

Due Process Hearings in California – An Overview

The California Department of General Services, Office of Administrative Hearings handles all requests for due process hearing.

The Office of Administrative Hearings (OAH) provides a neutral forum for fair and independent resolution of matters while ensuring due process and respecting the dignity of all. The OAH is divided into two statewide divisions: General Jurisdiction and Special Education. The Special Education Division provides Administrative Law Judges to hear disputes and provide mediation and settlement services throughout the state to school districts and parents of special needs children. The Special Education Division has regional offices in Laguna Hills, Sacramento and Van Nuys.

How to File for a Due Process Hearing

When a parent, guardian, student or education agency has a dispute regarding the following, that person may file a request for a due process hearing. The request must be in writing. There is also a form that can be submitted either to the OAH or to the California Department of Education to request a due process hearing.

The parent or guardian and the public agency involved may initiate the due process hearing procedures prescribed by part 30 chapter 5 of the California Education Code under any of the following circumstances:

1. There is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child.
2. There is a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child.
3. The parent or guardian refuses to consent to an assessment of the child.
4. There is a disagreement between a parent or guardian and a local educational agency regarding the availability of a program appropriate for the child, including the question of financial responsibility, as specified in Section 300.148 of Title 34 of the Code of Federal Regulations.

Scheduling of the Hearing

Each party will receive a written document titled Notice of Due Process Hearing and Mediation and Scheduling Order approximately one week after a party files a request for due process hearing. The notice will contain a date, time, and location of the mediation and due process hearing. It will also contain a date for a telephonic prehearing conference.

The due process hearing is initially scheduled approximately 55 days after the hearing request is received, to allow time for the 30-day resolution session and for a mediation to take place. The average hearing takes approximately five days to complete.

Resolution Session

Once a school district receives notice that a due process hearing request has been filed by a parent, the school district has 15 days to hold a meeting with the parents called a resolution session. The resolution session must include someone from the district who has the power to make a decision for the district. Additionally, the law requires participation by “relevant” IEP members who have knowledge of the complaint. The district’s lawyer is not allowed to come to the resolution session unless the parent brings a lawyer. This session gives the parties an opportunity to resolve the dispute. If the dispute is not resolved within 30 days after the district has received the due process hearing request, then the due process hearing proceeds as specified in the Scheduling Order.

The school district is responsible for convening the resolution session, agreeing on a date for the session with the parent, and assembling the required participants.

The resolution session can be waived if the parties agree in writing to waive it. The parties can agree to use mediation instead. If the OAH receives written waiver of the resolution session signed by both parties, the period allotted for the resolution session ends, and the matter proceeds to hearing.

If the parents refuse to attend the resolution session, then the parents have not met the legal requirements for a due process hearing, and the school district can seek to have the case dismissed.

If the parties have reached an impasse prior to expiration of the 30-day period and submit to the OAH a written statement to that effect, signed and dated by both parties, the matter will proceed to mediation and hearing. The OAH will not consider the resolution period terminated based on one party’s assertion that the parties are at impasse.

After the First 30 Days

After the first 30 days from the filing of the hearing, the parties attend the prescheduled mediation.

When a hearing or mediation is requested, the OAH sends a notice to all the parties setting the mediation date. A mediator will be assigned shortly before the mediation. The identity of the mediator can be obtained by either calling the Sacramento OAH office or through the online calendar at www.oah.dgs.ca.gov

The mediation is usually held at the school district or a nearby OAH office.

Mediation is a way of settling a disagreement through facilitated discussion. At mediation, the parties have the help of a trained mediator, who is unbiased and independent. The mediator will help the parties try to find a solution that is acceptable to both parties. The parties decide whether or not the dispute is settled. If the parties try mediation but cannot reach an agreement, they still have the right to continue to a due process hearing.

Mediation is a voluntary process. It is encouraged because it is more likely to lead to a settlement of the dispute, but participation in mediation is voluntary. If one of the parties declines the opportunity to mediate, the dispute will proceed to hearing.

If parents/student need a language interpreter or an interpreter for the hearing or sight impaired, they must notify the OAH before the mediation. The OAH will provide the interpreter at state expense.

Both parties may have an attorney represent them at mediation, which is scheduled as part of the due process hearing. Parents/student do not have the right to have an attorney appointed for them.

The OAH maintains a list of people and organizations that can provide representation for parents/student for free or at a reduced cost. This list is available upon request and is on the OAH's Web site. Other resources for obtaining legal representation may be available through the local school districts, or the Internet.

Both federal and state law encourages the use of mediation for all special education disputes. Most special education disputes are resolved through mediation. Mediation is a preferred method for resolving disputes for a number of reasons, including: 1.) The parties are more likely to maintain a cooperative relationship in the future if the settlement of the dispute is by mutual agreement. 2.) Through mediation, the parties have a great deal of flexibility in reaching a mutually acceptable settlement. When the dispute goes to hearing, the Administrative Law Judge makes the final decision, which may not be completely satisfactory to either party. 3.) If the parties reach an agreement in mediation, the agreement is written and signed that same day and can be implemented immediately. If the case goes to hearing, the Administrative Law Judge must take time to consider the evidence presented at the hearing and then write a decision informing the parties of his or her determination. 4.) Mediation is less costly than a hearing in terms of time, money, and personal stress.

Except for enforcement purposes, any agreement reached and everything said in mediation are confidential and are protected by law from being revealed in any other place. This is to encourage the parties to discuss their dispute candidly without fear of the later consequences of what they say.

While all mediators have different ways of approaching mediation, most mediators begin with all of the parties in the same room. The mediator will explain how the mediation will proceed and will usually ask the parties to explain their positions regarding the dispute. The mediator will summarize the issues and invite discussion. Then the mediator may suggest that the parties adjourn to separate rooms. This is called "caucusing." During caucusing, the mediator goes back

and forth between the parties trying to develop a basis for common ground and a written agreement. Sometimes, the parties are brought back together; sometimes they are not.

If mediation is successful, the parties enter into a written agreement resolving their dispute. The OAH then closes the matter because the dispute has been resolved.

If the mediation is unsuccessful, the case will proceed to due process hearing before an Administrative Law Judge on the date scheduled in the scheduling order unless postponed. A telephonic prehearing conference, also scheduled in the Scheduling Order, will be conducted prior to the hearing.

An Administrative Law Judge from the OAH is in charge of the due process hearing, just like a judge is in charge of a trial. The Administrative Law Judge does not take the side of either party, and is independent of the school district and the California Department of Education. He or she rules on all procedural matters, runs the hearing, listens to the evidence and arguments of the parties, and writes a final decision. The Administrative Law Judge will have telephone conferences or meetings before the hearing, give written orders, and generally control the hearing process. All Administrative Law Judges are licensed California attorneys who have received specialized training in special education law and in conducting administrative hearings.

Who Attends a Due Process Hearing?

If parents/student are a party in a due process hearing, they do not have to have an attorney. They may represent themselves and their child. If the parents/student choose to represent themselves, they will need to know the law and rules that apply to their case. The OAH cannot give parents/student legal advice or help them present their case. Parents/student can also be accompanied throughout the hearing process by someone with special knowledge or training related to the problems of special education students, at their own expense. At a parent's request, the OAH will provide, without charge, a mediator to assist the parent in identifying the issues and proposed resolutions that are stated in the request for due process hearing. However, the OAH-provided mediator can only assist with preparation of documents and answer questions about the process. The mediator cannot provide legal advice.

Parties may have an attorney represent them at the due process hearing. Parents/student do not have the right to have an attorney appointed for them. The law requires that a party notify all other parties ten days before a hearing if that party intends to be represented by an attorney at the hearing.

Parents may be entitled to have attorney's fees reimbursed if they prevail as a result of filing for a due process hearing. School districts may also have attorney's fees reimbursed, but only if parents act in bad faith in using the hearing process. Attorney's fees are not awarded by the Administrative Law Judge hearing the case. Recovery of attorney's fees requires a separate case to be filed with the federal or state court.

The OAH maintains a list of people and organizations that can provide representation for free or at a reduced cost. The list is available on request and is on the OAH's Web site. Other resources for obtaining legal representation may be available through local school districts or the Internet.

Interpreters

If the parents/student need a language interpreter or an interpreter for the hearing or sight impaired, they must notify the OAH before the mediation, hearing, or event where the interpreter will be needed. The OAH will provide the interpreter at state expense. When parents/student ask for an interpreter, they will need to specify which language or type of interpreter is needed.

Continuances

A postponement, which is called a continuance, may be requested as long there is "good cause" to do so. A request for the hearing to be continued is simply a request by one or more of the parties for the hearing to be rescheduled to a later date. Continuing the case also means that the time for issuance of a decision is extended.

In determining whether good cause exists for a continuance, the Administrative Law Judge will consider the facts supporting the request for continuance, prior rulings by the OAH on continuance requests, and the legal mandate for speedy resolution of special education disputes.

Whenever possible, a party seeking a continuance should first contact the other party to inquire if the other party will agree to continue the hearing. If all the parties agree to the continuance, they should promptly communicate their agreement in writing to the OAH. The parties must identify specific facts showing good cause for the continuance. If the parties are unable to agree on a continuance of the hearing, the party requesting a continuance should submit a request in writing to the OAH and at the same time send a copy of the request to the other parties. The written request should state the specific facts supporting the request for a continuance, indicate the time at which the parties learned of the facts that created the need for a continuance, and show that a copy of the request has been sent at the same time to the other parties. If the parents/student wish to oppose a request for continuance, they must submit their reasons for opposing the request, in writing, to the OAH within three business days of the request for continuance.

All continuance requests are ruled on by a Presiding Administrative Law Judge or his or her designee. Until a ruling has been made on the continuance request, the parties should be prepared to proceed on the date and time previously scheduled.

If a continuance request is granted, the hearing will be rescheduled and the 45-day time limit will be extended accordingly. The OAH will either provide the parties with a notice of the new hearing date or schedule a telephonic trial setting conference to set mutually agreeable dates for the prehearing conference and the hearing.

While parties may jointly request a continuance, by law, the parties must still establish good cause, which must be decided by a Presiding Administrative Law Judge. A stipulation by the

parties is not a substitute for the requirement of finding good cause. However, the fact that the parties jointly request a continuance will be considered in the assessment of good cause.

Before the hearing is held, various prehearing events may occur. Primarily, these are motions, trial setting conferences, status conferences, and prehearing conferences.

Trial-Setting Conference

This is a brief, unrecorded telephonic conference initiated by the Administrative Law Judge from an OAH office during which the dates and times for further proceedings are set, such as the prehearing conference and the due process hearing. It gives the parties and the Administrative Law Judge an opportunity to consult their calendars and agree on dates that are acceptable to all.

If a party does not participate in a trial setting conference, the conference will proceed without that party, and the other party and the Administrative Law Judge will set dates for further proceedings that are convenient to them.

Prehearing Conference

A prehearing conference is a meeting, usually by telephone, of the Administrative Law Judge and the parties that is held to organize the upcoming hearing. The parties may discuss with the Administrative Law Judge almost any issue concerning how the hearing will proceed, such as the need for clarification of issues, the length of the hearing, additional dates for motions and the hearing, and the need for an interpreter or special accommodation at the hearing. The Administrative Law Judge may cover the disclosure of witnesses, evidence, and exhibits. A prehearing conference may also decide which party will put on its case first and what documentary evidence and witnesses will be presented by the parties. The parties are required to address these issues in written prehearing statements that must be filed three business days before the prehearing conference.

The OAH makes every effort to assign the Administrative Law Judge who conducted the prehearing conference to the hearing. However, scheduling problems may require another Administrative Law Judge to be assigned to conduct the hearing.

A peremptory challenge is the disqualification of the Administrative Law Judge scheduled to preside over the hearing. A party can challenge an assigned Administrative Law Judge one time for any reason. The challenge will be reviewed and if this challenge is granted, a different Administrative Law Judge will be assigned. If a party wants to exercise a peremptory challenge, the challenge should be made as soon as an Administrative Law Judge is assigned. This can be determined by contacting the Sacramento OAH office or from the calendar located on the OAH web site at www.oah.dgs.ca.gov. In no event can the challenge be made once the prehearing conference or hearing has started.

Preparing for the Hearing

In preparing for a hearing, a party must determine what issues need to be addressed by the Administrative Law Judge, and must also prepare to present evidence during the hearing to support the party's position on those issues. Additionally, the law requires that, prior to the hearing, each party must make certain disclosures to the other parties, including notice of the following: (1) proposed issues; (2) proposed resolutions; (3) evidence to be presented at the hearing; (4) witnesses that may be called to testify; and (5) representation by an attorney.

By law, each party must provide to the other parties copies of all documents that the party plans to use during the hearing. Each party must also provide to the other parties a list of all witnesses who will provide testimony, and a brief description of their expected testimony.

Evidence

Copies of the evidence must be provided to the other party at least five business days prior to the hearing.

Copies of the evidence should not be sent to OAH, but a copy for the Administrative Law Judge should be brought to the hearing instead. Another copy should be brought to the hearing for use by witnesses.

If a party fails to provide the evidence to the other party five business days prior to the hearing, the Administrative Law Judge has discretion to exclude the evidence.

How to File Evidence Documents

The OAH accepts documents delivered by mail, personal delivery, or facsimile (fax) between 8 a.m. and 5 p.m. on regular business days. It is not necessary to file a document by more than one method. A party may not fax any document exceeding 35 pages in length. Usually, documents will be considered filed on the day received. However, documents not fully received by fax until after 5 p.m. will be considered filed on the next business day. A party faxing a document should not wait until just before 5 p.m. to fax it. OAH's fax number is 916-376-6319. As previously mentioned, OAH is unable at this time to accept any documents via email, but is working toward offering this filing option to parents, students, and educational agencies.

A document is not considered properly filed unless the document itself shows that the party filing it delivered the document to all other parties on the same day it was sent to the OAH.

When a filing deadline falls on a weekend or holiday, the deadline is automatically extended to the next business day.

Most disputes must, by law, be heard and decided within 45 calendar days of the receipt of a request for a due process hearing. This timeline does not include time used by a continuance (postponement) requested by a party and granted by OAH, or time used by the resolution session process. Expedited hearings, which involve student discipline, must be held within 20 school days of the receipt of the complaint, and a written decision must be issued within ten school days after the hearing.

Any party has the right to appeal the decision to a state or federal court of competent jurisdiction within 90 days of the receipt of the decision, but no later. The hearing is recorded, and parents have the right to a written verbatim transcript of the hearing. If a parent wishes to have such a transcript, the parent should submit a request in writing to OAH.

Witnesses

Most witnesses appear voluntarily when asked. Typically, the school district will be calling many of the same witnesses, who can be questioned when they testify for the district. If a witness is unwilling to appear voluntarily, a subpoena (or a subpoena for records) may be obtained from the OAH and served by the party wanting to ensure the presence of the witness or the records. The requirements for serving a subpoena must be observed or the subpoena will be ineffective. Those requirements can be found in Government Code sections 11450.05 through 11450.50. The Government Code can be found in a law library or online at <http://www.leginfo.ca.gov>.

Hearings are scheduled on any regular business day, depending on the availability of an Administrative Law Judge, usually on mutually convenient dates chosen by the parties. The starting time will depend on the location and the time that will be required for the Administrative Law Judge to travel to the hearing site. Most hearings begin at 9:30 a.m. and end at 5 p.m. The law requires the hearing to be held at a place reasonably convenient to the parent and student. Hearings are usually held in local school facilities. The hearing room, at a minimum, should have one table for student representatives, one table for district representatives, one table for the Administrative Law Judge with a nearby electrical outlet, and one witness table. The OAH has hearing rooms available in all its offices (Sacramento, Oakland, Los Angeles, Van Nuys, Laguna Hills, and San Diego).

The OAH normally sends documents notice only to the parties to the matter. A written notice of representation must be received for each case before a notice will be sent to an advocate, a lawyer or a law firm.

The Administrative Law Judge has the power to set time limits for witness testimony

Telephonic testimony is permitted at the discretion of the Administrative Law Judge. A witness testifying by telephone must have available all of the exhibits of both parties.

The technical rules of evidence do not apply in a special education due process hearing. The rules for admitting evidence in due process hearings can be found in Title 5 of the California Code of Regulations, section 3082(b).

Rules that Apply to the Hearing

The Administrative Law Judge is required to decide the hearing according to the legal principles set forth in the federal and state law, and in the decisions of courts interpreting those principles. The OAH also relies on prior decisions of its own Administrative Law Judges and of its

predecessor agency, the Special Education Hearing Office, which by law may be used as persuasive, but not binding authority.

Hearing

The purpose of the hearing is to allow all parties to present evidence supporting their positions and to explain to the Administrative Law Judge why they believe they should prevail on the issues being heard. The hearing is not governed by formal rules of procedure or evidence. Although the hearing is less formal than a court trial, it proceeds in an orderly fashion that is similar to a trial.

At the beginning of the hearing, the Administrative Law Judge turns on a recorder to make a record of the hearing and, after identifying the case and the parties for the record, briefly explains how the hearing will proceed. The Administrative Law Judge may only speak with a party about the case in presence of the other parties. It is important to have any substantive discussions about the case on the record.

Once preliminary matters are completed, each party is given an opportunity to make an opening statement, which should provide the Administrative Law Judge with a brief summary of the party's position on the issues being heard.

Then evidence is presented. The party who requested the hearing is usually the party who presents evidence first. All witnesses are sworn to tell the truth. After one party has presented its witnesses and evidence, the other parties will call their witnesses. Each party will be given an opportunity to ask questions of the other parties' witnesses, and the Administrative Law Judge may also ask questions of the witnesses. The Administrative Law Judge may ask the parties to be flexible as to when witnesses are called to ensure that all relevant testimony is presented. At the end of the hearing, each party is allowed to make a closing argument.

In some cases the Administrative Law Judge may ask the parties to make oral closing arguments. In others, closing statements will be submitted in writing after the hearing. After closing statements are received, the hearing record is closed. The Administrative Law Judge will then prepare a written decision, which will be sent to the parties.

Issues at Hearing

State and federal law prohibit the consideration at a due process hearing of any issue that is not raised in the request for due process hearing, unless the other party consents, or unless, not later than five days before the hearing, an Administrative Law Judge grants permission to a party to add an issue under Education Code section 56502, subdivision (e). A party that wishes to add issues to a case must file a motion for leave to amend the complaint. If a complaint is amended, the timelines for resolution sessions, mediations, and hearing start over again.

Rights of the Parties during the Hearing

All of the parties have the following rights during the hearing:

- Right to representation. All parties have the right to be accompanied, advised, and assisted by counsel and by persons
- Right to request the exclusion of witnesses. Any party may ask the Administrative Law Judge to order prospective witnesses to remain outside the hearing room while other witnesses are testifying. This practice allows the Administrative Law Judge to compare the testimony of witnesses who have not heard each other testify.
- Right to present evidence and argument. All parties have the right to call witnesses and present evidence that will help them prove their cases. They will also be given the opportunity to argue the merits of their cases.
- Right to confront and cross-examine adverse witnesses. All parties have the right to be present when witnesses testify against their positions and to ask them questions concerning their testimony.
- Right to written findings of fact and decision. The Administrative Law Judge must prepare a written decision setting forth his or her factual findings, analysis of the applicable law, and final decision.

Special Rights

The law provides the following special rights to parents in addition to the rights set out above:

- Right to an interpreter. If the primary language of a party is other than English, an interpreter will be provided by the OAH. It is important that the parties notify the OAH well before the hearing that an interpreter will be needed.
- Right to close the hearing to the public. At the parents' request, the Administrative Law Judge will close the hearing to anyone but the participants.
- Right to a public hearing. Parents have the right, if they choose, to allow members of the public to attend the hearing.
- Right to presence of the student. Parents have the right to have their child present during the hearing.

Authority of the Administrative Law Judge

The Administrative Law Judge has the authority to take all actions necessary to complete the hearing in an efficient and expeditious manner, and to render the final administrative decision. By law, the hearing officer is given additional specific authority to:

- Question a witness on the record before any of the parties does;

- With the consent of all parties, request that conflicting experts discuss an issue with each other while on the record;
- Visit the proposed placement site when the physical attributes of the site are at issue;
- Call a witness to testify at the hearing if all the parties consent, or if the hearing is continued for at least five days prior to the testimony of the witness;
- Order that an impartial assessment of the pupil be conducted (the cost of which will be paid by the OAH);
- Put reasonable time limits on the hearing; and
- Initiate contempt sanctions and/or impose expenses and attorney's fees against a party, attorney, or other representative for misconduct.

Nonattendance at Hearing

If the person who requested the hearing does not appear at the hearing, the request for hearing may be dismissed or the hearing may proceed without that party, and a decision may be rendered based on the evidence presented during the hearing.