

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
SPECIAL EDUCATION APPEALS**

In Re: Student v.
Arlington Public Schools

BSEA # 1611465

Ruling on Arlington Public Schools' Motion for Protective Order

On June 24, 2016, Parents filed a Hearing Request challenging the program and placement proposed by Arlington Public Schools (Arlington) for Student, and seeking public funding of a therapeutic out of district placement that serves children with complex psychiatric needs.

Student is a thirteen year old resident of Arlington who presents with Borderline Personality Disorder based on “severe anxiety, depression, mood dysregulation, social isolation and self-harm [behaviors]” including trichotillomania and cutting. She has been found eligible to receive special education, but according to Parents, under an IEP that fails to address her significant needs and “grossly under-serves her”. Parents also claim that Arlington failed to comprehensively and appropriately evaluate Student in all suspected areas of need, and assert that Arlington denied Student eligibility until November of 2015 when it should have found her eligible earlier. In addition to an out-of-district placement, Parents seek transportation, summer services and compensatory education for Arlington’s failure to find Student eligible starting in sixth grade and for failing to offer Student an IEP that afforded her a FAPE once Arlington found her eligible in November 2015.

Arlington denies Parents’ allegations, asserting that Student is and has been making effective progress through her IEPs.

Sometime on or about July 2016, Parents served their First Request for Production of Documents on Arlington. On July 29, 2016, Arlington filed a Request for Protective Order to protect Arlington from having to produce certain information sought by Parents’ attorney through discovery. Specifically, Arlington objects to two of Parents’ discovery requests: 1) requests #2 and #7, seeking text messages “from or to any employee, consultant, agent and/or contractor of the district, referencing student from July 1, 2014 to the present”, and minutes or notes taken by any of these individuals during any meeting in which Student’s disability and or educational programming options have been discussed; and 2) request #3 seeking observation notes, staff interview notes, protocols, and score sheets related to standardized testing or observations of student since January 2014.

Arlington noted that as part of its response to the discovery requests made by Parents it will produce any notes personally identifying Student which is part of Student’s educational record, as well as test score sheets to the extent they exist, but objects to production of its messages, minutes and notes not maintained as part of the educational record, arguing that it

would be unduly burdensome for the district to produce. Arlington further objects to producing standardized testing protocols over concerns that this could infringe upon the rights of test publishers on copyrighted material.

In making these arguments, Arlington relies on *In Re: Grafton Public Schools and Logan*, BSEA #1506275, 21 MSER 131, 132-133 (2015), granting a protective order and not requiring the district to produce notes not maintained over time as part of the student record and protecting test protocols found irrelevant to the issue of students eligibility for services.

Parents filed an opposition to Arlington's Request for Protective Order on August 4, 2016. Parents argued that their Request for Production of Documents complies with the BSEA Hearing Rules¹ and further, that as the moving party, Parents carry the burden of persuasion² and are responsible to provide sufficient information to show that both the IEP and placement proposed by Arlington fails to meet Student's needs.

Parents argued that consistent with the applicable BSEA Hearing Rule, the District must "simply request information from their employees that are responsive to parents' request, i.e., text message or notes" that have not been permanently deleted or discarded, as the latter would fall outside the "district's custody or control." However, if the documents exist Arlington's employees would simply need to forward the information to the district's attorney to facilitate the response to Parents' request. As such, production of these documents is not unduly burdensome to the district. Parents further argued that production of the aforementioned documents was not irrelevant, immaterial, or unduly burdensome as the information sought was limited to the particular student subject of this Hearing for the period between 2014 and 2016.

Regarding the District's reliance on *In Re: Grafton Public Schools and Logan*, Parents argue that it is "patently unfair and inequitable to protect the discoverability of one form of messaging (text messages) over another form of communication (electronic mail)" and "there should be no greater expectation of privacy if a district employee communicates about student via a text messaging application on their phone or on an email application using that very same device." Providing educators a non-discoverable way of communication to discuss the needs of students would, according to Parents, be contrary to the spirit of the IDEA and against public policy. Parents further assert that district employees have communicated via texting and email, even with Parents, in the case at bar.

Lastly, Parents object to Arlington's refusal to turn over test protocols, noting that it is common practice at the BSEA for test protocols to be shared directly with experts, thereby alleviating any copyright concerns. Parents suggest that Arlington forward the test protocols to their private evaluator, Wendy McKernon, PH.D., ABPP-CN.

¹ See Rule VI(B) of the *Hearing Rules for Special Education Appeals*.

² *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

Legal Standard:

Consistent with 810 CMR 1.01(8)(a)³ applicable in BSEA proceedings, Rule VI(B)(1) of the Hearing Rules for Special Education Appeals 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.

The aforementioned rule is however silent in terms of the scope of discovery. In this regard, the BSEA has found guidance in Rule 26(b)(1) of the Massachusetts⁴ and Federal Rules of Civil Procedure⁵, allowing discovery of non-privileged matters relevant to the claims and/or defenses raised by the parties which *may* lead to the discovery of admissible evidence. Consistent with the Federal Rules, the parties' resources and relative access to relevant information, the burden or expense associated with the proposed discovery relative to its benefit, and the information's importance in resolving the issues must be considered.

Rule VI(C) of the *Hearing Rules for Special Education Appeals* further contemplates the need for issuance of protective orders to "protect a party from undue burden, expense, delay, or as otherwise deemed appropriate by the Hearing Officer". Protective orders may limit the "scope, method, time and place for discovery or [may delineate] provisions protecting confidential information." *Id.*

Discovery provisions have been liberally interpreted by the BSEA. See *In Re: Mattapoisett Public Schools*, BSEA No. 06-153 (Crane, 2006).

Ruling:

Upon careful consideration of the arguments advanced by the Parties, the applicable law and Parents' Hearing Request, I find that the information requested by Parents may lead to the

³ "General Policy and Protective Orders. The Parties are encouraged to engage in voluntary discovery procedures. In connection with document requests, interrogatories, depositions or other means of discovery, the Presiding Officer may make any order which justice requires to protect a Party or Person from annoyance, embarrassment, oppression, or undue burden or expense. Orders may include limitations on the method, time, place and scope of discovery and provisions for protecting the secrecy of confidential information or documents." 801 1.01(8)(a).

⁴ "Parties 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 a discovery or to the claim for defense of any other party... It is not grounds for objections that the information sought will be inadmissible at the trial if... [it]... appears reasonably calculated to the lead to the discovery of admissible evidence." Rule 26(b)(1) of the Massachusetts Rules of Civil Procedure (as amended, effective July 1, 2016).

⁵ Rule 26(b)(1) of the Federal Rules of Civil Procedure (as amended effective December 1, 2015) allows discovery of "any non-privileged matter that is relevant to any party's claim for 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."

discovery of admissible evidence which could be relevant to the issue raised by Parents in their Hearing Request. Parents are correct that the information sought is not privileged information which could otherwise be excluded, and production of the desired text messages or notes, if they exist, is not unduly burdensome on Arlington.

Federal and state laws governing maintenance of student records by school districts require that certain information be maintained in the particular student's record which in turn must be maintained in a central location in the school.

At times, information shared informally between teachers/service providers and parents/students or between school personnel may not be maintained in the ordinary course because the communication occurs via a private telephone, or computer, and is discarded or may be kept in a private device. This is particularly so with information shared via emails or text messages. While much of this information may be inconsequential, some may be relevant as to the student's academic and/or emotional functioning, and or a staff's impressions or concerns regarding the student. These snapshots may bear direct relevance to the appropriateness of a student's program and placement as they may provide insightful information as to what works or not with a student, and therefore, should be part of the student's record. However, because of the private nature of the device used for communicating, there may be a false sense of privacy regarding those communications; while the device may be private, the communications are not. As such, the communications are discoverable whether or not they are contained in the student record.

Communication regarding a student's educational performance (whether academic or social/emotional) bearing on the student's area of need and functioning, may lead to discovery of relevant information regardless of the manner of communication (email or text) and as such, is discoverable. Here, Parents are requesting that the individuals who taught or serviced Student during the past two years be asked to release available texts and or emails containing information about the disabled student. This request is not unduly burdensome. Therefore, Arlington shall request said information and if it exists, shall release it to Parents in response to their discovery request.

Turning to the issue of the test protocols, in the instant case, Parents seek release of the information directly to their expert, not to Parents. Parents note that it is common practice at the BSEA for test protocols to be shared directly with experts, thereby resolving any issues regarding infringement of copyrights. I agree, therefore, Parents' suggestion that the test protocols be shared and/or forwarded directly to Dr. McKernon is adopted.

In its Request for issuance of a Protective Order, Arlington relied on *In Re: Grafton Public Schools and Logan*, BSEA #1506275, 21 MSER 131, 132-133 (2015), case granting in part and denying in part a request for protective order. Arlington relied on the portion of the ruling in which the Hearing Officer allowed the protective order as to requests for all notes made by staff members, grade books, lesson plans and syllabi not maintained in the Student's

record and denied release of the testing protocols to parents.⁶ I note that while BSEA Decision and Rulings may provide useful guidance, they are not precedential.

Order:

Arlington's Motion for Protective Order is DENIED consistent with this Ruling.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: August 9, 2016

⁶ The Ruling addressed other requests not relevant to the instant dispute.