

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

In re: Eleanor¹

BSEA #1503787

**RULING ON PEMBROKE PUBLIC SCHOOLS' MOTION FOR SUBSTITUTE
CONSENT TO ISSUE REFERRAL PACKETS**

This matter comes before the Hearing Officer on the Motion of the Pembroke Public Schools for Substitute Consent to Issue Referral Packets, filed on January 6, 2015. Neither party has requested a hearing on the Motion, and as testimony or oral argument would not advance the Hearing Officer's understanding of the issues involved, this Ruling is being issued without a hearing pursuant to *Bureau of Special Education Appeals Hearing Rule VII(D)*. For the reasons set forth below, Pembroke Public Schools' Motion for Substitute Consent to Issue Referral Packets is DENIED.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On December 4, 2014 Eleanor's parents (hereinafter "the Parents"), through their advocate, filed a Request for Hearing with the Bureau of Special Education Appeals (hereinafter "BSEA") against the Pembroke Public Schools (hereinafter "the District"). Among other things, the Parents alleged that the District did not have an appropriate placement for Eleanor and was denying her a Free Appropriate Public Education (FAPE). A conference call was scheduled for December 23, 2014 and a Hearing for January 8, 2015. Neither party appeared for the Hearing Officer-initiated conference call on December 23, 2014; the BSEA was informed later that day that the parties had entered into a settlement agreement that involved placing Eleanor at a private out-of-district school.

On December 24, 2014, the Parents filed an "Emergency Motion to Continue the Hearing Process and an Order to Provide an Interim Placement and Services," which this Hearing Officer construed as notice that the parties required the continued involvement of the BSEA. By letter on December 29, 2014 the District both confirmed that the settlement agreement had fallen through due to the intended placement's rejection of Eleanor's application and requested a postponement of the initial hearing date. A second conference call was scheduled for January 5, 2015. During that conference call² the Parents, through their advocate, agreed to the District's

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

² It should be noted that the Parents' advocate initially missed this conference call too, though she later called the Bureau of Special Education Appeals and both the Hearing Officer and Pembroke Public Schools' attorney were able to accommodate her request to hold the scheduled call later that day.

request to postpone the Hearing. A further conference call was scheduled to take place on January 7, 2015.

On January 6, 2015, the District filed the instant Motion for Substitute Consent to Issue Referral Packets (hereinafter “Motion for Substitute Consent”). After the Parents’ representative missed yet another conference call, the BSEA issued an Order on January 7, 2015 noting the missed conference call and providing that the Parents had seven calendar days to respond to the District’s Motion.

On January 12, 2015 the Parents filed a 61-page document entitled “Parent’s (*sic*) Object (*sic*) to the District’s Motion to Obtain Consent and Motion for Sanctions Against the District” (hereinafter “Parents’ Response”). Much of the information contained in the Parents’ Response, and the documents submitted within it, goes beyond the scope of the District’s Motion for Substitute Consent and therefore has not been considered for purposes of this Ruling.³

On January 12, 2015, the District filed a Response to the Parents’ Response in which it notified the BSEA of an agreed-to change in Eleanor’s placement (her return to the local public school) and clarified that it intended that she stay there while the parties continue to work toward resolution of the issues raised in the Parents’ Hearing Request and subsequent filings. Because this information, like that discussed above, is not relevant to the issues raised in the Motion for Substitute Consent, it has not been considered.⁴

Although the parties, through their filings, have indicated disagreement with each others’ renditions of the facts, those few facts relevant to the present dispute are as follows⁵:

1. At the time the Hearing Request was filed on December 4, 2014, Eleanor was undergoing an extended evaluation at the Amego School.

³ See *BSEA Hearing Rule VII(E)* (“In support of, or opposition to, a motion, a party may offer only evidence relevant to the particular motion.”) The Parents’ response (hereinafter “Parents’ Response”) to the District’s Motion for Substitute Consent to Issue Referral Packets (hereinafter “District’s Motion for Substitute Consent”) purportedly both objected to the District’s Motion for Substitute Consent and requested sanctions against the district. The remedies requested by the Parents are either not in the form of sanctions that may be awarded by the BSEA or are the ultimate remedies they propose in their *Hearing Request* and/or subsequent filings. Moreover, the Parents’ Response fails to specify which of their allegations (many of which are restatements of the allegations contained in their *Hearing Request*) support an award of sanctions. Parents request, in closing, that the District’s Motion for Substitute Consent be denied “and the Parent’s (*sic*) Motion to Oppose be granted with all of the remedies in order to provide FAPE in the Least Restrictive Environment.” The Parents’ Response is therefore construed as an Opposition to the District’s Motion, and the information relevant to that motion has been considered. (See *BSEA Hearing Rule VII(E)*).

⁴ In the interim, on January 15, 2015, the Parents filed a seventy-three page “Emergency Motion for Neuropsychological Evaluation.” The same day, the District filed its Opposition to the Parents’ Motion. Also on the same day, the Parents filed a “Response to the District’s Motion to Oppose the Parent’s (*sic*) Emergency Motion for a Neuropsychological Evaluation.” This Motion is not the subject of the instant ruling.

⁵ The facts recited below have been found based on the limited evidence now before the BSEA and are subject to revision during future proceedings.

2. At some time between the filing of the Hearing Request on December 4, 2014, and December 23, 2014, the parties signed a settlement agreement, contingent on Eleanor's admission to the Glenholme School in Washington, Connecticut.
3. At some time between December 24 and December 29, 2014, Eleanor's application to the Glenholme School was rejected, vitiating the settlement agreement.
4. The parties have each asserted that Eleanor requires an out-of-district placement in order to receive FAPE.
5. By email on December 29, 2014, the District sought parental consent to send referral packets to the following programs: Devereux (private day and residential programs); Judge Baker Children's Center – Manville (private day program); The League School of Greater Boston (private day and residential programs); The Italian Home (private day and residential programs); and Wayside (residential program).
6. As of January 6, 2015, when it filed its Motion for Substitute Consent, the District had not received parental consent to send referral packets to any of the above-listed programs.
7. The Parents have indicated that they do not believe the programs proposed by the District are appropriate for Eleanor and they have, to date, refused to sign consent forms to allow the District to issue referral packets.
8. Eleanor has been returned to the Pembroke Public Schools, where the District intends to maintain her placement until an appropriate therapeutic and specialized program is identified for her.

DISCUSSION

In support of its Motion for Substitute Consent, the District indicates that without the ability to send referrals to programs it has identified as potential placements for Eleanor, it cannot move forward in the process of identifying an appropriate program. Moreover, it asserts that without obtaining input from specialized programs as to whether they are appropriate for Eleanor, it is unable to fulfill its obligation to provide her with a FAPE. Furthermore, the District points out that consent to referral packets does not constitute consent to a particular placement, so were the BSEA to allow its Motion the Parents would still be able to investigate, visit, and tour the identified placements and accept or reject whatever program Eleanor's Team proposes.

In their opposition to the District's Motion for Substitute Consent, the Parents focus on their belief that the programs selected by the District are inappropriate for Eleanor, and they assert that the District, in concert with Eleanor's extended evaluation placement, the Amego School, is attempting to force Eleanor into the Amego School, at least in the short term. Moreover, they assert that "the District is deliberately throwing as many schools at the wall to

see what will stick and it is not relevant to the District if the Program in another school can actually provide the student with FAPE.”⁶

The District is correct in that it cannot fulfill its obligations to Eleanor without investigating potential placements, a process that requires that the placements themselves make a determination as to whether Eleanor is appropriate for their programs and whether they have space to accommodate her at the present time. After the Team develops her Individualized Educational Program (IEP), it must, among other things: (1) determine the specific placement, “based on the IEP, including the types of related services that are to be provided to the student, the type of settings in which those services are to be provided, the types of service providers, *and the location* at which the services are provided (emphasis added).”⁷ Where “the needs of the student and the services identified by the Team are complex, and the Team is considering an initial placement out-of-district or a different setting for a student who has been served in an out-of-district program,” as is the case with Eleanor, “the school district may schedule a separate Team meeting to determine placement.”⁸ Prior to the placement meeting, “the school district and the parent shall investigate in-district and out-of-district placement options in light of the student’s needs and identified services required,”⁹ so that at the meeting they may “report on the investigation of in-district and out-of-district options.”¹⁰

In order to investigate potentially appropriate placements for Eleanor, the District must send out referral packets to those programs, describing Eleanor’s needs in detail. These packets generally contain a considerable amount of private information about students, such as their medical history, psychological history, disciplinary incidents, evaluations, etc. that would be considered “education records” under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (“FERPA”).¹¹ Pursuant to FERPA, students’ educational records may not be released without the written consent of their parents to any individual, agency, or organization, with certain exceptions.¹² Although one of the enumerated exceptions includes disclosure to officials of other schools “in which the student seeks or intends to enroll,” at this point none of the potential placements has been confirmed appropriate for Eleanor and she and her parents are not seeking to enroll in any of them.¹³ For this reason, the programs for which the District seeks consent to send referral packets do not fit within this exception.

⁶ “Parent’s (*sic*) Object (*sic*) to the District’s Motion to Obtain Consent and Motion for Sanctions Against the District” at p. 2.

⁷ 603 CMR 28.06(2)(a).

⁸ 603 CMR 28.06(2)(e).

⁹ 603 CMR 28.06(2)(e)(2).

¹⁰ 603 CMR 28.06(2)(e)(3).

¹¹ See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g(a)(4)(A) (defining as educational records “those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution”).

¹² FERPA, 20 U.S.C. § 1232g(b)(1).

¹³ See *id.* at § 1232g(b)(1)(B) (permitting disclosure of a student’s educational records without her parents’ consent to “officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student’s parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record.” A separate provision permits disclosure to “other school officials, including teachers within the educational institution or local educational agency, who have been determined by such

To support its argument that the BSEA has the authority to grant substitute consent for referral packets, the District relies on 603 CMR 28.07(1)(b). This provision explicitly allows for a school district to seek dispute resolution through the BSEA in the event that it determines that a parent's failure or refusal to consent to a reevaluation or to placement in a special educational program subsequent to the initial placement "will result in a denial of a free appropriate public education to the student." *See id.* By its terms, however, this provision applies only where, subsequent to initial evaluation and placement, "the school district is unable to obtain parental consent to a reevaluation or to placement." *See id.* Nowhere in the Individuals with Disabilities Education Act or in Massachusetts law is there a mechanism to overrule parents' refusal to consent to the release of protected student records for the purpose of sending referral packets to prospective out-of-district placements. The existence of such a mechanism within 603 CMR 28.07(1)(b), which applies specifically to reevaluation and placement, demonstrates that the Board of Elementary and Secondary Education (Board) is aware that there are circumstances under which the withholding of parental consent may be overcome in order to prevent the denial of FAPE to a child. Where the Board, the agency properly charged with developing the Massachusetts special education regulations, has chosen not to create a mechanism to allow for overrides of parental consent in the context of referral packets, it would be improper for the BSEA to do so.¹⁴

This does not mean, however, that the District's efforts to locate an appropriate program for Eleanor are stymied. Consistent with this Ruling, the District may send out referral packets to the programs it has identified as potential placements, so long as those packets do not contain any personally identifiable information protected by FERPA. The District must redact from the information it sends Eleanor's name, the names of her family members, her address, her social security number, her student identification number, her date of birth, place of birth, and mother's maiden name, as well as other information that could be linked to her that "would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty."¹⁵

agency or institution to have legitimate educational interests." *Id.* at § 1232g(b)(1)(A). Albeit inartfully drafted, this provision appears to refer only to other school officials within the student's local educational agency.

¹⁴ *Cf.* *First Nat. Bank of Boston v. Judge Baker Guidance Ctr.*, 13 Mass. App. Ct. 144 (1982) ("Where the Legislature has carefully employed specific language in one paragraph of the statute . . . but not in others which treat the same topic, . . . , the language should not be implied where it is not present.")

¹⁵ *See* 34 CFR § 99.3 (Defining "Personally Identifiable Information" to include, but not be limited to – "(a) The student's name; (b) The name of the student's parent or other family members; (c) The address of the student or student's family; (d) A personal identifier, such as the student's social security number, student number, or biometric record; (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.")

CONCLUSION

Upon consideration of the District's Motion for Substitute Consent to Issue Referral Packets and the Parents' Opposition thereto, as well as the relevant documents submitted by the parties, I find I cannot grant substitute consent in this context, as there is no mechanism within the relevant statutes and regulations that would allow me to do so.

Given the following realities: (1) redaction of Eleanor's records is a substantial undertaking; (2) the District is likely to send out Eleanor's redacted referrals to the programs it has identified as potentially suitable placements for her in order to meet its obligations; and (3) consent to a referral does not limit the Parents' ability to investigate, visit, and reject any program they feel is inappropriate for Eleanor, the Parents may wish to reconsider their stance with regard to consenting to the issuance of referral packets, notwithstanding their legal right to withhold such consent.

ORDER

The District's Motion for Substitute Consent to Issue Referral Packets is hereby DENIED. The District may send out referral packets for Eleanor immediately, but those packets may not contain any personally identifiable information.

By the Hearing Officer:

Amy M. Reichbach
Dated: January 20, 2015