

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019060280

ORDER OVERRULING OBJECTION TO VIDEOCONFERENCE  
HEARING

APRIL 24, 2020

On June 6, 2019, Parent on Behalf of Student filed a Due Process Hearing Request, referred to as a complaint, with the Office of Administrative Hearings, naming Long Beach Unified School District. The Office of Administrative Hearings is referred to as OAH. On September 3, 2019, Student filed an amended complaint. On October 21, 2019, Student filed a second amended complaint. On December 9, 2019, OAH granted the parties' joint request for mediation and to continue the hearing to April 28, 29, and 30, 2020.

On March 19, 2020, amid concerns about the novel coronavirus, called 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).

On April 15, 2020, OAH granted the parties' joint request to continue the hearing for good cause. The Order set the prehearing conference on August 24, 2020, and the hearing on September 1, through September 3, 2020.

On April 21, 2020, Student filed an objection to electronic hearing. Student attached a copy of California Code of Regulations, title 5, section 3089, Partial Non-Applicability of Certain Sections of the Administrative Procedure Act to Special Education Procedures; a copy of Government Code section 11440.30 Conducting Hearing by Electronic Means; and an unauthenticated copy of a letter dated April 15, 2020, addressed to the Division Chief Presiding Administrative Law Judge.

Student contends the videoconference hearing may not be heard if a party objects pursuant to Government Code section 11440.30, subdivision (b). Student further contends Parents cannot attend a hearing because

- they cannot arrange for a care-giver for Student;
- Student's attorney does not have a webcam and cannot access one due to social distancing;
- Parents would be denied the right to counsel;

- an interpreter would be “unworkable;” and
- counsel is unable to contact witnesses who are not working because of COVID-19.

## 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.

No federal or state legislature has tolled or suspended the state and federal timeline during the COVID-19 pandemic. The hearing is currently set for September 1, through September 3, 2020, 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 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). California Code of Regulations, title 5, section 3089, expressly provides that Government Code section 11440.30, subdivision (b), does not apply 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. 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).

Student's objection to a videoconference hearing relies upon Government Code, section 11440.30, subdivision (b), the provision specifically inapplicable under California Code of Regulations, title 5, section 3089. Accordingly, Students' objection to a videoconference hearing is 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.

Student contends their attorney must be physically present to communicate with each other because “they would be unable to communicate with counsel during any long-distance ‘virtual’ due process hearing.” 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 can contact each other to speak outside the presence of the ALJ. Nothing in the OAH procedures preclude 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 does not challenge any of the procedures OAH has established for videoconference hearings. Instead, Student contends the procedures might not work.

Counsel argues, without any declarations from anyone, that Parents are at home caring for their children at this time. There is no evidence Parents could not arrange for a care-giver in September if needed. If a care-giver is needed in September, the need would be the same whether the hearing was in person or by videoconference. There is no evidence Counsel could not obtain a webcam before, or access one, in September.

Moreover, the hearing ALJ has discretion to allow a participant to participate telephonically if they do not have a webcam. There is no evidence that the use of an interpreter is “unworkable.” OAH uses interpreters in videoconference mediations and prehearing conferences using the same software as used for hearings. None of these

concerns are inherent in the procedures OAH has established to conduct videoconference hearings. Student offered no evidence it would be prejudiced by any of these possibilities in September.

OAH has not considered the general "concerns" addressed to the Division Chief Presiding Administrative Law Judge. The letter is dated April 15, 2020, it does not appear to have been served on Long Beach. The objection, with the letter attached, was filed April 17, 2020. Given the letter appears to have been sent to OAH before the objection was filed, it could be construed as an ex parte communication intended to support the arguments made in the objection. If the letter was not intended to advance the arguments in this objection, it is irrelevant hearsay.

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 Student's objection is overruled.

**IT IS SO ORDERED.**

Marian H. Tully  
Presiding Administrative Law Judge  
Office of Administrative Hearings