BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

TORRANCE UNIFIED SCHOOL DISTRICT AND

REDONDO BEACH UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2019090067

ORDER GRANTING REQUEST FOR RECONSIDERATION AND DENYING CONTINUANCE REQUEST

APRIL 30, 2020

On April 22, 2020, the Administrative Law Judge Chris Butchko issued an order the continuance request of Torrance Unified School District and Redondo Beach Unified School District. On April 28, 2020, Torrance and Redondo Beach filed a motion for reconsideration of continuance of due process hearing. On April 30, 2020, Student filed an opposition.

APPLICABLE LAW

The Office of Administrative Hearings, referred to as OAH, will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time, generally within ten days. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.)

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. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (Ed. Code, § 56505, subd. (f)(3); Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served

by the continuance or imposing conditions on the continuance; and any other relevant fact or circumstance. (Cal. Rules of Court, rule 3.1332(d).)

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 that exists 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), shall not apply to special education due process hearings.

DISCUSSION

The motion for reconsideration offers new facts, circumstances or law. to support reconsideration as to witnesses of Redondo Beach and that three witnesses may have difficulty appearing at hearing as scheduled for next week. The motion does provide further information as to hearing difficulties for the attorney representing Torrance and Redondo Beach. As such, the motion for reconsideration is granted to consider this new information in regards to the continuance request.

As to the difficulties concerning how this hearing shall proceed for the attorney of Torrance and Redondo Beach, good cause is not established to continue the hearing. Torrance and Redondo Beach object 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 COVID-19 pandemic. Torrance and Redondo Beach raise technical concerns why it cannot be prepared to proceed to hearing next week.

The procedures created by OAH for video 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 witnesses to view the electronically uploaded documents if attending the hearing by videoconference. For the 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 copy of the evidence binders.

Regarding Torrance's and Redondo Beach's concerns about being accompanied and advised by an attorney, and its attorney's ability to accompany and advise Torrance and Redondo Beach, the OAH procedures permit parties to communicate confidentially through the use of caucus rooms. Also, 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. Finally, nothing prevents the parties from requesting a break so they their attorneys can contact each other to speak outside the presence of the ALJ.

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. Finally, Torrance and Redondo Beach and their counsel can use electronic document production to obtain documents from third parties, and raise with the hearing ALJ any particular problems regarding document production.

Neither the United States Department of Education or California Department of Education have issued official notice suspending special education due process hearings

in response to the COVID-19 pandemic. None of the Executive Orders from the California Governor has suspended administrative hearings as non-essential. Also, in response to Executive Order N-38-20, that on March 30, 2020 that Chief Justice Tani G. Cantil-Sakauye suspended any rule of court that prevented the use of technology to conduct judicial proceedings to protect the health and safety of all participants. (https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/Statewide%20Order%20by%20the%20Chief%20Justice-Chair%20of%20the%20Judicial%20Council%203-30-2020.pdf) Also, OAH hearings do not constitute a gathering as they do not require a group of people to meet in a single room or prevent the practice of social distancing. Also, OAH has no assurance that it will not still be required to hold videoconference hearings in the Summer or Fall 2020 due to COVID-19 pandemic, which according to the position put forth by Torrance and Redondo Beach would require an indefinite continuance of special education hearings.

Finally, whether the attorney for Torrance and Redondo can see all the participants that the attorney wishes to see is a personal preference and not a due process requirement as due process does not require perfect hearings. (*Mathews v. Eldridge* (1976) 424 S.Ct. 319, 334-335 [summary of Constitutional analysis applying to administrative hearings.] With the particular limitations imposed on personal contact caused by the COVID-19 pandemic, the Individuals with Disabilities Education Act requirement for speedy hearings and special education hearing requirements in Education Code, section 56505, subdivision (e), OAH balances these competing interests with the videoconference hearing process used and provides due process.

As to the difficulties in the testimony of the three Redondo Beach witnesses, Walsh, Tenant and D'Amore, this can be addressed by having these witnesses testify last in Student's case in chief, including testifying out of order, and coordinating when they

will testify with the Administrative Law Judge at hearing. Further, the Administrative Law Judge can establish time limitations in the witness examination to reduce the burden on these witnesses pursuant to Education Code, section 56505.1, subdivision (h).

ORDER

1. The motion for reconsideration by Torrance and Redondo Beach is granted.
2. The continuance request of Torrance and Redondo Beach is denied.
3. In consideration of specified difficulties in testifying by three witnesses of Redondo Beach, Walsh, Tenant and D'Amore, Student shall proceed with Student's case in chief by calling these witnesses last after confirming their availability with counsel for Redondo Beach and hearing dates with the assigned Administrative Law Judge during the hearing.

IT IS SO ORDERED.

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Peter Paul Castillo
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Peter Paul Castillo

Presiding Administrative Law Judge

Office of Administrative Hearings