BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

URBAN DISCOVERY ACADEMY.

OAH CASE NUMBER 2021040345

ORDER DENYING MOTION TO COMPEL PRODUCTION OF DOCUMENTS, GRANTING SECOND MOTION FOR RECONSIDERATION AND DENYING MOTION TO COMPEL OBSERVATION

MAY 25, 2021

On April 9, 2021, Student filed a request for due process hearing with the Office of Administrative Hearings, called OAH, naming Urban Discovery Academy as respondent. On April 29, 2021, Student filed a motion to compel observation by an independent evaluator. That motion was denied on the grounds that Student failed to establish a basis for granting the order. None of the exhibits discussed in the motion had been attached and key pieces of information were missing from the motion.

Student filed a motion for reconsideration on May 12, 2021. Student then filed a motion to compel documents on May 13, 2021 seeking a copy of a June 23, 2020 IEP offer. Urban opposed this motion on May 19, 2021.

Student attached exhibits, not all of which were authenticated, to his May 12, 2021 Motion for Reconsideration, but once again failed to identify what he was asking to observe. Nor was it clear from the documents that Student was asking to observe a currently offered IEP placement. While the request for reconsideration was granted, the motion to compel the observation was denied on May 19, 2021.

Between May 20, 2021 and May 21, 2021, Student filed his second request for reconsideration. Ultimately, three versions of the motion were filed due to missing pages. No opposition to the motion by Urban was received. Student filed the missing page 10 of his May 21, 2021 motion papers on May 24, 2021. Student included new facts in the second motion for reconsideration.

As with the prior two motions to compel observation. Student continues to request that his assessor be allowed to observe Student's educational placement at Urban Academy as offered to Student in the December 6, 2019 IEP; and the placement as changed per Urban's Counsel's email of June 18, 2020, and as offered during what Student argues was a June 23, 2020 IEP team meeting. Urban denies a June 23, 2020 IEP team meeting occurred and argues that Student is not entitled to observe a prior placement.

MOTION TO COMPEL DOCUMENTS

Student's May 13, 2021 Motion to Compel Documents sought an order requiring Urban to produce the IEP document Student asserts should have been developed in

relation to the June 23, 2020 IEP team meeting, and any documents establishing that Parent had removed her son from Urban. Urban opposed the motion on May 19, 2021, stating that there was no IEP team meeting held on June 23, 2021 and all documents regarding Student had been produced on September 28, 2020. Urban also asserts that Student's cumulative file was transmitted to New Bridge School, pursuant to New Bridge's request, upon Parent's authorization dated August 10, 2020. Urban provided a proof of mailing of a medium size flat rate box to New Bridge School on September 16, 2020.

The Individuals with Disabilities in Education Act or IDEA, grants parents of a child with a disability the right to examine all relevant records relating to their child's "identification, evaluation and educational placement." (20 U.S.C. §1415(b)(1).) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an individualized educational program, or any hearing, or resolution session, and in no case more than 45 days after the request has been made. (See 34 C.F.R. §300.613(a) (2006).) The right to inspect and review education records under this section includes: (1) the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) the right to have a representative of the parent inspect and review the records. (See 34 C.F.R. §300.613(b).) In California, all parents have the right to receive copies of all school records within five business days after parents make a request. (Ed. Code, §56504.)

Student has failed to establish that there are documents that exist that Urban has not previously sent. Student's request for production of documents is denied. Nothing in this order prevents Student from examining witnesses on this issue during hearing and making whatever motions he deems appropriate based on witness testimony.

REQUESTS FOR 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.)

At the outset, it must be noted that this extraordinary second request for reconsideration, resulting a third consideration of this motion, would not have been necessary if the original motion had included all required information and necessary attachments. Subsequent requests filed were incomplete and included partially illegible exhibits.

However, Student did raise a new fact, that is, that he seeks the opportunity to observe "the fourth and fifth grade classrooms, SAI push-in in the fourth and fifth grade classrooms and pull out SAI for reading …and in the 6/23/20 IEPT meeting… by the Principal and the Ed Specialist." Student further described the observation being sought as, "the placement Student was offered in the 12-6-19 IEP, the change in placement for school year 2020-21 by and through the 6-18-20 email from Ms. Salayer on behalf of UDA (Exhibit 1) and in the 6-23-20 IEPT meeting by UDA Principal, Chloe Medina

(Exhibit 2) and the Student's Ed Specialist Will Burns. (Exhibit 3)." Although no declaration was provided explaining why this information was not included in the original motion or the first motion for reconsideration, in the interests of justice, reconsideration is granted.

MOTION TO COMPEL OBSERVATION

California law allows an observation by an assessor, as part of an independent educational evaluation or IEE, of Student in his current educational setting, if such an observation was available to the educational agency assessors. Additionally, the law allows observation by an assessor of the pupil's currently offered educational setting. (Ed C. § 56329, subd. (b).) Student, however, has failed to establish the current educational setting offer he is asking to observe.

Student did not attach a copy of the December 6, 2019 IEP to the motion to compel observation; but did attach a copy of the December 6, 2019 IEP offer, as amended on April 7, 2020, to his May 13, 2021 Motion to Compel Documents and it is being considered as part of Student's Motion to Compel observation. That IEP amendment, described only how Student's educational program would be changed due to the distance learning requirements of the Covid-19 pandemic. The April 7, 2020 IEP amendment noted that, due to the limitations imposed by distance learning, compensatory education would need to be discussed when regular instruction resumed.

Student asserts that the December 6, 2019 IEP was amended pursuant to an email from Urban's counsel dated June 18, 2020. The June 18, 2020 email, attached as Exhibit 1 to Student' motion, discussed compensatory education only, not how the IEP would be amended prospectively. Nor did it describe Student's currently offered placement as of that date. Student asserts that Exhibits 2 and 3 attached to her motion,

provide "partial excerpts" from a recording made of a June 23, 2020 IEP team, demonstrating an IEP offer made. However, those attachments do not support his argument.

Urban asserts Parents chose private school over public school for the 2020-2021 school year. Urban objects that the recording transcripts offered are excerpts only and do not fully represent the discussions. Urban also notes date disparities in the attached partial recording transcriptions.

Student does not have the right to have its expert observe a prior placement. He is entitled to observe a currently offered educational setting. Student has failed to establish what the currently offered educational setting is.

Student has not requested that his assessor observe his distance learning program, which is detailed in the April 7, 2020 amendment to the December 6, 2019 IEP (which was not signed by Parent and not attached to the motion to compel observation.) Student has failed to provide the details of any IEP offer that was applicable to Student either before or following distance learning. The June 18, 2020 email makes a cryptic compensatory education. Student's asserted "partial excerpts" of an IEP meeting are unclear as to origin, date and authenticity.

Whether the June 23, 2020 meeting, from which Student asserts the recording excerpt transcriptions at Exhibits 2 and 3 were taken, was an IEP team meeting is in dispute and that issue cannot be resolved without a hearing on the evidence. The impediment to ordering the observation is that Student has failed to establish the "current offer of placement" he wants the assessor to observe. Student offers only two recording excerpt transcriptions to establish the offer, neither of which show what Student asserts they show. The transcriber is not identified other than as "rev.com"

which is not explained. The transcriptions are unsigned and the date of transcription is not provided. Only one excerpt is dated, and that has a date of June 3, 2020, not June 23, 2020 which Student asserted was the date of the meeting. While the context of the excerpt indicates the meeting took place after June 15, 2021, this excerpt does not include an IEP offer but only a compensatory education offer. The other paragraph offered as a transcription of an excerpt of a meeting is not dated and does not include all of the terms of an IEP offer, identifying only a range of placement options considered, as opposed to a placement being offered to Student. The excerpt ends with the beginning of a new sentence that is not completed. As a "partial excerpt" as Student describes it, the transcription cannot be relied on to represent an offer of FAPE. Nor has Student established the last agreed upon and implemented IEP offer so that an observation of a comparable fifth grade equivalent to that IEP placement offer could be ordered.

No conclusion is reached by this order regarding whether Urban owed Student an offer of FAPE beyond the April 7, 2020 IEP amendment, or whether an offer of FAPE was made after the April 7, 2020 IEP amendment. These are issues that will require the evaluation of evidence at hearing. However, Student has the burden of establishing the currently offered educational setting he wishes his assessor to observe in order to meet the statutory standard and Student has failed to do that, despite being given three opportunities. Nothing in this order denies Student the opportunity to examine witnesses on the topic of any currently offered educational setting and making whatever motions are appropriate during hearing.

ORDER

1. Student's Motion to Compel Documents is denied.
2. Student's motions for reconsideration is granted.
3. Student's motion to compel observation is denied.

IT IS SO ORDERED.

Penelope S. Pahl

Penelope S. Pahl

Administrative Law Judge

Office of Administrative Hearings