District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
810 First Street, NE, 2nd Floor, Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Parents, on behalf of Student,[1]	)	
	)	
Petitioners,	)	
	)	**HOD Due: January 31, 2016**
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2015-0371**
District of Columbia Public Schools,	)	
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an [redacted]-year-old student who is eligible for services as a student with autism. (the "Student")

A Due Process Complaint ("Complaint") was received by District of Columbia Public Schools ("DCPS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on November 17, 2015 in regard to the Student. On November 18, 2015, Respondent filed a response. A resolution meeting was held on December 4, 2015. The resolution period expired on December 17, 2015.

II. Subject Matter Jurisdiction

A decision in this matter is being rendered pursuant to the Individuals with Disabilities Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing

[1]Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

On December 14, 2015, this Hearing Officer held a prehearing conference. Attorney A, counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order issued on December 17, 2015, summarizing the rules to be applied in this hearing and identifying the issues in the case.

Respondent filed District of Columbia Public Schools' Motion for Summary Disposition on December 4, 2015. Petitioners subsequently sought leave to submit opposition papers to the hearing officer in excess of the three-day time limit enumerated in the Standard Operating Procedures. In particular, Petitioners sought leave to submit opposition papers by December 18, 2015 because of an important personal obligation. Over the objection of Respondent, I granted Petitioners leave to submit their opposition papers by December 18, 2015, at 11:59pm. Respondent then requested an opportunity to reply by December 23, 2015. Without objection, I granted Respondent an opportunity to reply by December 23, 2015 at 11:59pm.

On December 21, 2015, Petitioners moved for summary judgment through Petitioners' Motion for Summary Judgment. On December 23, 2015, DCPS filed District of Columbia Public Schools' Reply in Support of Motion for Summary Adjudication and Opposition to Petitioners' Cross-Motion for Summary Judgment.

During an oral argument on December 28, 2015, I indicated to the parties that I did not believe a hearing was necessary given that both sides had moved for summary adjudication. The proposed hearing date, January 8, 2016, was therefore cancelled.

On January 8, 2016, Petitioners submitted Petitioners submitted Petitioners' Supplementation Submission to Petitioners' Motion for Summary Judgment.

IV. Issue

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issue to be determined are as follows:

Did DCPS fail to provide Petitioners with an opportunity to have an expert view the Student's current placement? If so, did DCPS violate DC Act 20-486, Sect. 103(5)(A)-(H) and also violate the parents' right to meaningfully participate in the IEP and placement process pursuant to CFR Sect. 300.513(a) and 300.501(b)? If so, did DCPS deny the Student a FAPE?

Petitioners contended that Respondent has improperly put additional conditions on the observation that are not contained in the statute. Respondent contends that the conditions, including a requirement to file the expert's written report with DCPS within 24 hours of completion and a requirement to sign a confidentiality form, are appropriate. Respondent also contends that no genuine issue of facts exists in this case.

As relief, Petitioners seek an order requiring DCPS to allow the expert to observe the placement without having to sign a confidentiality form and without having to submit a report with time constraints.

V. Undisputed Facts.

The parties do not dispute the follows facts[2]:

[2] This can be concluded from a review of the emails forwarded to me by the parties in this case. The parties were prepared to stipulate to a version of these facts until Respondent decided not to sign the stipulation since Petitioners would not agree to additional facts relating to a request to sign the agreement "under protest." See emails

1. The Student is an [redacted]-year-old who is eligible for services as a student with autism. (Petitioner's Motion, Exh. 1)

2. The Student attended School A, a public school in the District of Columbia, for the 2014-2015 school year. (Due Process Complaint)

3. An IEP was written for the Student by Respondent dated November 6, 2014. The IEP recommends that the Student receive eleven hours per week of specialized instruction outside general education, with 180 minutes per month of speech-language pathology, 240 minutes per month of occupational therapy, 30 minutes per month in physical therapy, and 1 hour per month in speech-language pathology. (Petitioners' Motion, Exh. 1)

4. On June 18, 2015, the IEP was amended to increase the hours of specialized instruction outside of general education to twenty hours per week. (Petitioners' Motion, Exh. 2)

5. Respondent proposed that the Student attend School A for the 2015-2016 school year. (Due Process Complaint)

6. In or about August, 2015, Petitioners proposed to Respondent that Consultant A, an educational consultant ("the consultant"), observe the Student's program. (Due Process Complaint; Petitioner's Motion, Exhibit 4)

7. DCPS, through Principal A, Principal at School A, asked Petitioners to have the consultant sign a confidentiality form, the "Classroom Observer Confidentiality

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between the IHO, Attorney A and Attorney B dated January 25, 2016 through January 26, 2016. (IHO Exh. 1)

Agreement" ("the agreement") on or about September 6, 2015. (Petitioners' Motion, Exhibit 4-3)

8. The agreement requires that the observer agree to the following:

-- I agree to preserve the confidentiality of any and all student information that I view or have access to during the course of my observation of the above-referenced student and the instruction provided at his/her school;

-- I agree that I will not attempt to audiotape, photograph, or videotape at any time during my observation, unless it is specifically authorized by the campus administrator;

-- I agree that I will not attempt to engage with students or school personnel during my observation unless previously scheduled and agreed to by the Principal and parent of child;

-- I agree that if I complete a written report of any recommendations or observations I made regarding the above-referenced student and the student's classroom/school environment, I will provide that written report to the District of Columbia Public Schools within 24 hours upon completion;

-- I understand that this student information is confidential and will become a part of the student's educational file as defined by Family Educational rights and Privacy Act (20 U.S.C. Sect. 1232(g)) and will receive the same protection pursuant to such;

-- I understand that any information obtained or received by me will be used only for purposes of providing information to parents/guardians to assist with the provision of educational services to the above-referenced student;

-- I further agree that I may not disclose information about any other DCPS student obtained by me during the course of my observation(s), as required by law;

-- I further agree that I am to use reasonable means and measures to prevent the disclosure and unauthorized use of student information obtained by me during the course of my observation and will protect the confidentiality of this confidential information;
-- I certify that I do not represent the student in litigation related to the provision of a free appropriate public education and I have no financial interest in the outcome of such litigation;
-- I certify that I will not disclose nor use any information obtained during the course of the observation for the purpose of engaging clients in litigation against the District or the LEA;
-- I understand that my failure to abide by any District of Columbia Public Schools Policy, Administrative Rule, procedure, rule or any term of this Agreement may result in a prohibition against me conducting any future observations of any student or proposed educational placement on District of Columbia School Property;
-- I further understand that the terms of this Agreement shall remain in effect during and after my observation. (Petitioner's Motion, Exh. 6; District's Motion, Exh. A)

9. Petitioner communicated to DCPS that she objected to the agreement, and that the observer would not sign the agreement. (Due Process Complaint)

VI. Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Petitioners' argument is that there are no issues of material fact in this case and that summary adjudication is proper. They argued that the hearing officer does have

jurisdiction to hear this matter, stating that the observation is being proposed to ascertain whether a new placement at School A would meet the Student's special education needs. They argued that the restrictions placed upon the observation by Respondent's "Classroom Observer Confidentiality Agreement" go "far beyond" the limitations appropriately placed on observations pursuant to the applicable law, the Special Education Student Rights Act of 2014 ("the Student Rights Act"), Sect. 103(5)(A)-(H)[3].

Respondent agreed that there are no issues of material fact in this case and that summary adjudication is proper. Otherwise, they disagreed with Petitioners. They contended that a hearing officer has no authority to rule on such an issue, since confidentiality forms are matters within DCPS's discretion. They also argued that a Due Process Complaint pursuant to the IDEA must relate to "a description of the nature of the problem of the child relating to the proposed or refused initiation or change." They argued further that the "proposed or refused initiation or change" must relate to the "identification, evaluation, or educational placement of a child". 34 CFR Sect. 300.507; 34 C.F.R. Sect. 300.503(a)(1) and (2).

They also argued that the terms of the agreement are consistent with the language in the Student Rights Act. They pointed out that the IDEA does not provide parents of a student with a disability with the right to observe a placement, whether by themselves or through an advocate or professional observer. Moreover, they argued that the Student Rights Act allows a school district to set appropriate parameters on time, duration, and conduct during the observation.

[3] These regulations are codified at D.C. Code Sect. 38-2571.03. For the purposes of this decision, I will refer to the original sections of the bill that was passed by the District of Columbia Council, which was provided by the parties.

They noted that DCPS is obliged to preserve the confidentiality of its students pursuant to FERPA, located at 34 C.F.R. Sect. 300.610 et seq. and 20 U.S.C. Sect. 1232(g). They argued that Petitioners refused to sign the agreement even though they offered Petitioners to sign the document "under protest." They also argued that all objections by Petitioners are speculative and not ripe for review.

1. Jurisdiction.

The IDEA has been described as a model of "cooperative federalism." Schaffer v. Weast, 546 U.S. 49, 52 (2005). The statute requires participating states to establish a "basic floor of meaningful, beneficial educational opportunity," but states may exceed the federal floor and enact their own laws and regulations to guarantee a higher level of entitlement to disabled students. D.D. ex rel. V.D. v. New York City Bd. of Educ., 480 F.3d 138, 139 (2d Cir. 2007), amending, 465 F.3d 503, 514 n.13 (2d Cir. 2006); Burlington v. Dep't of Educ. for Comm. of Mass., 736 F.2d 773, 792 (1st Cir. 1984) (holding that "a state is free to exceed, both substantively and procedurally, the protection and services to be provided to its disabled children" under IDEA).

This is a case about legislation that was passed by the District in Columbia in 2014. The act in question is the "Special Education Student Rights Act of 2014," and it contains a title called: "Special Education Procedural Protections Expansion Act of 2014." (Title 1, Sect. 101).

In Sect. 103(5)(A) of that title, it is provided that, "(u)pon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current or proposed special educational 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 a litigation related to the provision of free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.[4]

The Student Rights Act goes beyond protections of the IDEA with respect to observations. As pointed out by Respondent, the IDEA does not allow parents or observers to view students in the classroom. The OSEP document Letter to Mamas, 42 IDELR 10 (May 26, 2004) relates to parents' and parents' representatives' rights to observe children in a classroom. This letter indicates that there is no general entitlement in IDEA or the corresponding regulations for parents or their representatives to observe their children in a current classroom or to observe a proposed educational placement. The letter then goes on to indicate that OSEP encourages districts and parents "to work together in ways that meet the needs of both the parents and the school, including providing opportunities for parents to observe the children's classrooms and proposed placement options." See also Letter to Blades, 213 IDER 169 (August 12, 1988)(OSERS letter indicating that local or State procedures control where a parent requests observation by professional under parent hire).

Petitioner is seeking to have her consultant observe the classroom at School A to determine the appropriateness of the educational placement of the child. 34 CFR Sect.

[4] The law also includes limitations of the right to observation, in subsections (B) through (H), which I will address later on this decision.

300.507. However, Petitioners' claim -- while ultimately premised on the enforcement of rights established pursuant to the IDEA – is mainly based on District of Columbia law. The question is, does a special education due process hearing officer, authorized by the Office of the State Superintendent of Education, have authority to rule on such a claim?

This issue has recently been addressed by a federal court in the First Circuit. In Cano-Angeles v. Commonwealth of Puerto Rico (Department of Education), Civ. No. 15–1005(BJM), 2015 WL 6133130, (D.P.R. October 14, 2015), Petitioner brought an action before a hearing officer (or, "ALJ") to enforce a local statute that provided for reimbursement for transportation to related services providers. The IDEA ALJ dismissed the case, contending that there was no jurisdiction to hear such a claim. The federal court reversed. The court pointed to cases where hearing officers considered both state and federal statues when resolving reimbursement disputes. Gadsby by Gadsby v. Grasmick, 109 F.3d 940, 953–54 (4th Cir.1997) (Maryland's laws and regulations); T.G. ex rel. T.G. v. Midland Sch. Dist., 848 F.Supp.2d 902, 929 (C.D.Ill.2012) (Illinois regulations). The court also referenced a case from the District of Columbia, D.S. v. Dist. of Columbia, 699 F.Supp.2d 229, 235 (D.D.C.2010), where a hearing officer was reversed on a case involving jurisdictional issues.

The Cano-Angeles court pointed out that "the IDEA does not suggest that a hearing officer is prevented from considering state regulations when resolving disputes." Cano, at *4. The court analyzed the IDEA and determined that, "under 20 U.S.C. Sect. 1415(f) and the IDEA's model of "cooperative federalism," "Congress intended to create a system in which hearing officers consider both state and federal law to ensure that the Act is properly being implemented at the local level." Id. The court also noted that 20

U.S.C. Sect. 1412(a) allows that participating States must certify to the Secretary of Education that they have "policies and procedures" that will effectively meet the Act's conditions, and that 20 U.S.C. Sect. 1415(f)(3)(ii) requires that ALJs must have technical competence to understand both state and federal law pertinent to the IDEA. Id. It also suggested that, in determining whether jurisdiction is appropriate for an IDEA hearing officer or ALJ, the hearing officer or ALJ should consider the impact the local law has on an underlying IDEA dispute. Id.

Respondent has provided no cases in support of its view that a hearing officer such as myself has no jurisdiction over a case like this. I should note that the Student Rights Act specifically references special education due process hearings, suggesting that the government of the District of Columbia contemplated that a special education due process hearing officer would adjudicate disputes pursuant to these provisions. In fact, in Sect. 103(6)(A), the Student Rights Act goes on to directly address special education due process hearings by changing the burden of persuasion and the burden of production in "special education due process hearings occurring pursuant to IDEA (20 U.S.C. Sect. 1415(f)(1) and 20 U.S.C. Sect. 1439(a)(1). . . ." Moreover, a preamble to the Act describes the act's function is: "(t) to provide for additional procedural safeguards for students with disabilities and their families, to provide for the neutral administration of due process hearings for students with disabilities as required under the Individuals with Disabilities Act, and to require the State Superintendent of Education to issue rules to implement this act."

Under the circumstances, I find that I have jurisdiction to decide the issue in the Due Process Complaint.

2. Appropriateness of Summary Adjudication.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

This standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-50 (1986). In Anderson, the court indicated that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party" for a judgment for that party. Id.

Here, both sides have moved for summary judgment, making it clear that neither believes there are any material issues of genuine fact that would require a hearing. Though counsel were not able to agree on all the terms of a stipulation of facts because of a dispute about the context of Respondent's offer to for the consultant to sign the confidentiality agreement "under protest," neither side has had claimed that this issue is a genuine issue of material fact that would require a hearing.

Finally, there is no dispute about the facts as written in the "Undisputed Facts" section of this decision. These facts are gleaned from the provisions of a stipulation that had been agreed to by the parties. As already explained in footnote #1, I find that those facts are sufficient for a decision on the merits of this case.

3. The Issue.

Did DCPS fail to provide Petitioner with an opportunity to have an expert view the Student's current placement? If so, did DCPS violate DC Act 20-486, Sect. 103(5)(A)-(H) and also violate the parent's right to meaningfully participate in the IEP and placement process pursuant to CFR Sect. 300.513(a) and 300.501(b)? If so, did DCPS deny the Student a FAPE?

A. The Statute.

Sect. 103(5)(A) provides that, "(u)pon request, an LEA shall provide timely access, either together or separately, to the following for observing a child's current or proposed special educational 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 a litigation related to the provision of free and appropriate public education for that child nor has a financial interest in the outcome of such litigation.

The statute contains specific rules and limitations in Sections (B) though (H). Those sections read as follows:

(B) The time allowed for a parent, or the parent's designee, to observe the child's program shall be of sufficient duration to enable the parent or designee to evaluate a child's performance in a current program or the ability of a proposed program to support the child.

(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 a 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 designee; or

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

(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.

(F) The LEA may require advance notice and may require the designation of a parent's observer in writing.

(G) Each LEA shall make its observation policy publicly available.

(H) Nothing in this paragraph shall be construed to limit or restrict any observational rights established by IDEA or other applicable law.

B. Applicability of the Statute to this Case.

Respondent contends that federal standards are relevant to the determination that I must make here. In particular, Respondent pointed out that the OSEP letter Letter to Mamas, and its progeny, should be considered in assessing whether the agreement was appropriately used by School A in connection to the observation by the consultant.

A state may add protections to parents and students that go beyond the protections in the IDEA. D.D., 480 F.3d at 139; Burlington, 736 F.2d at 792. A preamble describes

the Student Rights Act's function is: "(t) to provide for additional procedural safeguards for students with disabilities and their families, to provide for the neutral administration of due process hearings for students with disabilities as required under the Individuals with Disabilities Act, and to require the State Superintendent of Education to issue ruled to implement this act." Accordingly, Letter to Mamas is not on point. The inquiry here should be whether the twelve provisions of the agreement comply with the Student Rights Act.

Respondent also argued that the matter is not ripe for adjudication because the claim is hypothetical. The "ripeness" doctrine applies to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967) There is nothing premature about this dispute. The is no question that Petitioners have tried to arrange for their consultant to observe the School A placement, and there is also no question that DCPS required the consultant to sign the agreement prior to the observation. There is nothing more that Petitioners could have done except to litigate, and Respondent does not point to any additional steps that Petitioners could have undertaken to ripen this matter further.

Finally, the consultant's refusal to sign the agreement "under protest" does not vitiate Petitioners' claims. Respondent did not clearly explain what "under protest" means in this context, did not argue that no liability could result from signing "under protest," and did not support this argument with any cases or any statutory references.

C. Application of the Student Rights Act to the Agreement.

Petitioners objected to ten out of the twelve provisions in the agreement. I will address them in the order that they are listed in the agreement.

a. Provision #1.

This provision reads:

-- I agree to preserve the confidentiality of any and all student information that I view or have access to during the course of my observation of the above-referenced student and the instruction provided at his/her school;

Petitioners' view is that this requirement is vague, overly broad and ambiguous. Petitioners pointed out that this clause appears to mean that this mean the consultant's observations and conclusions cannot even be discussed with the parents, among other individuals. Respondent contended that the term confidentiality is clear, and that information that is "otherwise confidential under law" is at issue here.

In the Student Rights Act, the only reference to confidentiality is in Sect. 103(5)(D)(ii), which relates to the protection of *personally identifiable information* of "other children in the program." This provision in the agreement does *not* include the words "personally identifiable information" and does not reference existing law in any way. I agree with Petitioners that this provision could be interpreted to mean that the consultant is prevented from revealing important information about instructional issues that were observed. The consultant should not have to be concerned about the impact of such provisions when conducting the observation at issue.

I note that Sect. 103(5)(D) specifically restricts these kind of limitations on observations. It states that that "(t)he LEA shall not impose any conditions or restrictions on such observations" except for the specifically enumerated permissible restrictions,

which mainly relate to safety and personally identifiable, confidential information. I will also note that language in contracts must be construed against the draftsperson. Trans-Bay Engineers & Builders, Inc. v. Hills, 551 F.2d 370, 379 (D.C. Cir. 1976)

I find that, by requiring the consultant to agree to this provision, DCPS violated the Student Rights Act.

b. Provisions #2 and 3.

These provisions read:

-- I agree that I will not attempt to audiotape, photograph, or videotape at anytime during my observation, unless it is specifically authorized by the campus administrator;

-- I agree that I will not attempt to engage with students or school personnel during my observation unless previously scheduled and agreed to by the Principal and parent of child;

Petitioners' argument is that these provisions are overly broad and restrictive (Provision #2) and vague and ambiguous (Provision #3). Petitioners posit that an audio or video might assist the parent with understanding her child's education, such as if physical barriers exist at School A. Petitioners agreed that the consultant should not engage in conduct that is disruptive, destructive, or threatening -- but contend that there is no basis to require the consultant to agree not to talk to anyone.

Respondent's argument is that Provision #2 does not bar the use of all recording devices, only that they be approved ahead of time by school administrators. They also argued that Provision #3 reasonably protects the confidentiality of students and reasonably controls the classroom environment. In this respect, Respondent points to memoranda from the United States Department of Education, Office of Special Education

and Rehabilitative Services. Letter to Mamas; Letter to Savit, 65 IDELR 250 (OSEP, February 10, 2014).

Though Respondent's position is reasonable, it is not consistent with the law. The Student Rights Act says "(t)he LEA shall not impose any conditions or restrictions on such observations" except the permissible conditions or restrictions listed in the statute. There is nothing in the law about limiting an observer's right to photographs, audio, or video. While any photographing, audiotaping or videography by the consultant would certainly have to protect children's confidentiality as required by the Student Rights Act and also FERPA, 20 U.S.C. Sect. 1232(g) et seq., this statute is written in a rather broad way. It does not give school officials the discretionary right to exclude photography, audio, or video for reasons of their choosing.

There is also nothing in the law about restricting an observer's communications with individuals at the school. The District of Columbia passed this law to enable parents and their representatives to observe the school environment. The law is accordingly written in a way that allows the consultant a fair amount of latitude. I point out that Petitioners agree that the consultant will not: (1) interrupt any teacher during teaching time; and (2) engage in any conduct that that is disruptive, destructive or threatening. (Petitioners' Motion, at 7)

I find that, by requiring the consultant to agree to these two provisions, DCPS violated the Student Rights Act.

c. Provision #4.

This provision reads:

-- I agree that if I complete a written report of any recommendations or observations I made regarding the above-referenced student and the student's

classroom/school environment, I will provide that written report to the District of Columbia Public Schools within 24 hours upon completion;

Petitioners argued that there is no basis to require providing any such report to DCPS in any statute, whether it be IDEA, the Student Rights Act, or other provisions of the D.C. Code or the DCMR. They point out that the parents might not want to give the report to DCPS and might want only to provide it to their child's therapist.

Respondent's argument in defense of this provision does not rely on the Student Rights Act. Instead, Respondent points out that such a report is not admissible at a due process hearing if it had not been provided to DCPS previously, and that DCPS would need that information in order to provide the Student a FAPE.

These rationales are not on point. The issue here is the applicability of the Student Rights Act. There is nothing in that act that even suggests that DCPS can demand a report from the observer, much less a report within 24 hours of it being written. While, ordinarily, it is appropriate for a parent to share observations and evaluations with the school district, that is a different issue than the one referred to here.

I find that, by requiring the consultant to sign an agreement containing this provision, DCPS violated the Student Rights Act.

d. Provision #5.

This provision reads:

-- I understand that this student information is confidential and will become a part of the student's educational file as defined by Family Educational rights and Privacy Act (20 U.S.C. Sect. 1232(g)) and will receive the same protection pursuant to such;

Petitioners' position is that this clause is vague and "does not make any sense." Respondent's position is that this provision refers to the report referenced in Provision # 4.

This provision, which does not use the word report, does *not* clearly reference the prior provision. It uses the words "this student information," but it is not clear what "this student information" refers to. The provision does not incorporate the prior provision by reference in any way.

Moreover, there is no language in the Student Rights Act about requiring a consultant's report to be in a student's educational file. Nor is there language in FERPA requiring observer reports to be part of a student's educational file. The section referred to here, 20 U.S.C. Sect. 1232(g), is about the release of student records, not the composition of educational files.

I find that, by requiring the consultant to sign an agreement containing this provision, DCPS violated the Student Rights Act.

e. Provision #6.

This provision reads:

-- I understand that any information obtained or received by me will be used only for purposes of providing information to parents/guardians to assist with the provision of educational services to the above-referenced student;

Petitioners contend that this provision is overly restrictive because it would prevent them from sharing information with the Student's therapist, pediatrician, or grandmother. Respondent contends that this provision is supported by relevant law and is hardly objectionable.

Again, the Student Right Act says "(t)he LEA shall not impose any conditions or restrictions on such observations" except the permissible conditions or restrictions listed in the statute. There is nothing in the statute about limiting the parent/guardians use of information in this connection. While, clearly, the main purpose of the law is to allow parents to observe students so that they can further their child's education, it is conceivable that Petitioners could use this information for other purposes, including to caregivers, for health-related purposes, or to other family or friends.

I find that, by requiring the consultant to sign an agreement containing this provision, DCPS violated the Student Rights Act.

f. Provision #7.

This provision reads:

-- I further agree that I may not disclose information about any other DCPS student obtained by me during the course of my observation(s), as required by law;

Petitioners argued that observers routinely refer to other students in the classroom when they conduct an observation of a student. Respondent argued that this provision simply restates the requirement to keep personally identifiable information confidential.

Here, DCPS is reasonably stating that it is reinforcing existing statutory requirements. While this language does not specifically refer to a particular statute, it can and should be inferred that this is a reference to the Student Rights Act, which, among other things, requires that the LEA impose conditions necessary to protect other children in the program from disclosure of confidential and *personally identifiable* information in the event that such information is obtained. Sect. 103(5)(D)(ii). Confidential, *personally identifiable* student information should also not be disclosed

pursuant to the Family Education Rights and Privacy Act, or ("FERPA"), which cannot be trumped by local law pursuant to the Supremacy Clause of the United States Constitution. See 20 U.S.C. Sect. 1232(g); 34 C.F.R. Part 99. The Student Rights Act also insures that Student safety is protected during the observation. Sect. 103(5)(D)(i).

Here, I find that DCPS is reasonably acting to protect the privacy interests and safety of students during the observation. Petitioners' objections to this provision are dismissed.

g. Provision #8.

This provision reads:

-- I further agree that I am to use reasonable means and measures to prevent the disclosure and unauthorized use of student information obtained by me during the course of my observation and will protect the confidentiality of this confidential information;

Petitioners argued that Provision #8 is vague since it does not define "unauthorized use" and prevents the consultant from disclosing what they have observed "to anyone." Respondent argued that this provision simply restates the requirement to keep personally identifiable information confidential.

Again, the Student Rights Act prohibits only the dissemination of "personally identifiable" information. This provision does not reference personally identifiable information. Moreover, I agree with Petitioners that it is unclear what is meant by unauthorized use. The consultant was reasonably wary to sign a provision like this, which warns against "unauthorized" use but does not define what kind of authorization is needed.

I find that, by requiring the consultant to sign an agreement containing this provision, DCPS violated the Student Rights Act.

h. Provision # 11.

-- I understand that my failure to abide by any District of Columbia Public Schools Policy, Administrative Rule, procedure, rule or any term of this Agreement may result in a prohibition against me conducting any future observations of any student or proposed educational placement on District of Columbia School Property;

Petitioners argued that the only proper bar that exists in the law is the bar that has been established by the Chancellor of the District of Columbia Public Schools pursuant to 5-E DCMR Sect. 501.3. According to Petitioners, this bar was issued through a directive and establishes barring procedures for individuals entering a school building. According to Petitioners, pursuant to the directive, a bar is necessary only where there is disruption to school activities, destruction of school property, or threats. Petitioners also pointed out that, pursuant to the directive, the individual who is the subject of the bar notice may appeal the bar to the Chancellor and then to the Deputy Mayor of Education.

Respondent did not address the issue of the directive and argued only that this provision restates the school district's right to regulate the learning environment so that learning may take place. They point out that violations pursuant to this language "may" result in a bar and that administrators will apply the bar reasonably.

The Student Rights Act says "(t)he LEA shall not impose any conditions or restrictions on such observations" except the permissible conditions or restrictions listed in the statute. Sect. 103(5)(D). There is nothing in the law about establishing a bar if an observer happens to violate a rule during observation. Moreover, I agree that there is no way to ensure that this rule will be administered fairly to the consultant. This provision goes beyond the statute and could conceivably be used to bar the consultant from future observations for inappropriate reasons.

I find that, by requiring the consultant to sign an agreement containing this provision, DCPS violated the Student Rights Act.

i. Provision #12.

-- I further understand that the terms of this Agreement shall remain in effect during and after my observation.

Petitioners object to this provision to the extent it references other provisions which they find objectionable. Petitioners also object to this provision insofar as it provides a "*carte blanche* prohibition for some undisclosed period in the future," and that there is nothing authorizing this provision in the Student Rights Act.

Respondent's position is only that this provision is not unreasonable, and I agree. It is unclear what Petitioners' objection is with respect to this provision. I have upheld Petitioner's objections with respect to most provisions, which go beyond the statute. To the extent that provisions have been deemed to be lawful, there should be no "time frame" within which to comply with them. That is, the consultant may not, in the future, decide that it might be appropriate to disseminate personally identifiable confidential information about students that was gleaned from the observation. Petitioners' objection to this provision is dismissed.

4. Summary.

In sum, I find that the agreement does, in large part, go beyond the Student Rights Act in establishing requirements and conditions for the consultant's observation. The intent of this law, pretty clearly, was to give consultants discretion so that they could appropriately observe children in schools. The law is strictly written and does not allow the LEA to impose any additional requirements, however reasonable, on observers.

One can certainly understand why DCPS would want to impose most, if not all, of the limitations in the agreement. DCPS has a responsibility to keep order in its schools, and it also has a responsibility to insure that personally identifiable information about students is not disclosed to third parties. However, restrictions on this consultant must be limited to the exceptions that are directly authorized by the Student Rights Act, as well as the specific requirements of federal laws such as FERPA. The consultant was justified in refusing to sign the agreement, which is contrary to the letter, and also the spirit, of the Student Rights Act.

VII. Order

As a result of the foregoing:

1. Respondent is hereby ordered to delete all provisions in the agreement except for provisions 7, 9, 10, and 12;

2. Respondent may revise the agreement to include language requiring the consultant to refrain from disruptive, destructive, or threatening behavior during the observation;

3. Respondent shall then promptly present the agreement to the consultant for signature;

4. After the consultant signs the agreement, Respondent shall promptly arrange for an observation as requested by Petitioners and authorized by the Student Rights Act.

Dated: January 31, 2016

Michael Lazan
Impartial Hearing Officer

cc: Petitioner's Representative, Attorney A
Respondent's Representative, Attorney B
OSSE Division of Specialized Education
Contact.resolution@dc.gov
Chief Hearing Officer

X. Notice of Appeal Rights

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: January 31, 2016

Michael Lazan
Impartial Hearing Officer