BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

CHAFFEY JOINT UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2019090129

ORDER DENYING REQUEST FOR CONTINUANCE

JULY 29, 2020

On January 6, 2020, Student filed an amended request for due process hearing, naming Chaffey Joint Union High School District. On February 21, 2020, a prehearing conference order issued, granting a continuance in this matter, scheduling the hearing to begin on June 16, 2020.

On June 1, 2020, amid concerns about the novel coronavirus, called COVID- 19, OAH served on the parties a General Order for Due Process Hearings and Mediations and Closure of Public Counters, an Order Setting Video Prehearing Conference Procedures, both dated April 15, 2020 and an Amended Order Setting Procedures for Filing Exhibits Electronically Using CaseLines, dated May 29, 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).

The hearing commenced via videoconference on June 16 and proceeded on June 17-18, 23-25, July 7-8, July 21-22, July 28, and July 29, with four additional scheduled dates still remaining.

On July 28, 2020, at the beginning of the eleventh day of the due process hearing in this matter, Student made an oral request on the record to continue this matter until such time as it may be conducted by an in-person hearing. The continuance request is hereby denied.

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. 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).)

No federal or state legislature has tolled or suspended the state and federal timeline during the COVID-19 pandemic. Student cites no law that would permit OAH to suspend hearing dates indefinitely.

VIDEOCONFERENCE HEARING

California Code of Regulations, title 5, section 3082, subdivision (g), provides "Notwithstanding Government Code section 11440.30 of the [Administrative Procedures Act], 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).

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. 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).

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.

Student's attorney contends that she and her client must be physically present to communicate with each other because they are unable to communicate during any long-distance 'virtual' due process hearing. However, OAH procedures permit parties to communicate confidentially through the use of separate emails, texts, phone calls or other means. 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. In addition, nothing prevents the parties or counsel from requesting a break to can contact each other to speak outside the presence of the ALJ. Furthermore, nothing in the OAH procedures precludes attorneys and clients from participating from the same physical location, consistent with guidelines to maintain social distancing. Therefore, the procedures OAH has established for videoconference hearing do not deny Student the right to counsel at the hearing.

Student's counsel has made numerous contentions throughout the hearing that technological limitations, not experienced either by opposing counsel nor the ALJ, are preventing her from accessing the hearing video or audio feed, and from viewing documents. She has stated, in particular that she is unable to readily access electronic documents via CaseLines, particularly those presented to refresh recollection or for impeachment. The Amended Order Setting Procedures for Filing Exhibits Electronically

Using CaseLines, dated May 29, 2020 applies. Moreover, at numerous junctures, the ALJ halted or slowed the proceedings to accommodate Student's counsel's technological limitations, in particular to ensure that at every moment, all counsel, the witness and the ALJ were viewing identical documents. To the extent counsel objects to the use of electronic exhibits via CaseLines, the objections are overruled. There is no evidence that technical difficulties experienced by counsel constitute good cause to continue a hearing mid-stream for an indefinite period of time based on any of the authorities cited above. (Ed. Code, § 56505, subd. (f)(3); Cal. Rules of Court, rule 3.1332(c) and (d.).)

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), Student's request for continuance is denied.

IT IS SO ORDERED.

DocuSigned by:
June Lehrman
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June Lehrman
Administrative Law Judge
Office of Administrative Hearings