

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

In Re: Dorian<sup>1</sup>

BSEA #1702306

**RULING ON PARENT’S<sup>2</sup> MOTION FOR RECONSIDERATION**

Following the issuance on August 29, 2017 of the undersigned Hearing Officer’s Ruling on Waltham Public Schools’ (“the District”) Motion to Dismiss, the District’s Motion for Rulings and Sanctions, Parent’s Cross-Motion for Sanctions and Motion to Compel, and Parent’s Motion to Enter Protective Orders (“August Ruling”), on September 7, 2017 Parent filed the instant Motion for Reconsideration. In her Motion and Memorandum in support thereof, Parent requested that the Hearing Officer reverse prior rulings insofar as they relied on the conclusion that attorney-client privilege does not apply to communications between non-attorney advocates and their clients. Specifically, Parent requested reconsideration of her Motion to Quash, which was denied in a ruling dated July 20, 2017 (“July Ruling”) as to documents she asserted were protected by attorney-client privilege. For the reasons enumerated in my July and August Rulings, in addition to those below, Parent’s Motion is **DENIED**.

In support of her Motion, Parent reiterates the same arguments she made in her previous filings. She contends, essentially:

- (1) “Given the high level of expectation (*sic*) of lay-advocates, the Student presents that communications between the Student and Advocate” should be protected by attorney-client privilege.
- (2) Given the relationship between an advocate and her client(s) and the need for uninhibited discourse, all communications between a Parent, a Student, and an Advocate should be protected by attorney-client privilege.
- (3) The Bureau of Special Education Appeals (BSEA) should take into consideration *Woods v. New Jersey Dep’t of Education*, 858 F. Supp. 51 (D.N.J. 1993), “where it has been ruled that non-attorney advocate communication are protected under client privilege to provide the best possible service to the client.”

Furthermore, Parent points to state and federal rules of evidence and civil procedure, requesting that the Bureau of Special Education Appeals (BSEA) “consider the implication of vacating the Student’s right to privilege with his advocate.” Finally, she suggests in her Motion, without providing any legal support in her Memorandum, that attorney-client privilege “in matters specifically relating to non-attorney advocates representing students and parents in

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<sup>1</sup> “Dorian” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

<sup>2</sup> Although the Motion for Reconsideration was filed in Dorian’s name, I use “Parent” to refer to the claimants for consistency with prior rulings.

BSEA and Education (*sic*) related hearings is highly relevant for the Student's ability to receive fair access and appropriate to (*sic*) education and equal protection," and that "denying attorney-client privilege in matters specifically relating to non-attorney advocates in the BSEA proceedings and education related hearings is unconstitutional as applied denying the student" (*sic*). Because she provides no authority for, and fails to develop, this final argument, I need not address it.

Parent's reliance on *Woods* is misplaced. In that case, the District Court of New Jersey acknowledged that "[t]raditionally, th[e attorney-client] privilege has only applied to communications made to a licensed attorney," and that "[c]ourts addressing the question of whether a privilege extends to a person's communications with his or her lay representative have reached conflicting results."<sup>3</sup> The court cited to an earlier, unreported New Jersey case and explained "courts have considered whether the law expressly authorizes lay advocates to provide the same representation provided by licensed attorneys, whether lay advocates are subject to an extensive system of regulation requiring individual application, proof of expertise, compliance with ethical standards, and direct control by the adjudicative tribunal, and whether the purposes of the privilege are fully applicable to this kind of representation."<sup>4</sup> The *Woods* court noted that a New Jersey Court Rule specifically authorized lay advocacy before the state Office of Administrative Law (OAL)<sup>5</sup> and that "full and frank communications" between lay advocates and clients were no less necessary than "uninhibited discourse" between attorneys and clients.<sup>6</sup> Although Parent failed to cite to relevant authority in the instant matter, these two factors apply in Massachusetts as well. There is one significant difference, however, that Parent overlooked.

In reaching its conclusion that attorney-client privilege could be extended to the matter before it, the *Woods* court relied, in part, on a provision of the New Jersey administrative code applicable to lay advocates representing parents or children in special education proceedings. This code "provides that an application must be made, the OAL has control over the lay advocate and the lay advocate must follow the [New Jersey] Rules of Professional Conduct" that apply to attorneys.<sup>7</sup> Unlike New Jersey, Massachusetts has no system for regulating lay advocates in special education proceedings. Potential advocates do not apply for any kind of license, endorsement, or certification. They need not demonstrate any training or expertise. Nothing requires that they comply with ethical rules governing attorneys, and they are not in any way controlled by an adjudicative tribunal. In fact, nothing in Massachusetts law or administrative rules prevents any individual from holding herself out as qualified to represent a child or parents before the BSEA.

Finally, I address Parent's contention that my previous rulings somehow vacate a right Dorian has to privilege with his advocate. Notwithstanding the fact that privilege is a common law principle, something must be established in order to be vacated. The BSEA has never recognized a client-lay advocate privilege. We do not do so now.

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<sup>3</sup> *Woods v. New Jersey Dep't of Educ.*, 858 F. Supp. 51, 54 (D N.J. 1993),

<sup>4</sup> *Id.* at 54-55 (citing *Vernitron Medical Products, Inc. v. Baxter Laboratories, Inc.*, 186 U.S.P.Q. 424, 1975 WL 21161 (D.N.J. 1975)).

<sup>5</sup> The Office of Administrative Law, or OAL, is the administrative body that hears and decides special education appeals in New Jersey. See *id.* at 52.

<sup>6</sup> *Id.* at 55.

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

For the reasons above, as well as those explained in my July and August Rulings in this matter, Parent's Motion is hereby DENIED.

By the Hearing Officer,

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Amy Reichbach  
Dated: September 8, 2017