

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

UKIAH UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2023100750

ORDER DENYING MOTION FOR IN PERSON HEARING

JANUARY 5, 2024

The due process hearing in this matter is scheduled to begin on January 23, 2024, and to be held by videoconference. On December 14, 2023, Ukiah Unified School District, known as Ukiah, moved for an order requiring that the upcoming due process hearing in this matter be held in person rather than by videoconference. On December 19, 2023, Student filed a non-opposition to the motion.

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

Ukiah asserts there is no longer a strong government interest in OAH holding virtual hearings since the Governor terminated California's COVID-19 state of emergency on February 23, 2023. Specifically, Ukiah asserts that without a state of emergency, the private interests of the parties and the risk of erroneous deprivation of such interests, outweighs OAH's interest in holding a videoconference hearing.

Ukiah also claims videoconference hearings violate title 20 United States Code section 1415 by preventing the parties from being physically accompanied and advised by their counsel, in person, and from presenting evidence in the physical presence of witnesses. Ukiah claims this undermines the administrative law judge's ability to determine witness credibility, especially in assessing a witness's "demeanor, reaction, response, character and appearance."

Finally, Ukiah asserts videoconference hearings are significantly longer and more expensive than in person hearings. Ukiah also asserts the use of a Spanish interpreter will make the hearing even longer. Ukiah refers to a Texas state court study but provides no other authority to support its claims.

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VIDEOCONFERENCE HEARINGS ARE AUTHORIZED BY STATE AND FEDERAL LAW

CALIFORNIA LAW

Currently, OAH is not conducting special education due process hearings in person. Both federal and state law authorize OAH's Special Education Division to conduct videoconference due process hearings whether or not an emergency exists, which Ukiah failed to address in its motion.

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), which provides:

"Notwithstanding Government Code section 11440.30 of the [Administrative Procedure 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 in Government Code section 11440.30, subdivision (a). Ukiah 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 promulgated California Code of Regulations, title 5, section 3089, that exempted specific provisions of the Administrative Procedure 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 or educational agency veto of a decision to proceed virtually.

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, called IDEA, at 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, advised that school districts may conduct due process hearings by electronic means if due process guarantees are observed:

“Q[uestion] 6: May due process hearings be conducted virtually when schools and other public facilities are closed or have restrictions that prevent face-to-face meetings?

[Answer]: 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, Office of Special Education and Rehabilitative Services (OSERS) & Office of Special Education Programs (OSEP), June 22, 2020.) The guidance also advised that the same rule would apply to expedited due process hearings. (*Id.*, Answer to Question 7.)

Nothing in the text of the IDEA, its regulations or legislative history, or in decided cases, indicates that the IDEA would prohibit OAH from conducting virtual hearings. The United States Department of Education first recognized this fact in 1995 in *Letter to Anonymous*, 23 IDELR 1073, 23 LRP 3438 (September 1, 1995.) The then regulation in effect is substantially similar to the current federal regulation. The Department of Education’s guidance left the decision to whether to permit telephonic testimony to the discretion of the hearing officer, who “should exercise his/her judgment in light of the relevant facts and circumstances of the particular case and in a manner that is consistent with rights accorded the parties to the hearing under Part B.” OAH does this through the use of videoconference technology, which, as explained later, provides due process to the parties.

Furthermore, 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, OSERS final regulations, *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 implementing the IDEA, 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).)

Federal courts have reasoned that allowing telephonic testimony is a proper use of discretion when state regulations permit the hearing officer to conduct all or part of a hearing by telephone. (*Board of Education of Montgomery County v Griffin* (D.Md. June 11, 2007, Civil No. PJM 06-169) 2007 WL 9782558, **4-6; like California, Maryland affords the hearing officer the discretion whether to conduct all or part of the hearing by video conference, see Md. Regs Code tit. 28 § 02.01.20B(1).) Moreover, the Sixth Amendment right to confront witnesses does not apply to civil or administrative proceedings. (*Perrtti v Nat’l Transp. Safety Bd. Fed. Aviation Admin.* (10th Cir. 1993) 999 F.2d 548.)

VIDEOCONFERENCE HEARINGS DO NOT SIGNIFICANTLY REDUCE THE ADMINISTRATIVE LAW JUDGE'S ABILITY TO MAKE CREDIBILITY DETERMINATIONS

CALIFORNIA LAW

Education Code section 56505, subdivision (e), governs special education due process hearings. The due process rights afforded under this section of the Education Code include the right to:

- Be accompanied by counsel;
- Present evidence;
- Confront, cross-examine, and compel the attendance of witness;
- Receive a copy of all documents from the other parties; and to
- Prohibit the introduction of any evidence that has not been disclosed.

FEDERAL LAW

Testimony by videoconferencing in civil matters is now well established in federal courts. 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).)

An administrative hearing is essentially a civil proceeding with no constitutional right to confront witnesses, as noted by *Board of Education of Montgomery County v Griffin*.

"Due process can be satisfied at the administrative level by convening the parties and the witness by telephone or by such other means as video conferencing, allowing for direct testimony and providing for cross-examination. Insofar as the witness's demeanor cannot be observed when testimony is given telephonically, while there may be some instances where that

becomes a critical factor, it seems highly doubtful in the IDEA setting that the testimony of an expert physician will stand or fall on whether his eyes shift suspiciously or sweat breaks out on his forehead.”

With video hearings, OAH ALJs can see eye shifts and a sweaty brow. Further, the opinion accurately looked at the future as “[w]hile there may be instances in IDEA proceedings where live in-person testimony will be appropriate, in this day and age, the tilt is undoubtedly in favor of more, rather than less, distance testimony.” (*Board of Education of Montgomery County v Griffin, supra*, *6.)

At least two United States 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”).)

Furthermore, if an in-person hearing were held in this matter, witnesses, if they requested, would have to be permitted to wear face masks as a preventative measure to reduce the transmission of the COVID-19 or other respiratory viruses or illnesses. There is no evidence that a judge could determine credibility any better in person when

witnesses were masked than online when they were not. Credibility determinations extend beyond watching a witness's mouth while they speak. Credibility can also be evaluated with corroborating documentary evidence and witness testimony.

VIDEOCONFERENCE HEARINGS DO NOT SIGNIFICANTLY IMPACT UKIAH'S RIGHT TO COUNSEL

Ukiah asserts it will be unable to confer and communicate effectively with its counsel if they are not physically present in the same room, and that counsel cannot meaningfully communicate with any co-counsel in a virtual format. However, 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 also communicate through other means such as email or text messaging during the hearing, so long as this is not disruptive of the hearing process. Further, nothing prevents the parties or counsel from requesting a break to contact each other and speak outside the presence of the administrative law judge and other parties.

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DUE PROCESS UNDER THE LAW

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

Ukiah failed to show that OAH's videoconference procedures violate the IDEA, California law, or any other related special education guidance or regulations. Ukiah also failed to show that participating in a videoconference special education due process hearing would violate its right to due process under relevant laws. Therefore, Ukiah's motion for an in-person due process hearing is denied.

IT IS SO ORDERED.

Deborah Myers-Cregar
Administrative Law Judge
Office of Administrative Hearings