

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

In re: Ollie¹

BSEA #2007894

RULING ON MULTIPLE MOTIONS

This matter comes before the Hearing Officer on various motions filed by the parties between May 6 and May 11, 2020. Arguments regarding each motion were heard during a Virtual Motion Hearing via Zoom on May 19, 2020. For the reasons set forth below, Parent's *Motion for an Independent and Impartial Law Firm to Collect and Produce Discovery Student File Documents*, Parent's *Request for Hearing Officer to Prevent Futher (sic) Violation of Parent Rights to Comprehensive Student File/and Freedom of Speech*, and Springfield's *Motion that Parent Keep the Information About This Matter Confidential* are hereby DENIED. Springfield's *Motion for Protective Order and Request for Order Compelling Complainant to Destroy Inadvertent (sic) Disclosed Documents* are hereby ALLOWED.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On February 24, 2020, Parent filed a *Hearing Request* alleging multiple violations by Springfield Public Schools (Springfield or the District) against herself and her son, Ollie. After much discussion, on March 24, 2020, I issued an Order outlining the issues for Hearing. On April 10, 2020, after hearing arguments from both parties, I allowed the District's *Motion to Postpone* for good cause, for reasons discussed therein. The Hearing was scheduled to begin June 29, 2020. Additional *Motions* and *Requests* were filed, and these were addressed, following a telephone *Motion Session*, in an Order dated May 5, 2020.

On May 4, 2020, Parent filed a *Motion to Amend the Hearing Request* to allege that the Individualized Education Program (IEP) proposed for Ollie, dated 4/16/20 to 4/15/21, denies him a free appropriate public education (FAPE). The District filed its *Response* on May 8, 2020. Although Parent filed a *Response to District's Response to Parents (sic) Hearing Request* on May 11, 2020, I advised the parties that I would not consider this *Response* or accept further pleadings in this vein.²

¹ "Ollie" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

² Since the filing of the motions and requests addressed in this *Ruling*, the following additional motions and requests have been filed, some of which will be addressed during the next Virtual Pre-Hearing Conference on June 3, 2020:

- (1) On April 24, 2020, Parent filed a *List of Witnesses* and wrote the word "subpoena" next to the names of witnesses she wished to have come before the Hearing Officer. On April 27, 2020 the District filed a *Motion to Exclude Parent Witnesses on the Basis of Relevancy*, which it revised and resubmitted April 28, 2020. I deferred consideration of Springfield's *Motion*, as Parent's *List of Witnesses* was not in accordance with the procedure for requesting subpoenas outlined in BSEA *Hearing Rule VII*. On May 25, Parent updated her *List of Witnesses to be Subpoenaed*. She also requested that subpoenas be issued for three other individuals, but again did not specify the date or location for the witness to appear.

In addition to the motions discussed in detail, below, on May 12, 2020, Parent filed a document entitled *Request for Hearing Officer to Prevent Futher (sic) Violation of Parent Rights to Comprehensive Student File/ and Freedom of Speech*. Although this document contains allegations regarding Parent’s difficulty obtaining Ollie’s file, Springfield “stalking” her social medial, and other issues, it does not contain any request for relief. As such, it is DENIED, and Parent is instructed (again) to refrain from filing letters that are more aptly characterized as complaints about the opposing party than motions.

II. DISCUSSION

A. Motion for Impartial Law Firm

On May 6, 2020, Parent filed both an initial and an amended *Request for an Independent and Impartial Law Firm to Collect and Produce Discovery Student File Documents* “to ensure Springfield stops purposefully withholding documentation from student file and further discovery being requested in this matter.” The District filed its *Opposition* on May 11, 2020, and the parties offered further arguments during the Motion Session on May 19, 2020.

i. *Legal Standard*

The decision whether to disqualify an attorney or law firm “ordinarily turns on the peculiar factual situation of the case.”³ “A party generally enjoys the right to the counsel of his or her choice,”⁴ and courts have made clear that the relationship between a lawyer and client is one

-
- (2) On May 14, 2020, less than one week before the *Motion Session*, Parent filed a letter entitled *District Continued Purposeful Denial of Comprehensive Student File*.
 - (3) On May 20, 2020 and May 26, 2020 Parent filed a *Motion to Compel* requesting sanctions for the District’s failure to provide all inter office emails between staff in a timely manner
 - (4) On May 21, 2020, the District requested a *Subpoena Duces Tecum* for Ollie’s employment records. Ms. McGovern, an advocate who is “standing in” for Ollie, requested that she be permitted to obtain these records instead.
 - (5) On May 25, 2020, Parent filed a *Motion to Change Venue*.
 - (6) On May 25, Parent filed two *Subpoena for Personnel Records*, once again failing to comply with BSEA *Hearing Rules* for subpoena requests.
 - (7) On May 26, 2020, Parent filed a *Motion for Reconsideration IEP Audio Tapes*; a *Request for Protective Order*; and *Parent’s First Request for Expedited Discovery Production of Documents and Interrogatories*.
 - (8) On May 26, 2020, Springfield filed a *Response* to Parent’s requests for documents and interrogatories and her request for a protective order, seeking a protective order of its own and denial of Parent’s request for one.
 - (9) On May 27, 2020, Parent filed a *Response to District’s Protective Order Request/Concern for Personal Safety from District* and a Corrected version of the same *Response*. She also sent an email to Springfield’s Attorney regarding her accommodations, copied to the Hearing Officer in disregard of a prior Order that the Hearing Officer only be contacted with requests for BSEA action.

³ *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981).

⁴ *Steinert v. Steinert*, 73 Mass. App. Ct. 287, 288 (2008).

that should not be lightly interrupted.⁵ Therefore, the burden rests on the party seeking disqualification to establish the need to interfere with this relationship.⁶

Although circumstances exist where it may be an appropriate measure, the authority to disqualify legal counsel “should be exercised sparingly and only in the most exceptional circumstances.”⁷ Courts have recognized that a party may have standing to move for disqualification of opposing counsel where a fiduciary duty ran from that counsel to the moving party (i.e. a current or former client),⁸ as, for example, confidences may exist from the first representation that would be relevant to the second. However, even in these circumstances, “disqualification is a drastic measure which courts should hesitate to impose except when absolutely necessary.”⁹ Furthermore, courts are reluctant to disqualify an attorney for alleged ethical violations when the moving party is using disqualification as a tactical weapon.¹⁰

Legal counsel may also be disqualified where counsel is likely to participate as a witness, “and could give testimony on behalf of his client on other than formal or uncontested matters.”¹¹ In such a case, the court is instructed to look to whether the attorney is likely to “withhold crucial testimony from his client because he prefers to continue as counsel,” to determine whether “continued participation as counsel taints the legal system or the trial of the cause before it.”¹²

ii. Application of Legal Standard

For Parent to prevail on this *Motion*, she must demonstrate that the facts of this case merit disqualification of Springfield’s chosen legal counsel. Parent’s chief complaint is Springfield’s compliance with her discovery requests. As counsel for the District explained, Springfield’s slight delay in producing evidence is related to school closures in connection with the COVID-19 pandemic and the District’s compliance with ADA accommodations requested by Parent.¹³ Parent has not alleged, much less established, the existence of a fiduciary duty, ethical violations, or that Springfield’s counsel is likely to participate as a witness in the proceedings. Instead, she appears to be seeking disqualification as a tactical weapon.¹⁴

⁵ *Adoption of Erica*, 426 Mass. 55, 58 (1997); see *Mailer v. Mailer*, 390 Mass. 371, 373 (1983).

⁶ See *Steinert v. Steinert*, 73 Mass. App. Ct. 287, 288 (2008).

⁷ *Masiello v. Perini Corp.*, 394 Mass. 842, 850 (1985).

⁸ See, e.g., *Great Lakes Const., Inc. v. Burman*, 114 Cal. Rptr. 3d 301, 307-08 (2010) (“A ‘standing’ requirement is implicit in disqualification motions. Generally, before the disqualification of an attorney is proper, the complaining party must have or must have had an attorney-client relationship with that attorney”); *Strasbourg Pearson Tulcin Wolff Inc. v. Wiz Tech., Inc.*, 82 Ca. Rptr. 2d 326, 329 (1999). Cf. Mass. R. Prof. C. 1.9(a) (“[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation”).

⁹ *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir.1982).

¹⁰ See *Serody v. Serody*, 19 Mass. App. Ct. 411, 414 (1985).

¹¹ *Brynes v. Jamitowski*, 29 Mass. App. Ct. 107, 109 (1990).

¹² *Borman v. Borman*, 378 Mass. 775, 787 (1979); see *Jamitowski*, 29 Mass. App. Ct. at 110 (*Borman* “sounds a cautionary note about judicial disqualification of counsel”).

¹³ Moreover, as I explained to Parent during the Motion Session that took place on May 19, 2020, the appropriate remedy for discovery violations is a motion to compel and/or a motion for sanctions, not an attempt to disqualify legal counsel.

¹⁴ See *Serody*, 19 Mass. App. Ct. at 414.

For these reasons, Parent’s *Motion for an Independent and Impartial Law Firm to Collect and Produce Discovery Student File Documents* is DENIED.

B. Request for Directive to Parent Regarding Confidentiality

On May 11, 2020, the District filed a letter requesting that the Bureau of Special Education Appeals (BSEA) provide to Parent a “directive around keeping information about this matter confidential,” alleging that Parent had shared information regarding confidential proceedings on a public forum. Specifically, Springfield appears to object to information regarding the city’s expenditures in this case. The same day, Parent filed a *Response* in opposition to this request, asserting that Springfield was “stalking [her] personal Facebook for reasons to file things against” her, and that her post revealed nothing confidential. The parties offered further arguments during the Motion Session on May 19, 2020.

i. *Legal Standard for BSEA Jurisdiction*

Among other things, the IDEA, 20 U.S.C. § 1400 *et seq.* provides parents with a formal complaint process with respect to “any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.”¹⁵ In Massachusetts the BSEA is the administrative agency before which any impartial due process hearing regarding these issues takes place. The BSEA is an agency of limited jurisdiction; it has jurisdiction over requests for hearing filed by:

a parent or school district . . . on any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities. A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 . . .¹⁶

BSEA jurisdiction extends to IDEA-based claims as well.¹⁷ The First Circuit held, in a case addressing exhaustion of claims filed under 42 U.S.C. § 1983, that the BSEA is not deprived of jurisdiction by the fact that certain claims are not based directly upon violations of the IDEA, nor by the fact that the relief a complainant seeks cannot be awarded by the agency.¹⁸ The IDEA’s exhaustion requirement ensures that the BSEA is able to develop a factual record and apply its “specialized knowledge” in an IDEA-based claim.¹⁹ Whether a claim is IDEA-based turns on whether the underlying claim is one of violation of the IDEA; a claim is not IDEA-based, and therefore not properly before the BSEA, where a student solely seeks money damages for tort like damages not subsumed in a federal claim, or “where there are no factual

¹⁵ 20 U.S.C. § 1415(b)(6).

¹⁶ 603 CMR 28.08(3)(a).

¹⁷ The IDEA’s exhaustion requirement is not limited to IDEA claims, as it “applies even when the suit is brought pursuant to a different statute so long as the party is seeking relief that is available under subchapter II of IDEA.” *Rose v. Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000).

¹⁸ See *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 59, 64 (1st Cir. 2002).

¹⁹ *Id.* at 60.

allegations to indicate that a dispute exists concerning the individual student's eligibility under the IDEA or Section 504 or the discharge of the School's procedural and substantive responsibilities under the IDEA or Section 504.”²⁰

ii. Application of Legal Standard

Although BSEA proceedings are confidential and closed to the public unless Parent request otherwise,²¹ a claim that Parent has shared information regarding a BSEA case is neither within the jurisdiction of the BSEA as set forth above, nor is it IDEA-based.²² As such, the District's request is DENIED.

C. Motion for Protective Order

On May 11, 2020, Springfield filed a *Motion for a Protective Order* regarding several categories of information Parent requested through discovery. Specifically, Parent requested (1) Budget and expenditure knowledge; (2) Lawsuit and settlement information (including how much SPS has paid out in legal settlement); (3) Office of Civil Rights (OCR) complaints; and (4) Cell phone/texting records from about September 2018-present. Parent later limited her fourth request to “text messages of the Springfield school districts (*sic*) business cell phones pertaining to [Ollie and herself] for dates between about September 2018 to present.” The District agreed to produce the fourth category of information, as limited, but objected to the remaining discovery requests as irrelevant, unreliable, burdensome, and costly, and argued that said requests would not provide evidence or information probative of the issues in this matter. The parties offered further arguments during the Motion Session on May 19, 2020.

i. Legal Standard

Although BSEA Hearing Officers are not bound by the rules of evidence applicable to courts, we do receive and consider only evidence that is “relevant and reliable,”²³ and we are authorized to issue Protective Orders “to protect a party from undue burden, expense, delay, or as otherwise deemed appropriate.”²⁴

ii. Application of Legal Standard

As explained to the parties during the *Motion Session* on May 19, 2020, discovery requests in BSEA proceedings generally address information of direct relevance to the student and his educational programming. There is no question that production of the information listed in the first three categories of Springfield's *Motion* would be burdensome, and

²⁰ *In Re Xylia*, (BSEA #12-0781, 18 MSER 373, 376 (Byrne 2012)); see *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (2006); *Frazier*, 276 F.3d at 64.

²¹ BSEA Hearing Rule IX(A).

²² See *Frazier*, 276 F.3d at 60.

²³ BSEA Hearing Rule IX(C).

²⁴ BSEA Hearing Rule V(C).

Parent has not established that it is relevant to the claims that remain before me, or even that it is likely to lead to the discovery of relevant evidence.²⁵

As such, the District's *Motion for a Protective Order* is hereby ALLOWED.

D. Motion to Compel Parent to Destroy Inadvertent (*sic*) Disclosed Documents

On May 11, 2020, the District filed a *Request for Order Compelling Complainant to Destroy Inadvertent (sic) Disclosed Documents*, asserting that it had realized after the fact that it had mistakenly produced to Parent irrelevant documents and documents containing other students' private information on May 4, 2020. On May 9, 2020, the District sent a letter to Parent explaining that pages identified as Bates Stamped Springfield School District (SPS) 370-484 and SPS 517 – 544, and about 100 pages of an SPS employee's Outlook inbox, a PRS black form for a Springfield student, and special education documents relating to another student, were inadvertently disclosed. Springfield informed Parent it did not know how those documents were included in the discovery and requested that Parent either return those documents to the District or destroy them and let the District know they had been destroyed. On May 11, 2020, Parent filed a *Response* to the District's request, contending that it was she who noticed the inadvertent discovery and brought it to the District's attention on May 8, 2020. The parties offered further arguments during the Motion Session on May 19, 2020, and Parent was cautioned not to share any of the information she had received unless and until such action was permitted by the instant *Ruling*.

i. *Legal Standard for Protected Information Produced in Discovery Inadvertently*

Although the BSEA is not bound to follow the *Massachusetts* or *Federal Rules of Civil Procedure*, these rules provide helpful guidance for this situation. Pursuant to *F.R.C.P.* 26(b)(5)(B):

[T]he party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

I bear this in mind as I examine the three sections of material that the District claims to have inadvertently disclosed.

ii. *Application of Legal Standard*

²⁵ This information appears to be more relevant to some claims Parent initially filed in a previous matter, which were dismissed for lack of BSEA jurisdiction. As I explained during the *Motion Session*, this information might be obtained more appropriately by means of a request pursuant to the Public Records Act.

A. Bates Stamped SPS 370 – 484

The information in this section of materials consists of PRS forms for students other than Ollie. After some discussion, Parent agreed to destroy them, as they are not relevant to this matter and contain privileged information.

B. Bates Stamped SPS 517 – 544

Although Parent was reluctant to destroy the information contained in this section, which includes an IEP for another student and nothing regarding Ollie, the District acted properly upon discovering it had inadvertently disclosed to Parent information that is both irrelevant and privileged by notifying her and requesting that she return or destroy it.

C. 100 Pages of a Springfield Employee’s Outlook Inbox

These documents contain students’ first and last names and their student identification (ID) numbers. Parent asserts that she has the right to retain the documents in this section since Ollie’s name and ID number appear in these documents along with those of other students. The District acted appropriately upon discovering that it had inadvertently disclosed this information by notifying Parent and requesting its return.

D. Next Steps

As I have determined that all of this privileged information was disclosed inadvertently, and that Springfield took the appropriate steps, the District is entitled to its requested Order. The District’s *Request for Order Compelling Complainant to Destroy Inadvertent (sic) Disclosed Documents* is hereby ALLOWED. Parent must either return all of these documents to the District or destroy them. She must also send a letter to the District and the BSEA affirming that she has done so, and that she has not shared any of the information with anyone.

CONCLUSION

Upon consideration of the multiple motions before me, and the arguments of the parties, I conclude the following:

Parent’s *Motion for an Independent and Impartial Law Firm to Collect and Produce Discovery Student File Documents* is DENIED.

Springfield’s *Request for Directive to Parent Regarding Confidentiality* is DENIED.

Springfield’s *Motion for Protective Order* is ALLOWED.

Springfield's *Request for Order Compelling Complainant to Destroy Inadvertent (sic) Disclosed Documents* is ALLOWED.

ORDER

Parent is hereby directed to either return or destroy all inadvertently disclosed documents in her possession and report their destruction to the District, affirming that they have not been shared with anyone, no later than close of business on May 29, 2020. She is also directed to notify the BSEA on June 1, 2020 that this has occurred.

Given the sheer volume of filings in this matter, unless it is an emergency regarding health and safety, all motions, requests, and letters in this matter shall only be filed on Mondays. No filings will be accepted on any other days, and anything that is sent outside of these parameters will not be considered by the Hearing Officer.

A further Virtual Pre-Hearing Conference will take place via Zoom at 11:00 AM on June 3, 2020.

The matter will proceed to Hearing on June 29 and 30 and July 13, 16, and 17, 2020.

By the Hearing Officer,²⁶

/s/

Amy Reichbach

Date: May 28, 2020

²⁶ The Hearing Officer acknowledges the diligent assistance of legal intern Alison Sexson in the preparation of this Ruling.