

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>Parent, through Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	<b>Room: 111</b>
	)	<b>Hearing: May 8, 2018</b>
<b>v.</b>	)	<b>Hearing Officer: Michael Lazan</b>
	)	<b>Case No.: 2018-0026</b>
<b>DCPS,</b>	)	<b>Issue Date: May 18, 2018</b>
<b>Respondent.</b>	)	

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case brought by the Petitioner, who is the parent of the student (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 February 2, 2018. A response was filed by Respondent on February 9, 2018. The resolution period ended on March 4, 2018.

**II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

**III. Procedural History**

After the instant Due Process Complaint was filed, DCPS moved on February 22, 2018, to dismiss the Complaint, alleging that Petitioner is barred from the instant action

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<sup>1</sup> Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

by collateral estoppel and/or *res judicata* because the Petitioner's proposed observation, to be performed by a "litigation expert," is the same kind of observation that was ruled upon in an earlier case by Impartial Hearing Officer ("IHO") Coles Ruff. On February 26, 2018, Petitioner filed opposition papers, arguing that the instant action involves a different "nucleus of fact" than the case before IHO Ruff, since there is no litigation pending and the reasons for the proposed observation are distinct from the reasons for the observation in the earlier case. Petitioner also argued that issues of fact remain to be determined, in particular about the distinction between the request for observation in the case before IHO Ruff and the request for observation in the instant case. Petitioner also explained that she could not appeal the decision of IHO Ruff because she ultimately prevailed in the litigation.

A prehearing conference call was held with this Hearing Officer on March 6, 2018. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, counsel for Respondent, appeared. A prehearing conference order was issued on March 9, 2018, summarizing the rules to be applied in this hearing and identifying the issue in the case. Also, this Hearing Officer offered the parties an opportunity to submit additional authority to support their points.

Petitioner submitted such a supplemental brief on March 11, 2018, referring to legislative history and arguing that Respondent is wrongly arguing that the Special Education Student Rights Act of 2014 bars expert observations where the observations might conceivably be used in future litigation. DCPS then sought leave to provide additional materials on its position, which was granted.

On March 20, 2018, DCPS submitted a supplemental brief on the issues raised. DCPS argued that Petitioner's opposition was tardy and that the same "nucleus of fact" exists in each case, *i.e.* they involve the same request, the same school, the same advocacy agency, the same student, the same parent, and the same litigation expert. DCPS stressed that Petitioner's lawyer has retained Witness A instead of Petitioner herself. On March 22, 2018, Petitioner submitted an additional document entitled "Limited Opposition to Respondent's Supplemental Motion to Dismiss." Petitioner pointed out that Respondent has submitted no affidavits to support its position, and again argued that Respondent is improperly arguing that the Special Education Student Rights Act of 2014 bars expert observations where the observations might conceivably be used in future litigation. Petitioner also argued that this case is distinct since Respondent is now arguing that counsel cannot retain an expert on the parent's behalf. Petitioner also argued that her submissions were timely, noting that this Hearing Officer, in the conference call on March 6, 2018, was receptive to additional submissions.

On March 22, 2018, the parties conducted a brief conference call with the Hearing Officer, during which the parties agreed that the matter should be decided on the pleadings. An April 3, 2018, hearing date was therefore cancelled. On March 27, 2018, Petitioner filed a motion for summary judgment, again arguing that Witness A should be able to observe the Student per the Special Education Student Rights Act of 2014, since there are no exceptions that apply to prevent Witness A from doing so. Petitioner again noted that there is no other current litigation between the parties and suggested that no such litigation is necessarily contemplated by the parties. Petitioner also repeated similar arguments to those made in previous submissions and attached a proposed stipulation of

facts. On March 30, 2018, DCPS submitted opposition papers, arguing that there were material issues of fact to be decided. DCPS also reasserted the arguments made in previous submissions, namely that DCPS had the right to bar Witness A from the proposed observation because IHO Ruff had already heard and decided the matter, which involved the same “nucleus of fact.” On April 3, 2018, Petitioner submitted a reply, indicating that DCPS had not responded to the proposed stipulation of facts and repeating arguments that had been made previously.

On April 30, 2018, this Hearing Officer denied both motions because material issues of fact were present and ordered that a hearing be held. There was one hearing date: May 8, 2018. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-26. There were no objections. Exhibits 1-26 were admitted. Respondent moved into evidence Exhibits 1-9. There were no objections. Exhibits 1-9 were admitted. Petitioner presented as witnesses: Witness A, a psychologist; Witness B, an executive director; and Petitioner. Respondent presented one witness: Witness C, a compliance case manager. At the close of testimony, both sides presented oral closing statements. Petitioner presented a written supplemental closing statement on May 11, 2018.

#### **IV. Credibility.**

All four witnesses presented credible testimony that was consistent with documentation in the record.

#### **V. Issue**

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

Did DCPS deny the Petitioner's expert an opportunity to observe the Student's classroom in violation of the Special Education Student Rights Act, located at D.C. Code Sect. 38-2571.03(5)(A)?

## **VI. Findings of Fact**

1. The Student is an X-year-old who is eligible for services as a student who has been diagnosed with Angelman's Syndrome, Agenesis of the Corpus Callosum, asthma, allergies, microencephaly, cerebral palsy (mild), and global delays across all developmental levels. (Stipulation of parties; P-10-24-27)

2. The Student currently attends School A. (Stipulation of parties; P-10-24-27)

3. During the 2016-2017 school year, the Student attended School B. The Student was placed in a self-contained classroom with a dedicated aide. (Stipulation of parties; P-10-24-27)

4. At the end of the 2016-2017 school year, DCPS informed Petitioner that it would be removing the Student's dedicated aide and placing the Student in a separate day school. Petitioner objected, filed a Due Process Complaint, and invoked "stay-put" on August 14, 2017. The case was assigned to IHO Ruff. Following the filing of the Due Process Complaint, the Student was placed at School A as a "stay-put" placement with a dedicated aide. (Stipulation of the parties; P-10-24-27)

5. At the hearing, IHO Ruff determined the issues to be adjudicated were (1) whether DCPS had denied the Student a Free and Appropriate Public Education

("FAPE") by failing to develop an appropriate Individualized Education Program ("IEP") for the 2017-2018 School Year, because the IEP did not provide a dedicated aide, and (2) whether DCPS denied the Student a FAPE when it failed to propose an appropriate placement in the Student's Least Restrictive Environment ("LRE"). (P-3-4)

6. In an interim order, IHO Ruff denied Petitioner's request for Witness A to observe the Student at School A because IHO Ruff decided that Witness A had a potential financial interest in the litigation. (P-2-19)

7. IHO Ruff issued his HOD on November 4, 2017. He determined that DCPS had denied the Student a FAPE when DCPS proposed that the Student be placed in a more restrictive educational placement. Specifically, IHO Ruff found "there is insufficient evidence...which would advise the Hearing Officer that the Student's LRE had to be changed from the ELS classroom to a separate special education school, or that the Student could not be maintained at School A without appropriate AT devices and/or additional accommodations. While there is appreciation for the Student's learning difficulties and slow progress, it is unclear whether these difficulties are part and parcel of the student's non-verbal state and lack of appropriate tools for effective communication." (P-2-23, 38)

8. As relief, IHO Ruff ordered DCPS to complete an Assistive Technology Evaluation and an updated Psychological Evaluation to assess the Student's non-verbal functioning, and, after completing these evaluations, to convene a meeting to review and revise the Student's IEP as appropriate and determine a placement for the Student. (P-2-34)

9. Petitioner again sought to observe the Student at School B through the services of Witness A. On December 5, 2017, DCPS informed Petitioner that it would not allow Witness A to observe the Student at School B because IHO Ruff had denied Petitioner's request for Witness A to observe the Student in the prior litigation.

(Stipulation of parties; P-10-24-27)

10. DCPS completed a Psychological Evaluation of the Student on December 6, 2017. The Psychological Evaluation included three undated school-based observations by a DCPS psychologist, and the psychologist's interviews with the Student's special education teacher, speech and language pathologist, occupational therapist, paraprofessional classroom aide, and dedicated aide. DCPS completed an Assistive Technology Evaluation on December 11, 2017. The Assistive Technology Evaluation included two school-based observations and interviews with the Student's speech and language pathologist, dedicated aide, and special education teacher. (Stipulation of parties; P-10-24-27 ; P-18; P-19)

11. DCPS convened a Multidisciplinary Team Meeting ("MDT") on January 22, 2018, to review the Student's new evaluations. Witness A attended this meeting. At the meeting, DCPS proposed amending the IEP to add assistive technology services. DCPS also proposed amending the IEP to address a typographical error, and to "reflect that this student receives the correct percent of educational services outside of the general education setting." (Stipulation of the parties; P-10-24-27; Testimony of Witness A)

12. Following the meeting, DCPS provided Petitioner with an Amended IEP dated January 23, 2018. The Amended IEP included a new page that indicated that the

Student was to be placed in a separate day school. (Stipulation of parties; P-10-24-27; P-20)

13. On February 26, 2018, Witness A signed an affidavit indicating that he would not disclose information obtained during the course of any observation of the Student for the purposes of seeking to engage any client against DCPS. (P-22-1)

14. Witness A works for families and school systems and conducts observations to help him understand how a child responds to instruction. He is seeking to observe the Student to determine how the Student is being taught in the classroom. In particular, he is seeking how independent the Student is, how the Student is “receiving” instruction from the teacher or aide, and whether assistive technology is needed. Witness A’s participation in the IEP meeting on January, 2018, was impacted by DCPS’s refusal to allow him to observe the Student, because he had to base his conclusions on data compiled by others. For instance, he was not clear on how much prompting was needed for the Student, or whether the Student’s “token economy” system was appropriate.

(Testimony of Witness A)

15. Witness A is not currently in dispute with DCPS and has not accepted a contingency fee agreement in connection to the Student. His retainer is with Petitioner’s counsel. He works for a company called Company A. In order to be paid, Witness A submits work hours to the company. (Testimony of Witness A; Testimony of Witness B)

16. Witness A is open to the possibility of testifying against DCPS in future litigation regarding the Student, and also to the possibility of seeking expert witness fees from DCPS in connection to future litigation regarding the Student. (Testimony of Witness A; Testimony of Petitioner)

17. Petitioner has observed the Student personally at School A but does not feel that the observation was beneficial because she is not an educational expert.

(Testimony of Petitioner)

## VII. Conclusions of Law

This case involves the interpretation of a local law which was passed in 2014.

This law, part of the Special Education Student Rights Act of 2014, provides 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 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 free and appropriate public education for that child nor has a financial interest in the outcome or such litigation.

D.C. Code Sect. 38-2571.03(5)(A).

This law also provides that:

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.

D.C. Code Sect. 38-2571.03(5)(E).

As stated in the decision on the motion to dismiss and the motion for summary judgment, the exception to the general rule allowing for expert observations at a student's school reads: "provided, that the designee is *neither representing the parent's child in 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*." Sect. 38-

2571.03(5)(A)(ii)(emphasis added). To this Hearing Officer, the reference to “such litigation” is a reference to currently existing litigation, since a designee could not be “representing” a parent’s child “in litigation” that does not yet exist. Since it is undisputed that Witness A is a person who has professional expertise in the area of special education, and since there is no current litigation between the parties other than this case, the statute requires DCPS to allow an observation in this matter.

Another part of the statute prohibits observers from using the information from the observation for the purpose of “seeking or engaging clients in litigation against the District or the LEA.” Sect. 38-2571.03(5)(E). This language is not written as an “exception” to the general rule permitting observations but does place conditions on observers who intend to use the information from their observation for clients in future litigation. Witness A submitted an affidavit which states that Witness A has no financial interest in any current litigation *and will not use the information obtained through the observation for the purpose of seeking or engaging clients in litigation against DCPS.* However, during testimony, Witness A made clear that he did not understand what this clause meant, and indeed indicated that he might use the information used in the observation to engage clients in litigation against DCPS. Accordingly, before the observation, DCPS may require Witness A to sign a document under oath affirming that he will not use the information obtained through the observation: 1) in any subsequent special education litigation against DCPS, involving this Student or any other student; and 2) in an effort to retain additional clients so that they may be able to engage in special education litigation against DCPS.

It is noted that DCPS pointed out that the retainer agreement for this expert is between the expert's firm and Petitioner's lawyer and not between the expert and Petitioner herself. However, the largesse of Petitioner's counsel is not good cause to deny Petitioner her rights under the Special Education Student Rights Act of 2014. There is nothing in the statute forbidding third parties from paying experts to observe students on behalf of parents, who are third-party beneficiaries to any retainer agreement between the third party and the expert.

**ORDER**

For the foregoing reasons:

1. Petitioner's request for Witness A to observe the Student at the Student's school is granted;
2. Before this observation, DCPS may require Witness A to sign a document under oath affirming that he will not use the information obtained through the observation: 1) in any subsequent special education litigation against DCPS; and 2) in an effort to retain additional clients so that they can engage in special education litigation against DCPS.

Dated: May 18, 2018

*Michael Lazan*  
Michael Lazan, Esq.  
Impartial Hearing Officer

Copies to:

Petitioner's Representative: [REDACTED]  
Respondent's Representative: [REDACTED]  
OSSE Office of Specialized Education  
Office of Dispute Resolution

### **IX. Notice of Appeal Rights**

This is the final administrative decision in this matter. A party aggrieved by the findings and decision of a due process hearing may bring a civil action in any court of competent jurisdiction in accordance with 20 U.S.C. § 1415(I)(2). *See* 5-E DCMR Sect. 3031.5.

Dated: May 18, 2018

*Michael Lazan*  
Impartial Hearing Officer