BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LONG BEACH UNIFIED SCHOOL DISTRICT .	OAH Case No. 2018081089 ORDER GRANTING STUDENT'S MOTION TO COMPEL SCHOOL AND STAFF ACCESS FOR STUDENT'S EXPERT'S FUNCTIONAL BEHAVIOR ASSESSMENT

On August 27, 2018, Student filed a Due Process Hearing Request (complaint) with the Office of Administrative Hearings, naming Long Beach Unified School District. On March 28, 2019, Student filed a Motion to Amend the Due Process Hearing Request (amended complaint). OAH granted the motion to amend and the amended complaint was deemed filed on April 5, 2019.

On April 10, 2019, Student filed a motion to compel Long Beach to allow Dr. Corinne Wickett to observe Student in his current placement for the 2018 -2019 school year for the purpose of conducting a functional behavior assessment. The Motion was supported by Student's attorney's declaration, Student's expert's declaration, and authenticated exhibits. According to the supporting documents, Long Beach funded an independent functional behavior assessment of Student by Dr. Wickett in spring of 2018. Parents agreed to allow Long Beach to conduct a functional behavior assessment on March 29, 2019. Parent's retained Dr. Wickett to conduct a functional behavior assessment to provide an independent evaluation of Student's behavioral needs to determine environmental factors as to excess behaviors and deficit skills following a change in Student's environment since Student's circumstances had changed since his last functional behavior assessment. Student's expert stated in her declaration that she had planned approximately seven hours and twenty minutes of observation over three sessions[1], along with the planning to obtain information from Long Beach staff, in order to complete the 2019 functional behavior assessment. Dr. Wickett is a Board Certified Behavior Analyst and holds a doctorate in psychology with an emphasis in applied behavior analysis.

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1 Dr. Wickett had previously conducted four observations over five hours in completing her May 31, 2018 functional behavior assessment. A functional behavior assessment in 2017, conducted by Long Beach's expert, Linda Nguyen, was based upon 16 hours of observation by Ms. Nguyen.

On April 15, 2019, Long Beach filed an opposition to Student's Motion. Long Beach argued that Student had obtained an independent functional behavior evaluation the prior school year, that Student had no absolute right to conduct an independent assessment, and that Student was using the independent functional behavior assessment to obtain unpermitted pre-hearing discovery. In its Opposition, Long Beach also sought a ruling by OAH that would bar any information obtained by Student's expert from the pending due process hearing in the instant matter. On April 16, 2019, Student filed a reply. Upon consideration of all papers submitted, the Motion is granted for the reasons stated below.

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, 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.).

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

Student contends that his expert should be allowed to observe Student's current educational placement for the 2018-2019 school year and that Long Beach has refused to permit the observation. Long Beach contends that the observation would constitute impermissible pretrial discovery, and is duplicative of an earlier independent functional behavior evaluation by the same expert. While it is true that the IDEA does not contemplate pretrial discovery for a due process hearing, California law specifically provides for a student's expert witness to observe the placement proposed for a student in preparation for a due process hearing. Additionally, Student's request is reasonable as his expert has not observed Student in his placement during the current school year. Further, Student is entitled to obtain an independent educational evaluation, regardless of whether Long Beach has

chosen to evaluate Student or not, as long as Student's expert is bound by no more than the standards that would apply to Long Beach's assessor(s).

Long Beach also seeks an order precluding the use of any information obtained by Dr. Wickett through the independent functional behavior assessment during the due process hearing. Not only does this request run afoul of Section 56329, but any evidentiary ruling is premature as Student has yet to offer such evidence at hearing, much less put forward the rationale for doing so. Long Beach's request to exclude Student's evidence prior to its proffer at hearing is denied.

ORDER

Within 14 days of the date of this Order, District shall permit Student's expert, Dr. Corinne Wickett, to observe Student in his current placement. Student's expert shall be permitted a minimum of eight hours of observation time of Student, and shall also be permitted reasonable access to Long Beach staff to obtain information, either written or oral, from them regarding Student's behavior consistent with the functional behavior assessment purpose and process. Long Beach shall allow Dr. Wickett's observations and other assessment protocols consistent with the time, place and manner for such provided to Long Beach's assessors, as illustrated by Ms. Nguyen's 2017 functional behavior assessment report.

DATE: April 24, 2019

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Ted Mann
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TED MANN
Administrative Law Judge
Office of Administrative Hearings