BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

ANTIOCH UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020030954

ORDER GRANTING REQUEST FOR OFFICIAL NOTICE, OVERRULING OBJECTIONS TO VIDEOCONFERENCE HEARING, AND DENYING CONTINUANCE

JUNE 10, 2020

On March 23, 2020, Student filed a Request for Due Process Hearing with the Office of Administrative Hearings, referred to as OAH, naming Antioch Unified School District. On April 23, 2020, OAH granted the parties' request for mediation and for a continuance. This matter is currently scheduled for hearing beginning June 23, 2020.

On June 9, 2020, Antioch filed an objection to videoconference or teleconference hearing. Antioch argues that a virtual hearing will not afford due process, does not comport with the law, and is prejudicial. On June 9, 2020, Antioch also filed a request for official notice of numerous documents regarding the novel coronavirus, called

COVID-19. These include five of Governor Newsom's Executive Orders; three orders of the Health Officer of the County of Contra Costa; Antioch's April 1, 2020 announcement regarding school closures; California Department of Education's Special Education Guidance for COVID-19; the United States Department of Education's Questions and Answers on Providing Services to Children with Disabilities during the pandemic; and the Office for Civil Rights' Fact Sheet regarding COVID 19. Student has not filed a response.

OFFICIAL NOTICE

No specific statute or regulation governs the taking of official notice in special education due process proceedings. For guidance in such situations, OAH often looks to the Evidence Code. Section 452, subdivision (h) of that Code allows the taking of judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." As specified in Government Code section 11515, judicial notice is generally called official notice when taken by an administrative tribunal. Antioch's request for official notice of the documents attached to its request is granted.

TIMELY RESOLUTION

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. Antioch's objection to proceeding by way of a virtual hearing, is in effect, a request to indefinitely continue this matter to a time when it may present its defense in person.

No federal or state legislature has tolled or suspended the state and federal timeline for adjudicating special education disputes during the COVID-19 pandemic. Antioch cites no law, and there is nothing in the executive orders, county health notices, agency statement of school closures, or other attached documents, that would permit OAH to indefinitely suspend the hearing dates in his matter.

On March 19, 2020, amid concerns about COVID-19, OAH issued a General Order Continuing All Non-Expedited Special Education Prehearing Conferences and Hearings through April 17, 2020. On April 15, 2020, based upon continuing COVID-19 concerns, OAH ordered all special education prehearing conferences and due process hearings to occur by videoconference using the Microsoft Teams application, until otherwise ordered, as authorized by California Code of Regulations, title 5, section 3082, subdivision (g). OAH has also issued orders setting procedures for filing exhibits electronically using the evidence platform called CaseLines.

OAH is open for business and the law requires this matter be timely adjudicated. As such, Antioch's request to suspend this matter until an unknown future date when it may be able to participate in an in-person hearing is denied.

VIDEOCONFERENCE HEARING

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 or APA, including Government Code, section 11440.30, subdivision (b), which limited the use of telephonic or video hearings if a party

objected. Pursuant to this authority, Government Code section 11440.30, subdivision (b), does not apply to special education due process hearings.

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). This subdivision 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 as in Government Code section 11440.30, subdivision (a).

Antioch argues that OAH's videoconference hearings run counter to Governor Newsom's Executive Order N-63-20 issued on May 7, 2020. This argument is not persuasive. Executive Order N-63-20 suspends regulations requiring in-person public hearings or allowing objection to virtual hearings if each participant has the opportunity to participate and hear the proceeding and observe exhibits; members of the public otherwise entitled to observe have access; and the presiding officer satisfies all requirements of the Americans with Disabilities Act and the Unruh Civil Rights Act.

OAH was authorized to conduct virtual hearings without party consent prior to the Executive Order. OAH is not bound by Government Code section 11440.30, subdivision (b). OAH's authority to conduct virtual hearings is not based on a suspension of regulations governing objections to such hearings. The authority to conduct virtual hearings flows from title 5 of the California Code of Regulations, section 3082. As such, Antioch's objection that a videoconference hearing is unlawful, is without merit and overruled.

DUE PROCESS

Education Code, section 56505, subdivision (e), governs special education due process hearings. The rights afforded under this section of the Education Code include the right to be accompanied by counsel; to present evidence; confront, cross examine and compel the attendance of witness; to receive a copy of all documents from the other parties; and to prohibit the introduction of any evidence that has not been disclosed. Antioch's objections assume these rights cannot be afforded unless the due process hearing is conducted in a "live person format."

Antioch avers it cannot attend a hearing without counsel physically present to confer and communicate with counsel, that counsel cannot meaningfully communicate between themselves, and with their client. OAH procedures permit parties to communicate confidentially through the use of separate videoconference caucus rooms. 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. Nothing prevents the parties or counsel from requesting a break to contact each other to speak outside the presence of the ALJ and the other party. Additionally, nothing in the OAH procedures preclude attorneys and clients from participating from the same physical location, consistent with guidelines to maintain social distancing.

The procedures OAH has established for videoconference 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 of witnesses to view the electronically uploaded documents if attending the hearing by videoconference. The hearing ALJ has discretion to allow a participant to participate telephonically if they do not have a webcam or otherwise experience internet connectivity issues. For 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 copies of each party's evidence. OAH procedures require parties to timely exchange electronic copies of exhibits as required by Education Code section 56505, subdivision (e)(7).

OAH has developed new subpoena forms 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. Parties may use electronic document production to obtain documents from third parties, and raise any particular problems regarding document production with the ALJ during the hearing.

Antioch offered no law or evidence that the procedures established deny it the rights afforded by Education Code, section 56505, subdivision (e). Antioch does not challenge any of the procedures established for videoconference hearings. Instead, Antioch contends the procedures could be violated or might not work. Antioch is concerned parties and attorneys could coach witnesses off camera; parties will have difficulty attacking the credibility of witnesses; ALJ's will have difficulty judging the credibility of witnesses; audio recordings of the hearing will be difficult without proper training; and the sound quality of recordings will be poor. None of these concerns are inherent in the procedures OAH has established to conduct videoconference hearings. Antioch offered no evidence it would be prejudiced by these possibilities. Accordingly, Antioch's objection on the grounds the due process rights can only be protected in a "live person format" is overruled. Other issues presented by the shelter in place order or technology concerns can be addressed to the ALJ during the prehearing conference.

Considering the federal and state timeline, by the authority in California Code of Regulations, title 5, section 3082, subdivision (g) and Government Code section 11440.30, subdivision (a), and based upon the procedures established by OAH consistent with Education Code, section 56505, subdivision (e), all of Antioch's objections are overruled.

IT IS SO ORDERED.

DocuSigned by:
Theresa Ravandi
180B9BDB98E5424...

Theresa Ravandi

Administrative Law Judge

Office of Administrative Hearings