

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

In Re: Greater New Bedford Regional Voc. Tech.

BSEA # 1308227

RULING ON MOTION FOR PROTECTIVE ORDER

This ruling is issued by the Bureau of Special Education Appeals (BSEA) pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

This dispute requires that I rule on Greater New Bedford Regional Vocational Technical High School's (GNBVT) Motion for Protective Order. Parents filed an opposition and a telephonic motion hearing occurred on September 11, 2013.¹

FACTUAL AND PROCEDURAL BACKGROUND

Student lives with her Parents in New Bedford and was a sophomore at GNBVT for the 2012-2013 school year, which was her second year at GNBVT. The proposed IEP for Student for the 2013-2014 school year would place Student back at the New Bedford High School. Parents seek to have Student continue at GNBVT for the 2013-2014 school year, and on May 16, 2013, they filed a Hearing Request with the BSEA for that purpose.

Parents' Hearing Request alleges that Student has a "central auditory processing disorder, emotional issues and borderline cognitive skills" and also suffers from PTSD. As a result of these disabilities, Parents take the position that Student requires a small class setting, extra academic support, modified curriculum and "a supported environment across all academic and vocational settings." The Hearing Request argues that these services and accommodations can and should be provided at GNBVT, but that GNBVT is taking the position that Student is no longer appropriate for GNBVT and thereby seeks to "dump" Student back to the New Bedford High School.

Parents' Hearing Request includes systemic claims—for example, that "GNBVT has a double standard of education, one for regular students and boot them out the door standard for children with disabilities." The Hearing Request alleges that this "double standard" is "supported by a system that denies access to vocational programs to children with disabilities

¹ Parents and Student are represented by attorney Michael Turner. GNBVT is represented by attorney Paige Tobin.

....” Claims of discrimination are made under the Individuals with Disabilities Education Act, MGL c. 71B, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, and accompanying regulations, as well as under Article CXIV of the Massachusetts Constitution.

Parents’ Hearing Request seeks a variety of relief, including creation of a program for Student with “small classes in all subject areas in a language based format, modified, so that she can progress academically at her level as well as such a program for her vocational shop so she can achieve her potential and thus receive FAPE [i.e., a free appropriate public education]” Parents also seek two years of compensatory services “for [GNBVT’s] failure to provide FAPE.”

On June 4, 2013, GNBVT responded to Parents’ Hearing Request. Its response generally denies all allegations of wrong-doing and asserts that a proposed IEP developed by GNBVT for the 2013-2014 school year appropriately places Student back at New Bedford High School with a pre-vocational program, life skills and therapeutic support. GNBVT states that Student’s IEP Team concluded that Student could not receive FAPE at GNBVT “because of her need to develop independent life skills”. GNBVT believes that Student requires “an academic program which has therapeutic, social and life skills components woven throughout her day in a consistent setting.” GNBVT seeks findings that it has acted appropriately and is not fiscally or programmatically responsible for Student for the 2013-2014 school year.

After filing its response to the Hearing Request, GNBVT filed a Motion to Dismiss, asserting that the BSEA does not have jurisdiction over Parents’ systemic discrimination claims. By ruling dated July 24, 2013, I denied GNBVT’s Motion to Dismiss with respect to Parents’ systemic claims that can be shown to have caused or contributed to the alleged violations of Student’s right to receive FAPE and to be free from discrimination under Section 504, as set forth within the Hearing Request, but I agreed with GNBVT that any systemic complaint regarding its admission policies or practices is irrelevant to the specific claims regarding Student’s rights, as set forth in the Hearing Request, and these systemic claims were dismissed.

ISSUES TO BE RESOLVED IN THE DISPUTE ON THE MERITS

The issues to be resolved at an evidentiary hearing are as follows:²

Prospective claims:

1. Did GNBVT correctly determine that Student requires an out-of-district placement in order to receive a free appropriate public education in the least

² During a conference call on September 11, 2013, the parties’ counsels agreed to this recitation of the issues (with the proviso that GNBVT’s counsel noted her continuing objection to my consideration of systemic claims, which objection was previously addressed through my July 24, 2013 ruling on GNBVT’s Motion to Dismiss).

restrictive environment? If not, then the following three additional issues must be addressed to resolve Parents' prospective claims. (And, if GNBVT's determination was correct, then none of the following three issues need be addressed in order to resolve Parents' prospective claims.)

2. What changes must be made in GNBVT's most recently-proposed IEP in order for it to be reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment?
3. What additional accommodations or services, if any, must be provided Student in order for GNBVT to comply with Section 504 of the Rehabilitation Act?
4. Are there any systemic policies or practices that caused or contributed to GNBVT's determination that Student requires an out-of-district placement in order to receive a free appropriate public education in the least restrictive environment?³

Compensatory claims:

1. During the time period from May 16, 2011 to the present, has GNBVT denied Student her right to receive a free appropriate public education in the least restrictive environment or her right to be free from discrimination under Section 504 of the Rehabilitation Act? If so, then the following two additional issues must be addressed to resolve Parents' compensatory claims. (And, if not, then none of the following two issues need be addressed in order to resolve Parents' compensatory claims.)
2. Are there any systemic policies or practices that caused or contributed to GNBVT's denial of Student's right to receive a free appropriate public education in the least restrictive environment or to be free from discrimination under Section 504 of the Rehabilitation Act?
3. What compensatory services, if any, are due Student?

DISCUSSION

The BSEA Hearing Rules and the state Administrative Procedure Act regulations offer guidance regarding the scope of discovery, providing that a protective order may be issued "to protect a party from undue burden, expense, delay, or as otherwise deemed appropriate by the Hearing Officer." BSEA Hearing Rule VI(C). See also 801 CMR 1.01(8)(a)

³ Parents must demonstrate that the systemic policies or practices likely caused or contributed to the alleged violation of rights of Student in particular. Therefore, for example, systemic claims regarding admission policies and practices cannot be considered since Parents have made no claim that Student's rights were violated when she was admitted to GNBVT. The same proviso applies to systemic policies or practices relevant to Parents' compensatory claims (referenced in issue # 2 under compensatory claims in the text).

(protective order may be issued “to protect a party or Person from annoyance, embarrassment, oppression, or undue burden or expense”).

I note and find useful as additional guidance the general principles found within the Massachusetts Rules of Civil Procedure and the Federal Rules of Civil Procedure.

Massachusetts Rule 26(b)(1) provides, in part:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Federal Rule 26(b)(1) is to the same effect.

I now separately consider each discovery request that is in dispute.

Interrogatory Number Ten

This interrogatory seeks an explanation of “why [GNBVT] has a drop-out rate of 10% of special education students compared to a rate of 3.9% for all students as noted on the DOE profile of [GNBVT].”

There can be little dispute that through this interrogatory, GNBVT should be required to identify any systemic policy or practice that explains, in part or in whole, the difference between the 10% drop-out rate for special education students and the 3.9% for all students since, if there is such a policy or practice, it may possibly be relevant to GNBVT’s seeking to return Student to her home school district. I therefore find that this interrogatory is relevant to the issues in dispute or is reasonably calculated to lead to the discovery of admissible evidence regarding Parents’ systemic claims.

However, for reasons explained below regarding production request number five, GNBVT need not answer this interrogatory by explaining the circumstances of individual students—for example, the circumstances of the special education students who dropped out.

GNBVT has generally alleged that it would be unduly burdensome to respond to this interrogatory, without providing any basis for me to determine that it would, in fact, be unduly burdensome.

For these reasons, GNBVT’s Motion for Protective Order with respect to interrogatory number ten is ALLOWED regarding the need to provide any explanation of the circumstances of individual students but is otherwise DENIED.

Interrogatory Number Eleven

This interrogatory seeks an explanation of “why [GNBVT] has an enrollment of 9.4% students with disabilities, ratio [sic], compared with other vocational schools whose average is 19%.”

As explained above, the enrollment of Student at GNBVT is not in dispute and therefore systemic claims regarding enrollment have been dismissed pursuant to my ruling of July 24, 2013. I therefore find that this interrogatory is not relevant to the issues in dispute nor is it reasonably calculated to lead to the discovery of admissible evidence.

For these reasons, GNBVT’s Motion for Protective Order is ALLOWED with respect to interrogatory number eleven.

Production Request Number Three

This request for production of documents seeks a copy of the “building license stating how many persons may occupy [GNBVT].”

Parents’ counsel has not explained the relevance of this request nor has he explained how this request would be reasonably calculated to lead to the discovery of admissible evidence. I have no basis for concluding that Parents have the right to obtain this document through discovery.

For these reasons, GNBVT’s Motion for Protective Order is ALLOWED with respect to production request number three.

Production Request Number Five

This request for production of documents seeks a copy of the “enrollment statistics for the incoming sophomore and freshman classes, at the [GNBVT], for 2008, 2009, 2010, 2011, and 2012 school years, from the start of the school year, including the percentage of ... special education students on IEPs, and the drop-out rate for each class for each year.”

During the motion hearing, it was not disputed by Parents’ counsel that these statistics, by themselves, are not probative of whether there are any systemic policies or practices that caused or contributed to GNBVT’s alleged violation of Student’s individual rights under state and federal special education law and under Section 504 of the Rehabilitation Act. For example, if, hypothetically, it was disclosed that GNBVT had a high drop-out rate of students on IEPs during the 2011-2012 school year, that fact alone would have no relevance to the question of whether there was a systemic policy or practice that caused or contributed to GNBVT’s alleged violation of Student’s rights.

Rather, during the motion hearing, Parents’ counsel took the position that discovering this fact (that is, the hypothetical, high drop-out rate during the 2011-2012 school year) could

lead him to seek to put into evidence facts regarding the particular circumstances of individual special education students who dropped out during this school year, and for this reason, he argues that the drop-out rate should be discoverable. Thus, for example, if there happened to be five special education students who dropped out during the 2011-2012 school year, Parents' counsel has explained that he may need to provide evidence regarding the particular circumstances that led to each of those students dropping out, to establish through this evidence that GNBVT unlawfully caused some or all of these students to drop out, and that this evidence demonstrates that GNBVT had an unlawful systemic policy or practice that was relevant to GNBVT's actions regarding Student.

As explained in my July 24, 2013 ruling on GNBVT's Motion to Dismiss, there is nothing within my jurisdiction as a BSEA Hearing Officer that would permit me to go further than resolving the dispute between Student and GNBVT. Yet, what Parents' counsel is proposing would essentially allow him to litigate the appropriateness of GNBVT's actions regarding every special education student who left GNBVT over the course of five school years, even though none is a party to the instant dispute.

Parents' counsel proposes to seek what may be a very large amount of testimonial and documentary evidence regarding the individual circumstances of other students with the hope that this evidence would support the conclusion that there was an unlawful systemic policy or practice that impacted Student. Yet, Parents' counsel has provided no basis from which I could conclude that such evidence has any likelihood whatsoever of actually supporting Parents' claims that Student's rights have been violated.

As discussed above, Parents are entitled to put into evidence testimony or documents that directly establish that there was, in fact, an unlawful systemic policy or practice and to argue from this that the policy or practice impacted Student's rights. But, for the reasons explained above, I am not prepared to allow Parents to try to establish the existence of such alleged unlawful systemic policy or practice by litigating the appropriateness of GNBVT's actions regarding other students. I therefore find no reason to allow Parents' counsel to obtain discovery of the requested statistics since they, by themselves, would not be relevant and, for reasons explained above, would not likely lead to admissible evidence.

For these reasons, GNBVT's Motion for Protective Order is ALLOWED with respect to production request number five.

Production Request Number Six

This request for production of documents seeks a copy of the "any and all Program Quality Assurance (PQA) complaints made by any person against [GNBVT] for school years 2008, 2009, 2010, 2011, and 2012 and copies of any documents from PQA as to action plans and resolutions."

During the motion hearing, Parents' counsel agreed that GNBVT need not provide this information for school years 2008 and 2009.

It is apparent that the request is overly broad. Parents have an interest only in those documents that relate to special education students.

With these limitations, I find that the requested documents may be relevant to the issues in dispute or reasonably calculated to lead to the discovery of admissible evidence. Because the requested documents may include information regarding other students, certain steps must be taken, as explained below, to protect the confidentiality of that information.

For these reasons, GNBVT's Motion for Protective Order regarding production request number six is ALLOWED with respect to school years 2008 and 2009 and with respect to any documents that do not pertain to one or more special education students. GNBVT's Motion for Protective Order regarding production request number six is otherwise DENIED. Any documents provided to Parents' counsel pursuant to this production request are subject to the following requirements:

- Prior to providing the requested documents to Parents' counsel, GNBVT shall redact these documents of all "personally identifiable information" as that term is defined at 34 CFR § 99.3.
- Parents' counsel may disclose the redacted documents to any of Parents' experts who are assisting Parents' counsel. At the close of the dispute before the BSEA, Parents' counsel shall ensure that the experts return the documents to Parents' counsel.
- Parents' counsel may submit the redacted documents to the Hearing Officer and opposing party as proposed exhibits in this dispute.
- Parents' counsel shall otherwise maintain the confidentiality of the redacted documents. Parents' counsel may not otherwise disclose the documents to any persons (including, but not limited to, Parents themselves) unless explicitly ordered by the Hearing Officer.
- Parents' counsel shall return the redacted documents to GNBVT's counsel at the conclusion of the BSEA dispute and any court appeals.

Production Request Number Seven

This request for production of documents seeks "the number of students accepted by the [GNBVT] and attended by [sic] the [GNBVT] who returned to the sending district for school years 2008, 2009, 2010, 2011, and 2012"

GNBVT's Motion for Protective Order is ALLOWED with respect to production request number seven for the same reasons that I have allowed GNBVT's Motion for Protective Order regarding request number five.

ORDER

GNBVT's Motion for Protective Order is ALLOWED in part and DENIED in part, as explained above.

As discussed with the attorneys yesterday, all remaining discovery shall be completed and delivered to opposing counsel no later than 5:00 PM on September 20, 2013, unless the parties otherwise agree.

This matter is scheduled for a conference call at 9:00 AM on September 18, 2013.

Hearing dates continue to be scheduled for October 2, 3 and 4, 2013 at the BSEA offices in Boston.

GNBVT has also filed a Motion to Compel which, by request of GNBVT, is held in abeyance but will be considered upon written request of either party.

By the Hearing Officer,

William Crane
Dated: September 12, 2013