IN THE SUPREME COURT OF THE STATE OF OREGON

DONNA JO CONINGSBY
Petitioner-Appellant – Petitioner on Review

v.

STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
AN OFFICE OF THE OREGON DEPARTMENT OF EDUCATION

Respondent-Respondent – Respondent on Review.

Supreme Court No. S063785
Court of Appeals No. A160227
Washington County Circuit Court No. C144492CV

Petitioner's Brief on the Merits

Donna Jo Coningsby, self-represented
2400 SW Sandalwood Ave.
Beaverton, OR 97005
(425) 241-3600
donna_coningsby@bstz.com

For Petitioner on Review Donna Jo Coningsby

Cecil A. Reniche-Smith
Department of Justice
Appellate Division
1162 Court Street, NE
Salem, Oregon 97301-4096

For Respondent on Review Oregon Department of Education

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ACKNOWLEDGMENT

The petitioner gratefully acknowledges the assistance of Thomas M. Christ of the Oregon State Bar's Appellate Pro Bono Program in analyzing the issues in this case.

Any errors are my own.

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I. QUESTIONS PRESENTED

A. Whether an evidentiary hearing in a proceeding under ORS 183.484 for judicial review of an agency order in other than a contested case amounts to a "trial," thus authorizing a litigant to file a motion for a new trial to seek a new evidentiary hearing under ORCP 64 that extends the deadline for filing a notice of appeal?

B. Whether a circuit court's failure to provide a litigant with an opportunity to develop a record in a proceeding under ORS 183.484 for judicial review of an agency order in other than a contested case authorizes the litigant to file a motion for a new trial to seek a new evidentiary hearing under ORCP 64 that extends the deadline for filing a notice of appeal?

II. PROPOSED RULES

A. An evidentiary hearing in a proceeding under ORS 183.484 for judicial review of an agency order in other than a contested case amounts to a "trial," thus authorizing a litigant to file a motion for a new trial to seek a new evidentiary hearing under ORCP 64 that extends the deadline for filing a notice of appeal.

B. Failure to provide a litigant with an opportunity to develop a record in a proceeding under ORS 183.484 for judicial review of an agency order in other than a

contested case authorizes the litigant to file a motion for a new trial to seek an evidentiary hearing under ORCP 64 to develop the record, and such motion for a new trial extends the deadline for filing a notice of appeal.

III. SUMMARY OF PROCEEDINGS

Appellant/Petitioner on review is a self-represented parent ("parent") of a minor disabled child receiving special education services in the state of Oregon. The Individuals with Disabilities in Education Act, 20 USC § 1400, et seq. ("IDEA") provides numerous procedural safeguards to disabled students and their parents to ensure that the disabled student receives a free and appropriate public education ("FAPE").

The Respondent/Respondent on review is the Oregon Department of Education (ODE), a state education agency (SEA) responsible for resolving IDEA state complaints against local education agencies (LEA), such as a school district (District) in Oregon in accordance with federal minimum state complaint procedures under the IDEA. 34 CFR §300.152.

The parent filed an IDEA state complaint with the ODE alleging violations of procedural safeguards by her child's District that resulted in a denial of FAPE. The parent alleged that the District violated procedural safeguards related to parental consent, parental notice, parent access to the student's records, parent participation,

and failing to reimburse the parent for District consultations with the her child's treating physician during a reevaluation. Sections 1414 and 1415 of the IDEA.

On April 9, 2014, after contracting with an outside investigator James Varner to perform an investigation, the ODE issued a Final Order refusing to order the District to take corrective action. (App-1 to App-10). On May 8, 2014, the parent timely filed a detailed Petition for Reconsideration and Entry of New Order with the ODE pursuant to OAR 137-004-0080 (ER-1 to ER 5, excerpted pps. 7-11). On June 5, 2014, the ODE mailed a letter dated June 3, 2014 denying the petition for reconsideration.

The parent timely filed in Washington County Circuit Court ("the trial court") the Petition for Judicial Review of the ODE's Final Order as an agency order in other than a contested case under ORS 183.480 and ORS 183.484, Case No. C144492CV. The parent alleged that the ODE's Final Order was defective in numerous respects and requested review under each of the three alternative standards of review specified in ORS 183.484(5)(a),(b) and (c):

> (a)…If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it ***shall***:
> (A) Set aside or modify the order; or
> (B) Remand the case to the agency for further action under a correct interpretation of the provision of law.
> (b) The court ***shall*** remand the order to the agency if it finds the agency's exercise of discretion to be:
> (A) Outside the range of discretion delegated to the agency by law;

> (B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or
> (C) Otherwise in violation of a constitutional or statutory provision.
> (c) The court ***shall*** set aside or remand the order if it finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. (emphasis added) ORS 183.484(5)(a),(b) and (c).

The ODE failed to file a timely answer to the parent's petition for judicial review. The parent filed a notice of intent to request a default judgment. Eventually the ODE late-filed an answer and the trial court issued a notice setting the hearing on the petition for March 2, 2015. Subsequently, Petitioner agreed to the Respondent's motion to reset the hearing to a later date, resulting in the trial court notice re-setting the hearing on the petition for June 1, 2015 (ER-6).

Unfortunately, the parent fell ill in February 2015 and traveled to Seattle during the spring break week at the end of March and again in mid-April to undergo several diagnostic tests at the University of Washington Medical Center after which she was immediately scheduled for surgery at UWMC on May 2, 2015.

During this time the ODE filed a summary judgment motion on just two of the three separate standards under which the parent requested judicial review of the ODE's defective order, namely just the two review standards set forth in ORS 183.484(5)(a) and (c). The trial court set the hearing date for the summary judgment motion for 5/18/15 (ER-7).

Unable due to illness to timely reply to the ODE's motion for summary judgment or to file a summary judgment motion of her own, the parent, after conferring with counsel for the ODE, filed an unopposed motion to extend time to respond to the ODE's pending motion for summary judgment and to continue the hearing on the motion to a later date.

After returning to Oregon from her surgery in Seattle, the parent received the trial court's April 29, 2015 notification rescheduling the hearing on the summary judgment for June 1, 2015, on the same date set for the evidentiary hearing on the petition itself. (ER-8)

After conferring again with the counsel for the ODE, and with the calendaring clerk of the trial court, both parties agreed that the summary judgment and evidentiary hearings should be scheduled on separate dates several weeks apart. Counsel for the ODE then filed an unopposed motion to reschedule the petition evidentiary hearing to a mutually agreeable later date, June 29, 2015 that the calendaring clerk indicated was available.

However, on May 22, 2015, the trial court denied the ODE's unopposed motion to continue insisting in a somewhat unusual hand-written order that the "summary judgment motion will be considered at the conclusion of the judicial review motion [sic] on June 1." (ER-9) The counsel for ODE abruptly withdrew his support for continuing the petition evidentiary hearing on the grounds that his witnesses *might* be unavailable on the mutually agreed later date of June 29, 2015

and stated his intention to proceed with his witnesses on June 1, 2015 as the trial court insisted.

On May 28, 2015, the parent filed her own motion to reset the evidentiary hearing under UTCR 6.030 and SLR 6.031 (ER-11 to ER-14). The parent appeared on June 1, 2015 before the trial court and orally renewed her motion to reset the evidentiary hearing. The parent stated that she hadn't recovered sufficiently from her surgery in May to prepare for and participate in that long of a hearing and arrange for the necessary after school care for her disabled child. The parent argued that the unforeseen circumstances of her illness and recent surgery outweighed the ODE counsel's sudden concern over the possibility that his witnesses might not be available on the previously agreed to later date of June 29, 2015 and even outweighed the judge's interest in clearing his docket.

But the trial court was not to be persuaded. After a brief hearing, a transcript of which has been filed in this appeal (ER-15 to ER-64), the trial court proceeded to strike the opposition and cross-motion papers that the parent filed prior to the hearing and granted summary judgment in favor of the ODE on the two standards of review ORS 183.484(5)(a) and (c) under which counsel for the ODE moved. The trial court subsequently issued a written Notice of Pending Dismissal (ER-65) on June 1, 2015 and on June 3, 2015 entered the denial of the parent's motion to reset the evidentiary hearing under UTCR 6.030 and SLR 6.031.

On June 24, 2015, the parent filed her motion objecting to the trial court's subsequent Notice of Pending Dismissal arguing, among other reasons, that the trial court had not disposed of all of the parent's claims, i.e. the review of the defective ODE order under the third alternative standard of review ORS 183.484(5)(b), and that an entry of judgment was premature. (ER-66 to ER-98)

The parent also notified the counsel for the ODE that she objected to an entry of a general judgment of dismissal because, among other errors, the trial court failed to review the defective ODE order under the third alternative standard of review, namely ORS 183.484(5)(b).

On July 13, 2015 the parent filed a motion to set aside the *order* granting the Respondent's motion for summary judgment.

On July 17, 2015, the parent timely filed her motion to set aside the *judgment* (referring to the general judgment of dismissal) and her motion for a new trial (it appears from OJIN that the clerk failed to record the filing of the petitioner's motion until July 21, 2015). The trial court denied the motion for new trial on July 28, 2015 and the clerk filed the denial of the motion for new trial on July 29, 2015. It is not clear from OJIN whether the denial of the motion for new trial was ever entered. Petitioner filed this appeal on August 26, 2015.

On October 14, 2015, the Appellate Commissioner dismissed the appeal as untimely by ruling that a motion for a new trial does not extend the time for appeal

when the action is decided by summary judgment citing *Association of Unit Owners of Timbercrest Condominiums v. Warren*, 352 Or 583, 589-99, 288 P3d 958 (2012).

On November 23, 2015 the appeals court denied reconsideration of the Appellate Commissioner's order of dismissal. In a footnote to the order denying reconsideration, the appeals court stated that, because the circuit court disposed of the action without a trial, there cannot be a new trial. Chief Judge Haselton further noted "[i]t follows that, without a trial, there cannot be a motion for new trial that extends the appeal period," *Id.* at 589-99.

On December 28, 2015, parent timely filed the petition now before this court.

IV. SUMMARY OF ARGUMENT

The June 1, 2015 hearing conducted by the trial court, although couched in terms of summary judgment, was actually an evidentiary hearing, albeit a defective one, authorizing the parent to file a motion for a new trial to seek a new evidentiary hearing under ORCP 64 that extends the deadline for filing a notice of appeal.

Even if this court determines that the June 1, 2015 was not an evidentiary hearing, failure by the trial court to provide the parent with an opportunity to develop a record in a proceeding under ORS 183.484 for judicial review of an agency order in other than a contested case authorized the parent to file her motion for a new trial under ORCP 64, and that extended the deadline for filing her notice of appeal.

V. ARGUMENT

A. The June 1, 2015 hearing was an evidentiary hearing

During the June 1, 2015 hearing, the trial court's stated its intention to conduct a summary judgment hearing first (ER-17, line 19-20). The parent acknowledged that summary judgment should be held first as well (ER-21, lines 6-11) since the parent had a compelling argument that the ODE had failed to meet its obligation to ensure that the District complied with the requirement to provide FAPE as well as the numerous procedural safeguards afforded to parents of disabled children under the IDEA.

Despite the court's stated intention and the parties understanding that this was to be a summary judgment hearing, a close look at what transpired during the hearing reveals that the court did not limit its inquiry to the respondent's summary judgment motion. Instead, the court expanded its inquiry beyond summary judgment to that more akin to a petition for judicial review hearing, so much so that it even exceeded its authority in reviewing the petition. To understand why, a review of the requirements for a petition for judicial review as contrasted with the requirements of summary judgment will be helpful.

B. The circuit court's authority to review an agency order under ORS 183.484(5) is limited

ORS 183.484(5) strictly limits the circuit court's authority in reviewing an agency order in other than a contested case. Counterbalancing this limited review,

however, is the petitioner's broad authority to challenge an agency's order on numerous grounds.

Two grounds for challenging an agency order are reviewed for errors of law. Under ORS 183.484(5)(a), should the court find that an agency has erroneously interpreted a provision of law the court can set aside or modify the order, or remand the order back to the agency for further action under a correct interpretation of the law.

Under ORS 183.484(5)(b), should the court find that an agency's action is outside the range of discretion delegated to the agency by law, inconsistent with an agency rule, an officially stated agency position, or a prior agency practice and the inconsistency is not explained by the agency, or if the court finds that the agency's action is otherwise in violation of a constitutional or statutory provision, then the court can only remand the order back to the agency, presumably for further agency action within the range of discretion delegated to the agency by law. *Middleton v. Dep't of Human Servs.*, 219 Or App 458, 465, 183 P3d 1041 (2008).

A third ground for challenging an agency order is whether the agency order is supported by substantial evidence ORS 183.484(c). If not, then the court can set aside or remand the order, presumably so the agency can take further action to correct whatever evidentiary problems were uncovered during the review.

From these three grounds for challenging agency orders, it follows that the only authority the court has to modify an agency order is if it finds that the agency

has erroneously interpreted a provision of law and that a correct interpretation compels a particular action. 183.484(5)(a)(A). Otherwise, the most the circuit court can do is set aside the agency's order or remand the case back to the agency.

As the court of appeals helpfully explained in a case involving a challenge to the Oregon Child Services Division's (CSD) denial of a petitioner's request to adopt a child:

> The circuit court cannot dictate CSD's placement decisions. Even if the court determined that CSD had, on an improper basis, issued a final order denying consent to the proposed adoption (for example, if CSD had decided that it would no longer consent to any adoptions by Hispanic families, and petitioners happened to be Hispanic), the circuit court could at most reverse and remand that order to CSD. ORS183.484(4)(b). CSD would then be required to reconsider its decision by following the required procedures, applying the proper criteria and refraining from applying improper criteria. The agency's resulting decision could be exactly the same as the original one, i.e., CSD could again refuse to consent to the petitioners' adoption request, but the basis for the second decision, and the process by which it was reached, would have to comply with the law. *Adams v. Oregon State Children's Services Div.*, 886 P.2d 19, 131 Or.App. 396 (Or. App., 1994)

While this is a straightforward analysis of the circuit court's authority to review an agency order for errors of law, the circuit court' s authority to review a challenge to an agency order for substantial evidence is less straightforward.

In another petition for judicial review of an agency order in other than a contested case involving the ODE, the court of appeals stated that "[t]he circuit court's charge in that proceeding was to test the superintendent's [ODE's] factual

determinations for "substantial evidence," which meant that the circuit court was to decide only whether "the record, viewed as a whole, would permit a reasonable person to make" the factual findings that the superintendent made. ORS 183.484(5)(c). *Powell v. Bunn*, 185 Or App 334, 59 P3d 559, 326 Or. 557 (Or. App., 2002) "[S]ubstantial evidence review 'does not entail or permit the reviewing tribunal to reweigh or to assess the credibility of the evidence that was presented to the factfinding body.'" *Middleton,* 219 Or App at 473.

C. Summary judgment presents conflicts in the standard of review of an agency order for substantial evidence

In the context of judicial review of an agency order in a uncontested case for substantial evidence, a summary judgment hearing can present conflicts in the standard of review.

The burden of the petitioner in the petition for judicial review is not a burden of proof, but rather a burden of establishing error in the prior resolution. As the court explained in *Marvin Wood Prods. v. Callow (In re Callow)*, 171 Or App 175, 179–180, 14 P3d 686 (2000), "[l]ike a burden of proof, the burden to establish error has two components: first, a burden of going forward by proposing in what way the determination below is erroneous; second, a burden of establishing the correctness of that proposition."

In contrast, the burden on a party moving for summary judgment is to demonstrate that there are no material issues of fact and that the movant is entitled

to judgment as a matter of law. *Powell,* at 566, citing *McKee v. Gilbert*, 62 Or.App. 310, 321, 661 P.2d 97 (1983).

Thus, in a summary judgment motion in a petition for judicial review, the trial court must view the evidence and all reasonable inferences it may support in the light most favorable to the nonmoving party and determine whether the moving party, despite that view of the evidence, is entitled to judgment as a matter of law. *Powell v. Bunn*, 185 Or App 334, 59 P3d 559, 326 Or. 557 (Or. App., 2002) citing ORCP 47 C; *Jones v. General Motors Corp.*, 325 Or. 404, 420, 939 P.2d 608 (1997).

For this reason, as the court explained in *Powell* when confronted with reviewing summary judgment of a petition for judicial review of an ODE order in other than a contested case, summary judgment "is not appropriate for the judgment in favor of the superintendent [ODE] on judicial review of the superintendent's administrative order." *Powell*, at 566.

D. The court charged the parent with the burden of proof in the June 1, 2015 hearing as if it were an evidentiary hearing

As the trial court and the parties stumbled through the June 1, 2015 hearing, one of the issues that the petitioner was able to successfully raise was the District's failure to give the parent access to her disabled child's evaluation reports before an upcoming IEP meeting in violation of her parent right of access to such records under the IDEA, and despite her numerous requests that they do so. (ER-49 to ER-50).

The court, perhaps in consideration of the possibility that the parent met her burden of going forward in the hearing on the petition by proposing in what way the ODE's final order was erroneous as well as the burden of establishing the correctness of that proposition picked up on this point, began enquiring about whether the results of the reevaluation report were complete or incomplete, and whether the report was withheld from the parent. This was not an issue that the ODE had addressed during the investigation, but one that the parent urged the court to consider in light of her extensive written requests to the District to provide her with copies of her disabled child's test results and evaluation reports prior to the upcoming IEP meeting.

For example, the parent succeeded in bringing to the court's attention the various procedural safeguards for parents with which the ODE and the District were obliged to comply (beginning at ER-44, line 23). In particular, the parent brought to the court's attention the ODE's own earlier ruling in 2002 in *In the matter of C.O. and the Parkrose School District*, State of Oregon for the Supt. of Public Instruction, Hearing Officer Panel Case No. 20819, Agency Case No. DP 02-105, Page 3 of 7, September 16, 2002[1] a case in which In Oregon, the Respondent's own agency has previously emphasized the importance of the parent's right of access

[1] For online access to this decision follow this link: http://www.ode.state.or.us/services/disputeresolution/dueprocess/2002orders/dp02_105c.pdf

to education records ruling that "[t]he parents are entitled ***to full and unfettered access to their son's education records*** in order to prepare for [a] hearing…" and ordered the District to provide the parents with the student's autism evaluation and recommendations prepared by the District's outside expert witness. (ER-45 to ER-46). In that case the parents were only provide with portions of the completed evaluation reports, and the ODE found they were entitled to all of the completed evaluation reports.

In this case the evidence in the record shows, and the counsel for the ODE conceded, that at least the school psychologist's report was complete at the time the petitioner asked for a copy, (ER-25, lines 10-12 and lines 18-20), but the ODE counsel further stated that "they [the District] were not going to print out the evaluation report prior to the November IEP meeting." (ER-25 to ER-26).

Indeed the evidence present in the agency record revealed an outright refusal to provide the parent with the evaluation reports in an email from the special education facilitator Joan Krug on November 15, 2013 (ER-3, in an excerpt ER-1 to ER-5, of the parent's petition to the ODE to reconsider their final order, and attached as an exhibit to the parent's petition for judicial review before the trial court.) The District's refusal occurred after the District had already faxed portions of their evaluation reports to the student's physician, and after the District's school psychologist report was complete.

Despite the evidence during the hearing, the court perplexingly made a finding that "nothing has been represented by way of pleading in this particular case, that those records were somehow complete and withheld." (ER- 62, lines 10-12), when, in fact, the evidence shows that they were complete and withheld! The court continued "[i]n fact, the petitioner's saying that she's taking no objection with the actual evaluation that was done in this particular case[2], rather it is a procedural question that is brought. *On that, the petitioner fails to establish the burden of proof that she has*. ER-62, lines 19-24, emphasis added).

Such an assertion by the court reveals that the hearing that the court conducted was not simply a summary judgment hearing; it was an evidentiary hearing on the petition itself. Moreover, the appropriate action for the court to take once it decided that the parent had successfully met her burden of going forward in raising the issue of parent access to a student's records under the IDEA, was to remand it back to the ODE for further action on the issue, not to make a finding and resolve the issue itself.

[2] Petitioner decided not to contest the sufficiency of her disabled child's eligibility evaluation under the autism spectrum category. This was a strategic decision on her part. Parent believes the evaluation was inadequate and was responsible for the premature withdrawal of behavioral supports resulting in a disastrous mainstream effort and school refusal issues in the following school year. But it is too difficult and expensive for parents to mount a challenge to the sufficiency of an evaluation, especially for the autism spectrum disorders. This is because parents cannot recoup expert witness fees in due process hearings. Efforts are underway in the US Senate to provide parents with the ability to recoup such fees but the effort has stalled. http://www.copaa.org/news/192457/COPAA-Praises-Senate-introduction-of-The-IDEA-Fairness-Restoration-Act.htm

E. The court failed to require the ODE to meet its burden to demonstrate that there are no material issues of fact under summary judgment in the June 1, 2015 hearing

One of the critical facts in dispute in this case is whether the parent asked the District school psychologist to contact her disabled child's treating physician for purposes other than the reevaluation, and in particular whether the parent requested that the District psychologist contact the physician to verbally explain to him the results of the evaluation.

During the hearing, the counsel for the ODE conceded that the District's psychologist's action to initiate a call the physician to verbally explain the results of the evaluation might not have been at the parent's direction. But then the ODE's counsel offered dubious explanation that the District's actions in contacting the physician were in the parent's interest. (ER-25-26)

The parent argued that she did not request or authorize such communication — rather she only consented to contacting her disabled child's physician to obtain an explanation of her child's medical diagnosis as part of the evaluation. In support of her argument, the parent succeeded in bringing to the court's attention the existence of numerous and contemporaneous written correspondence to the District in the months leading up to the District's disputed communications with the physician that contradicted the District's version of events, and which the ODE investigator

had access to but chose to ignore (ER- 40 to ER-41) (App-5 – ODE Final Order, Para 7. investigator claiming no written evidence in the record)

Despite the existence of the dispute over the facts for such a critical issue, the trial court closed its inquiry by declaring "there isn't an issue of material fact." (ER-60, lines 22-23). By failing to require that ODE demonstrate that there are no material issues of fact, the trial court failed to view the evidence and all reasonable inferences it may support in the light most favorable to the nonmoving party, i.e. the parent.

As the court of appeals explained in Powell, the likely explanation for the trial court's failure is that it was conflating the substantial evidence standard required for judicial review of the petition (whether "the record, viewed as a whole, would permit a reasonable person to make" the factual findings that the superintendent made ORS 183.484(5)(c)" *Powell v. Bunn*, 185 Or App 334, 59 P3d 559, 326 Or. 557 (Or. App., 2002) with the entirely different review of the evidence standard required for summary judgment, i.e. whether the evidence and all reasonable inferences it may support in the light most favorable to the parent precluding the superintendent (ODE) from demonstrating that there are no material issues of fact.

For at least this reason, the June 1, 2015 hearing should be considered a hearing on the petition and not simply a summary judgment hearing.

F. The trial court made factual findings beyond the agency's findings and substituted its judgment for the agency's judgment in the June 1, 2015 hearing

ORS 183.484(5) does not permit the circuit court to reweigh or to assess the evidence to the extent that it substitutes its own judgment for that of the agency. And yet a review of the June 1, 2015 hearing reveals that the trial court did just that.

One of the issues that the parent raised during the hearing was whether the ODE erroneously interpreted the parental consent provisions of the IDEA and the confidentiality provisions of FERPA that are incorporated into the IDEA. (ER-37, lines 10 to ER-39, line 13).

In the ODE Final Order, the ODE ruled that the permission on the FERPA records release allowed the District to contact the physician for reasons other than what was set forth in the parent consent for reevaluation, and yet still exclude any costs associated with contacting the physician to not be reimbursable under the requirement to provide a reevaluation at no cost to the parent (the FAPE requirement). (APP-7, comparing the consent form, "Prior Notice about Evaluation/Consent for Evaluation" with the records release form "Authorization to Use and/or Disclose Educational and Protected Health Information", both of which the parent signed on September 12, 2013 at the reevaluation planning meeting with the District in response to the District's request that it was necessary to sign both in

order to obtain an explanation of the medical statement from the student's physician).

At the June 1, 2015 hearing, the ODE counsel argued that the records release form was a simple document, and that the plain language of the form should speak for itself, and that the parent, as an attorney, should not have been "confused" by it. (ER-24 to ER-25) In fact, in his brief for summary judgment, the ODE counsel argued that the records release should be interpreted under state common law of contract.

The parent argued that she wasn't confused by it because she knew it was required in order to release records under FERPA, and that the FERPA release must be interpreted under the IDEA, and could not eviscerate the protections afforded the parent under the IDEA.[3] (ER-37, line 13 to ER-38, line 3).

In taking up this issue, the trial court, following the lead of the ODE counsel, went much further than the ODE's Final Order, and ruled "this Court does acknowledge that the petitioner is an attorney, and she simply could have, had she wished, limited the authorization to show that they clearly stepped outside the

[3] Under the Part B Confidentiality of Information regulations of IDEA, 34 CFR §§ 300.610-300.627, the SEA is also obligated to enforce FERPA in the context of the IDEA because Part B IDEA regulations do not simply incorporate or restate FERPA requirements and apply them to Part B agencies; they address specific issues and concerns that arise in the special education context and that are not addressed adequately under the more general FERPA requirements. (See March 7, 2008 US Dept. of Educatation Letter to Anderson, Texas Education Agency, published at http://www2.ed.gov/policy/speced/guid/idea/letters/2008-1/anderson030708confidentiality1q2008.pdf

authorization. They didn't. And therefore, summary judgment is appropriate, and it is appropriate for the respondent. And that is my ruling for today." (ER- 63).

The implications of this ruling for attorneys who are parents of disabled children receiving special education services under the IDEA cannot be underestimated. Attorneys should be afforded the same procedural protections under the IDEA as any other parent of a disabled child. More importantly for the purpose of this petition, however, is that in making this ruling, the trial court substituted its own judgment for that of the ODE. For at least this reason, the June 1, 2015 hearing should be considered a hearing on the petition and not simply a summary judgment hearing.

G. The Notice of Pending Dismissal refers to the June 1 hearing as a trial.

After the conclusion of the June 1, 2015 hearing, the trial court issued a notice to the parties entitled "Notice of Pending Dismissal" In the notice the trial court referred to the June 1, 2015 hearing as a "trial." The notice further stated "If no action is taken within 28 days this case will be dismissed. To prevent dismissal a **written motion and order** must be submitted showing good cause why this case should not be dismissed."(ER-65, emphasis in original).

In response to the Notice of Pending Dismissal, the parent timely filed a detailed objection that she denominated a "Motion Objecting to Notice of Pending

Dismissal." (ER-66 to ER-98). The detailed objection alerted the court to many of the shortcomings of the hearing that are detailed in this appeal. The court ignored the motion.

For at least this reason, the June 1, 2015 hearing should be considered a hearing on the petition and not simply a summary judgment hearing.

H. The trial court failed to provide the parent with an opportunity to develop the record as required by ORS 183.484

Even if this court determines that the June 1, 2015 was not an evidentiary hearing, failure by the trial court to provide the parent with an opportunity to develop a record in a proceeding under ORS 183.484 for judicial review of an agency order in other than a contested case authorized the parent to file her motion for a new trial under ORCP 64, and that extended the deadline for filing her notice of appeal.

The Court of Appeals' reliance on the *Timbercrest Condominiums* case to dismiss the parent's appeal is misplaced. In that case the motion under review was a motion for reconsideration of summary judgment where the outcome of the case turned on the outcome of the summary judgment ruling. In this case the summary judgment ruling is, at best, a partial summary judgment ruling, because neither the counsel for the ODE nor the trial court addressed the parent's petition to review the defective ODE order under the third standard of review in ORS 183.484(5)(b). The trial court's refusal to reschedule the evidentiary hearing to at least hear evidence

relating to the third standard of review of the defective order is just one of the appropriate grounds for the parent's motion to set aside the general judgment of dismissal and to grant a new trial.

The Court of Appeal's *reductio ad absurdum* argument that "without a trial, there cannot be a motion for a new trial" fails to recognize that there can be many circumstances during a court proceeding that result in the need for a new trial, including circumstances where, as happened in this case, the originally scheduled trial did not take place. A more accurate statement of the rule is that without the ***possibility*** of a trial, there cannot be a motion for a new trial, as set forth in *Alt v. City of Salem*, 756 P.2d 637, 306 Or. 80 (Or., 1988).

> What must therefore be determined is whether there is any ***possibility*** of a "reexamination of an issue of fact" in a writ of review proceeding. A circuit court, in a writ of review proceeding, may review the jurisdictional, procedural, legal and constitutional bases of the challenged decision. It may also determine whether the decision is supported by substantial evidence. *Alt*, 756 P.2d 637, 639 (emphasis added)

In Alt, the court ultimately determined that there was no possibility of a trial because the writ of review proceeding does not permit the reviewing court to conduct an evidentiary hearing. In a judicial review of an agency order in other than a contested case, however, a trial court must provide an evidentiary hearing that

meets the requirements described in *Norden v. Water Resources Dept.* 329 Or. 641, 996 P.2d 958 (2000), and *Gasp v. Environmental Quality Commission* 108 P.3d 95, at 97, 198 Or App. 182 (Or. App., 2005).

Specifically, the *Norden* court concluded that the "record" to which ORS 183.484 refers, and which serves as the basis for judicial review, is the record that the agency and the petitioner make before the circuit court. As the *Gasp* court explained:

> The ability of the petitioner and the agency to present evidence in the circuit court is especially significant in light of the "*whole record*" standard for determining whether substantial evidence supports the agency's findings. In making that determination, the reviewing court must consider evidence that detracts from those findings as well as evidence that support them. Judicial review before the circuit court may be the first chance for the petitioner to present evidence that would detract from the agency's order. *Gasp*, 108 P.3d, at 102.

In view of *Norden* and *Gasp*, since there is the ***possibility*** of a trial in a judicial review of an agency order in other than a contested case, there can be a motion for a new trial, including the motion for the new trial that the parent filed in this case. Among other errors as detailed in the parent's motion for a new trial, the failure of the trial court to hold an evidentiary hearing materially

affected substantial rights of the parent under ORS 183.480 and ORS 183.484.

VI. CONCLUSION

Because the parent's motion for a new trial is correctly based on the grounds set forth in ORCP 64(B) and ORCP 64(C) and was appropriately made in a petition for judicial review that requires an evidentiary hearing under ORS 183.484 and *Norden*, the parent's motion for a new trial extends the deadline for filing a notice of appeal under ORS 19.255(2), because there either was an evidentiary hearing, or there should have been an evidentiary hearing, and parent's notice of appeal is timely.

In view of the foregoing, the parent requests that the court order the Court of Appeals to reverse its order of dismissal and reinstate the appeal.

Date this 6th day of June, 2016.

Respectfully submitted,

DONNA JO CONINGSBY, self-represented petitioner

/s/ Donna Jo Coningsby

Donna Jo Coningsby, OSB No. 942757
Email: donna_coningsby@bstz.com
For Petitioner on Review – Donna Jo Coningsby

Certificate of Filing and Service

I certify that I filed the foregoing document by causing it to be electronically filed with the Appellate Court Administrator on June 6, 2016, through the appellate eFiling system.

I further certify that on the same date, through the use of the electronic service function of the appellate eFiling system, I served the foregoing document on the following party:

Cecil A. Reniche-Smith
Department of Justice
Appellate Division
1162 Court Street, NE
Salem, Oregon 97301-4096

/s/ Donna Jo Coningsby

Donna Jo Coningsby

cc. Thomas M. Christ, tchrist@cosgravelaw.com