

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:  PARENTS ON BEHALF OF STUDENT,  v.  FULLERTON SCHOOL DISTRICT.	OAH CASE NO. 2011061318
FULLERTON SCHOOL DISTRICT  v.  PARENTS ON BEHALF OF STUDENT.	OAH CASE NO. 2011061012  ORDER DENYING MOTION TO COMPEL WITHOUT PREJUDICE

On June 22, 2011, the Fullerton School District (District), filed a Request for Due Process Hearing in OAH case number 2011061012, naming Student. District sought an order allowing it to conduct a re-assessment pursuant to a proposed May 20, 2011, assessment plan.

On June 28, 2011, Student filed a Request for Due Process Hearing in OAH case number 2011061318, naming the District, seeking an independent educational evaluation (IEE).

On July 7, 2011, Student filed a “Motion to Compel District to Allow Observation of Student.” On July 12, 2011, District opposed the Motion. On July 13, 2011, Student replied to the opposition. District’s and Student’s cases were consolidated on July 13, 2011.

As explained below, the Motion is denied without prejudice as moot given the undisputed fact that Student is not currently attending school and therefore cannot be observed. The denial is without prejudice. Student may re-bring the Motion, should she now seek to observe District’s proposed educational placement, rather than Student’s actual placement.

## APPLICABLE LAW

A parent has the right to obtain, at public expense, an IEE from qualified specialists, if the parent disagrees with an assessment obtained by the public education agency. 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 IEE 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 IEE is initiated before or after the filing of a due process hearing proceeding. (Ed. Code, § 56329, subd. (b).)

The public education agency may initiate a due process hearing to show that its assessment is appropriate. If the final decision resulting from the due process hearing is that the assessment is appropriate, the parent maintains the right for an IEE, but not at public expense. If the parent or guardian obtains an IEE at private expense, the results of the assessment shall be considered by the public education agency with respect to the provision of free appropriate public education to the child, and may be presented as evidence at a due process hearing. 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 IEE 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 IEE is initiated before or after the filing of a due process hearing proceeding. (Ed. Code, § 56329, subd. (c).)

The purpose of Education Code sections 56329, subdivisions (b) and (c) is to level the playing field between the parents and a more knowledgeable school district. (*Benjamin G. v. Special Educ. Hearing Office* (2005) 131 Cal.App.4th 875, 881 [32 Cal.Rptr.3d 366] (hereafter *Benjamin G*); see also *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 909-910.) *Benjamin G.* construed Education Code section 56329, subdivision (c) broadly, to allow independent experts to observe placements not only as part of IEEs, but also as part of expert preparation for due process. *Benjamin G.*, furthermore, provides for a pre-hearing order compelling a school district to permit the observation in question.

A school district's limitation of a parent's expert to twenty-minute observations has been held to constitute a procedural violation of Education Code section 56329, subdivision (c) when the limitation was not also imposed on district's own employees. (*L.M. v. Capistrano Unified School Dist.*, *supra*, 556 F.3d at pp. 909-910.)

## DISCUSSION

Student initially sought District's permission to allow its expert to observe Student in her District educational placement. District proposed a thirty-minute limitation on each observation session. Student's expert declared that a ninety-minute observation of Student in her educational placement was necessary to permit him to evaluate it. On that basis, Student

sought an order permitting a ninety-minute observation of Student in school to occur. District argued that its school psychologists typically limit themselves to thirty-minute classroom observations; that to impose such a limitation on Student's expert is consistent with the Education Code's mandate of "equivalent opportunity" to observe; and that Student's expert could return for three separate thirty-minute sessions. Student replied that this would be too costly and burdensome. Both parties cited *L.M. v. Capistrano Unified School Dist.*, *supra*, 556 F.3d 900 (hereafter *L.M.*), to support their respective positions.

In *L.M.*, a school district limited parent's expert to twenty-minute observations of a placement despite its own assessors' observations lasting up to three hours. Parents filed for due process on that, and other issues. *L.M.* held that the twenty-minute limitation violated California Education Code section 56329, subdivision (c), however on the basis of the facts presented the procedural error did not result in a denial of FAPE. Here, District's main argument is that its time limitation is procedurally proper because its own school psychologists "typically" limit their assessment observations to thirty minute sessions. This argument is unmeritorious given parent's expert's declaration that, under the particular facts and circumstances here, he required a ninety-minute session to reach a considered opinion, and that to make the separate round trips to return for three separate thirty-minute sessions would be unnecessarily costly and burdensome.

However, the Motion as originally brought, to allow a ninety-minute session observing Student in her current educational setting, is now moot. At an IEP meeting on or around June 15, 2011, Parents notified District that rather than having Student attend District's summer program, they would be seeking private school options. Student therefore cannot be observed in school; her expert's declaration as regards his need to observe her is no longer pertinent to the current circumstances. As such, Student's Motion is moot. It is therefore denied without prejudice.

Parents, however, argue that an order allowing their expert to observe *can* be enforced as to District's *proposed* educational placement, rather than Student's actual educational setting. Student's reply brief, thus, correctly argues that the law also allows observation not only of Student's current placement but also of the "educational placement and setting, if any, proposed by the public education agency." (See *Benjamin G.*, 131 Cal.App.4th at pp. 882-883 (the statute "gives the parents the right to have their expert observe the proposed placement without regard to whether their child is present".)) However, the Motion on its face and the evidence supporting it was addressed to observing Student, not the proposed placement. Accordingly, because Student is no longer enrolled, the motion is moot.

ORDER

Student's Motion for Observation is denied as moot, without prejudice to Student filing further motions regarding observation of a proposed placement.

Dated: July 14, 2011

/s/

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JUNE R. LEHRMAN  
Administrative Law Judge  
Office of Administrative Hearings