

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BAKERSFIELD CITY SCHOOL  
DISTRICT.

OAH CASE NO. 2010120162

ORDER DENYING MOTION TO  
COMPEL OBSERVATION OF IN-  
HOME PROGRAM

On December 7, 2010, Parents filed, on behalf of Student, a request for due process hearing, naming the Bakersfield City School District (District), and alleging that various deficiencies in the District's offered educational program for Student denied her a free appropriate public education (FAPE).

On February 2, 2011, the District filed a Motion to Compel Observation by the District of the delivery of certain services to Student in her home, and a declaration of the District's attorney in support of the motion. Student has not filed any response to the motion.

APPLICABLE LAW AND DISCUSSION

The District's moving papers assert the following facts: Student is a three-year-old girl who is autistic, and is now placed in a special day class in a District school. Student now also receives 15 hours a week of in-home Applied Behavioral Analysis (ABA) training, which is being provided by the Center for Behavior Research and Education (CBRE), a nonpublic agency, at the expense of a regional center. Parents want the District to provide Student a placement consisting exclusively of 15 hours of ABA training a week in their home. The District is unwilling to do so.

The District further asserts that it wishes to observe the "program" of ABA now delivered to Student in her home in order to prepare for the upcoming due process hearing, and that Parents have refused to allow such an observation. The District seeks by this motion an order compelling Parents to allow that observation, or, in the alternative, an order excluding any evidence at hearing about CBRE's ABA services and any request for placement involving those services.

In support of its motion the District cites Education Code section 56329, subdivision (d), which provides in pertinent part:

If a parent or guardian proposes a publicly financed placement of the pupil in a nonpublic school, the public education agency shall have an opportunity to observe the proposed placement and the pupil in the proposed placement, if the pupil has already been unilaterally placed in the nonpublic school by the parent or guardian.

That statutory provision does not apply to the facts the District describes in this case. In receiving 15 hours a week of ABA training in the home, Student is not already in a placement proposed by parents. The District affirmatively alleges that Student's current placement is in a special day class in one of its schools. At present the ABA services Student receives at home are only ancillary to that placement and are not provided by the District.

Moreover, it is not clear from Parents' complaint that they seek a placement solely in their home. At one point the complaint states that Parents seek payment for 15-20 hours a week for in-home ABA services. At another point, however, it states that "[P]arents are requesting 15-20 hours of ABA services to be performed in a private setting, i.e., the Center for Behavior Research and Education (BRE)." And several of the specific recommendations advanced in the complaint involve Student's presence in a classroom, in small groups, or interacting with peers on the playground. Although the parties may have discussed other options, the subject of the upcoming hearing is not necessarily a placement in the home.

Finally, the District alleges that CBRE, the provider of Student's in-home ABA services, is a nonpublic agency. The statute on which the District relies entitles it to observe only a placement in a nonpublic school. The two entities are not alike, and they are defined separately and differently by statute. (Ed. Code, §§ 56034 [nonpublic school]; 56035 [nonpublic agency].)

The District cites *Benjamin G. v. Special Educ. Hearing Office* (2005) 131 Cal.App.4th 875 as authority for the order it seeks. The court in *Benjamin G.* held that parents were entitled to observe a placement proposed by a district. However, in *Benjamin G.* the court interpreted a different subsection of section 56329 of the Education Code. Subsection (b) of that section establishes the right of parents to demand an independent educational assessment and, if a district has observed a student's placement as part of its own assessment, the right of parents to have an equivalent opportunity for their assessor to observe "an educational placement and setting ... proposed by the [District]." Subdivision (b) of section 56329 accords parents a broader right of observation, addresses a different context, and is worded differently than subdivision (d), which only allows a District to observe a parent-proposed placement in a nonpublic school.

Since neither the statute nor the decision cited by the District entitles it to an order compelling an observation, the District is also not entitled to an order in the alternative limiting the evidence Student can present. Parents have not denied the District an observation that the law compels them to permit.

ORDER

The District's motion for an order compelling Parents to allow it to observe Student's in-home program of ABA training is denied.

Dated: February 23, 2011

/s/

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CHARLES MARSON  
Administrative Law Judge  
Office of Administrative Hearings