

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

In re: Ollie<sup>1</sup>

BSEA #2007894

**SECOND RULING ON MULTIPLE MOTIONS**

This matter comes before the Hearing Officer on various motions filed by the parties between May 14, 2020 and June 1, 2020. Arguments regarding these motions (13 in total) were heard during a Virtual Motion Hearing via Zoom on June 3, 2020. This Ruling specifically address Parent’s *Motion to Amend Hearing Issues*; Parent’s *Motion for Reconsideration IEP Audio Tapes (sic) (Motion to Reconsider)*; and multiple motions regarding discovery and subpoenas: Parent’s *First Request for Expedited Discovery Production of Documents and Interrogatories (Motion for Expedited Discovery)*; Parent’s two *Motions to Compel*; Parent’s *Motion for a Protective Order*; Parent’s *List of Witnesses Updated*; Springfield’s *Request for Protective Order*; Springfield’s *Motion to Quash Subpoenas for Personnel Records*; and Springfield’s *Motion to Quash Subpoena for Regina Tate, Esq., and Other Witnesses*.

For the reasons set forth below, Parent’s *Motion to Amend Hearing Issues* is ALLOWED and Parent’s *Motion to Reconsider* is DENIED. Parent’s *Motion for Expedited Discovery*, Parent’s *Motion to Compel*, and Parent’s *Motion for a Protective Order* are DENIED, as is Springfield’s *Request for Protective Order*. Springfield’s *Motion to Quash Subpoenas for Personnel Records* is ALLOWED, with one limited exception, and its *Motion to Quash Subpoenas for Regina Tate, Esq. and Other Witnesses* is ALLOWED IN PART and DENIED IN PART.

I. BRIEF FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On May 28, 2020, I issued a *Ruling on Multiple Motions* which, together with my *Ruling on Springfield Public Schools’ Motion to Postpone*, issued April 10, 2020, summarizes the factual background and procedural history of this case. On June 8, 2020 Springfield filed a *Second Motion to Postpone*, which I denied on June 11, 2020.

II. DISCUSSION

A. Motion to Amend

Parent filed a *Motion to Amend Hearing Issues* on June 1, 2020, seeking to include a claim that Springfield violated regulations relating to her request for an Independent Educational Evaluation (IEE) on or about April 22, 2019. The District filed an *Opposition* the same day, asserting that the Hearing already involved too many issues unrelated to this one, and as such,

---

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

the requested amendment would be prejudicial to Springfield. Furthermore, Springfield had recently agreed to fund an IEE, rendering any alleged violation moot.

i. *Legal Standard*

Pursuant to BSEA *Hearing Rule I(G)*, the moving party may amend the hearing request without the opposing party's written consent if the Hearing Officer grants permission. Such permission can only be given if the request is made more than five days before the hearing.

ii. *Application of Legal Standard*

At the time Parent filed her *Motion*, on June 1, 2020, the first day of the hearing was still four weeks away. Her new claim accrued within time period addressed by her initial *Hearing Request*, and it alleges a procedural violation; for these reasons, efficiency favors allowing the amendment. Moreover, as procedural violations during this time period are already before me, and because the Hearing is still one month away, prejudice to the District is minimal. Whether the claim is, in fact, moot, is a factual determination to be made upon consideration of the evidence. Parent's *Motion to Amend Hearing Issues* is ALLOWED. Consistent with my Order dated May 22, 2020 and this Ruling, the issues for Hearing are as follows:

- (1) Whether the IEPs proposed by Springfield for the following periods and not fully accepted by Parent/Student (including transition services), and any amendments thereto, were and/or are reasonably calculated to provide Ollie with a FAPE;
  - a. 5/10/18 – 4/10/19
  - b. 5/31/19 – 4/23/20
  - c. 9/25/19 – 4/22/20
  - d. 4/16/20 – 4/15/20
  
- (2) Whether any of the following accepted, expired IEPs were implemented fully, and if not, what is the appropriate remedy;
  - a. so much of the IEP dated 6/15/17 – 5/1/18 that pertains to the period beginning 2/24/18
  - b. 10/3/18 – 4/10/19
  
- (3) Whether Springfield has committed procedural errors in connection with a meeting in or about September 2018, and/or in connection with a request for an Independent Educational Evaluation made on or about April 22, 2019, that amounted to a deprivation of a FAPE because they impeded Ollie's right to a FAPE; significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of FAPE to Ollie; or caused a deprivation of educational benefits;

- (4) Whether any of the District’s actions between February 24, 2018 and February 24, 2020, described by Parent as discrimination, retaliation, threat, and abuse of power, impeded Parent’s or Ollie’s ability to participate in IEP meetings.

B. Motion to Reconsider

During a virtual Motion Session on May 19, 2020, Parent indicated that she wished to offer into evidence audiotapes of at least one of Ollie’s Team meetings. I stated that I would not accept such tapes, because it is difficult to discern the speaker on an audiotape, and because those present at the meeting(s) would be available to give live, sworn testimony concerning what had transpired. On May 26, 2020, Parent filed her *Motion to Reconsider*, arguing that the tapes were necessary for her to respond to the District’s Discovery Requests and Interrogatories. Springfield did not file a written response to this *Motion*.

Pursuant to BSEA *Hearing Rule IX(C)*, Hearing Officers have the discretion to admit evidence “only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.” During the pandemic, BSEA hearings are conducted by video conference, which presents additional challenges for relying on audiotapes as evidence. Parent has not persuaded me otherwise.

Parent’s *Motion to Reconsider* is hereby DENIED.

C. Discovery

The parties filed multiple motions involving discovery, which I have broken down into several categories below.

i. *Timing and Completeness*

On May 20, 2020, Parent filed a *Motion to Compel*, expressing concern that the District was not producing the documents she had requested in a timely manner. On May 26, 2020 Parent filed a second *Motion to Compel*, arguing that the District was still withholding documents. She requested that I sanction Springfield for its actions and inactions. On May 27, 2020, the District responded with an *Opposition to Complainant’s Motion to Compel* in which it detailed numerous steps Springfield attorneys and personnel had taken to review over 19,000 pages of emails before producing 4,590 pages responsive to Parent’s discovery requests.

In the meantime, on May 26, 2020, Parent filed a *Motion for Expedited Discovery*, requesting that the District be instructed to answer her discovery requests and interrogatories by June 16, 2020 to allow her “time to review and submit evidence binder in a timely manner.” On May 27, 2020, Springfield responded with a *Motion for Protective Order*, asserting that Parent had simply made minor edits to the District’s discovery requests and sent them back to Springfield as her own, in an attempt to harass the District.

a. *Legal Standards*

BSEA *Hearing Rule V* governs discovery in the context of BSEA hearings. Pursuant to Rule V(B), discovery requests may occur in the form of interrogatories, written requests for records, or depositions. The party upon whom the request is served has 30 days to respond, unless a shorter or longer period of time is established by the Hearing Officer.<sup>2</sup> The party upon whom a request for discovery is served may, within ten (10) calendar days of service of the request, file with the Hearing Officer objections to the request or move for a protective order.<sup>3</sup>

Although the BSEA is not bound by the *Federal Rules of Civil Procedure* or their state counterpart, these rules provide helpful guidance in this context. Fed. R. Civ. P. 37(a)(1) permits a party, upon notice to other parties and all affected persons, to move for an order compelling discovery.<sup>4</sup>

b. *Application of Legal Standards Requires Denial of All Motions*

This matter was filed in February, and the parties have engaged in ongoing discovery, which has required significant time on the part of both parties – and the BSEA. Springfield, through its attorneys, attested during the Motion Session on June 3, 2020, that it has conducted a thorough search for documents responsive to Parent’s request and produced them to her. As I explained then, and affirm now, to the extent Parent has in her possession relevant emails that the District failed to produce, she may submit them as evidence and question witnesses about them. Nothing prevents Parent from making additional discovery requests, but similarly, nothing requires the District to respond immediately.

For these reasons, Parent’s *Motion to Compel* and *Second Motion to Compel* are hereby DENIED. Parent’s *Motion for Expedited Discovery* and Springfield’s *Motion for Protective Order* are also DENIED. The District is expected to respond to Parent’s new discovery request within 30 calendar days of its receipt, in accordance with BSEA *Hearing Rule V*(B).

ii. *Work Product Protection*

On May 26, 2020, Parent filed a *Request for Protective Order* and a *Corrected Request for Protective Order*, arguing that a *pro se* party is entitled to the protections of the work product doctrine because “the privilege is intended for the protection of litigants, not just attorneys.” On May 27, 2020, as part of its response to several motions filed by Parent, the District asserted that Parent may not claim work product protection in response to its discovery requests because she is not an attorney, the requested documents were not personally created in the course of litigation, and Parent had failed to specify which requests she was objecting to or the reason for said objections.

a. *Legal Standards*

---

<sup>2</sup> BSEA *Hearing Rule V*(B).

<sup>3</sup> See BSEA *Hearing Rule V*(C),

<sup>4</sup> Such a motion under Fed. R. Civ. P. 37(a)(1) “must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”

Parent presumably meant to refer to work product protection under Mass. R. Civ. P. 26(b)(3) and Fed. R. Civ. P. 26(b)(3)(a), which generally protect from discovery documents and other tangible things prepared in anticipation of litigation.<sup>5</sup> This protection is not absolute, as it may be overcome by a showing of “substantial need” of materials that cannot be obtained, without undue hardship, by other means.<sup>6</sup>

Several years ago, in a Ruling on Parent’s *Motion to Quash and Vacate Subpoenas* and Waltham Public Schools’ *Motion to Compel*, in *In Re: Dorian* (Reichbach 2017), I held that the work product doctrine applies to materials prepared by non-attorney advocates. As I explained, the language of Mass R. Civ. P. 26(b)(3) protects documents “prepared in anticipation of litigation...by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer, or agent).”<sup>7</sup> This broad language, as well as that of Fed. R. Civ. P. 26(b)(3)(A), suggests that the work product doctrine applies to documents composed in anticipation of litigation by any individual— attorney or non-attorney—acting as a party’s representative in the matter.<sup>8</sup> As I wrote in *In Re: Dorian*, “[t]his interpretation of work product protection in the context of BSEA proceedings serves the important policy goals underlying the provision; to exclude advocates could have a chilling effect on communication among parents, their experts, and advocates; and hamper advocates’ ability to communicate in writing with their clients and maintain records of their work.”

---

<sup>5</sup> See Fed. R. Civ. P. 26(b)(3)(A) (“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative. . . .”); Mass. R. Civ. P. 26(b)(3) (“Subject to the provisions [regarding experts], a party may obtain discovery of documents and tangible things otherwise discoverable [as relevant] and prepared in anticipation or for trial by or for another person or by or for that other party’s representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case, and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means”).

<sup>6</sup> See Fed. R. Civ. P. 26(b)(3)(A)(ii) (allowing for discovery of otherwise discoverable documents and tangible things prepared in anticipation of litigation if “the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means”); Mass. R. Civ. P. 26(b)(3) (permitting discovery of otherwise discoverable documents and tangible things prepared in anticipation of litigation only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case, and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means”). Even where this standard has been met and the protection abrogated, “mental impressions, conclusion, opinion, or legal theories” are protected from disclosure. See Fed. R. Civ. P. 26(b)(3)(B) (“If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation”); Mass. R. Civ. P. 26(b)(3) (“In ordering the discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation”).

<sup>7</sup> Fed. R. Civ. P. 26(b)(3)(A) contains similar language, providing that “a party may not discover documents and tangible things that are prepared in anticipation of litigation...by or for another party or its representatives (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent”).

<sup>8</sup> See *Comm’r of Revenue v. Comcast Corp.*, 453 Mass. 293, 314-15 (2009) (noting that the Massachusetts work product doctrine, codified in Mass R. Civ. P. 26(b)(3) “protects a client’s nonlawyer representatives, protecting from discovery documents prepared by a party’s representative ‘in anticipation of litigation,’” and that rather than be limited to attorneys, “[t]his protection applies also to other representatives of a party, provided their work relates to litigation” (internal quotations omitted)). Cf. *McKenzie v. McNeil*, No. 4:11cv45—RH/WCS, 2012 WL 695108 at \*1 (N.D. Fla. March 1, 2012) (unreported case) (suggesting, in a case involving a *pro se* litigant, that non-attorneys acting in place of counsel “can assert at least some work-product protection”).

As I concluded in *In Re Dorian*, a non-attorney advocate who asserts work product protection bears the burden to demonstrate that the specific documents sought are not discoverable. To do so, she must file a Motion for Protective Order identifying each document she intends to withhold and showing that each identified document was prepared (1) by an individual representing the party and (2) in anticipation of litigation, and not for a broader purpose.

b. *Parent Has Not Established That Any of the Documents Sought by Springfield are Entitled to Work Product Protection*

Parent's *Request for Protective Order* appears to seek general protection against every discovery request made by Springfield, on the basis that she is a *pro se* parent. She did not specify which documents she seeks to withhold on the basis of work product protection, nor did she assert that each of these documents was prepared by Ollie's representative in anticipation of litigation, rather than for the broader purpose of securing a FAPE for Ollie.<sup>9</sup>

For these reasons, Parent's *Motion for Protective Order* is hereby DENIED.

D. Motions to Quash<sup>10</sup>

The issue of which Springfield witnesses will be required to testify has been raised several times. In response to the *List of Witnesses* Parent on filed April 24, 2020, the District filed a *Motion to Exclude Parent Witnesses on the Basis of Relevancy*, which it submitted in revised form April 28, 2020. On May 25, 2020, Parent filed a *List of Witnesses Updated*, which consisted of 21 names, several separate incomplete subpoena requests, and two *Subpoenas for Personnel Records*. On June 1, 2020, Springfield filed a *Motion to Quash Subpoenas for Personnel Records* and a *Motion to Quash Subpoena for Regina Tate, Esq. and Other Witnesses*.<sup>11</sup> On June 10, 2020, Parent filed an *Objection to District's (sic) Motion to Quash Witnesses*. These will be discussed in turn, below.

i. *Legal Standards*

BSEA *Hearing Rule VII* permits the BSEA to issue subpoenas to command witnesses to appear at a certain time and place to give testimony, and subpoenas *duces tecum*, which may require the production of documents. A person receiving a subpoena may request that a Hearing Officer vacate or modify the subpoena, which the Hearing Officer may do "upon a finding that the testimony or documents sought are not relevant to any matter in question or that the time or

---

<sup>9</sup> Had she done so, these materials (minus "mental impressions, conclusions, opinions, or legal theories" might still be discoverable upon a showing by Springfield consistent with Fed. R. Civ. P. 26(b)(3)(A)(ii). See *Hickman v. Taylor*, 329 U.S. 495, 508 (1947); *Comm'r of Revenue*, 453 Mass. at 314.

<sup>10</sup> Although Parent has not filed adequate subpoena requests for many of the individuals she wishes to call as witnesses, despite being instructed as to how to do so during several motion sessions and as part of my first *Ruling on Multiple Motions*, for purposes of efficiency I am addressing this issue here.

<sup>11</sup> As it appears Parent did not receive these motions until approximately June 3, 2020, which she indicated in her *Motion to Overturn Quashed Subpoena's (sic) for District's Failure to Timely Serve*, I issued an Order allowing her until end of business on June 10, 2020 to file her responses.

place specified for compliance or the breadth of the material sought imposes an undue burden on the person subpoenaed.”<sup>12</sup>

ii. *Personnel Records*

Parent requested employment records for MAM, MM, DW, MO, and MS.<sup>13</sup> Springfield contends that the personnel records of these employees are not relevant to the issues for hearing and, moreover, to request employment records of District personnel “is a blatant attempt to invade the privacy of said employees without cause or justification.” During the Motion Hearing on June 3, 2020, Parent indicated that she was interested in these records to show that other complaints, similar to her retaliation claims, had been filed against these individuals. She offered no additional arguments in her written *Objection*. Considering the issues before me, I conclude that the only relevant information that might be contained in the specified personnel records are current resumes. As such, with the exception of resumes contained in the requested personnel files, Springfield’s *Motion to Quash Subpoenas for Personnel Records* is hereby ALLOWED. These subpoenas will not issue. Springfield is hereby directed to produce these resumes, to the extent they exist, as part of its second batch of discovery, due July 3, 2020.

iii. *Subpoenas for Particular Individuals*<sup>14</sup>

a. *Attorney Regina Tate, Esq.*

According to the District, Attorney Tate is a partner at the law firm of one of the attorneys currently representing Springfield in this matter. She previously represented the District in this litigation. As such, she is bound by both attorney/client privilege and legal ethics. Parent argues that Attorney Tate should be able to testify as a “fact witness to only discuss the facts of [Ollie]’s IEP’s (*sic*) and contract she created.” For the reasons offered by the District, I will not issue a subpoena for Attorney Tate.

b. *Superintendent DW*

According to Springfield, DW has had no direct dealings with this case or with Ollie. Parent contends that he did, in fact, have a direct role in IDEA-based retaliation that prevented her and Ollie from participating meaningfully in Ollie’s IEP meetings. Specifically, she argues that DW violated parent and student rights to notice of an attorney’s presence at a Team meeting; observed the case closely and made inappropriate comments about Parent; and made decisions, sent emails, and inquired consistently about Ollie and about her. Upon consideration of the parties’ arguments, I find that the superintendent’s connection to the issues before me is too attenuated. As such, I will not issue a subpoena for him.

c. *Chief Schools Officer KW*

---

<sup>12</sup> BSEA Hearing Rule VII(C).

<sup>13</sup> I refer to these individuals by their initials to avoid any unnecessary invasion of their privacy.

<sup>14</sup> As no subpoenas have been properly requested, to the extent I find that an individual is not required to appear and testify at hearing, I will not issue a subpoena for that individual if and when I receive a subpoena request containing all of the necessary elements.

According to the District, KW has attended one Team meeting for Ollie, at the principal's request. As such, I will issue a subpoena for her, if one is properly requested, though her testimony will be limited to the Team meeting that occurred on or about May 31, 2010.

d. *Speech and Language Supervisor LV*

According to the District, LV has not worked directly with Ollie. Parent contends that even so, LV attended multipole meetings, made recommendations, and assisted in tutoring Ollie. As such, I will issue a subpoena for him, if one is properly requested.

e. *Human Resources Employee KR*

According to Springfield, KR works in Human Resources and has no direct involvement with Ollie. Parent argues that her testimony relates to an issue that I have already found is not properly before the BSEA. As such, I will not issue a subpoena for her.

f. *Special Education Teacher SB*

According to the District, SB was Ollie's special education teacher four years ago and can offer no relevant, current information about him. Given her direct involvement with Ollie, I believe her testimony may be relevant to the issues before me. As such, I will issue a subpoena for her, if one is properly requested.

## CONCLUSION

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

Parent's *Motion to Amend Hearing Issues* is ALLOWED.

Parent's two *Motions to Compel*; Parent's *Motion for a Protective Order*; Parent's Updated Witness Lists; Springfield's *Request for Protective Order*; Springfield's *Motion to Quash Subpoenas for Personnel Records*; and Springfield's *Motion to Quash Subpoena for Regina Tate, Esq., and Other Witnesses*.

Parent's *Motion for Reconsideration IEP Audio Tapes (sic)* is DENIED.

Parent's *Motion for Expedited Discovery Production of Documents and Interrogatories* is DENIED.

Parent's *First and Second Motion to Compel* are DENIED.

Springfield's *Motion for a Protective Order* is DENIED.

Parent's *Motion for a Protective Order* is DENIED.

Springfield's *Motion to Quash Subpoenas for Personnel Records* is ALLOWED, with the exception of current resumes.

Springfield's *Motion to Quash Subpoena Requests* is ALLOWED as to Regina Tate, Esq., DW and KR. It is DENIED as to KW, LV, and SB.

#### ORDER

The matter will proceed as outlined in my *Ruling on Springfield Public Schools' Second Motion to Postpone*, issued June 11, 2020. Should Parent wish to subpoena witnesses, and/or documents from non-parties, she must file subpoena requests that contain the required information.

This matter will proceed to Hearing via Zoom on July 13, 15, 16, and 17, 2020.

By the Hearing Officer,<sup>15</sup>

/s/

Amy Reichbach

Date: June 11, 2020

---

<sup>15</sup> The Hearing Officer gratefully acknowledges the diligent assistance of legal intern Alison Sexson in the preparation of this Ruling.