

**District of Columbia**  
**Office of the State Superintendent of Education**  
**Office of Dispute Resolution**  
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**Confidential**

STUDENT, through the legal guardian <sup>1</sup>	)	Case No. 2022-0113
	)	
Petitioner	)	
	)	
	)	
v.	)	Date Issued: July 8, 2022
	)	
District of Columbia Public Schools	)	
	)	Terry Michael Banks,
Respondent	)	Hearing Officer

**FINAL DECISION AND ORDER ON MOTIONS TO  
EXPEDITE AND FOR SUMMARY JUDGMENT**

**BACKGROUND**

Petitioner is the mother of a [REDACTED]-year-old student (“Student”) attending School A. On June 9, 2022, Petitioner filed a *Due Process Complaint Notice* (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing to permit Student’s designee (“Designee”) to observe Student’s current placement. Respondent filed *District of Columbia Public Schools’ Response to Petitioner’s Administrative Due Process Complaint* on June 21, 2022, denying that it had failed to provide a FAPE in any way.

On June 9, 2022, Petitioner also filed *Petitioner’s Motion for Expedited Due Process Hearing*, citing OSSE Appropriate Standard Practices (3)(C) as authority for expedition. Petitioner argued that she “suspects that DCPS is denying her [child] a FAPE” and needed the observation to gather facts and evidence to confirm her suspicion. She asserted that DCPS’ refusal to consent to the observation was “a clear attempt to run out the clock on the rest of the school year so that Petitioner cannot obtain information about her [child’s] current placement.”

That day, Petitioner also filed *Petitioner’s Motion for Summary Judgment*. Petitioner asserted

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<sup>1</sup> Personal identification information is provided in Appendix A.

as follows. At an Individualized Education Program (“IEP”) team meeting on June 1, 2022, Petitioner’s counsel requested that Designee be allowed to observe Student in her/his current educational program prior to the end of the 2021-22 school year. The request was reiterated the next day by email from Petitioner’s counsel to Respondent’s counsel.<sup>2</sup> Respondent’s counsel instructed Petitioner’s counsel to direct her request to the principal [“Principal”] at School A.<sup>3</sup> On June 8, 2022, Petitioner’s counsel’s office made the request to School A’s principal by email on which Respondent’s counsel was copied.<sup>4</sup> Two minutes later, Respondent’s counsel inquired as to the purpose of the observation.<sup>5</sup> Petitioner’s counsel promptly responded that Petitioner wanted an observation by her designee because Petitioner “does not have a specific background in the subject of special education and therefore is not able to adequately evaluate whether her child’s instruction is sufficient.”<sup>6</sup> Respondent’s counsel denied the request shortly thereafter: “The prior email was providing information. However, based on your communication and request, the observation is denied. [Principal] may of course say differently but the law you cite does not support the request made.”<sup>7</sup>

On June 10, 2022, DCPS filed *District of Columbia Public Schools’ Objection to Expedite Due Process Hearing*. Respondent argued that petitioners are entitled to expedited hearings only in claims alleging changes of placements associated with disciplinary proceedings, citing Section 708 of the Office of Dispute Resolution’s Standard Operating Procedures (“SOP”).

On June 21, 2022, DCPS filed *District of Columbia Public Schools’ Opposition to Petitioner’s Motion for Summary Judgment (“Opposition”)*. Respondent argued that disputes involving a student’s IEP and placement nearly always involve disputes of fact that are not subject to summary treatment. DCPS also argued that by asking to observe Student in his/her classroom environment, “Petitioner has conflated observing the student with observing an educational program, distorted the request made to DCPS and DCPS OGC for the observation and does not have the observation right as alleged by Petitioner.” DCPS asserted that the local statutory provision that affords parents the right to observe their children’s *educational program* does not extend to a right to observe their *children* in those educational programs. DCPS argued that Petitioner’s request was made two to three weeks before the end of the school year; little could be gleaned from an observation at this time of the year “as students are preparing for summer, promotion to the following school year, engaging in field trips and celebrations, [and] making up any missed assignments for grade completion...” which “would not allow the Petitioner to adequately evaluate the student’s performance in [his/her] current program.” DCPS further argued that the timing is counterproductive because there is no pending IEP meeting or FAPE decision for the student. In addition, DCPS argued that Petitioner has had ample opportunity throughout the school year to gauge Student’s progress through an online parent portal. Finally, DCPS argued that Petitioner has been fully involved in the decision-making as to Student’s educational program as is demonstrated by Petitioner’s successful effort to secure authorization of an independent speech and language evaluation after rejecting one that DCPS had developed. Thus, “Granting the Petitioner’s motion would not provide the Petitioner an opportunity to fully evaluate the student’s educational programming, rather it would result in an unjust, unreasonable, or absurd outcome due, in

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<sup>2</sup> *Motion for Summary Judgment*, Exhibit 2 at 30. The page references are to the Bates pagination.

<sup>3</sup> *Id.* at 31.

<sup>4</sup> Exhibit 3 at 32.

<sup>5</sup> *Id.* at 33.

<sup>6</sup> *Id.* at 34.

<sup>7</sup> *Id.* at 35.

large part, to the timing of Petitioner’s request.”

## **SUBJECT MATTER JURISDICTION**

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”),<sup>8</sup> the implementing regulations for IDEA,<sup>9</sup> Title V, Chapter E-30 of the District of Columbia Municipal Regulations, and The District of Columbia Special Education Student Rights Act of 2014 (“Act”).<sup>10</sup>

## **STATEMENT OF UNDISPUTED FACTS**

1. The student is X-years-old and attends School A.<sup>11</sup>

2. On June 2, 2022, Petitioner’s counsel sent an email to Respondent’s counsel requesting that Designee be permitted to observe Student in his/her classroom on June 10, 2022.<sup>12</sup> Respondent’s counsel directed Petitioner’s counsel to address the request to Principal.<sup>13</sup>

3. On June 8, 2022, Petitioner’s counsel’s investigator (“Investigator”) sent an email to School Principal requesting that Designee be permitted to observe Student in his/her classroom on June 13, 2022. Designee was described in the email as having professional expertise in the area of special education.<sup>14</sup> Two minutes later, Respondent’s counsel inquired, “Advise the purpose of [Designee’s] sought observation.”<sup>15</sup> Petitioner’s counsel responded shortly thereafter: “ The parent is requesting that her designee observe her [child] in the classroom because she does not have a specific background in the subject of special education and therefore is not able to adequately evaluate whether her child’s instruction is sufficient.”<sup>16</sup> Respondent’s counsel promptly: “... [b]ased on your communication and request, the observation is denied. [Principal] may of course say differently, but the law you cite does not support the request made.”<sup>17</sup>

4. DCPS did not question the qualifications of Designee to conduct the proposed observation.

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<sup>8</sup> 20 U.S.C. §1400 *et seq.*

<sup>9</sup> 34 C.F.R. Part 300.

<sup>10</sup> DC Code § 38-2571.03(5) (2015).

<sup>11</sup> *Opposition*, Exhibit 4 at 1 (39). Respondent’s exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., 4:1 (39).

<sup>12</sup> *Motion for Summary Judgment*, Exhibit 2 at 30.

<sup>13</sup> *Id.* at 31.

<sup>14</sup> *Motion for Summary Judgment*, Exhibit 3 at 32.

<sup>15</sup> *Id.* at 33.

<sup>16</sup> *Id.* at 34.

<sup>17</sup> *Id.* at 35.

## ANALYSIS

### ***Motion for Expedited Due Process Hearing***

Petitioner cited OSSE's Appropriate Standard Practices (3)(C) as authority for her request for an expedited hearing. However, due process hearings in the District of Columbia are governed by the Section 708 of the SOP. The SOP, like IDEA, provides for expedited hearings only in disputes involving disciplinary proceedings resulting in suspensions, expulsions, or other changes of placement:

Pursuant to 34 CFR §300.532, expedited hearings must be held when the dispute is related to a disagreement with regard to any change to the student's current placement under 34 CFR §§300.530 and 300.531, or the manifestation determination under 34 CFR §300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others.

As the instant claim does not involve a disciplinary proceeding, Petitioner is not entitled to an expedited hearing.

### ***Motion for Summary Judgment***

Under Rule 56 of the Federal Rules of Civil Procedure,<sup>18</sup> summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A fact is "material" if it is capable of affecting the substantive outcome of the litigation.<sup>19</sup> A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.<sup>20</sup> "A party asserting that a fact cannot be or is genuinely disputed must support the assertion" by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."<sup>21</sup> The moving party bears the burden of demonstrating the absence of a genuine issue of material fact.<sup>22</sup>

Respondent argued that summary judgment is inappropriate and unwarranted in this matter because disputes involving a student's IEP and placement nearly always involve disputes of fact that are not subject to summary treatment. However, this case does not involve the appropriateness of Student's IEP or placement that would require making an extensive factual record. Rather, the only issue in this case is whether DCPS had a justifiable reason for denying Petitioner's designee the opportunity to observe Student in her/his classroom. There is no genuine dispute as to any material fact relevant to this issue.

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<sup>18</sup> The Federal Rules of Civil Procedure are not applicable to IDEA due process hearings, but Rule 56 is cited here by analogy.

<sup>19</sup> See *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 D.C. Cir. 2006).

<sup>20</sup> See *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); *Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. 2505; *Holcomb*, 433 F.3d at 895.

<sup>21</sup> Fed.R.Civ.P. 56(c)(1).

<sup>22</sup> See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

District of Columbia law specifically authorizes a parent to observe his or her child's educational program and/or to have a special education professional conduct the observation. The District of Columbia Special Education Student Rights Act of 2014 ("Act") provides, in pertinent part, as follows:

Upon 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...<sup>23</sup>

Respondent argues that the statute does not provide for an observation of the student *in* his or her educational program, but only *of* the student's program. Respondent's argument imposes an illogical restriction of the right to an observation. It would require that the observation be conducted of another classroom at School A that was virtually identical to Student's, or of Student's classroom when s/he was either absent or required to leave during the observation. Respondent offered no reason for Student not to be present while the observation is conducted. In fact, the statute contemplates the child's presence during the observation where it requires that

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...*

A parent, or the parent's designee, shall be allowed to view the child's instruction *in the setting where it ordinarily occurs...*<sup>24</sup>

Arguably, the child's performance in the current program cannot not be evaluated in the child's absence. Respondent's argument is also internally inconsistent; DCPS argued that scheduling the observation in the last few days of the school year, when little instruction is being conducted, "would not allow the Petitioner to adequately evaluate the student's performance *in* [his/her] current program."<sup>25</sup> It appears more likely that Respondent would not want documentation of its concession that minimal instruction is provided in the last "two to three weeks"<sup>26</sup> of the school year. While Respondent provided an extensive defense of its denial of the observation in its *Opposition*, Principal never responded to Petitioner's request, and Respondent's counsel offered no reason to Petitioner's counsel in the email that denied the request.

The Act provides exceptions to, and limitations on, a parent's right to an observation, none of which includes the physical presence of the student. The designee cannot currently represent the parent's child in litigation related to the provision of free and appropriate public education for the child, and the designee cannot have a financial interest in the outcome of the litigation.<sup>27</sup> The school may only impose limitations on the right to an observation to (1) ensure the safety of the children in

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<sup>23</sup> D.C. Code§ 38-2571.03(5) (2015).

<sup>24</sup> D.C. Code§ 38-2571.03(5)(B) and (C), emphasis added.

<sup>25</sup> *Opposition* at 4, emphasis added.

<sup>26</sup> *Opposition* at 3.

<sup>27</sup> D.C. Code§ 38-2571.03(5)(A)(ii).

the program, (2) protect other children in the program from disclosure of personally identifiable information, and (3) avoid any potential disruption arising from multiple observations occurring in a classroom simultaneously.<sup>28</sup> Respondent did not assert that any of the cited exceptions or limitations applied to Petitioner's request. Petitioner's oral and written requests for the observation were made prior to the filing of the *Complaint*. Thus, Designee cannot be deemed to have been "currently" representing Petitioner in litigation even assuming that Designee could be shown to be performing in a representative capacity.<sup>29</sup>

Respondent cites the U.S. Department of Education's Office of Special Education and Rehabilitation Service's *Letter to Mamas*<sup>30</sup> for the proposition that IDEA does not authorize observations. This reliance ignores *Letter's* observation that local jurisdictions have the authority to mandate observations and encourages school districts to do so:

The determination of who has access to classrooms may be addressed by State and/or local policy. However, we encourage school district personnel and parents to work together in ways that meet the needs of both the parents and the school, including opportunities for parents to observe their children's classrooms and proposed placement options.<sup>31</sup>

Thus, Respondent's suggestion that the District's enactment of legislation authorizing parental observations is in any way inconsistent with IDEA is unfounded.

Respondent relied on a decision by another Hearing Officer in the jurisdiction to support its decision to deny the observation. In Case No. 2019-0287, the parent requested that her educational advocate be permitted to observe her child in the classroom. The advocate had extensive experience in special education and was an employee of the parent's counsel's law firm. At the time of the request, as in this case, there was "no upcoming meeting scheduled for Student and no school concerns about Student's academic or social functioning." The principal had been involved in previous due process hearings with the parent's law firm and "was suspect of the observation request, as there was no apparent reason for the observation given when the request was made." Through counsel, DCPS denied the request for the observation. Hearing Officer Coles B. Ruff upheld DCPS' decision. Despite the fact that the request for the observation was made prior to the filing of the due process complaint, and the subsequent complaint was filed only to enforce the parent's entitlement to an observation, Hearing Officer Ruff applied the litigation exception:

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.

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<sup>28</sup> D.C. Code § 38-2571.03(5)(D).

<sup>29</sup> See, *Woodson v. District of Columbia*, 119 LRP 28316 (D.D.C. 2019) (the representation limitation refers to existing litigation, not litigation that has not yet occurred); *Opposition*, Exhibit 3:14 (33).

<sup>30</sup> 42 IDELR 10 (OSEP 2004); *Opposition*, Exhibit 1:1 (8).

<sup>31</sup> *Opposition*, Exhibit 1:2 (9).

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.<sup>32</sup>

I simply, but respectfully, do not concur with Hearing Officer Ruff's interpretation of the Act. First, as is discussed above, the Act unequivocally confers a right to parents or their designees to observe their children's educational program. The Act includes exceptions and limitations. In fact, the Act specifically prohibits DCPS from imposing any conditions or restrictions on such observations except those necessary to ensure safety, protect privacy, or to avoid multiple simultaneous observations. Thus, the tacit preconditions or limitations of requiring an imminent IEP meeting, requiring the school staff to have had concerns about the student's performance, or requiring the parent to have expressed educational concerns to DCPS before requesting an observation, is specifically precluded by the Act. I also take issue with Hearing Officer's conclusion that the litigation exception applied because by the time the matter reached him, it was then in litigation. First, the Act only provides a litigation exception for "litigation related to the provision of free and appropriate public education for the child." At the time the petitioner made the request for an observation, there was no pending litigation. Even when the parent then initiated litigation, that litigation was not related to the provision of direct services to the child. Rather, it was to enforce the parent's right to an observation. Clearly, the parties were not engaged in litigation at the time the request was made, so the exception was simply inapplicable. To bootstrap the litigation exception into subsequent litigation, initiated solely to enforce the right to an observation, effectively precludes the parent the opportunity to challenge the denial of an observation by any educational advocate.

In *Woodson v. District of Columbia*,<sup>33</sup> the issue was DPCS' refusal to allow a designee to observe a student unless the designee executed a non-disclosure agreement that he would not testify about the observation in any subsequent due process proceeding. In *dicta*, the *Woodson* court stated that the litigation exception "references existing litigation, and not future litigation that has not occurred."<sup>34</sup> The court also stated that DCPS' effort to preclude the designee in that case from testifying in subsequent litigation involving an alleged denial of FAPE to the student undermined the fundamental purpose of the Act:

Under the defendant's interpretation, a parent may have a designee observe the student and then participate in the IEP, but if that parent disagrees with the IEP and begins a due process claim against the school, the designee would not be able to testify at the hearing. Far from being a "meaningful observation," this observation would only help to the extent it would inform the parent at the initial IEP meeting. If the parent disagreed with the school after the IEP meeting, she would need to instigate a due process hearing, where the school would be able to bring in the employees who had developed the IEP. Under the Defendant's reading, the parent would either be forbidden from bringing in her own expert who had evaluated the adequacy of the student's education or could bring them in if they did not testify about the observation they conducted. This would

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<sup>32</sup> *Opposition*, Exhibit 2:10 (19).

<sup>33</sup> *See*, n. 29, *supra*.

<sup>34</sup> *Id.*, Exhibit 3:14 (33).

create an additional burden on a parent rather than put them on the same playing field as the LEA. This result is inconsistent with the plain language and legislative intent of the statute, and is therefore not consistent with the Act.<sup>35</sup>

It is similarly inconsistent with the Act to preclude an observation to a designee when the parties are not engaged in litigation simply because there is the potential for litigation in the future. For these reasons, I respectfully do not concur with Hearing Officer Ruff's decision in Case No. 2019-0287.

Respondent's counsel included in her exhibits a December 2021 IEP,<sup>36</sup> IEP Meeting Notes,<sup>37</sup> the user guide for the Parent Portal,<sup>38</sup> emails concerning a dispute over independent evaluations,<sup>39</sup> and notes of DCPS' staff's contacts with Petitioner dating back to September 16, 2014.<sup>40</sup> Counsel argued that "there is no pending IEP meeting or FAPE decision for this student," and asserted that Petitioner fully participated in the development of the IEP and was pleased with Student's progress. Counsel further asserted that there was no scheduled meeting, no changes proposed for Student's FAPE or placement, and no concern expressed by Petitioner regarding Student's progress that would warrant an observation.<sup>41</sup> These arguments and exhibits have no relevance to the issue presented. The Act affords Petitioner a right to an observation unless one of the exceptions or limitations applies. The Act does not require a showing of a potential or alleged denial of FAPE, poor performance by the student, concerns expressed by the parent, concerns expressed by a teacher, of a pending meeting, of a pending IEP, of a showing that DCPS has failed to provide a meaningful opportunity to participate in the IEP process, or anything else. Conceivably, a parent could abuse the process by requesting multiple observations during a school year, but that is not this case.

Finally, Respondent's counsel also included a copy of *B.B. v. District of Columbia* in her exhibits.<sup>42</sup> In *B.B.*, the parent and designee requested an observation of the program proposed for the student. DCPS granted the request. During the visit at the school, they observed the student's proposed special education program, but they were not permitted to see a general education classroom. The court upheld the Hearing Officer's ruling that the parent and designee had an adequate opportunity to observe instruction in the relevant program at the school despite not being able to see a general education classroom.<sup>43</sup> *B.B.* is clearly distinguishable because the parent there was not denied an observation of the student's proposed program without an explanation.

For all of these reasons, I conclude that Petitioner has met her burden of proving that DCPS denied Student a FAPE by failing to grant Petitioner's request for Designee to conduct an observation of Student in his/her classroom. I concur with an aspect of DCPS' argument that Petitioner waited too late into the school year to expect the full relief requested: an observation before the end of the school year. Petitioner's first request for an observation was on June 2, 2022. She did not file the *Complaint*

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<sup>35</sup> *Id.* at 18 (37).

<sup>36</sup> *Opposition*, Exhibit 4:1 (39).

<sup>37</sup> *Id.*, Exhibit 5:1 (61).

<sup>38</sup> *Id.*, Exhibit 6:1 (66).

<sup>39</sup> *Id.*, Exhibit 7:9 -18 (90-99).

<sup>40</sup> *Id.*, Exhibit 10:2-40 (137-175).

<sup>41</sup> *Opposition* at 4.

<sup>42</sup> Civ. Action No. 20-2467 (D.D.C. March 21, 2022); *Opposition*, Exhibit 8:1 (101).

<sup>43</sup> *Opposition*, Exhibit 8:28-29 (128-29).



until June 9, 2022. According to Respondent's counsel, the last day of the school year was June 24<sup>th</sup>.<sup>44</sup> Thus, DCPS was not even required to respond to the *Complaint* until the last week of the school year. While I have concluded that Petitioner is entitled to the requested observation, I will order that it take place before the end of the first full month of the 2022-23 school year. This affords School A ample flexibility during the hectic first weeks of the new year.

### ORDER

Upon consideration of the *Complaint*, DCPS' *Response*, *Petitioner's Motion for Summary Judgment*, *Petitioner's Motion for Expedited Due Process Hearing*, *District of Columbia Public Schools' Objection to Expedite Due Process Hearing*, and *District of Columbia Public Schools' Opposition to Petitioner's Motion for Summary Judgment*, it is hereby

**ORDERED**, that *Petitioner's Motion for Summary Judgment* is **GRANTED**.

**IT IS FURTHER ORDERED**, that *Petitioner's Motion for Expedited Due Process Hearing* is **DENIED** as moot.

**IT IS FURTHER ORDERED**, that on or before September 30, 2022, DCPS shall facilitate an observation of Student by Designee in one of Student's core subject classes. The time allowed for the observation shall be of sufficient duration to enable Designee to evaluate Student's performance in that classroom.

### APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

*Terry Michael Banks*  
Terry Michael Banks  
Hearing Officer

Date: July 8, 2022

Copies to: Attorney A, Esquire  
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<sup>44</sup> *Opposition* at 4.