

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. SAN DIEGUITO UNION HIGH SCHOOL DISTRICT,	OAH Case No. 2015071255
SAN DIEGUITO UNION HIGH SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2015100591 ORDER DENYING STUDENT’S REQUEST FOR ORDER COMPELLING DISTRICT TO PERMIT CLASSROOM OBSERVATION BY AN EXPERT

On November 18, 2015, Student filed a motion asking that the Office of Administrative hearings compel San Dieguito Union High School District to permit Student’s expert witness to observe a special day class and another classroom at Dieguito Middle School. On November 23, 2015, San Dieguito filed an opposition to the motion.

APPLICABLE LAW

A student has the right to have his or her expert observe a school district’s proposed placement prior to testifying in a due process hearing. (Ed. Code, § 56329, subs. (b) and (c); *Benjamin G. v. Special Education Hearing Office* (2005) 131 Cal. App. 4th 875 (*Benjamin G.*); *L.M. v. Capistrano Unified Sch. Dist.* (9th Cir. 2008) 538 F.3d 1261.)

Education Code section 56329, subdivisions (b) and (c), are essentially identical in their relevant parts and provide as to assessments at public or private expense that, “if [the public education agency’s] 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.* examined the legislative history of Education Code section 56329, subdivision (b) and held that the statute mandated an opportunity for student's hired expert to observe the school 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. (*Benjamin G.*, *supra*, 131 Cal.App.4th at pp. 883-884.)

DISCUSSION

The crux of the dispute between Student and San Dieguito is placement of Student for the 2015-2016 school year. Student is asking that he be placed at Dieguito Middle School, and San Dieguito is recommending placement at Oak Crest Middle School in its Transitional Alternative Program.

In his motion to compel observation, Student is asking that his expert, Dr. Sharon Lerner-Baron, be permitted by San Dieguito to observe the Middle School Learning Program and the Learning Resource Center at Dieguito Middle School. San Dieguito has refused consent for the expert to observe these classrooms. Student cites Education Code section 56329 and *Benjamin G.* in support of his motion.

San Dieguito, in its opposition, correctly argues that Education Code section and *Benjamin G.* permit parents or their representative to observe placements that the school district has proposed (emphasis supplied), but not placements Student wants to be considered by the ALJ at a due process hearing, and are not proposed by the school district. Further, San Dieguito claims that such an observation will interfere with class time pursuant to Education Code section 32212, subdivision (a), by interrupting class time; and violate the privacy rights of students in these classes pursuant to the Federal Education Right to Privacy Act, 20 U.S.C. section 1232g, and Education Code section 49060 et seq.

Little weight is given to San Dieguito's arguments that observations would interrupt class time, and violate the privacy rights of students in those classes. If San Dieguito was correct in this regard, virtually no one would ever be permitted to observe a public school classroom, even parents of students enrolled in the class. However, the language in both Education Code section 56329 and *Benjamin G.* is very clear that the right to observe classrooms is restricted to those which a school district has proposed for placement of a student. In the instant case, San Dieguito has not proposed either the Middle School Learning Program, or the Learning Resource Center at Dieguito Middle School as a possible placement for Student. Accordingly, Student's motion for an order to compel San Dieguito to permit observations of these classrooms by his expert is denied without prejudice. Student may renew the request if San Dieguito proposes one or both classrooms as placement for Student, and then refuses permission for Parents and/or Student's expert to observe

the classrooms. Further, if, during the hearing, San Dieguito presents evidence concerning either of these classrooms, Student may renew his request for Parents, and/or an expert retained by them, to observe these classrooms.

IT IS SO ORDERED.

DATE: December 4, 2015

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings