BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

CHULA VISTA ELEMENTARY SCHOOL DISTRICT.

OAH CASE NUMBER 2019120858

ORDER OVERRULING OBJECTIONS TO VIDEOCONFERENCE HEARING

APRIL 24, 2020

On December 20, 2019, Parent on Behalf of Student filed a Due Process Hearing Request, referred to as a complaint, with the Office of Administrative Hearings, naming Chula Vista Elementary School District. The Office of Administrative Hearings is referred to as OAH. On January 24, 2020, OAH granted the parties joint request for mediation and to continue the hearing to April 7, through April 9, 2020.

On March 19, 2020, amid concerns about the novel coronavirus, OAH issued a General Order Continuing All Non-Expedited Special Education Prehearing Conferences and Hearings through April 17, 2020. On March 20, 2020, OAH issued an Order

granting the parties' joint request for continuance, setting a prehearing conference on April 24, 2020, and a hearing on April 28, through April 30, 2020.

On April 21, 2020, Chula Vista filed objections to videoconference or teleconference hearing and a request for official notice. Chula Vista seeks official notice of several executive orders, a health agency statement and notice of Chula Vistas' school closures. Official notice of the documents attached to the request is taken. (Evid. Code, § 452, subds. (c) & (h); Gov. Code § 11515; Cal. Code Regs., tit. 5, § 3089.)

The prehearing conference was held on April 24, 2020. The Order following the prehearing conference established procedures for filing exhibits and presenting witnesses and documentary evidence. The Order informed the parties that a separate Order Setting Procedures for Filing Exhibits Electronically that included instructions for how to file exhibits electronically and Instructions for Joining the Online Due Process Hearing would be provided. OAH continued the hearing to May 5, through May 7, 2020, to be conducted by videoconference. (5 C.C.R. § 3082, subd. (g).)

Student filed a response to Chula Vista's objections on April 24, 2020. Chula Vista filed amended objections on the same day.

Chula Vista objects to OAH's use of videoconference hearings during the Safer at Home restrictions implemented by the State of California and local jurisdictions in response to the novel coronavirus, called COVID-19, pandemic. Chula Vista contends a videoconference hearing does not comport with Government Code section 11440.30, subdivision (b); does not afford due process rights under Education Code section 56505(e); and will be prejudicial. Student argues OAH should not postpone the hearing for an indefinite period of time and requests the hearing to proceed as scheduled.

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. Chula Vista cites no law and there is nothing in the executive orders, agency statement or notice of Chula Vistas' school closures, 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).

Chula Vista'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, Chula Vistas' 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. Chula Vista's objections assume these rights cannot be afforded unless the due process hearing is conducted in a "live person format."

Chula Vista avers it cannot attend a hearing without counsel physically present to confer and communicate with counsel, that counsel cannot meaningfully communicate between themselves, and with their client. 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.

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 upload hearing exhibits to OAH well before the hearing starts, and the ability of witnesses to view the electronically uploaded documents if attending the hearing by videoconference. 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 the evidence binders. 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. Limits imposed by collective bargaining agreements regarding school district personnel do not apply to a witness subpoenaed to testify as they are commanded by law to appear to testify by OAH, or face sanctions for failure to appear. 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.

Chula Vista offered no law or evidence that the procedures established deny Chula Vista the rights afforded by Education Code, section 56505, subdivision (e). Chula Vista does not challenge any of the procedures established for videoconference hearings. Instead, Chula Vista contends the procedures could be violated or might not work. Chula Vista is concerned parties and attorneys could coach witnesses off camera; parties will have difficulty attacking the credibility of witnesses; ALJ's 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. Chula Vista offered no evidence it would be prejudiced by these possibilities. Accordingly, Chula Vistas' objection on the grounds the due process rights can only be protected in a "live person format" is overruled.

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 Chula Vista's objections are overruled.

IT IS SO ORDERED.



Marian H. Tully

Presiding Administrative Law Judge

Office of Administrative Hearings