BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL DISTRICT .

OAH CASE NUMBER 2021040043

ORDER GRANTING REQUEST FOR RECONSIDERATION, FINDING GOOD CAUSE FOR STUDENT'S LATE FILING, AND GRANTING IN PART MOTION TO COMPEL OBSERVATION

MAY 19, 2021

On April 1, 2021, Student filed a request for due process hearing naming Bellflower Unified School District. This matter is scheduled for hearing beginning May 25, 2021. On May 14, 2021, Student filed a Motion to Compel Observation. Student requests that his expert witness Dr. Jan Blacher be allowed to conduct in-person observations of Student in Chemistry and English class, for the full class periods, on May 20, 2021. Alternatively, if in-person observations are prohibited by state or local law in light of the pandemic, Student requests his expert be allowed to conduct a remote,

virtual observation, from a preferred location, as opposed to traveling to Bellflower's administrative office as offered by Bellflower on May 13, 2021.

On May 17, 2021, during the prehearing conference, called PHC, the undersigned found good cause as to why this motion was not timely filed three business days prior to the PHC, based on the parties' recent email communications regarding the observation request. Namely, in response to Student's May 11, 2021 request for expert observation, Bellflower informed Student on May 13, 2021, that it would only allow the expert to virtually observe each class for 20 minutes from a District location on an administrator's device.

During the PHC, both parties were afforded the opportunity to address Student's motion. Student corrected two typographical errors in the motion, clarifying that Student returned to in-person learning for four days per week on May 10, 2021, not March 10, 2021, and that Student's counsel was made aware of this May 11, 2021.

Bellflower argued that Student's campus is closed to all external visitors, that there is no right for Student's expert to conduct an observation outside of an independent educational evaluation, that in-person learning returned on April 1, 2021, and this is the final week of instruction, and that it offered Student the opportunity to conduct a virtual observation consistent with its visitor policy.

Bellflower requested leave to file a written opposition. This request was granted, and Bellflower was allowed to file a written response no later than 4:00 p.m. on May 18, 2021. Bellflower failed to timely file its opposition. Bellflower filed its opposition at 4:43 p.m. Student chose to submit a reply despite the undersigned's advisement that no schedule would be set for a reply given the time sensitive nature of the motion. Student filed a reply at 10:20 p.m. on May 18, 2021. Because both pleadings were submitted

after the 4:00 p.m. deadline, the undersigned did not receive these until May 19, 2021. In this instance, the undersigned has considered each pleading, though each party bears the consequence of receiving a delayed adjudication of the motion. Further, the parties are advised that if they miss future deadlines, they risk being subject to an Order to Show Cause and their late filings being stricken.

APPLICABLE LAW

RECONSIDERATION

The Office of Administrative Hearings 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.)

STUDENT EXPERT OBSERVATIONS

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 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.

(Ed. Code, § 56329, subds. (b) and (c).)

Separate and apart from a formal assessment, students have the right to have their expert observe a school district's proposed placement prior to testifying in a due process hearing. (*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 (*L.M.*).) 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.)

Likewise, the Ninth Circuit in its decision in *L.M., supra,* 538 F.3d at pp. 1267-1270, found that Education Code 56329, subdivision (c), requires a school district to provide an equal amount of observation time to a student's expert if the district conducted its own observation of the student. The court, however, affirmed the OAH finding that the district's failure to provide the student's expert with an equal amount of observation time did not constitute a denial of a free appropriate public education to the student because the student presented no evidence that parents' right to participate in the individualized education program or IEP process was significantly affected. (*L.M. v. Capistrano Unified School District* (9th Cir. 2009) 556 F.3d 900, 910-11.) The purpose of allowing Student's expert these observation opportunities is to "level the playing field" by permitting students to present evidence at a due process hearing, be advised by experts and have the experts testify at hearing. (*Id.* at 909.)

DISCUSSION

RECONSIDERATION

Bellflower asks for reconsideration of the May 17, 2021 Order Following PHC which found good cause for Student's late filing of the motion to compel observation. Bellflower offered a new fact to support reconsideration, namely, the sworn declaration of a program administrator attesting that in-person learning resumed for Student on April 1, 2021. Student's motion instead indicates Student more recently returned to a four-day in-person learning schedule on May 10, 2021. The motion for reconsideration is granted.

On reconsideration, good cause is found for the late filing. While Student waited until May 11, 2021, to first request an in-person observation by Student's expert, Bellflower's argument that this was an intent to harass is not persuasive. Further, once Bellflower informed Student the afternoon of May 13, 2021, that it would not grant the request as specified, Student filed the motion to compel observation after hours that same evening. Good cause is found for failing to timely file the motion on May 12, 2021, three busines days prior to the PHC.

MOTION TO COMPEL

Student argues that his expert should not be limited to a 20-minute observation period pursuant to Bellflower's Visitor Policy Guidance as this is prejudicial and does not afford Student his rights under statutory and case law. Student points to Bellflower's November 2020 multidisciplinary assessment during which one District assessor observed Student in History and in math class, and another observed Student in English class. Bellflower's observations were virtual as there was no in-person learning at that time. Student argues there is no indication that Bellflower's assessors were limited to a

20-minute observation. Given Bellflower's observations, Student posits his expert should be afforded an equivalent opportunity to observe in two separate classes for the full 70-minute class period. Further, since Student's expert is fully vaccinated and willing to comply with all COVID-19 safety protocols, Student contends his expert should be allowed to conduct in-person observations as in-person instruction has resumed.

Bellflower argues Student is attempting to obtain impermissible pre-hearing discovery and any observations would not be relevant to the issues at hearing. Additionally, given COVID-19 restrictions, independent educational evaluators are only authorized to conduct video observations from an administrator's device or through a Bellflower email address to ensure the privacy of the distance instructional setting. Bellflower further contends it is bound by the Los Angeles Department of Public Health Orders of the Health Office Reopening Protocols for K-12 Schools and Appendix T1 Recent Updates April 28, 2021. Pursuant to these protocols, visitors other than parents of enrolled students are limited to those deemed essential for the school's operation. Further, visitors are limited to designated areas, outside of the classrooms, and are not to interact with class cohorts. In addition, Bellflower requires all external visitors to be escorted by a Bellflower administrator, and administrator schedules are full given the recent return to in-person learning, and end of year duties.

In reply, Student indicates there was yet another error in Student's motion, namely that Student is not requesting that his counsel also be allowed to observe. Student argues that an independent assistive technology evaluator was allowed to conduct a remote virtual observation of Student in December 2020. Student contends that on May 14, 2021, Bellflower's counsel offered to allow Student's expert to remotely observe Student but then "illegally retaliated" against Student and "removed" this accommodation of a remote observation upon receipt of Student's motion.

The law specifically allows Student the right to have independent assessors as well as experts conduct classroom observations. It also places limits on that right, specifically restricting Student's observational rights to an "equivalent opportunity" to that afforded Bellflower's assessors per its assessment procedures.

Student has not established that OAH has the authority in this case to require in-person observations by Student's expert in light of COVID-19 restrictions and the Los Angeles Department of Public Health Orders. Even assuming Bellflower's assessment procedures currently permit in-person classroom observations which would entitle Student's expert an equivalent opportunity to in-person observations, given the pandemic and local and state health and safety measures, Bellflower has closed Student's campus to all external visitors that are not essential to the school's functioning. Student's request for in-person observation is denied.

Bellflower's requirement that Student's expert appear personally at a designated location to virtually observe Student on an administrator's device is in accord with its current independent assessment policy and is deemed reasonable to ensure privacy concerns of remote connections to the instructional setting. While Bellflower's counsel indicated on May 14, 2021, that a remote observation may be possible, Bellflower's counsel also specified that further inquiries were needed. Student's arguments of bad faith or retaliation are without merit. Student's expert will be required to appear at a designated District location to access a virtual connection to the classroom.

Bellflower seeks to limit Student's expert to two 20-minute observations, but it does not establish that its own assessors were so limited. Student's expert shall be afforded the opportunity to conduct observations of Student's Chemistry and English classes for the full 70-minute periods. The parties have already agreed to a 20-minute virtual observation of each class tomorrow, May 20, 2021. However, given the date of

this Order, if Bellflower is unable to accommodate virtual observations of the full class periods on May 20, 2021, the currently arranged observation shall proceed as scheduled unless Student declines, and Bellflower shall immediately arrange an opportunity for Student's expert to complete virtual observations of both classes for the full class periods to occur no later than May 28, 2021.

ORDER

1. Bellflower's motion for reconsideration is granted.
2. On reconsideration, good cause is found for the late filing of Student's motion to compel observation;
3. Student's motion to compel expert observations is granted in part.
4. Student's request for in-person observations is denied.
5. Student's request for Student's expert to remotely conduct a virtual observation, as opposed to appearing at a District site, is denied.

6. Bellflower shall immediately work with Student to ensure Student's expert has the opportunity to observe Student's Chemistry and English classes for the entire period, and that these observations occur no later than May 28, 2021. If Bellflower cannot arrange for this to occur on May 20, 2021, then Student's expert shall be allowed to conduct the previously agreed-upon two, 20-minute observations on May 20, 2021, unless Student declines. This will be in addition to the full class observations.

IT IS SO ORDERED.

Theresa Ravandi

Theresa Ravandi
Administrative Law Judge
Office of Administrative Hearings