

OSSE
Office of Dispute Resolution
February 04, 2020

Parent on Behalf of Student, ¹	HEARING OFFICER’S DETERMINATION
Petitioner,	Hearing Date: January 21, 2019
v.	Counsel for Each Party listed in Appendix A
District of Columbia Public Schools Local Educational Agency (“LEA”),	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Respondent.	
Case # 2019-0287	
Date Issued: February 4, 2020	

¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on January 21, 2020, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 1050 First Street, N.E., Washington, D.C. 20003, in Hearing Room 423.

BACKGROUND AND PROCEDURAL HISTORY:

The student or (“Student”) is age _____ and in grade _____.² Student resides with Student’s parent (“Petitioner”) in the District of Columbia. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of multiple disabilities (“MD”) including intellectual disability (“ID”) and other health impairment (“OHI”). Student attends a school in the District of Columbia (“School A”) and District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”).

On November 21, 2019, Petitioner, filed the due process complaint that is the subject of this decision, alleging that DCPS (“Respondent”), denied Student a free appropriate public education (“FAPE”) by failing to allow Petitioner’s educational advocate to observe Student in the classroom setting at School A. Petitioner seeks as relief that the undersigned hearing officer (“Hearing Officer”) order DCPS to authorize Petitioner’s advocate to observe Student at School A in an academic setting for up to one hour.

LEA Response to the Complaint:

DCPS filed its response to the complaint on December 5, 2019, styled as a Motion to Dismiss, along with documents. DCPS asserted that Petitioner’s advocate is disqualified to observe Student and cited a recent Hearing Officer’s ruling in support.

On December 10, 2019, Petitioner filed an Opposition to DCPS’ Motion to Dismiss and a Cross Motion for Summary Judgment, along with documents. On January 12, 2020, the Hearing Officer issued an order denying both parties’ motions and directing that the due process hearing proceed.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on December 19, 2019, and did not resolve the complaint. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on December 21, 2019, and ends [and the Hearing Officer’s Determination (“HOD”) is due] on February 4, 2020.

² The student’s current age and grade are listed in Appendix B.

The Hearing Officer convened a pre-hearing conference (“PHC”) on December 16, 2019, and issued a pre-hearing order (“PHO”) on December 31, 2019, outlining, inter alia, the issue to be adjudicated.

ISSUE: ³

The issue adjudicated is:

Whether DCPS denied Student a FAPE by failing to allow Petitioner’s designee to observe Student in the classroom setting at School A.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party’s disclosures (Petitioner’s Exhibits 1 through 11, Respondent’s Exhibits 1 through 10, and Hearing Officer Exhibit 1) that were admitted into the record and are listed in Appendix 2.⁴ The witnesses testifying on behalf of each party are listed in Appendix B.⁵

SUMMARY OF DECISION:

Petitioner held the burden of persuasion by a preponderance of the evidence to prove that DCPS’ refusal to grant Petitioner’s educational advocate’s request for a classroom observation, denied Student a FAPE. Based upon the evidence adduced the Hearing Officer concluded Petitioner did not sustain the burden of persuasion and the Hearing Officer dismissed Petitioner’s due process complaint with prejudice.

FINDINGS OF FACT: ⁶

1. Student resides with Petitioner in the District of Columbia and attends School A. DCPS is Student’s LEA. Student has attended School A since 2014. (Petitioner’s testimony, Petitioner’s Exhibit 11-1)

³ The Hearing Officer restated the issue at the hearing and the parties agreed that this was the issue to be adjudicated.

⁴ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁵ Petitioner presented two witnesses: (1) Student’s parent (“Petitioner”), (2) Petitioner’s Educational Advocate who is an employee of the law firm representing Petitioner. Respondent presented one witness: (1) School A’s Assistant Principal.

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact (“FOF”) is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party’s exhibit.

2. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of MD, including ID and OHI. (Petitioner's Exhibit 11-1)
3. School A serves students with cognitive disabilities and prepares students with daily living, functional skill and vocational training to transition students to adult services after leaving School A. (Witness 2's testimony)
4. School A provides parents individualized educational program ("IEP") progress reports quarterly and anytime a parent has concerns, the parent is invited to come to School A to confer with the teachers and to observe his or her student in the classroom. (Witness 2's testimony, Respondent's Exhibit 7)
5. Student's most recent individualized education program ("IEP") was developed at School A on May 28, 2019, and is thus due for annual review in May 2020. (Petitioner's Exhibit 11)
6. In the fall of 2019 Petitioner's engaged the services of her current law firm ("Firm") and was assigned an educational advocate ("Advocate") who is an employee of the Firm. Advocate has a master's degree in special education and is certified to teach special education in the District of Columbia. Advocate has worked for the Firm as an educational advocate since May 2019. (Witness 1's testimony)
7. Petitioner was represented by a different law firm from July 7, 2017, to July 25, 2019, and had a different educational advocate representing her at Student's May 28, 2019, IEP meeting. (Petitioner's testimony, Witness 2's testimony, Petitioner's Exhibit 9, Respondent's Exhibit 6-1)
8. Petitioner has been to Student's classroom a few times and has communicated with Student's teacher about Student when the teacher has had concerns. Student's teacher regularly communicates with Petitioner through a communication log. Petitioner has current concerns that Student cannot read or write or tie Student's shoes. Petitioner is not satisfied with the pace at which Student is acquiring skills. (Petitioner's testimony)
9. On November 6, 2019, Petitioner, through Advocate, requested that Advocate be allowed to observe Student at School A. Advocate, in her email communication, identified herself as an employee of the Firm. The email did not identify any concerns that Petitioner had about Student's performance at School A, but simply stated that Petitioner asked Advocate to observe Student on her behalf to provide professional input and to help Petitioner "participate meaningfully in this process." (Petitioner's Exhibit 7-2)
10. Petitioner requested that Advocate observe Student in the classroom because she believes Advocate's expertise will assist her in assessing whether Student's educational needs are being met. (Petitioner's testimony)
11. At the time that Advocate made her request to School A in November 2019, there was no upcoming meeting scheduled for Student and no school concerns about Student's academic or social functioning. (Witness 2's testimony)

12. Once School A received the observation request from the Firm, School A's Assistant Principal asked Student's teacher whether there anything going on with Student that would raise concern. The teacher indicated that there was none. (Witness 2's testimony)
13. In the past, the Firm has represented students at School A. School A's Assistant Principal has had to testify at due process complaint hearings filed by the Firm and his experience with the Firm has not been collaborative, but has been litigious. As a result, the Assistant Principal was suspect of observation request, as there was no apparent reason for the observation given when the request was made. (Witness 2's testimony)
14. On November 8, 2019, DCPS, through its counsel, rejected Advocate's request to observe Student at School A. (Petitioner's Exhibit 7-1)
15. Advocate has met Student in her office at Firm to get to know Student and to get a sense of Student's abilities. Advocate has also reviewed Student's educational records. Advocate has conducted classroom observations for other students in the past to assess how a student is engaging in classroom and with peers. Advocate finds that observing students outside the classroom is helpful in making recommendations to parents, but she prefers classroom observations to most effectively assess the appropriateness of an academic setting in meeting a student's needs. (Witness 1's testimony)
16. Prior to being employed with the Firm, Advocate was in graduate school obtaining her master's degree in which she, inter alia, served as a special education student teacher. In her current role at the Firm, Advocate is responsible for working with parents to make recommendations about students' special education needs and attending IEP meetings. Advocate also confers with attorneys at the Firm about students' needs and testifies for the Firm's clients in due process hearings. (Witness 1's testimony)
17. DCPS has a School Visitor Policy Handbook that, among other things, delineates requirements and restrictions on classroom observations of students with disabilities consistent with provisions of the Special Education Student Rights Act of 2014, D.C. Code § 38-2571.03(5)(A) . In pertinent part the policy states:

Observations can be conducted by parents as stated in Section B above. Parent's designees and professionals completing evaluations of a student at the school will also be allowed to observe the child in the classroom. Professional evaluators conducting an assessment must present an authorization letter from the parent. The authorization letter should indicate what assessment the evaluator is conducting, and include the parent's signature giving permission to conduct the assessment of the student at school. Third-party persons (including attorneys and educational advocates) who are not evaluators, Hearing Officer-designated experts, parents, or parent designee(s) shall not be allowed to observe classrooms while children are in the classroom. A parent of a child with a disability may appoint a designee to observe the child's current or proposed special educational program. This designee must:

1. Have professional expertise in the area of special education being observed;
2. Be necessary to facilitate an observation for a parent with a disability; or
3. Be necessary to provide language translation assistance to a parent.

A parent-appointed designee may not represent the child or family in litigation related to the provision of a free and appropriate public education (FAPE) nor can the designee have a financial interest in the outcome of such litigation. A designee must agree in writing that they will not disclose nor use any information obtained during the course of an observation for the purpose of seeking or engaging clients in litigation against the District or the LEA.

(Hearing Officer's Exhibit 1)

18. DCPS Visitor Policy Handbook also includes a form for parents to appoint an Observation Designate and a Classroom Observer Confidentiality Agreement, for the parent's Observation Designee to attest to, among other things, the fact that he/she does not represent the student being observed in litigation related to the provision of FAPE, has no financial interest in the outcome of such litigation, and will not use any information obtained during the observation for the purpose of seeking or engaging clients in litigation against DCPS. School A did not provide Petitioner or Advocate the DCPS' observation designee form or the confidentiality agreement in response to Advocate's observation request. (Hearing Officer's Exhibit 1)
19. Following the filing of Petitioner's due process complaint, at the December 19, 2019, resolution meeting the DCPS representative stated that there had been no concerns about Student identified prior to the request, and DCPS might be open to considering the observation if Petitioner were able to express specific concerns. Petitioner stated some of her concerns, but the School A principal did not consider the concerns raised to be sufficiently specific. (Witness 2's testimony, Respondent's Exhibit 1)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR § 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner held the burden of

persuasion on the issue adjudicated.⁷ The normal standard is for the burden of persuasion is a preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether DCPS denied Student a FAPE by failing to allow Parent's designee to observe Student in the classroom setting at School A.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence.

The purpose of IDEA is to "ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *M.G. v. District of Columbia*, 246 F.Supp.3d 1,7 (D.D.C. 2017) (citing 20 U.S.C. § 1400(d)(1)(A)).

Parents must have an opportunity to participate in the IEP process, and "procedural inadequacies that "seriously infringe upon the parents' opportunity to participate in the IEP formulation process ... clearly result in the denial of a FAPE." *Cooper v. District of Columbia*, 77 F.Supp.3d 32, 37 (D.D.C. 2014) (*quoting A.I. 3ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C. 2005)) (alteration in original). To ensure these requirements are followed, IDEA established procedural safeguards that allows parents to seek review of IEP decisions they disagree with. See *Middleton v. District of Columbia*, 312 F.Supp.3d 113, 122 (D.D.C. 2018). Section 1415(f)(1)(A) provides "the parents or the local education agency involved in such a complaint shall have an opportunity for an impartial due process hearing ..."

Further, IDEA allows states to create additional procedural and substantive protections if they are consistent with IDEA. *Middleton*, 312 F.Supp.3d at 122. If a state creates a higher standard, "an

⁷ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

individual may bring an action under the federal statute seeking to enforce the state standard." *Id.*(quoting *Gill v. Columbia 93 Sch. Dist.*,217 F.3d 1027, 1035).

In 2014, the District of Columbia passed the Student Rights Act. *Id.* The Act "provides district parents with additional procedural safeguards to help make sure parents have the tools they need to stay informed, engaged, and empowered throughout the special education process." See D.C. Council Comm. Rep. on B 20-723 (D.C. 2014) at 1. Recognizing that "parents who do not have a specific background in the subject area ... often cannot adequately evaluate whether their child's instruction is sufficient [and that] parents are concerned that an LEA may limit such access to the point that the observation is unable to provide meaningful input into their child's educational progress," the Student Rights Act expanded on a parent's "right to observe" under the IDEA...⁸

The Act (D.C. Code § 38-2571.03) states in pertinent part the following:

5(A) Upon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current to proposed special education program:

(i) the parent of a child with a disability; or

(ii) a designee appointed by the parent of a child with a disability who has professional expertise in the area of special education being observed or is necessary to facilitate an observation for a parent with a disability or to provide language translation assistance to a parent; provided, that the designee is neither representing the parent's child in litigation related to the provision of a free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.

(C) A parent, or the parent's designee, shall be allowed to view the child's instruction in the setting where it ordinarily occurs or the setting where the child's instruction will occur if the child attends the proposed program.

(D) the LEA *shall not impose any conditions or restrictions on such observations except those necessary to:*

(i) Ensure the safety of the children in the program;

(ii) Protect other children in the program from disclosure by an observer of confidential and personally identifiable information in the event such information is obtained in the course of an observation by a parent or a designee; or

(iii) Avoid any potential disruption arising from multiple observations occurring in a classroom simultaneously.

⁸ *Woodson, et al., v. District of Columbia*, 119 LRP 28316

(E) An observer shall not disclose nor use any information obtained during the course of an observation for the purpose of seeking or engaging clients in litigation against the District or the LEA.

In addition, DCPS policy states: Third-party persons (including attorneys and educational advocates) who are not evaluators, Hearing Officer-designated experts, parents, or parent designee(s) shall not be allowed to observe classrooms while children are in the classroom.

DCPS asserts that although there was no recent litigation for Student prior to the request, the Firm's past practices of requesting education records and subsequently filing complaints after review of those records are evidence that the firm's intention to file a due process complaint against DCPS.

The evidence demonstrates that soon after the Firm began representing Petitioner, the request for observation was made. That request was not preceded by any request for a meeting with School A staff to discuss Petitioner's concerns. Rather, the advocate, and thus the Firm, asked for an observation without first alerting School A with an substantive purpose of the observation. The evidence also demonstrates that Petitioner, herself, has had the opportunity to and has observed Student in the classroom setting.

The evidence demonstrates that Petitioner expressed at least during the resolution meeting that followed the filing of the due process complaint, that she has specific concerns that Student is not performing to her expectations and she has concerns about whether School A is effectively meeting Student's needs. However, prior to the filing of the due process complaint, there were no specific concerns expressed by Advocate as to why the observation was being requested. Advocate's email did not identify any concerns that Petitioner had about Student's performance at School A, but simply stated that Petitioner asked Advocate to observe Student on her behalf to provide professional input and to help Petitioner "participate meaningfully in this process."

On November 6, 2019, when Advocate made a request to observe Student at School A, she was, and remains, employed as a non-lawyer educational advocate at the Firm. The evidence demonstrates as an employee of the Firm, Advocate regularly confers with attorneys of the Firm and regularly participates in litigation that the firm brings against DCPS.

Although Advocate has experience and perhaps expertise that would qualify to meet the requirements for an observer designee under the Act, the evidence of this case strongly suggests that Advocate is primarily working on behalf of, and is an agent of the Firm. The District of Columbia's legal ethics rules support the interpretation that the Act's language, designee "representing ... in litigation" applies not only to attorney representing the parent, but also to nonlawyer assistances employed by the attorney.⁹

⁹ Under the Code of Professional Responsibility, lawyers in the District of Columbia are responsible for the work product of assistants employed in their practice including investigators and paraprofessionals. That is because such employees, act for the lawyer in rendition of the lawyer's professional services. The rules therefore, mandate that the employing attorney assure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer. See R. of Prof. Conduct 5.3, Responsibilities Regarding Nonlawyer Assistants, and Comment 1 (D.C. Bar 2010).

Although Petitioner asserts that she was not involved in litigation against DCPS when Advocate made the request to observe Student, and, therefore, the litigation limitation of the Act does not apply, the Hearing Officer concludes, that in this instance, the litigation limitation does apply. Although there was no recent litigation prior to the current due process complaint, it is uncontroverted that the parties are now engaged in litigation. In addition, based on the evidence adduced, given that there were no specific concerns raised when Advocate made the observation request, DCPS was justified in refusing the observation request based on its interpretation that the basis of the request was for purposes of litigation.

Accordingly, the Hearing Officer concludes that Advocate as a non-lawyer employee of the Firm is not allowed to conduct an observation because she is representing the student in litigation, and concludes that DCPS refusal of the request was not a denial of a FAPE to Student and did not significantly impede the Petitioner's opportunity to participate in the decision-making process regarding provision of FAPE.

ORDER:

Petitioner's Due Process Complaint is hereby Dismissed with Prejudice.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer
Date: February 4, 2020

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