

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

RED BLUFF ELEMENTARY SCHOOL
DISTRICT.

OAH CASE NO. 2011080264

ORDER GRANTING STUDENT'S
MOTION TO COMPEL CLASSROOM
OBSERVATION

On October 20, 2011 Student's attorney filed a motion on behalf of Student seeking an Order permitting Student to conduct an "assessment observation" of Student's communication needs by Partnership for Augmentative Communication and Technology (PACT), a State certified nonpublic agency. Student's motion was supported by a declaration under penalty of perjury from Student's mother, a copy of a September 7, 2011 "Summary of Observation/Consultation/Training" and a September 20, 2011 Summary by Educational Consultant Kandis Lighthall.

District filed an opposition to the motion on October 25, 2011, which was supported by a declaration under penalty of perjury from educational consultant Kandis Lighthall, and copies of her summaries of observation/consultations of Student from April and September 2011. District also provided an attorney declaration with copies of email correspondence.

APPLICABLE LAW

The Office of Administrative Hearings (OAH) has jurisdiction to hear matters arising under the Individuals with Disabilities Education Act (IDEA) that involve the identification, evaluation or educational placement of a child, or the provision of a free appropriate public education. (20 U.S.C. § 1515(b)(6); Cal. Ed. Code § 56501.)

Education Code section 56329, subdivision (b), provides an unequivocal, non-reciprocal right to have Student's expert observe the District's proposed placement, providing in relevant part:

If a public education agency observed the pupil in conducting its assessment, or if its assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity shall apply to an independent educational assessment of the pupil in the pupil's current educational placement and setting, and observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether

the independent educational assessment is initiated before or after the filing of a due process hearing proceeding.

The court in *Benjamin G. v. Special Education Hearing Office* (2005) 131 Cal.App.4th 875, 883-884, examined the legislative history of Education Code section 56329, subdivision (b), and held that the statute mandated an opportunity for a student's hired expert to observe a District's proposed placement prior to testifying at a due process hearing and regardless of whether the observation is technically a part of an independent educational evaluation. Recently, the Ninth Circuit Court of Appeals found that, while a school district procedurally violated IDEA by failing to provide a parent's expert with adequate observation time pursuant to Education Code section 56329, subdivision (b), under the facts of that case the violation did not result in a denial of a free appropriate public education because there was no significant denial of parents' right to meaningfully participate in the IEP process. (*L.M. v. Capistrano Unified School District* (9th Cir. 2009) 556 F.3d 900, 910-11.)

DISCUSSION

As a preliminary matter, this motion involves the right to observation and evaluation of Student under the IDEA, which is squarely within the jurisdiction of OAH. District argues that OAH has no jurisdiction to consider this motion because it does not relate to the District's refusal to initiate or change Student's eligibility identification, assessment or placement. District argues that Student's motion does not refute any District assessment or challenge placement of the Student, and that OAH has no authority to order a "five-hour assessment" as requested by Student. District's argument has no merit.

Student alleges in her motion that in September 2011 District conducted over five hours of observations of Student as part of an "assessment observation" without her parents' consent. Student also argues that Parents believe that District conducted these observations for the sole purpose of preparation for the due process hearing in this matter. Based upon her assumption that District assessed Student in the manner alleged, she now seeks equal time for an observation by PACT in order to prepare for hearing. While District did not refuse to allow the observations, District initially imposed a 30-minute time limit on the observations.

District asserts that it did not conduct any assessments as alleged by Student.¹ According to District, Ms. Lighthall's observations of Student were conducted in compliance with an earlier settlement agreement between District and parents for purposes of

¹ Student's assertion of impermissible assessments was also added as a claim to Student's recently filed first amended complaint. Whether or not District conducted an assessment without parents' consent in violation of IDEA is an issue for hearing that can only be decided by the hearing judge after the parties have established an evidentiary record. That does not preclude determination at this stage of the case as to whether Student is entitled to pre-hearing observations under Education Code section 56329, subdivision (b).

consultation and training. District also denies that the purpose of the observations was for hearing preparation. The purpose is not relevant to this motion.

Student is correct that Education Code section 56329, subdivision (b), as interpreted by *Benjamin G., supra*, and *L.M., supra*, provides an unequivocal, non-reciprocal right to have Student's expert observe Student in her classroom placement. Here, Student is seeking a single block of time of five hours and thirty minutes on one school day for the observation. That time block does not fit within District's policy of limiting observations to 30-minutes in order to avoid classroom disruption. However, recent correspondence from District's counsel to Student's counsel suggests that District would be willing to permit observations by PACT of Student in her classroom providing that the observations are reasonable in length and scope and on multiple days in multiple sessions.

In light of District's willingness to permit classroom observations of Student with reasonable restrictions and based upon terms consistent with the time spent by Lighthall, Student's motion will be granted.

ORDER

1. Student's motion is granted.
2. Within seven business days of the date of this Order and continuing until completed, the District shall permit Student's expert from PACT to conduct observations of Student at her current classroom placement for a total block of five hours and thirty-five minutes. The observations shall take place over the course of two or more school days in maximum time increments of 1) three hours and thirty minutes, 2) one hour and five minutes, and 3) one hour, at a time convenient for the observer. The observations shall be conducted in compliance with all other District policies and in a manner that does not disrupt or disturb classroom activities.
3. The District's failure to comply with this order absent good cause outside of District's control (e.g., unavailability of PACT personnel) shall result in an Order to Show Cause Re: Sanctions.

Dated: October 27, 2011

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings