

**COMMONWEALTH OF MASSACHUSETTS**  
**DIVISION OF ADMINISTRATIVE LAW APPEALS**  
*Bureau of Special Education Appeals*

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In Re: Student

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BSEA #1510008

Andover Public Schools

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**RULING ON MOTION OF ANDOVER PUBLIC SCHOOLS FOR PROTECTIVE  
ORDER<sup>1</sup>**

At issue in this Ruling is whether the Andover Public Schools (Andover or School) must provide Parents with documents related to students other than their child in response to Parents' discovery request.

**Background**

Student is a now 14-year-old child who is a resident of Andover. The parties agree that Student is eligible for special education on the basis of a specific learning disability that affects reading and written expression. Pursuant to an agreement negotiated by the parties, Andover funded Student's day placement at the Landmark School for the 2015-2016 school year. In late March 2016, Andover issued an IEP covering the period from March 28, 2016 to March 27, 2017. This IEP proposed changing Student's placement for the 2016-2017 school year to a substantially separate language-based classroom within Andover High School.<sup>2</sup> Parents rejected this change in placement on April 25, 2016.

On May 26, 2016 Parents filed a *Second Amendment* to their *Hearing Request*,<sup>3</sup> in which they alleged that the "program proposed by APS starting 6/30/16 is wholly inappropriate for [Student] and denies him a FAPE. Evidence at hearing will show that

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<sup>1</sup> The Hearing Officer gratefully acknowledges the contribution of BSEA Law Clerk Danielle Lubin in researching and drafting this *Ruling*.

<sup>2</sup> The IEP called for Student's continued attendance at Landmark through the end of the 2015-16 school year, with a transfer to Andover Public Schools on June 30, 2016.

<sup>3</sup> The original and first amended hearing requests, filed in June 2015, related to issues that are not pertinent to this *Ruling*.

Landmark will continue to provide [Student]...with a fully-integrated small group language-based program that he requires in order to make effective progress.”

Andover filed its *Response to Parents’ Second Amendment* on or about June 6, 2016 asserting, among other things, that the proposed IEP and placement were appropriate for Student. By agreement of the parties, the hearing was postponed to September 12, 13 and 14, 2016.

On July 5, 2016 Parents filed their first request for production of documents and first set of interrogatories with Andover. On the same day, Andover filed its *Rule IVC Notice of Objection to Parents’ discovery requests*. On July 6, 2016, Andover filed the *Motion for a Protective Order* that is the subject of this Ruling. The *Motion* seeks to preclude Parents’ discovery of documents relating to children other than Student who might be grouped with Student in Andover’s proposed placement.

On July 13, 2016 Parents filed an *Objection to the Motion* as well as a proposed *Third Amendment to their Hearing Request*<sup>4</sup> Parents filed this *Third Amendment* in response to the School’s claim that information about proposed peers was irrelevant because the *Second Amendment* contained no explicit challenge to the appropriateness of these peers. In pertinent part, the proposed *Third Amendment* stated the following:

Aspects of the IEP and placement that the Parents challenge include but may not be limited to, the IEP’s proposed teaching model, ...services, ...accommodations and modifications, ...placement, ...classroom environments, ...dates of services,...goals and benchmarks,...peer groupings, and descriptions of [Student’s] skills and alleged progress.

### **Disputed Documents**

At issue are the documents named in *Parents’ Document Request No. 10* as follows:

All IEPs, 504 Plans, individualized behavior plans, cognitive testing results and scores, grades and MCAS scores, for all students who are or are expected to be in the classes and Special Education Services and Related Services with [Student] under the disputed IEP during the 2016/2017 academic year, if [Student] were to attend APS. APS may “sanitize” said IEPs and 504 plans by redacting the names and addresses of the students and parents from said documents.

Andover objects to producing this information on two grounds: first, Andover argues that information regarding potential peers is neither relevant to the appropriateness of the

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<sup>4</sup> On July 18, 2016 the School filed an *Objection to Parents’ Third Amendment*. In an *Order* dated July 22, 2016 the *Objection* was overruled and the *Third Amendment* was allowed without changing the previously-established September 2016 hearing dates.

proposed IEP and placement for Student nor likely to lead to relevant information. Second, Andover states that disclosure of the requested information would violate state and federal statutes and regulations protecting the privacy of student information.

In their *Objection* to the School's request for a protective order, Parents argue that information about potential peers is highly relevant for determining whether, for example, the services delivered in the proposed placement will be likely to be at a level that is appropriate for Student. Additionally, Parents argue that they have requested that all documents be cleansed of personally identifiable information and propose additional constraints on further disclosure and/or dissemination of the redacted documents to address privacy concerns.

## DISCUSSION

Based on a careful review of the parties' submissions in light of applicable law, I conclude that Andover's *Motion for Protective Order* should be DENIED with respect to IEPs and 504 Plans, subject to conditions that will be listed below. The *Motion* is GRANTED with respect to individual behavior plans, grades, cognitive testing results and scores, and MCAS scores, except where these are incorporated or reported in the IEPs and 504 Plans themselves. My reasoning follows.

The BSEA *Hearing Rules* allow discovery in BSEA proceedings.<sup>5</sup> Rule VI(B)(1) of the *Hearing Rules* provides that "any party may request any other party to produce or make available for inspection or copying any documents or tangible things not privileged, not supplied previously and which are in the possession, custody, or control of the party upon whom the request is made." *Id.*

With respect to the scope of discovery, the BSEA looks for guidance to Rules 26(b)(1) of both the Massachusetts and Federal Rules of Civil Procedure. Massachusetts Rule 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...It is not ground for objection that the information sought will be inadmissible at the trial if...[it]...appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* (as amended, effective July 1, 2016).

The corresponding Federal rule allows discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues..., the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information...need not be admissible in evidence to be discoverable." Fed. R. Civ. P., Rule 26(b)(1) (as amended effective December 1, 2015)

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<sup>5</sup> See also 801 CMR 1.01(8)(a)-(i)

The BSEA, following the guidance of the courts in this matter, have interpreted the applicable discovery provisions liberally, to enable parties to thoroughly prepare for hearing or otherwise resolve the dispute. See, e.g., *In Re: Mattapoisett Public Schools*, BSEA No. 06-6153 (Crane, 2006). On the other hand, the applicable rules allow for limits on discovery when appropriate. Rule VI(C). provides for issuance of protective orders to “protect a party from undue burden, expense, delay, or as otherwise deemed appropriate by the Hearing Officer.” Rule VI(C).<sup>6</sup> Similarly, Rule 26(c) of both the Massachusetts and Federal Rules of Civil Procedure allow for protective orders “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *Id.*<sup>7</sup>

In light of the foregoing, Andover’s assertion that the documents sought by Parents are neither relevant to Parents’ claims nor calculated lead to the discovery of admissible evidence for hearing is not supported by the facts or law. The instant case concerns a dispute between Parents and Andover over whether a proposed substantially-separate language-based classroom at Andover High School will be appropriate for Student for the 2016-17 school year. Information about the instructional levels, skills, and needs of the proposed peers in that classroom, as may be gleaned from sanitized IEPs and 504 Plans is directly relevant to issues such as whether Student’s skill levels are similar to those of proposed classmates or much higher or lower, whether there are peers in the proposed grouping whose skills and/or instructional needs are close enough to Student’s to enable group instruction, and additional, similar concerns bearing on the capacity of the proposed program to meet Student’s unique needs.<sup>8</sup>

Having concluded that materials sought in discovery are directly relevant to the central issue in the case, I turn to the School’s argument that Federal and state provisions

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<sup>6</sup> See also 801 CMR 1.01(8)(a) (protective order may be issued “to protect a Party or Person from annoyance, embarrassment, oppression, or undue burden or expense.”).

<sup>7</sup> The Federal and Massachusetts Rules, though not identical apart from the quoted language, both suggest factors to be considered prior to issuing a protective order, as well as options for the scope of such an order. *Id.*

<sup>8</sup> The three cases cited by Andover on this issue are not analogous to the present case. In *MS v. Woodland Hills School District*, 56 IDELR 5 (W.D. PA, 2011), the parents requested information not about potential peers for their child but about most or all students in the entire district with autism or intellectual disabilities, regardless of whether they were potential classmates for their child, in attempt to discover district-wide policies and practices regarding children with these diagnoses. The court’s order to the district to simply provide the number of peers in the proposed classroom over several years seemed to be in response to the parents’ allegation that the student would have no peers or a changing group of peers—not that the peer grouping might be inappropriate. Further, it is unclear whether the parents in *Woodland Hills* proposed redacting the records sought. In *Hupp v. Switzerland of Ohio*, 51 IDELR 131 (S.D. OH 2008) the court determined that the peer information sought had limited relevance to the subject of the parent’s hearing request, which consisted of a challenge to the schools denial of special education eligibility for the student as well as claims of retaliation by the school against the parent; the request did not allege an inappropriate placement or peer grouping. *Id.* Finally, in *Loch v. Bd. of Education of Edwardsville Community School District No. 7*, 49 IDELR 131 (S.D. IL, 2008), the plaintiff parents explicitly sought to discover personally identifying information about other students. The court upheld a prior ruling declining to compel the school to produce unredacted documents but ordering the school to produce the documents with numbers substituted for names. *Id.*, p. 132.

governing privacy of student information precludes disclosure of the materials at issue. The Family Educational Rights and Privacy Act of 1974, 20 USC §1232 (hereafter, FERPA) conditions educational agencies' and institutions' receipt of federal funds on conforming their treatment of student information to FERPA requirements. Among other things, FERPA and its implementing regulations located at 34 CFR §99.1 *et seq.* require educational agencies to safeguard the privacy of student information. 34 CFR §99.2. FERPA and its implementing regulations explicitly prohibit educational institutions from disclosing "personally identifying information" about students without the written consent of parents or eligible students except in circumstances that are clearly delineated in the statute and regulations. 34 CFR §99.30.<sup>9</sup>

The FERPA regulations define "personally identifiable information" to include, but not be limited to:

- (a) The student's name;
- (b) The names of the student's parents or other family members;
- (c) The address of the student or student's family;
- (d) A personal identifier such as the student's Social Security number, student number, or biometric record;
- (e) Other indirect identifiers such as the student's date of birth, place of birth and mother's maiden name.
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.
- (g) Information requested by a person who the educational agency...reasonably believes knows the identity of the student to whom the education record relates.

34 CFR 99.3(a) – (g)

The Massachusetts Student Records Regulations, 603 CMR 23.00 *et seq.*, also prohibit disclosure of student records containing personally identifying information to third parties without parental and/or student consent, with certain limited exceptions. 603 CMR 23(07).

Neither FERPA nor the Massachusetts Student Records Regulations prohibits disclosure of records which do not contain personally identifiable information, because the removal of such information extinguishes the privacy concerns that these provisions are designed to protect. The FERPA regulations specifically allow disclosure of such "de-identified" information at 34 CFR 91.31(a)(1)(b)(1):

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<sup>9</sup> The FERPA requirements, with some adjustments to reflect reporting requirements under IDEA which are not relevant here, are incorporated into the Federal special education regulations at 34 CFR §300.610 – 627; 34 CFR §99.2

(b)(1) De-identified records and information: An educational agency or institution or a party that has received education records or information from education records under this part, may release the records or information without the consent required by §99.30 after the removal of all personally identifiable information provided that the educational agency or institution has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.

The state regulations do not track the language of this Federal provision; however, the state regulations define "the student record" as information "concerning a student that is organized on the basis of the student's name or in a way that such student may be individually identified..." 603 CMR 23.02. Thus, "de-identified records and information" would similarly not be considered "student records" under the state regulations.

In the instant case, Parents have requested IEPs and 504 Plans (as well as other documents) from which identifying information has been redacted. Such documents fall squarely within the definition of "de-identified information" which may be released pursuant to the pertinent federal and state regulations, subject to additional protections that are specified in the *Order* contained in this *Ruling*, below.

The School argues that redaction of the documents at issue will not prevent "linkage" to specific students as described in 34 CFR 99.3(f). The risk of such potential "linkage" is minimal in the instant case. First, the *Order* will limit disclosure of the documents themselves to persons who are not members of the school community, namely, Parents' counsel and their experts.<sup>10</sup>

Second, the argument that student privacy will be compromised by discussion of the profiles of peers at the hearing or in a publicly-available decision is not persuasive. In the context of a factually-dense hearing and decision any information about peers will be so attenuated that the risk of identifiability of such peers is minimal. Moreover, allowing the discovery sought at this point does not preclude either party from objecting

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<sup>10</sup> The District's argument that "limiting...disclosure to Parents' attorney and experts offers specious protection" is non-persuasive. The BSEA consistently has found that such limitation, together with other protections ordered, offers adequate protection and Andover has presented no evidence or legal basis to disturb these findings. See, for example, *In Re: Wellesley Public Schools (Ruling on Discovery)*, 21 MSER 39 (2015) and cases cited therein; *Touchstone Public Schools*, 21 MSER 137 (Byrne, 2015). See also *Ragusa v. Malverne Union Free School District, et al.*, 549 F.Supp.2d 288 (E.D. NY, 2008) which allowed a teacher to discover redacted student records from her employer school district to support her unlawful termination claim. Further, as Parents pointed out, Student did not attend school in Andover during 2015-16 and never has attended Andover High School, which draws its freshman class from three public middle schools in Andover, as well as, presumably, other public and private middle schools in the area. This circumstance alone reduces the likelihood of Parents or Student being able to identify an individual child from perusing a thoroughly redacted IEP or §504 Plan, even if they were allowed to view these documents, which they are not.

to introduction of testimony or documents at the hearing if that party believes a student's privacy rights will be violated.<sup>11</sup>

Based on the foregoing, the *School's Motion for a Protective Order* is DENIED with respect to the IEPs and 504 Plans. On the other hand, the *Motion for a Protective Order* is GRANTED with respect to release of the remaining documents requested, specifically, "individualized behavior plans, cognitive testing results and scores, grades and MCAS scores" of proposed peers, except insofar as such information is already contained in an IEP or 504 Plan.

As stated in *Danvers Public Schools*, BSEA No. 12-3302, the documents that would contain cognitive test results—usually evaluations—often contain highly sensitive but usually irrelevant information about the child and other family members, such as birth circumstances, health conditions, psychiatric history, custodial issues, family problems and the like. Once redacted to disclose only cognitive test results, such documents would be unlikely to yield any meaningful information that is not already provided in the IEPs and 504 Plans. Allowing the release of these documents risks intrusion without corresponding benefit. Similar concerns apply to behavior plans.

As for grades and MCAS scores, grades given to potential peers are of limited if any relevance to the issue of peer appropriateness. Especially at the high school level, there usually are multiple factors contributing to how a teacher grades students in a given subject (e.g., tests, quizzes, homework completion, long-term projects, class participation, etc.) The grade a particular student receives in, for example, history or math, has little bearing on that student's potential appropriateness as a peer for Student. MCAS scores from the prior year usually are shown on IEPs. Moreover, MCAS scores constitute the type of data that could be presented in a chart or aggregate form without diminishing their usefulness and further minimizing any linkage to a particular child.

### **Conclusion**

After a review of the relevant statutes, regulations and case law in light of the current case, I conclude that the release of sanitized IEPs and 504 Plans as requested does not contravene the provisions of FERPA, the IDEA, their implementing regulations, and corresponding state law that prohibit disclosure of personally identifiable information about students. I can find no basis to overturn longstanding BSEA policy in this regard. See, e.g., *Touchstone Public Schools*, and *In Re: Wellesley Public Schools*, *supra*, and cases cited therein. On the other hand, disclosure, in this case, of the other items requested by Parents is potentially overly intrusive without corresponding benefit and is not required of Andover at this time.

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<sup>11</sup> I note that MGL c. 71B §3 and 603 CMR 28.07(1)(c)(3) give parents of eligible students, as well as their consultants and evaluators, the right to observe any program being attended proposed for their child, provided the school takes steps to ensure confidentiality of personally identifiable information that the parent or observer might acquire incidentally.

## ORDER

Within ten (10) calendar days from the date of this *Order*, or on such other date as the parties agree, Andover shall provide counsel for Parents with the IEPs and 504 Plans specified in Parents Document Request No.10, subject to the following restrictions.

1. The documents shall be cleansed of all identifying information, including, at minimum, the name of the child, name(s) of parent(s), guardians, or other family members, address, date and place of birth, gender, race/ethnicity, any language(s) other than English that are spoken by the student and/or parents, student identification number, Social Security number, and involvement with a court or state agency. The documents also shall be cleansed of any and all information pertaining to family members other than the child, including but not limited to medical, social, educational, employment or demographic information, whether or not such information actually or potentially identifies the person at issue.
2. The redacted documents shall be provided solely to counsel for the Parents, and not to the Parents or Student, or any other person or entity except for Parents experts who may be called as witnesses at the hearing, subject to the following provisions.
  - a. No copies will be made of the redacted documents except that Parents' counsel may provide Parents' experts with copies of the documents, but shall instruct the experts that they may not further copy or distribute such copies and shall destroy or return all such copies to counsel for the Parents upon the conclusion of this case by hearing or settlement.
  - b. Parents' counsel will advise Parents' experts not to discuss the peer IEPs with Parents.
3. Prior to hearing, the parties shall discuss whether either party intends to use peer documents as exhibits at the hearing. If so, the parties shall determine whether additional protections are necessary before including such documents as hearing exhibits.
4. The redacted documents will be destroyed or returned to Andover upon conclusion of this matter. The matter will be deemed concluded after a decision has issued and the period for appeal has expired, or after conclusion of an appeal of a BSEA decision, or after final disposition of the case via settlement, withdrawal, and/or dismissal.

Nothing in the foregoing order precludes the parties from crafting a mutually-agreeable protective order that addresses the concerns of both parties.

By the Hearing Officer,

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Sara Berman

Dated: August 8, 2016