

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF
PARENT ON BEHALF OF STUDENT,

V.

PAJARO VALLEY UNIFIED SCHOOL DISTRICT

CASE NO. 2022050705

ORDER DENYING STUDENT'S REQUEST FOR AN
IN-PERSON DUE PROCESS HEARING

AUGUST 15, 2022

On May 19, 2022, Student filed a Due Process Hearing Request, referred to as a complaint, with the Office of Administrative Hearings, naming Pajaro Valley Unified School District. The Office of Administrative Hearings is referred to as OAH. On July 20, 2022, OAH granted Student's motion to file an amended complaint. This matter is currently scheduled for hearing beginning September 7, 2022.

On August 10, 2022, Student filed request for an in-person hearing and an objection to a videoconference hearing. On August 11, 2022, Pajaro Valley filed an objection to Student's request. On August 12, 2022, Student filed a reply.

VIDEOCONFERENCE HEARING

Student argues he is entitled to a live, in-person due process hearing and that a videoconference hearing does not comport with the law. Student fails to provide persuasive legal support for this contention.

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). 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). Student objects to a videoconference hearing based on Government Code section 11440.30, subdivision (b). However, 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

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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 specifically removed the possibility of parental veto of a decision to proceed virtually.

Nothing in the text of the Individuals with Disabilities Education Act, called IDEA, or its regulations, or in the legislative history, or in decided cases, indicates that the IDEA would prohibit OAH from conducting virtual hearings. The United States Department of Education has traditionally declined to regulate the conduct of the due process hearing itself. (See U.S. Dept. of Education, Off. of Special Education and Rehabilitation Services, final Regs., Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, Analysis of Comments and Changes, com. to § 300.511, 71 Fed.Reg. 46540, 46704 (Aug. 14, 2006)[2004 Comments,

“We believe that States should have considerable latitude in determining appropriate procedural rules for due process hearings as long as they are not inconsistent with the basic elements of due process hearings and rights of the parties set out in the Act and these regulations.”].)

According to the California state regulations, special education hearing officers have the authority to decide whether a hearing should be in person or virtual. (Cal. Code Regs., tit. 5, § 3082 (g).) Accordingly, Student’s objection to a videoconference hearing is overruled.

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DUE PROCESS

Student argues a videoconference hearing will be prejudicial to his interests and will not afford due process. Student contends

- his ability to communicate with counsel and counsel's ability to communicate with any co-counsel will be impaired;
- Parents have limited access to technology and training;
- the process for using subpoenaed or rebuttal documents will be limited and burdensome;
- parties and the hearing officer will not be able to assess witness' credibility or whether they are comporting themselves appropriately;
- it will not be possible to audio record the hearing; and
- the hearing will take longer resulting in cost to Student.

Pajaro Valley asserts Student failed to provide any evidence or legal authority that a virtual hearing will deprive him of his due process rights. It further argues Parents have successfully participated in other virtual education meetings, and Student can participate from the same remote location as his counsel.

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 objections assume these rights cannot be afforded unless the due process hearing is conducted in a "live person format."

Student argues he will be unable to confer and communicate effectively with counsel if they are not physically present, and that counsel cannot meaningfully communicate with any co-counsel in a virtual format. Nothing in the OAH procedures for virtual hearings precludes attorneys and their clients from participating in the due process hearing from the same physical location. Should the parties choose to participate from separate locations utilizing the virtual format, OAH procedures permit parties to communicate confidentially through separate videoconference breakout 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 and speak outside the presence of the administrative law judge.

Student contends Parents do not have a computer or sufficient training to participate in a virtual hearing. Student's counsel can arrange for his clients to participate in the hearing at his law office, or otherwise assist Parents in determining how to best access the virtual hearing. Counsel can meet and confer to determine if Pajaro Valley has a computer station at the District Office or school site available for Parents' use to participate in the virtual hearing. Further, Student can pursue a request for reasonable accommodation with OAH to determine whether OAH is able to provide Parents access to a computer and internet at a regional OAH office.

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 electronically upload hearing exhibits well before the hearing starts, and affords witnesses the ability to view these during the videoconference hearing. 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 electronic evidence bundles. OAH procedures require parties to timely exchange electronic copies of exhibits as required by Education Code section 56505, subdivision (e)(7).

OAH has established new subpoenas to compel the attendance of witnesses to testify via videoconference or telephone, and to produce documents. 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. Use of rebuttal documents, through screen sharing or uploading additional exhibits, as well as any technological challenges or delays can be addressed with the ALJ at the prehearing conference as well as during the hearing.

Student offered no law or evidence that OAH's established procedures for videoconference hearings deny Student the rights afforded by Education Code, section 56505, subdivision (e). Student does not challenge any of the procedures established for videoconference hearings. Instead, Student contends the procedures could be violated or might not work. Student's concerns are speculative. Student is concerned

- parties and attorneys could coach witnesses off camera;
- parties will have difficulty attacking the credibility of witnesses;
- the ALJ 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. Student offered no evidence he would be prejudiced by these possibilities. Concerns regarding witness coaching or referencing documents not submitted as exhibits, can be addressed at the time of hearing and through witness examination. Accordingly, Student's objection on the grounds the due process rights can only be protected in a "live person format" is overruled.

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 objections are overruled.

IT IS SO ORDERED

Theresa Ravandi

Administrative Law Judge

Office of Administrative Hearings