” section will be added where this acronym will be defined.

WILL THERE BE AN INTERPRETER FOR THE HEARING? p. 31

Comment: Information on requesting an interpreter for mediation and resolution meetings should be included in the Manual.

WHAT IF I WANT TO USE AN EXPERT WITNESS? P. 31

Comment: This section is highly disorganized and disjointed, containing multiple ideas with regard to experts. This Section needs to be rewritten and should start by affirmatively answering the question posed which is “yes,” a parent can use an expert witness if they wish.

This section is also written in a manner, as many other sections have been written in this draft Manual, which is highly likely to deter a parent from retaining an expert. For example, the language warning the parent that he or she will not be able to recoup costs for an expert may serve as a deterrent. While it may be the case that expert fees are not recoverable for IDEIA claims, often the assistance of an expert in these cases is crucial to the parent’s case, particularly where the parent is the party seeking relief because they bear the burden of proof in the case. Notably that information is not included in this Section.

WHAT ARE OPENING STATEMENTS? p. 37

Comment: This section should be rewritten for clarity and better organization. It should begin by directly answering the question posed, which, in this case, should be an explanation of an opening statement. The language explaining who makes their opening statement first should come after the explanation.

Additionally, the first paragraph in this section is missing a word. Rather than as currently written, the first paragraph should be modified as follows:

The party who filed the due process request presents his or her case first, so the ALJ will start with that party. The party who did not file the due process complaint presents his or her case after the party who filed the due process request.

CHAPTER 8-EVIDENCE AT THE DUE PROCESS HEARING p. 44

ARE THERE RULES ABOUT GETTING TESTIMONY AND DOCUMENTS ADMITTED INTO EVIDENCE AT THE HEARING? p. 44

Comment: This section should be rewritten to make it simpler. It is too technical and complicated for a parent who is not an attorney.

WHAT DO I HAVE TO SHOW TO HAVE THE A DOCUMENT ADMITTED INTO EVIDENCE? p. 45

Comment: This section references the term “hearsay” and states that hearsay can be contained in documents but there is no explanation as to how this relates to what is needed to show a document is authentic. Such an explanation is necessary.

EXPERT WITNESSES, p. 46

Comment: This section uses the term “disabled students.” People-first language should instead be used and the term should be changed to “students with disabilities.”

An explanation to the parent as to how to get a person qualified as expert at the hearing should be added to this section. Additionally, it should be suggested in this section that the party seeking to have an expert testify should offer the expert’s CV into evidence.

CHAPTER 9- CHALLENGING THE ADMINISTRATIVE LAW JUDGE- PREMPTORY CHALLENGE OR CHALLENGING FOR CAUSE

WHAT IS A PREMPTORY CHALLENGE? p. 50

Comment: This section should be rewritten to more directly answer the questions posed.

CHAPTER 10 – MOTIONS, p. 52

WHAT IS A MOTION? p. 52

Comment: This section is misleading because it mischaracterizes a “motion.” Contrary to the language set forth in this section, a motion is not “just” a letter to the court from a party asking the court to do one thing or another. Rather, a motion includes a specific request for relief by the moving party that includes relevant facts and any necessary legal analysis to convince a decision-maker, in this instance, the ALJ, to grant the motion. The explanation provided in this section oversimplifies a motion and thus, does not reasonably prepare a parent for a motion that a school district’s attorney might file. This section should be rewritten to be clear about what a motion and responding to a motion really entails.

CHAPTER 11-LAWS THAT APPLY TO SPECIAL EDUCATION HEARINGS AND HOW TO FIND THEM, p. 58

STATUTES AND REGULATIONS, p. 58

Comment: This section inaccurately references the IDEA. This language should be changed to reference the IDEIA, which is the correct name of the relevant statute.