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Office of the State Superintendent of Education
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Confidential

Parent on Behalf of Student, ¹ Petitioner, v. District of Columbia Public Schools Local Educational Agency (“LEA”), Respondent. Case # 2020-0025 Date Issued: May 15, 2020	HEARING OFFICER’S DETERMINATION On Petitioner’s Motion for Summary Judgment & Respondent’s Motion to Dismiss Counsel for Each Party listed in Appendix A <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

This decision or hearing officer determination (“HOD”) is 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. By agreement of the parties, this HOD is a decision on Petitioner’s Motion for Summary Judgment and Respondent’s Motion to Dismiss, considering the documents submitted with those motions and the arguments made therein. There was no formal hearing conducted.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this decision (“Student”) is age ___² and is currently assigned to a self-contained special education Communication and Education Support (“CES”) program in District of Columbia Public Schools (“DCPS”) at a DCPS school (“School A”). DCPS is Student’s local educational agency (“LEA”).

On October 28, 2019, Student’s parent (“Petitioner”) through her counsel, made a written request that an educational advocate, who is an employee of the law firm that represents Petitioner, be allowed to conduct a classroom observation. Petitioner asserts that on November 22, 2019, DCPS (“Respondent”) denied the observation request without explanation. On January 22, 2020, Petitioner’s counsel made a second written request for a classroom observation. Petitioner received no response from DCPS prior to Petitioner filing her due process complaint on January 31, 2020.

Petitioner’s through her due process seeks a finding of a denial of a free appropriate public education (“FAPE”) and asserts that by denying Petitioner’s educational advocate the requested observation, DCPS impeded Petitioner’s opportunity to participate in the decision-making process regarding provision of FAPE. Petitioner requests that the undersigned hearing officer (“Hearing Officer”) order DCPS to authorize Petitioner’s educational advocate to conduct a classroom observation of the CES program that Student attends. Petitioner also seeks compensatory education.

LEA Response to the Complaint:

DCPS filed its response to the complaint on February 13, 2020. In its response DCPS denied that it failed to provide Student a FAPE, and stated, inter alia, the following:

The law firm’s employee is not entitled to an observation under District of Columbia law or DCPS policy. Student is in a CES self-contained classroom. Student has a current May 2019 individualized education program (“IEP”) where Student is programmed for 26.5 hours of specialized instruction outside of the general education setting with speech-language (“SL”) services. Student was assigned School A since July 2019. There was no disagreement or concern about the IEP at the recent December 2019 meeting for programming and the placement. There

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

was discussion/concern about SL services. Respondent respectfully requests that Petitioner's request for relief be denied.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on February 27, 2020. The complaint was not resolved and the parties did not mutually agree to shorten the thirty (30) day resolution period. The 45-day period began on March 2, 2020, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on April 15, 2020. Petitioner's counsel filed a motion to extend the HOD due date by 30 calendar days to May 15, 2020. That motion was granted.

The Hearing Officer convened a pre-hearing conference ("PHC") on March 11, 2020, and issued a pre-hearing order ("PHO") on March 16, 2020, outlining, inter alia, the issue to be adjudicated.

ISSUE:

By agreement of the parties, the sole issue adjudicated is:

Whether DCPS denied Student a FAPE by preventing Petitioner's designee from conducting a classroom observation of Student's current CES program at School A.

RELEVANT EVIDENCE CONSIDERED:

The parties agreed to forgo a formal hearing on the record and to submit the matter for decision by the Hearing Officer based on the parties respective motions. The Hearing Officer considered and made findings of fact and conclusions of law based on the statements of fact and arguments made by Petitioner in the due process complaint, her Motion for Summary Judgment, and the supporting documents Petitioner submitted with her motion. DCPS filed a Motion to Dismiss Petitioner's due process complaint. The Hearing Officer also considered and made findings of fact and conclusions of law based the statements of fact and arguments made by Respondent in its response to the due process complaint, its Motion to Dismiss and the documents Respondent submitted with its motion. The Hearing Officer also admitted and considered the one document the Hearing Officer identified as a Hearing Officer exhibit. The documents both parties submitted and the Hearing Officer exhibit are listed in Appendix A.

SUMMARY OF DECISION:

The Hearing Officer denied DCPS' Motion to Dismiss and denied Petitioner's Motion for Summary Judgment. Petitioner held the burden of persuasion by a preponderance of the evidence to prove that DCPS' refusal to grant the requested observation denied Student a FAPE. Based upon the evidence adduced, the Hearing Officer concluded Petitioner did not sustain the burden of persuasion by a preponderance of the evidence and the Hearing Officer dismissed Petitioner's due process complaint with prejudice.

FINDINGS OF FACT:³

1. Student resides with Petitioner in the District of Columbia and attends School A. DCPS is Student's LEA.
2. Student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of Autism Spectrum Disorder ("ASD").
3. Student has an IEP developed on May 17, 2019, that prescribes 26.5 hours of specialized instruction per week and 240 minutes per month of speech-language services, both outside the general education setting.
4. Student is currently assigned to a CES program located at School A. Student has attended School A since the start of school year ("SY") 2019-2020.
5. School A scheduled thirty-day review meeting with Petitioner and her counsel to review Student's progress since attending School A. On October 21, 2019, Petitioner's counsel sent School A an email requesting that thirty-day review meeting be rescheduled to early November 2019.
6. On October 22, 2019, School A sent a return email to Petitioner's counsel, copying Petitioner, and asking whether there were any specific concerns they wanted to discuss or immediately review. The email stated that Student's seemed to be progressing and there was no pressing need to meet in November 2019. The email proposed a meeting of Student's IEP team on December 3, 2019, or December 5, 2019. By that time there would be sufficient data for the team to review and determine Student's eligibility for extended school year ("ESY") services.
7. On October 28, 2019, Petitioner's counsel responded to School A's email agreeing to meet on December 5, 2019. Petitioner's counsel also made the following request: "Also, we are requesting a classroom observation by our Education[al] Advocate, [Advocate's Name]. Please advise if [School A] will accept." The educational advocate is an employee of the law firm that represents Petitioner and is an expert in special education.
8. On November 22, 2019, School A responded to Petitioner's counsel's request, copying DCPS counsel on the email. The email stated that School A was forwarding the requested educational records to Petitioner's counsel and stated the following: "However, you will not be able to conduct an observation of the student."
9. On January 22, 2020, Petitioner's counsel sent an email to School A stating:

"Following up on our last communication, the Parent's Team is still interested in learning more about [Student's] academics. Since it has been two months since we last communicated about the classroom observation, I wanted to see if DCPS is willing to reconsider its position."

³ The findings of fact were derived from the facts detailed in Petitioner's due process complaint and the documents that Petitioner submitted with her Motion for Summary Judgment, the documents Respondent submitted with its Motion to Dismiss and the one document the Hearing Officer identified as a Hearing Officer exhibit.

10. On January 22, 2020, Petitioner's counsel made a second written request for a classroom observation.
11. On January 31, 2020, Petitioner filed a due process complaint against Respondent asserting a denial of a FAPE due to DCPS' failure to permit Parent's designee to observe Student in the school setting, citing District of Columbia's Code §38-2571.03(5)(A) .
12. DCPS responded to Petitioner's due process complaint February 13, 2020. DCPS' response stated that because Petitioner's educational advocate is an employee of the law firm that represents Petitioner, the advocate's observation is prohibited by District of Columbia law and policy.
13. On April 9, 2020, DCPS sent Petitioner's counsel an email stating that DCPS would allow Petitioner's educational advocate to observe the CES program at School A when students return to the school building and gave the name of the person to contact for a date and time that works for the advocate.
14. 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) . 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.

15. 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. (Hearing Officer's Exhibit 1)

Respondent's Motion to Dismiss:

Respondent in its motion asserts, inter alia, that the Hearing Officer should dismiss Petitioner's complaint based upon mootness because DCPS authorized Petitioner's educational advocate to conduct an observation at School A as of April 9, 2020.

Respondent cites *District of Columbia v. Nahass*, 699 F. Supp. 2d 175, 178 (D.D.C. Mar. 2010), in which the Court held that the District's prompt authorization of independent evaluations mooted a claim for failure to evaluate. Respondent asserts that in the present case, the Hearing Officer should dismiss the complaint because the issue has been mooted by DCPS providing the remedy sought by Petitioner: an observation.

Petitioner seeks three forms of relief: a finding a denial of FAPE by DCPS preventing the observation in Student's CES program at School A, (2) that DCPS be ordered to authorize Petitioner's advocate to conduct a classroom observation, and (3) compensatory education for Student.

Respondent asserts that on April 9, 2020, DCPS has provided all of the relief requested in the complaint and stated in the prehearing order that the Hearing Officer could grant, and Petitioner failed to allege facts relating to any educational harm that would warrant compensatory education. Respondent asserts that the complaint fails to provide even a scintilla of information regarding what Student should have gained in skill that Student didn't because of the alleged failure to allow the observation. Respondent urges the Hearing Officer to grant DCPS' Motion to Dismiss, dismiss Petitioner's due process complaint with prejudice, and deny Petitioner's Motion for Summary Judgment.

Petitioner Rebuttal/Response to DCPS' Motion to Dismiss

On April 20, 2020, Petitioner counsel filed a Rebuttal/Response to DCPS' Motion to Dismiss. In her rebuttal Petitioner asserts that the case is not moot as the Petitioner has not yet been afforded an opportunity to conduct an observation in the school setting nor has DCPS retracted its earlier position as set forth in its initial response to the due process complaint.

Petitioner asserts in its motion, inter alia, that this case clearly falls into the exception for "cases that are capable of repetition, yet evading review" pursuant to principles set forth in *Zearley v. Ackerman*, 116 F. Supp. 2d 109 (D.D.C. 2000), and points to the two prongs of analysis in that case: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again."

Petitioner asserts that with regard to the first prong, courts in the District of Columbia have held that issues concerning the parent's right to have a designee observe their child are of the type where the duration is too short to be fully litigated prior to the cessation or expiration. Petitioner points

to *Woodson vs. District of Columbia*, Civil Action No.: 18-1824 (Report and Recommendations issued July 15, 2019, adopted July 30, 2019) (stating that “Given the prolonged time between even her initial claim and the HOD issued in May, the Plaintiff is correct to point out that, ‘requiring a parent to begin a due process proceeding each time she requests, and is denied, an observation, would ensure that no parent would have access to information obtained from a school observation in time for the meeting which he or she requested’”).

With regard to the second prong, Petitioner asserts that it has only been since this due process complaint and the Motion for Summary Judgment was filed that DCPS has offered for the Petitioner’s designee to observe. Petitioner asserts that DCPS’ offer is disingenuous given the fact that schools are currently closed due to the COVID-19 emergency and an observation is unable to occur. Petitioner argues that there is nothing to ensure that DCPS doesn’t change its mind yet again when the opportunity to conduct the observe next presents itself.

Decision on DCPS’ Motion to Dismiss

The issue of mootness arises "when the issues presented are no longer live, or the parties lack a cognizable interest in the outcome." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395 (1980).

"A case is considered "moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome ... [a] case ... is 'not moot so long as any single claim for relief remains viable, whether that claim was the primary or secondary relief sought." *Morris v. District of Columbia*, 38 F.Supp.3d 57, 66 (D.D.C. 2014) (citation omitted). In *Woodson v. District of Columbia* (119 LRP 28316), the Court noted that it had previously determined that "[w]here a school district has provided a parent with some forms of relief, but not with all of the specific relief requested by her, her claims are not moot." *Suggs v. District of Columbia*, 679 F.Supp.2d 43, 54 (D.D.C. 2010).

Although it appears that the relief Petitioner seeks for the requested observation by the educational advocate has been provided by DCPS belatedly authorizing the observation, Petitioner also sought compensatory education. That is not a form of relief that has been provided Petitioner by DCPS. Thus, on that basis alone, Respondent’s Motion to Dismiss could be denied.

However, the doctrine of "capable of repetition yet evading review" is also an exception to mootness for cases where the party can demonstrate that "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." See *United States v. Weston*, 194 F.3d 145 (D.C. Cir. 1999).

As the Court pointed out in *Zearley v. Ackerman*, 116 F. Supp. 2d 109 (D.D.C. 2000), it is well established that violations of IDEA satisfy both prongs of this test. See, e.g., *Honig v. Doe*, 484 U.S. 305, 322-23 (1998) *Jenkins v. Squillacote*, 935 F.2d 303, 306 (D.C. Cir. 1991); *Petties v. District of Columbia*, 881 F. Supp. 63, 69 (D.D.C. 1995) (holding that DCPS' history of delayed payments in identical circumstances created a "sufficient likelihood" that the behavior would be repeated). “First, DCPS' failure to comply with its IDEA obligations is action too short to be fully

litigated prior to its cessation. See, e.g., *Jenkins*, 935 F.2d at 306 (D.C. Cir. 1991) ("there can be no doubt that a one-year placement order under the IDEA is, by its nature, too short in duration to be fully litigated prior to its expiration") (quoting *Honig*, 484 U.S. at 322-23)."

As Petitioner aptly points out in her motion, the case at bar falls into the exception for "cases that are capable of repetition, yet evading review" pursuant to principles set forth in *Zearley v. Ackerman*, 116 F. Supp. 2d 109 (D.D.C. 2000).

Petitioner counsel requested that the educational advocate observe Student's CES program at School A on October 28, 2019. On November 22, 2019, DCPS denied the request. On January 22, 2020, Petitioner's counsel reiterated the request and filed the current due process complaint on January 31, 2020. Although it is unclear from the facts whether DCPS responded to the January 22, 2020, request prior to Petitioner filing the due process complaint, it is clear from DCPS' response to the complaint that DCPS was, at least at that time, holding fast to its refusal to allow the educational advocate to observe the CES program at School A. It was not until April 9, 2020, after this case had progressed through to a pre-hearing conference and anticipation of a hearing, that DCPS apparently changed its position regarding the observation and communicated that to Petitioner's counsel.

Because of the COVID-19 emergency DCPS schools are currently closed and not slated to reopen perhaps until the start of SY 2020-2021. It is conceivable, although there is no evidence herein of the same, that DCPS' position with regard to the requested observation could change again to refusal. Such an action by DCPS would, with a dismissal of this case for mootness, put Petitioner in the position of challenging the refusal anew with another due process complaint.

The Hearing Officer, faced with the facts of this particular case, agrees with Petitioner that DCPS' refusal to authorize the observation by the educational advocate employed by the law firm representing Petitioner is the exact type of issue that is capable of repetition. If DCPS were allowed to void any and all litigation on this issue by belatedly granting the requested observation, the issue would, in effect, escape review.

Because this case falls squarely within the "capable of repetition, yet evading review" exception to the mootness doctrine, the Hearing Officer concludes that Petitioner's IDEA claims in her due process complaint are not moot and should not be dismissed on that ground. Respondent's Motion to Dismiss on the grounds of mootness is, therefore, denied.

Petitioners' Motion for Summary Judgment:

On August 13, 2019, Petitioner filed a Motion for Summary Judgment. Petitioner cites in her motion the Student Rights Act of 2014 ("the Act"): D.C. Code §38-2571.03(5)(A) which states:

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.

Petitioner further points out that D.C. Code §38-2571.03(5)(A) also requires that the school district must “not impose any conditions or restrictions on such observations” except to ensure the safety of students in the program or prevent disruption due to multiple observations being carried out at once. Petitioner asserts that D.C. Code §38- 2571.03(5)(D) provides that an observation cannot be used to engage clients in litigation and has been interpreted to mean that observations can’t be used to sign up additional clients post observation.

Petitioner asserts that it is the intent of the Act to add an additional level of procedural protection for parents of disabled children and the observation is a tool that a parent can use to develop and monitor the IEP by designating a professional in special education to assist with the process. Petitioner points out that the Act also takes into account LEA concerns by including advance notice, designations in writing, protection against disclosure of information, and duration limitation.⁴

Petitioner points out that the advocate has the requisite qualifications and specialized expertise in the area of special education as required by the Act. Additionally, Petitioner points out that the Act does not require any explanation for why an observation is requested and asserts in her motion that the Act does not prevent an attorney with expertise from a classroom observation where they are not representing the parent in litigation.

Petitioner points to two cases in support of her position:

In *Middleton v. District of Columbia*, 312 F. Supp 3d 113 (2018), the U.S. District Court held that DCPS denied the parent a FAPE when DCPS refused to allow the parent’s educational advocate a classroom observation. Petitioner asserts that the advocate in *Middleton*, was an employee of a law firm and had the same role as the advocate in the present case. Petitioner also asserts that the case also established the principle that future litigation is not a bar to an observation.

In *Woodson v. District of Columbia*, (119 LRP 28316), the U.S. District Court granted the Plaintiff’s Motion for Summary Judgement regarding the observation in which DCPS placed a condition that the advocate must agree to not use the information from the observation in any subsequent special education hearing. The Court found this condition to be unlawful.

Petitioner asserts that she requested that her educational expert be allowed to observe under D.C. Code §38-2571.03(5)(A), that DCPS denied her this right, and its response to the due process

⁴ See Council of the District of Columbia Committee on Education
July 10, 2014: <http://lims.dccouncil.us/Legislation/B20-0723>

complaint does not dispute that denial. Petitioner asserts there is, therefore, no question of material fact, and summary judgment in Petitioner's favor is appropriate.

Decision on Petitioner's Motion for Summary Judgment:

Although § 709 of the Office of the Dispute Resolution ("ODR") Standard Operating Procedures ("SOP") (2018) does not specifically address a motion for summary judgment, Petitioner cited by analogy Rule 56 of the Federal Rules of Civil Procedure. ODR has in past due process hearings considered motions for summary judgment, and by agreement of the parties, the Hearing Officer does so here.

Under Rule 56, a tribunal "shall grant summary judgment 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." FED. R. CIV. P. 56(a). The moving party "bears the initial responsibility of informing the [tribunal] of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In opposing a motion for summary judgment, the non-moving party "must designate specific facts showing that there is a genuine issue for trial." *Id.* at 324.

In addition to their pleadings, the parties have provided the Hearing Officer documents from which the Hearing Officer has adduced the findings of fact that are listed above. In addition, the Hearing Officer has taken official notice of DCPS policy and included that policy as a basis for the findings of fact and included that document in the administrative record of this proceeding. The Hearing Officer, therefore, addresses the arguments made in Petitioner's Motion for Summary Adjudication and decides the motion in the conclusions of law below.

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.⁵ 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. After consideration of Petitioner’s Motion for Summary Judgment, the arguments made therein, the evidence that was presented with Petitioner’s motion, the documents submitted with Respondent’s Motion to Dismiss, and the Hearing Officer exhibit, the Hearing Officer concludes that Petitioner’s arguments are not persuasive and that Petitioner’s Motion for Summary Judgment in her favor is denied.

The overall purpose of the IDEA is to ensure that “all children with disabilities have available to them a free 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.” 20 U.S.C. § 1400(d)(1)(A). See *Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA “aims to ensure that every child has a meaningful opportunity to benefit from public education”).

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

⁵ 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.

(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 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...⁶

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;

⁶ *Woodson, et al., v. District of Columbia*, 119 LRP 28316

(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.

(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.

The evidence demonstrates that soon after Student began attending School A, Petitioner's counsel requested an observation by "our Education[al] Advocate," an individual who, by Petitioner's admission, is an employee of the law firm that represents Petitioner.

The evidence demonstrates that School A had scheduled a thirty-day review meeting to discuss Student's progress at School A. Petitioner's counsel then requested a delay in that meeting and then later requested that the educational advocate conduct an observation. There is no indication that Petitioner personally observed Student's program at School A, which a parent is typically allowed to do, prior to this request by her counsel. There is no indication that Petitioner, or her counsel or the educational advocate ever met with School A prior to the October 28, 2019, request and the November 22, 2019, refusal by DCPS.

As Petitioner aptly points out, in *Woodson v. District of Columbia*, (119 LRP 28316) the Court granted the Plaintiff's Motion for Summary Judgment regarding an observation. DCPS placed a condition of the observation that the advocate must agree to not use the information from the observation in any subsequent special education hearing. The court found this condition to be unlawful. However, that opinion did not squarely address whether an LEA through published policy could restrict, consistent with IDEA and with the provisions of the Student Rights Act, lawyers and employees of law firms from observations when children are in the classroom.

Petitioner points out that in *Middleton v. District of Columbia*, 312 F. Supp 3d 113 (2018), the U.S. District Court held that DCPS denied a FAPE when it refused to allow the parent's educational advocate a classroom observation and in *Middleton*, the advocate was an employee of the law firm representing the parent. However, that additional factor of the advocate being an employee of the law firm was not squarely addressed in that opinion.

The evidence demonstrates that prior to the filing of the due process complaint, there were no specific concerns expressed by Petitioner's counsel in response to DCPS' inquiry as to why the observation was being requested. The attorney's email did not identify any concerns that Petitioner had about Student's performance at School A, but simply requested that the advocate observe Student's program at School A.

When Petitioner’s counsel made the requests for the advocate to observe, the advocate was, and apparently remains, employed as a non-lawyer educational advocate at the law firm that represents Petitioner. Although the 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 suggests that advocate is primarily working on behalf of, and is an agent of the law 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 non-lawyer assistances employed by the attorney.⁷

In *Middleton*, the Court noted that IDEA allows states to create additional procedural and substantive protections if they are consistent with IDEA. The Student’s Rights Act adds such additional protections. That Act sought to add additional protections for parents and also sought to balance those protections with some degree of protection for LEAs from needless litigation. DCPS’ additional policy that 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, is consistent with the protections of the Act afforded to LEAs.

Although Petitioner, in her motion, asserts that she was not involved in litigation against DCPS when the attorney requested the observation, 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 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 the attorney who made the observation request when the request was made, DCPS was justified in refusing the observation request.

Accordingly, the Hearing Officer concludes that the advocate as a non-lawyer employee of the law firm representing Petitioner is not allowed to conduct an observation absent a specific authorization from DCPS, as has now been given.

In addition, there was no specific evidence that squarely proved that Student was harmed by DCPS’ refusal of the observation, or that the refusal specifically impeded Petitioner’s opportunity to participate in the decision-making process regarding provision of FAPE. There was also no evidence presented that Student is due any form of compensatory education. Therefore, the Hearing Officer concludes there was no denial of a FAPE to Student and DCPS did not significantly impede the Petitioner’s opportunity to participate in the decision-making process regarding provision of FAPE.

⁷ 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).

ORDER:

Petitioner's Motion for Summary Judgment in her favor is hereby Denied, Petitioner's Due Process Complaint is hereby Dismissed with Prejudice, and all relief requested by Petitioner is denied.

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: May 15, 2020

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