BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2022090313

ORDER DENYING MOTION TO COMPEL OBSERVATION

NOVEMBER 21, 2022

On September 12, 2022, Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Monterey Peninsula Unified School District, called Monterey Peninsula. On October 20, 2022, OAH granted Student's leave to amend its due process hearing request.

On November 4, 2022, Monterey Peninsula filed a motion to compel an observation of Student at his nonpublic school. On November 9, 2022, Student filed opposition and Monterey Peninsula replied on November 10, 2022. The due process hearing is set to begin December 6, 2022.

Education Code section 56329 subdivision (d) states:

"If a parent or guardian proposes a publicly financed placement of the pupil in a nonpublic school, the public education agency shall have an opportunity to observe the proposed placement and the pupil in the proposed placement, if the pupil has already been unilaterally placed in the nonpublic school by the parent or guardian. An observation conducted pursuant to this subdivision shall only be of the pupil who is the subject of the observation and shall not include the observation or assessment of any other pupil in the proposed placement. The observation or assessment by a public education agency of a pupil other than the pupil who is the subject of the observation pursuant to this subdivision may be conducted, if at all, only with the consent of the parent or guardian pursuant to this article. The results of an observation or assessment of any other pupil in violation of this subdivision shall be inadmissible in a due process or judicial proceeding regarding the free appropriate public education of that other pupil."

On August 2, 2022, Parents noticed Monterey Peninsula of Student's unilateral placement at Chartwell Academy and stated that they would be seeking reimbursement for the unilateral placement. On October 4, 2022, Monterey Peninsula requested permission from Parents to observe Student at Chartwell Academy. The same day, Parents denied Monterey Peninsula's request for a Student observation. On October 20, 2022, OAH granted Student leave to amend its due process hearing request. Student's first amended due process hearing request seeks as a proposed remedy "reimbursement of all costs associated with unilaterally providing FAPE…"

A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not offered Student a free appropriate public

education, called FAPE, to the student in a timely manner before the placement, and the parental placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c) (2006); Ed. Code, § 56175.)

Monterey Peninsula contends that the clear language of the Education Code section 56329, subdivision (d), gives it the statutory authority to compel a Student observation without parental consent when reimbursement for unilateral placement is at issue. Thus, Monterey Peninsula requests OAH compel Parents to permit it to observe Student at Chartwell Academy before the December 6, 2022 due process hearing.

Student asserts that the plain meaning of Education Code section 56329 and the legislative history allow a school district to observe a privately placed Student as part of an assessment plan only. Because there is no pending assessment, the request should be denied. Further, the Ninth Circuit and other federal court decisions have interpreted this education code section in the contexts of assessments. Thus, there is no precedent to allow a Student observation under this code section outside of the assessment process. And the attempt to compel a Student observation is an attempt to engage in prehearing discovery.

While no higher court has specifically addressed the issue of the context under which a school district can compel a Student observation under Education Code section 56329, subdivision (d), OAH has done so. OAH has allowed a school district to observe a Student in the privately placed school under limited circumstances.

In *Student v. Garden Grove Unified School District* (2014) OAH case number 2014010894, the school district requested to observe student's unilateral placement because the school district had allowed student's expert to conduct an observation of its proposed placement, and student is requesting reimbursement of the placement. It

explained it would have one designated observer conduct the observation for the equivalent amount of time it allowed Student's expert to observe its proposed placement. The school district argued it should be given a reciprocal opportunity to observe. OAH allowed for a two-hour observation of the unilateral placement.

In *Parent on Behalf of Student v. Irvine Unified School District* (2013) OAH case number 2013110737, the school district requested a total of three hours for an education specialist, speech and language pathologist, and behavioral specialist to observe student in the unilateral placement that student is seeking reimbursement for and explained why the observation was needed. OAH granted the three-hour observation stating in part that Student's complaint indicated Student's expert had made recent observations of student and would likely be testifying to it at hearing. Thus, OAH determined that the school district is entitled to a like opportunity.

In *Hemet Unified School District v. Parent on Behalf of Student* and *Parent on Behalf of Student v. Hemet Unified School District* (2012) OAH case numbers 2012090499 and 2012110030 (consolidated), OAH granted the school district's request for a named person to observe student for one hour at the private placement and one hour at home, explaining the need for the observations, and that Student is seeking continued funding for the services at these placements. The school district specifically stated an assessment was not pending. In *Student v. Hermosa Beach City School District*, (2011) OAH case number 2011081019, OAH granted the school district's request for a two hour observation of student at the unilateral placement conducted by a named individual because parents are seeking reimbursement for the placement and no observation of the placement was made for the period at issue.

Other OAH cases have granted school district's motions to compel observations of students at unilateral placements under similar circumstances and when the requests

were specific and limited. (*Student v. San Luis Coastal Unified School District* (2011) OAH case number 2011070615; *Student v. San Luis Coastal Unified School District* and *San Luis Coastal Unified School District v. Student*, OAH Case Numbers 2011110858 and 2011090132 (consolidated); *Los Angeles Unified School District v. Parents on Behalf of Student* and *Parent on Behalf of Student v. Los Angeles Unified School District* (2010) OAH case numbers 2010080196 and 2010050623 (consolidated); *Parent on Behalf of Student v. Temecula Valley Unified School District* and *Temecula Valley Unified School District and Parent on Behalf of Student* and *Temecula Valley Unified School District and Parent on Behalf of Student* (2009) OAH case numbers 2009040514, 2009050048, and 2009031335 (consolidated).)

In *Parent on Behalf of Student v. San Luis Coastal Unified School District*, *San Luis Coastal Unified School District v. Parent on Behalf of Student;* and *San Luis Coastal Unified School District v. Parent on Behalf of Student* (2008 and 2009) OAH case numbers 2009031275m 2008110557, and 2009020316 (consolidated), the school district made a general request for an observation at the student's unilateral placement and OAH granted the motion but limited the request for a specified time with a specified amount of observers.

In general, there is no right to prehearing discovery in due process proceedings under the IDEA. (20 U.S.C. § 1400 et seq.) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings (Ed. Code,§ 56505, subd. (e)) but does not confer the right to prehearing discovery. Unlike most above cases, Monterey Peninsula failed to limit its request. It failed to explain who would be observing Student, for how long, and why this observation was needed. Under these circumstances, the request is considered prehearing discovery. Allowing a school district unfettered access to Student in a private placement with no limits as to

how this observation would be conducted is overbroad and improper. Further, the undersigned declines to limit the request. Thus, even if Education Code section 56329 subdivision (d) allows for an observation under these facts, which the undersigned does not need to reach here, Monterey Peninsula's request is denied as an improper discovery request.

Accordingly, Monterey Peninsula's request for an order compelling a Student observation at the unilateral placement is denied.

IT IS SO ORDERED.

Cynthia Fritz

Cynthia Fritz
Administrative Law Judge
Office of Administrative Hearings