**COMMONWEALTH OF MASSACHUSETTS**

## **Bureau of Special Education Appeals**

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In Re: Student.

& BSEA #12-3302

Danvers Public Schools

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# **RULING ON SCHOOL’S MOTION FOR PROTECTIVE ORDER**

The subject of this Ruling is a discovery dispute. At issue is whether the Motion for a Protective Order filed by the School on January 5, 2012 must be set aside as untimely because this Motion was filed more than ten days after the date of the discovery request.

On December 5, 2011, the Parents served the School with their First Request for Production of Documents. On December 9, 2011, the Parents served their Second Request for Production of Documents, and First Set of Interrogatories.

On January 4, 2012, at the request of the School’s counsel, Parents counsel agreed to extend the 30-day deadline for responding to discovery from January 5, 2012 to January 11, 2012. The reason provided by the School’s counsel was that she had not yet received documents from School personnel, and needed additional time to organize and label them before serving the documents.

On January 5, 2012, the School filed a Motion for a Protective Order Relative to Parents’ First Request for Production of Documents, in which the School objected to providing documents in response to three of the Parents’ Requests.

Also on January 5, 2012, the Parents filed the above-entitled Motion to Set Aside School’s Motion for Protective Order on the basis of untimeliness. I will construe the Parent’s Motion as their objection and response to the School’s Motion for Protective Order.

A telephone conference was held on January 10, 2012 at which counsel for the parties discussed their positions on the issue of timeliness of the School’s Motion. On January 12, 2012, Parents filed an additional memorandum in support of their Motion. An additional conference call was held on January 13, 2012, and the Parents filed additional correspondence on January 16, 2012, which was received on January 17, 2012. The parties have deferred discussion of the substance of this Motion until the timeliness issue is resolved.

**Discussion**

The jurisdiction and authority of the BSEA are derived from both federal and state sources of law. These include the IDEA, Section 504 of the Rehabilitation Act, and the regulations implementing these statutes,[[1]](#footnote-1) as well as the Massachusetts special education statute, and special education regulations.[[2]](#footnote-2)

In addition to the provisions referred to above, the procedures for conducting BSEA hearings are governed by the Massachusetts Administrative Procedures Act, G.L. c. 30A, and its corresponding regulations, the *Formal Rules of the Standard Adjudicatory Rules of Practice and Procedure* (hereafter, *Formal Rules*), codified at 801 CMR 1.00.08.

Pursuant all of the foregoing provisions, the BSEA has issued its own *Hearing Rules for Special Education Appeals* (hereafter, *Hearing Rules*). The introductory section of the *Hearing Rules*, entitled Scope of Rules, establishes the relationship between the *Hearing Rules* and the *Formal Rules* as follows:

Unless modified explicitly by these *Rules*, hearings are conducted under the *Formal Rules of the Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01 et seq. (Emphasis supplied).

Formal discovery is allowed in BSEA proceedings, including requests for production of documents and written interrogatories, and is governed by both sets of *Rules.* These *Rules* prescribe the scope of permissible discovery, the timelines for responses to discovery and the grounds and procedures for objecting to discovery requests*.* See BSEA *Hearing Rules* at Rule VI and the *Formal Rules* at 801 CMR 1.01(8)(a) through (i).

With respect to document requests, Rule VI.B.1 of the *Hearing* *Rules* as well as the *Formal Rules* at 801 CMR 1.01(8)(b) provide that a party may discover documents from the other party that are “in the possession, custody, or control of the [other] party…” The *Hearing Rules* further require that the documents requested be “not privileged [and] not supplied previously.”

Both the *Formal Rules* and the BSEA *Hearing Rules* establish a 30-day deadline for responses to requests for production and answers to interrogatories, unless the hearing officer establishes a longer or shorter time for response. *Formal Rules* at 801 CMR 1.01(8)(b) and (h); *Hearing Rules* at Rule VI(B), paragraph 3.

The BSEA *Hearing Rules* provide an additional 10-day time limit for objecting to discovery requests. Rule VI.C states that 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.” This 10-day limitation established by Rule VI.C is not contained in the *Formal Rules*, should be considered an explicit modification of the Formal Rules, and, therefore, should be applied to BSEA hearings. *Hearing Rules*, at Scope of Rules

This 10-day rule set forth in Rule VI.C appears to be inconsistent with both the third paragraph of Rule VI.B (establishing the 30-day response deadline for all discovery requests) and VI.B.2 (specifying that objections to interrogatories shall be filed in lieu of answers, within the 30-day deadline). To reconcile these contradictions requires discussion of the function of the ten-day rule.

Unlike some other types of administrative proceedings, the BSEA must operate within certain federal and state timelines. In non-expedited matters, a BSEA hearing officer must issue a final decision no more than 45 days after receipt of the hearing request, subject to postponements of the hearing for good cause. To implement this requirement, the *Hearing Rules* provide that the initial or “automatic” non-expedited hearing date is scheduled for 35 days after the responding party is served with the request. If a party who receives a discovery request waits the full 30 days to object to the request and seek a protective order, the ensuing process inevitably would delay a hearing scheduled on the automatic date, and might also delay a hearing in cases where the automatic date has been postponed.

Requiring a party to object to discovery requests before the final deadline for actually providing the information requested puts the requesting party on earlier notice of the existence and nature of the objection, thus giving the parties and, if necessary, the Hearing Officer, more time to resolve the discovery issues without unduly postponing the hearing. The objecting party may seek to elaborate on and supplement its objections after the 10-day deadline—including by filing objections to interrogatories in lieu of an answer—provided that this party has given timely notice of its objections within the 10-day period.

Based on the foregoing, I conclude that the School’s Motion for a Protective Order is DENIED. The School must provide the Parents with the documents and answers to interrogatories requested. To reduce any risks of compromise to student privacy, discovery is subject to the following conditions:

1. The documents 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. The documents also shall be cleansed of any and all information pertaining to family members other than the child, including but not limited to medical, social, educational, employment or demographic information, whether or not such information actually or potentially identifies the person at issue.
2. The redacted documents 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 share the information contained in the redacted documents with experts who are assisting Parents regarding appropriate peer groupings for Student and related issues and/or who may testify at the hearing.
3. Counsel for the Parents may submit copies of some or all of the redacted documents as exhibits at hearing.
4. Except as described in (2) and (3) above, counsel shall not disclose the documents or information therein to any other person or entity, nor allow any person other than Parents’ expert(s), counsel for the School, and the Hearing Officer to view the documents.
5. Upon the close of the record in this matter, counsel for the Parents shall ensure that any and all documents and answers to interrogatories are returned to counsel.

By the Hearing Officer,

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Dated: February 10, 2012

1. 20 USC Sec. 1400 et seq., 29 USC Sec. 794, 34 CFR 300.00 et seq., 34 CFR 794 [↑](#footnote-ref-1)
2. MGL c. 71B, 603 CMR 28. [↑](#footnote-ref-2)