

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

OXNARD UNION HIGH SCHOOL DISTRICT.

OAH CASE NUMBER 2021050095

ORDER DENYING MOTION FOR IN PERSON HEARING  
AND GRANTING IN PART AND DENYING IN PART  
STUDENT'S REQUEST FOR THE PROVISION OF COMPUTER  
EQUIPMENT

AUGUST 5, 2021

The due process hearing in this matter is scheduled to begin on August 24, 2021, and to be held by videoconference. On July 27, 2021, Student moved for an order requiring that the upcoming due process hearing in this matter be held in person rather than by videoconferencing, or, in the alternative, that the Office of Administrative Hearings, called OAH, furnish needed computer equipment to Student. At the prehearing conference on July 30, 2021, Oxnard stated it had no opposition to the motion.

## DISCUSSION

### MOTION TO HAVE DUE PROCESS HEARING HELD IN PERSON

Student's motion is based upon the assertions that an in-person hearing would ensure a fair hearing, that it could be done safely, and that Student does not have adequate computer equipment to participate online. Student attaches to the motion an announcement from the Ventura County Superior Court that its proceedings are being opened to in person attendance with appropriate safeguards, and suggests that the hearing be held somewhere in school district facilities.

Student's primary argument is that a hearing by videoconference undermines the ability of the ALJ and the parties to determine witness credibility, especially in assessing a witness's "demeanor, reaction, response, character and appearance." Student cites rule 43, subdivision (a) of the Federal Rules of Civil Procedure, which makes in person proceedings the preferred standard but allows for remote appearances under compelling circumstances and with appropriate safeguards. Student cites Circuit Court decisions from 1992 and earlier in support of the wisdom of the default rule.

### CALIFORNIA LAW

At present, the Office of Administrative Hearings, called OAH, is not conducting special education due process hearings in person due to the COVID-19 pandemic. On April 15, 2020, because of the COVID-19 pandemic, OAH Director and Chief Judge Zackery Morazzini ordered that all prehearing conferences, mediations and hearings conducted by OAH's Special Education Division would be held by videoconference or telephone until

further notice. Chief Judge Morazzini based his Order on the emergency orders of the President and the Governor, the orders of several health authorities, and Government Code section 11512, which authorizes OAH to make orders governing its proceedings. The Order of April 15, 2020, is still in effect. Student does not argue that the Chief Judge's Order is unlawful or explain how it could be disregarded.

However, the authority of the Special Education Division to conduct due process hearings by videoconference does not depend upon the existence of an emergency.

Since 1997, hearing officers in special education due process proceedings have had the discretion to order telephonic or videoconference hearings under a regulation adopted by the State Board of Education. It provides:

(g) 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. (Cal. Code Regs., tit. 5, § 3082, subd. (g).)

## FEDERAL LAW

The practice of conducting special education due process hearings by videoconference is consistent with the requirements of the Individuals With Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. The IDEA requires that a due process hearing be conducted at a place "reasonably convenient" to parents and the student. (34 C.F.R.

§ 300.515(d) (2006).) But it does not regulate the procedures used at hearings. The IDEA requires only that a hearing officer “possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice ....” (20 U.S.C. § 1415(f)(3)(A)(iii).) Otherwise it defers to state practice in the conduct of hearings.

The United States Department of Education, which interprets and administers the IDEA, recently advised that school districts may conduct due process hearings by electronic means if due process guarantees are observed:

Q6. May due process hearings be conducted virtually when schools and other public facilities are closed or have restrictions that prevent face-to-face meetings?

Yes. A State could permit hearings on due process complaints to be conducted through video conferences or conference calls, if a hearing officer concludes that such procedures are consistent with legal practice in the State. 34 C.F.R. 300.511 § (c)(1)(iii). A hearing conducted virtually must ensure a parent's right to an impartial due process hearing consistent with all requirements in 34 C.F.R. 300.511 §§ through 300.515 with State procedures. (IDEA Part B Dispute Resolution Procedures, Questions and Answers (OSERS & OSEP) June 22, 2020.

The guidance also advised that the same rule would apply to expedited due process hearings. (*Id.*, Answer to Question 7.)

## DUE PROCESS OF LAW

Since OAH's authority to conduct due process hearings by videoconference is clear under state and federal law, the only way Student could overcome it on the instant motion would be to make a convincing showing that a videoconference hearing would violate his right to due process of law. Student fails to make that showing.

Testimony by videoconferencing in civil matters is now well established in federal courts. As noted, Rule 43 of the Federal Rules of Civil Procedure expressly permits it in the trial court's discretion. (Fed. Rules Civ. Proc., rule 43(a).) The argument that witness credibility cannot be adequately determined when witnesses testify remotely has been frequently rejected. (See, e.g., *Evanston Insurance Co. v. Desert State Life Management* (D.N.M. 2020) 484 F.Supp.3d 987, 998, fn. 1; *Legacy Church, Inc. v. Kunkel* (D.N.M. 2020) 472 F.Supp.3d 926, 1022-1023; *Gould Electronics Inc. v. Livingston County Road Com.* (E.D.Mich. 2020) (Opinion & Order Overruling Parties' Objections to Conducting Civil Bench Trial Via Videoconference) 470 F.Supp.3d 735, 738-743 ("Court is unpersuaded that ... the Court's ability to effectively evaluate witnesses' credibility, will be impaired ...."); *Aoki v. Gilbert* (E.D. Cal., March 18, 2019, 2:11-cv-02797) 2019 WL 1243719, at p. 1 (citation omitted) ("video testimony can sufficiently enable cross-examination and credibility determinations ....").

In allowing proceedings by videoconference, federal courts have noted that advances in videoconference technology have significantly improved the ability of the trier of fact to evaluate credibility. (See, e.g., *Liu v. State Farm Mutual Automobile Ins. Co.* (W.D.Wash.2020) (Order Directing Jury Trial by Videoconference) 507 F.Supp.3d 1262, 1263-1266 (need to evaluate credibility "satisfied with contemporaneous videoconferencing

technology"); *In re: RFC and ResCap Liquidating Trust Action* (D.Minn.2020) (Order Re: Videoconferencing of Remaining Witnesses) 444 F.Supp.3d 967, 970-971 (“advances in technology minimize ... concerns” about weighing credibility).)

At least two district courts have specifically held that conducting proceedings over the Zoom videoconferencing platform does not significantly reduce the ability of the trier of fact to determine credibility. (*Anderson v. Ivey* (M.D. Fla., May 12, 2021, No. 6:19-cv-2014-JA-GJK) 2021 WL 1909793, p. 1) (use of Zoom “will not have a significantly adverse effect on ... the ability of the jury to make credibility determinations ...”); *Goldstine v. FedEx Freight Inc.* (W.D. Wash., March 11, 2021, No. C18-1164 MJP) 2021 WL 952354, p. 11 (using Zoom, “[j]urors and the Court are able to assess witness demeanor and credibility in much the same way as happens in open Court—with the added benefit of seeing faces head-on.”).)

One other factor deserves mention. If an in-person hearing were held in this matter during the pandemic, witnesses would have to be permitted, and probably required, to wear face masks for safety. It is not clear that a judge could determine credibility any better in person when witnesses were masked than online when they were not.

## REQUEST FOR COMPUTER EQUIPMENT AND TRAINING

Student asserts that he does not have appropriate computer equipment to participate in an online hearing, and requests that OAH furnish him both the equipment and training to use it. Student does not assert that such equipment is unavailable to him.

Student is represented by competent counsel from two established law firms, but does explain why his attorneys cannot assist him with obtaining the necessary computer equipment.

Nonetheless, OAH is able to grant part of Student's request. During the hearing, OAH will make available at its nearest regional office sufficient computer equipment for Student to attend and participate in the hearing. OAH cannot supply technical assistance, but Student may be accompanied by someone who can. If Student wishes to participate in this way at the OAH regional office, his counsel must contact the OAH case manager as soon as possible to make arrangements.

## ORDER

1. Student's motion that his due process hearing be held in person is denied.
2. Student's motion in the alternative that OAH furnish him necessary computer equipment and training in its use is granted to the extent that OAH will make computer equipment available to Student at its nearest regional office, and is denied in all other respects.

Charles Marson

Administrative Law Judge

Office of Administrative Hearings