

**COMMONWEALTH OF MASSACHUSETTS**  
**Division of Administrative Law Appeals**  
**Bureau of Special Education Appeals**

**In Re:** Student v.  
Newton Public Schools

**BSEA # 2010632**

**Ruling on Newton Public Schools' Motion To Limit The Scope Of Discovery**

On August 5, 2020, Parents in the above-referenced matter served their First Request for Production of Documents and Interrogatories on Newton Public Schools (Newton). On August 6, 2020, Newton filed a Motion to Limit the Scope of Discovery and Objections to The Parents' Discovery Requests (Motion *in limine*). Parents responded by filing a Motion in Opposition to Newton's Objections and Motion *in limine* (Opposition) on August 13, 2020<sup>1</sup>. The same date Parents also requested that "a telephonic or virtual motion session be scheduled to address the parties' motions." Via Order issued on August 14, 2020, the Motion Session was scheduled and held on August 19, 2020.

On August 19, 2020, the Parties informed the Hearing Officer that they had resolved most of their discovery dispute except for the release of the Newton's proposed programs sanitized/redacted cohort IEPs and Newton's request for protective Order regarding the same. The Parties requested to be heard and their request was GRANTED. As such this Ruling addresses only the aforementioned issue.

**Newton's Position:**

Newton objects and seeks a protective Order regarding Parents' document request #6 which calls for

...all IEPs, redacted of personally identifying information, showing the cognitive levels, benchmarks and service delivery grids of students grouped with or proposed to be grouped with [Student] for the 2018-19, 2019-2020 and proposed 2020-2021 school years.

Newton objects to the release of Student's sanitized/ redacted cohorts' IEPs on the basis that said IEPs of non-parties are protected under both state and federal law. Newton further asserts that "even if the names of those students are redacted from these documents, third party student will likely be individually identifiable due to the highly personal, specific, and detailed sensitive information contained in these documents." The IEPs at issue identify

---

<sup>1</sup> Via email.

each of the cohorts' behavioral, academic, cognitive, developmental profiles as well as their "medical, psychological, social-emotional and family history."

Relying on 603 CMR 23.07(4), Newton argues that absent informed consent of those third-party students or their parents, it may not release the information. Newton's objection is rooted on state regulations protecting the confidentiality of a student *vis a vis* regulations involving a student's record which require that the document be drafted in a way that individually identifies the student. See 603 CMR 23.02. Newton further argues that even if it were to remove the personally identifiable information<sup>2</sup>, consistent with the Family Educational Rights and Privacy Act (FERPA), privacy concerns linger since there is a "significant likelihood that the third party students are 'personally identifiable'...even if other demographic information is redacted". See 34 CFR 99.3(a)-(e), 34 CFR 99.3 (f) and 34 CFR 91.31(a)(1)(b)(1).

Lastly, Newton asserts that Parents may obtain information regarding the appropriateness of the peers in the proposed programs "anonymously" through observation of the proposed programs and services<sup>3</sup>, and/or through the testimony of Newton's teachers and service providers thereby better safeguarding the privacy and confidentiality of the third party students.

As such, Newton seeks a protective order regarding release of the third party IEPs.

### **Parents' Position:**

Parents assert that this matter involves the issue of the appropriateness of the placement for the 2018-2019, 2019-2020 and 2020-2021 school years is disputed and the appropriateness of the cohort in the proposed programs is highly relevant to the determination of appropriateness as are the presence of highly qualified and trained special educators and service providers.

Relying on the Massachusetts Rules of Civil Procedure, Parents raise general objections and further note that they carry the burden of persuasion at Hearing. Parents state that the information is necessary to prove their case.<sup>4</sup> Moreover, they argue that the only way to obtain the information needed to prove their case is through release of the cohort' IEPs.

Specifically, Parents seek that cohort IEPs appropriately cleansed of all personally identifiable information be produced. The aforementioned redacted IEPs must however, contain the cohorts' Key Evaluation Summaries, goals, current performance levels, benchmarks and Service Grid; information which Parents assert is not protected under FERPA.

---

<sup>2</sup> See 34 CFR 99.3.

<sup>3</sup> I note that Parents' Hearing Request involves challenges to past proposed programs as well as to the current program.

<sup>4</sup> See Rule 26(b)(1) of the Massachusetts Rules of Civil Procedure (as amend July 1, 2016) and *Schaffer v Weast*, 546 U.S. 49 (2005).

Mindful of the sensitivity regarding the aforementioned peers IEPs Parents agree that the IEPs must be redacted of all personally identifiable information and agree that only Parents' experts and Parents' counsel will have access to the redacted peer IEPs. Parents further agree that the cohort IEPs will be destroyed or returned to Newton at the conclusion of the Hearing. These confidentiality controls are in keeping with previous BSEA Rulings on the same issue.

Lastly, Parents argue that Newton's arguments regarding release of the Newton's proposed cohorts IEPs is disingenuous given that Newton has requested the IEPs of Student's peers at Learning Prep School.

Parents seek release of the proposed Newton cohorts IEPs pursuant to their discovery request and note that given their willingness to limit the individuals who would have access to the IEPs at issue and further agreement return those IEPs to Newton at the conclusion of the Hearing, or destroy them, there is no need for the Hearing Officer to issue a Protective Order.

### **Conclusion:**

The issue and arguments before me are not novel to the BSEA or this Hearing Officer. Consideration of whether to release the IEPs of cohorts in proposed programs, when the appropriateness of the proposed program is at issue has resulted in orders favoring release and containing additional provisions to safeguard the confidentiality of the proposed peers.

Parents are correct that neither the Massachusetts Student Records Regulations nor FERPA prohibit disclosure of records void of personally identifiable information when those IEPs are relevant to the determination of the appropriateness of the proposed program, especially when the individuals who would have access to the information are not members of the school community and as is the case in the case at bar, is limited to Parents' counsel and expert witnesses. See *In Re: Vic*, BSEA #1503712 (2015).

As noted in *In Re: Jerrol v. Haverhill Public Schools*, BSEA # 1900557 (Byrne, 11/19/2018):

These arguments are revisited frequently in BSEA matters and have spawned a long line of consistent decisions from which I will not depart here. *Beverly and Flavio*, 24 MSER 156 (2018); *Manchester-Essex R.S.D.*, 23 MSER 8 (2017); *Andover Public Schools*, 22 MSER 148 (2016); *Touchstone Public Schools*, 21 MSER 137 (2015); *Wellesley Public Schools and Vic.* 21 MSER 39 (2015); *Mattapoisett Public Schools*, 13 MSER 22 (2007). So long as the requested documents are appropriately cleansed of all personally identifiable references, their release for discovery purposes in an

administrative hearing before the BSEA is not barred by 603 CMR 23.07 (4)

Production of the peer IEPs is no more intrusive when sought by the Parents in discovery than when reviewed by school staff and its legal representatives in preparation for a hearing. Nor is proper preparation of the documents for release unduly burdensome in the context of a contested special education matter. Should there be some exceptional circumstance unique to this case that warrants a higher level of scrutiny or security that should be brought to the Hearing Officer's attention.<sup>5</sup>

Like my predecessors, I too see no reason to depart from the line of previous consistent rulings. Furthermore, in keeping with those Rulings given Parents' agreement to limit access of those IEPs to counsel herself and her experts, as well as her agreement to return or destroy the IEPs involved at the conclusion of the Hearing, there is no need to issue a Protective Order. Therefore, Newton's Motion to Limit the Scope of Discovery and for issuance of a Protective order is **DENIED**.

Response to Discovery requests is extended to the close of business on September 10, 2020. On the aforementioned date, Newton shall provide Parents' counsel with documents responsive to Parents' Requests for Production of Documents #6. Lastly, the following conditions apply to the release, receipt, custody and maintenance of the proposed programs cohort IEPS:

1. The IEPs requested shall be cleansed of all identifying information, including, at minimum, the name of the child, name(s) of parent(s) or other family members, address, date and place of birth, gender, race/ethnicity, any language(s) other than English that are spoken by student and/or parents; and any student number(s) assigned to such students(s).

2. The redacted IEPs shall contain all IEPs, the cognitive levels, benchmarks and service delivery grids of students grouped with or proposed to

---

<sup>5</sup> None has been raised in the case at bar.

be grouped with [Student] for the 2018-19, 2019-2020 and proposed 2020-2021 school years.

3. The redacted IEPs shall be provided solely to counsel for the Parents, and not to the Parents, Student, or any other person or entity. Counsel for the Parents may disclose the redacted documents to experts who are assisting Parents regarding appropriate peer groupings for Student and related issues and who will testify at Hearing.

4. Counsel for Newton and/or Parents may submit copies of some or all of the redacted IEPs as exhibits at Hearing.

5. Except as described in (2) and (3) above, counsel shall not disclose the IEPs, or information therein, to any other person or entity.

6. Upon the close of the record in this matter, counsel for the Parents shall ensure that any copies of the IEPs at issue that may have been shared with experts per Paragraph 2 are returned to the school district, or are destroyed.

So Ordered by the Hearing Officer,

---

Rosa I. Figueroa

Dated: September 2, 2020