BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:

BAKERSFIELD CITY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH CASE NUMBER 2020010042

and

BAKERSFIELD CITY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH CASE NUMBER 2019120777

ORDER GRANTING IN PART BAKERSFIELD CITY SCHOOL DISTRICT'S REQUEST FOR CONTINUANCE AND DENYING REQUEST FOR IN PERSON HEARING

APRIL 23, 2020

On April 21, 2020, Bakersfield City School District filed with the Office of Administrative Hearings, referred to as OAH, a request to continue this matter, based upon its inability to prepare adequately for a videoconference hearing. Bakersfield also contends that California's Administrative Procedures Act does not permit a telephonic or video hearing if one party objects. Student has not submitted a response.

APPLICABLE LAW

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (Ed. Code, § 56505, subd. (f)(3); Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice

to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance or imposing conditions on the continuance; and any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

California Code of Regulations, title 5, section 3082, subdivision (g), provides, "Notwithstanding Government Code section 11440.30 of the APA, the hearing officer may conduct all or part of a hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits." This is the same language that exists in Government Code, section 11440.30, subdivision (a).

California Code of Regulations, title 5, section 3089, expressly provides that Government Code, section 11440.30, subdivision (b), shall not apply to special education due process hearings.

DISCUSSION

Bakersfield objects to OAH's use of videoconference hearings during the Safer at Home restrictions implemented by the State of California and local jurisdictions in response to the COVID-19 pandemic. Specifically, Bakersfield contends that the processes that OAH established do not comport with the due process requirements in Education Code, section 56505, subdivision (e), which governs special education due process hearings. Further, Bakersfield raises technical concerns why it cannot be prepared to proceed to hearing next week.

Regarding Bakersfield's contention that OAH's requirements for video hearings violate the Administrative Procedures Act, Bakersfield cites the incorrect provisions of

law applicable to special education due process hearings. The California Department of Education is authorized by Education Code, section 56100, subdivision (j), to adopt regulations for special education due process hearings. Pursuant to that authority, the California Department of Education promulgated California Code of Regulations, title 5, section 3089, that exempted specific provisions of the Administrative Procedures Act, including Government Code, section 11440.30, subdivision (b), which limited the use of telephonic or video hearings if a party objected. Further, the California Department of Education explicitly permitted the use of a video or telephonic hearing in California Code of Regulations, title 5, section 3082, subdivision (g).

The procedures created by OAH for video hearings comply with Education Code, section 56505, subdivision (e), and California Code of Regulations, title 5, section 3082, subdivision (g), by creating a system for the parties to upload hearing exhibits to OAH well before the hearing starts, and the ability witnesses to view the electronically uploaded documents if attending the hearing by videoconference. For the witnesses testifying by telephone, the procedures that OAH has had in place for many years for telephonic testimony applies with the parties providing that witness with complete copy of the evidence binders.

Regarding Bakersfield's concerns about being accompanied and advised by an attorney, and its attorney's ability to accompany and advise Bakersfield, the OAH procedures permit parties to communicate confidentially through the use of caucus rooms. Also, the parties and their representatives may email or text each other during the hearing so long as this is not disruptive of the hearing process. Finally, nothing prevents the parties from requesting a break so they their attorneys can contact each other to speak outside the presence of the ALJ.

OAH has established new subpoenas to compel the attendance of witnesses to testify via videoconference or telephone, and to produce documents. Limits imposed by collective bargaining agreements regarding school district personnel do not apply to a witness subpoenaed to testify as they are commanded by law to appear to testify by OAH, or face sanctions for failure to appear. Finally, Bakersfield and its counsel can use electronic document production to obtain documents from third parties, and raise with the hearing ALJ any particular problems regarding document production.

Regarding a continuance, because of the newness of the processes that OAH has created, a short continuance is warranted so that the parties can comply with requirements for a videoconference hearing. Further, any particular issues that arise can be addressed at hearing.

ORDER

1. Bakersfield's motion to prevent OAH from conducting the hearing in this matter by videoconference or telephone is denied.
2. Bakersfield's request for a continuance is granted in part. The Prehearing Conference will be held on May 1, 2020, at 10:00 AM. Due Process Hearing will be held on May 12, 2020, through May 14, 2020. The hearing shall begin at 9:30 AM on all days unless otherwise ordered. The hearing shall continue day to day, as needed at the discretion of the Administrative Law Judge.

3. The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure their availability to testify. Good cause for witness unavailability is not established by failing to properly notify or subpoena a witness. Prehearing conference statements and motions are due to OAH no later than three business days before the prehearing conference or with evidence of good cause why it was not possible to file the motion by that date.

DocuSigned by:
Peter Paul Castillo
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Peter Paul Castillo

Presiding Administrative Law Judge

Office of Administrative Hearings