BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2018060471
v.	ORDER DENYING STUDENT'S MOTION TO COMPEL SECOND CLASSROOM OBSERVATION BY STUDENT'S EXPERT
SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT.	

On October 4, 2018, a day before the prehearing conference in this matter, Student filed a motion to compel Saddleback Valley to permit a second "meaningful" observation by Student's expert, Dr. Caroline Bailey. Student states that Saddleback Valley permitted Dr. Bailey to observe its Esperanza Education Center for one hour on October 1, 2018, but that Rae Lynn Nelson, the South Orange County SELPA Director who accompanied Dr. Bailey during the observation, had been instructed not to answer any questions about the school's program and not to permit other school staff to answer questions. Dr. Bailey informed counsel for Student that she requires information about the program, the teachers, the staff, safety plans that may be in place, and what type of specialists are available to support Student, before she can form an opinion as to whether the program at Esperanza can meet Student's needs.

Student therefore moves for an order that Dr. Bailey be permitted a second observation at Esperanza, that Dr. Bailey be permitted to ask Ms. Nelson and Esperanza staff all the questions she has, and that those individuals be ordered to answer the questions to the best of their ability. Student also moves for an order that Saddleback Valley pay Dr. Bailey's expert fees for the second observation.

Saddleback Valley filed an opposition to Student's motion on October 5, 2018.

APPLICABLE LAW AND DISCUSSION

The law is clear that a student has the right to have his expert observe a school district's proposed placement prior to testifying in a due process hearing. (Ed. Code, § 56329, subds. (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 (*L.M.*).)

The relevant portions of Education Code section 56329, subdivisions (b) and (c) provide 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.* went through a lengthy review of the legislative history of Education Code section 56329, subdivision (b). The court noted that the purpose of portions of the Individuals with Disabilities Education Act, and of the Education Code sections permitting observations by a student's expert, were to "level the playing field" by permitting students to present evidence at a due process hearing, be advised by experts, have the experts testify at hearing, and to have a neutral hearing officer, and to permit the student's expert to observe a district's placement whether or not the student was attending school there. (*Benjamin G., supra,* 131 Cal. App. 4th at pp. 881-883.) The court in *Benjamin G.* held that the Education Code statutes required school districts to permit a student's expert to observe a district's proposed placement prior to testifying at a due process hearing regardless of whether the observation is 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 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 FAPE to the student because the student presented no evidence that parents' right to participate in student's IEP process was significantly affected.

However, there is nothing in the decisions in *Benjamin G.* or *L.M.* that states or even implies that a student has a right to have his expert discuss issues pending in an upcoming due process hearing with a district's employees or prospective witnesses. There is nothing in either court decision that states or implies that an administrative body or a court can compel a party's employees to, in effect, participate in what would amount to an informal deposition of that person. As Saddleback Valley correctly points out in its opposition to Student's motion, in California there is no right to prehearing discovery in due process proceedings. A party has no right to depositions of a party or of any other potential witnesses. There is no system for or right to interrogatories from parties or potential witnesses. What Student seeks to do, without citing to a scintilla of legal authority in support of his position, is institute an informal pre-hearing discovery system to circumvent the lack of formal pre-hearing discovery in California due process proceedings.

Student does not have a legal right to compel Saddleback employees or other potential witnesses to talk to him, his representatives, or to his experts, outside of the hearing process. Nor does he have a legal right to force Saddleback's employees or other potential

witnesses to answer questions posed by Student's experts, Student's representatives, or by Student. Student's expert was provided observation time. That is all that is required by statute and by case law authority. Student's motion is therefore denied.[1]

ORDER

Student's motion to compel Saddleback Valley to permit Dr. Bailey a second observation, and to compel Esperanza staff, Ms. Nelson, or any Saddleback employee or other potential witness to respond to questions from Dr. Bailey, or any other Student expert or representative, is denied.

DATE: October 5, 2018

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Darrell Lepkowsky
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DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings

[1] In addition, Student's motion is untimely. The scheduling order in this matter, with the accompanying OAH information packet, was served on Student on June 12, 2018. The parties were notified that all prehearing motions needed to be filed no later than the date prehearing conference statements were due. Any late motions require an accompanying declaration by counsel explaining why the motion was not made no later than three business days prior to the prehearing conference. Student failed to include such a declaration with the instant untimely motion.