

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

In re: Logan¹

BSEA #1506275

**RULING ON GRAFTON PUBLIC SCHOOLS' MOTION FOR A PROTECTIVE
ORDER**

This matter comes before the Hearing Officer on a Motion filed by Grafton Public Schools (hereinafter “ District”) for a Protective Order Relative to a Discovery Request made by the Parents of Logan in this case before the Bureau of Special Education Appeals (BSEA). For the reasons set forth below, the District’s Motion for a Protective Order is hereby ALLOWED in part and DENIED in part.

FACTUAL BACKGROUND AND RELEVANT PROCEDURAL HISTORY

This case began with a Request for Hearing filed by the District through its Attorney on March 2, 2015. The District has determined that Logan no longer meets the eligibility criteria for special education services (hereinafter “services”). Parents have rejected this finding of ineligibility, and as a result Logan continues to receive services under his last accepted IEP (dated 10/22/14-10/21/15) as an exercise of his stay put entitlement.

The following facts are not in dispute and are taken as true for the purpose of this Motion. These facts may be subject to revision in subsequent proceedings.

1. Logan is 7 years old. He is in the second grade and has been on an Individualized Education Program (IEP) since preschool.
2. On January 22, 2015, Logan’s special education Team convened a meeting to review the results of several evaluations regarding Logan’s cognitive and behavioral functioning. At that time, the Team determined that Logan was no longer eligible for services.
3. On March 2, 2015, the District filed a Hearing Request with the BSEA seeking a determination that the Team’s finding was proper and that Logan no longer qualifies for services.
4. On March 10, 2015, Parents filed a written request for a two-week extension of the deadline for filing a Response to the District’s Hearing Request. This request was granted by the Hearing Officer on March 13, 2015.²

¹ “Logan” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

² Parents subsequently filed an additional request for extension on March 24, which was likewise granted.

5. Parents filed their Response on April 8, 2015, asserting that the District's discontinuation of services would deny Logan a free and appropriate public education ("FAPE"). Parents also assert that the Team failed to fully evaluate each of the areas in which Parents allege Logan has a need for services.
6. On May 12, 2015, Parents filed a Discovery Request seeking documents and other tangible things related to Logan's services dating back to 2011.
7. On May 20, 2015, the District filed a Motion for a Protective Order Relative to Parents' Discovery Request (hereinafter "District's Motion").
8. On June 3, 2015, a conference call (hereinafter "conference call") was held by the Hearing Officer to clarify issues with regard to Parents' Document Request and the District's Motion.
9. On June 5, 2015, Parents filed a Response to the District's Motion.

DISCUSSION

The BSEA Hearing Rules offer guidance regarding the scope of discovery. Rule VI(B)(1) provides that "any party may request any other party to produce or make available for inspection or copying any documents or tangible things not privileged, not supplied previously and which are in the possession, custody, or control of the party upon whom the request is made." The Rule further provides that protective orders may be issued to "protect a party from undue burden, expense, delay, or as otherwise deemed appropriate by the Hearing Officer." Rule VI(C).³ The Massachusetts Rules of Civil Procedure and the Federal Rules of Civil Procedure also offer some insight regarding the scope of discovery. Both Massachusetts Rule 26(b)(1) and Federal Rule 26(b)(1) provide that material is discoverable if it is not privileged and is "reasonably calculated to lead to the discovery of admissible evidence."

With these principles in mind, I now turn individually to each of the District's objections as noted in its Motion.

I. Document Request No. 1

This Document Request seeks in part "all documents and materials produced by, produced together, shared or referenced between Grafton Public Schools and legal counsel." The District objects on the grounds that this Request violates attorney-client privilege and the work-product doctrine and that this Request is overly broad and unduly burdensome because it does not specify a time period.⁴

³ See also 801 CMR 1.01(8)(a) (protective order may be issued "to protect a Party or Person from annoyance, embarrassment, oppression, or undue burden or expense.")

⁴ In its Motion, the District contends that because the Individuals with Disabilities Education Act (IDEA) creates a two year statute of limitations period, see 20 U.S.C. § 1415(b)(6)(B), it need not provide documents created before 2013. Although this period is relevant for claims arising under the act, historic documents from outside the two year window may still be reasonably calculated to lead to admissible evidence. As a result, the IDEA's two year statute of limitations period does not govern discovery in this case.

Attorney-client privilege is a matter of well-settled law. The Massachusetts Supreme Judicial Court has held that where legal advice of any kind is sought from a professional legal adviser in her capacity as such, the communications relating to that purpose, made in confidence by the client, are permanently protected from disclosure by herself or by the legal adviser, except when the protection is waived.⁵ Likewise, the Massachusetts Rules of Civil Procedure protect attorney work-product prepared in anticipation of litigation unless the party seeking discovery demonstrates a substantial need for the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means.⁶

Under this framework, the District is not required to turn over any materials protected by the attorney-client privilege. Additionally, absent a showing of substantial need or undue hardship on the part of Parents, materials prepared by Counsel for the District in anticipation of this action shall also be excluded. Counsel for the District must review the documents requested and withhold any materials that would violate this privilege. To the extent that compliance with this Request would violate attorney-client privilege and the work-product doctrine, the District's Motion is ALLOWED.

II. Document Request No. 2

Parents' Discovery Request seeks "[d]eficiency notices [*sic*] correspondence to and from parent(s) and other(s)." The District objects on the grounds that this Request is unclear and that it does not understand what documents Parents are seeking.

Pursuant to the conference call and the Parents' Response to the District's Motion, Parents have clarified that this Request is for correspondence from the school notifying Parents that Logan or Parents have not taken a required action, such as completing an assignment. To the extent that such correspondence exists in Logan's student record, the District's Motion is DENIED.

III. Document Request No. 3

Parents also seek "[a]wards." The District objects on the grounds that this Request is unclear and the District does not understand what documents Parents are seeking.

Pursuant to the conference call, Parents have clarified that this Request is for records of awards granted Logan for achievements such as good behavior or good academic performance.

⁵ See *Comm'r of Revenue v. Comcast Corp.*, 453 Mass. 293, 303 (2009); see also Mass. R. Prof. C. 1.6 (With limited exceptions not relevant here, "[a] lawyer shall not reveal confidential information relating to the representation of a client unless the client consents after consultation").

⁶ Mass. R. Civ. P. 26(b)(3) ("Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) 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.")

To the extent that such correspondence exists in Logan's student record, the District's Motion is DENIED.

IV. Document Request No. 4

In their Discovery Request, Parents seek "notes taken or composed and produced to comprise all and any staff member with the Grafton Public School and contracted evaluators and comments of any kind, including notes of telephone calls, multi-disciplinary meetings and observations of [Logan]; notes of: psychologists, speech and language therapists, resource specialists, reading teachers and other personnel who have provided services to [Logan], evaluated or otherwise been involved in or responsible for the provision of a free and appropriate education; and notes from multi-disciplinary team meetings and observations of [Logan]." The District objects to providing these notes because they are not "maintained by the District."⁷

Under the Family Educational Rights and Privacy Act (FERPA), Parents have the right to inspect and review the education records of their children. 20 U.S.C. § 1232g(a)(1)(A). The statute defines "education records" as 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." *Id.* at § 1232g(a)(4)(A). FERPA exempts from inspection and review "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." *Id.* at § 1232g(a)(4)(B)(i).

Parents, then, are entitled to inspect and review any documents that personally identify Logan and are maintained by the District. To the extent that the notes that they have requested are in Logan's student record and not exempted by § 1232g(a)(4)(B)(i), the District's Motion is DENIED.

Parents' Discovery Request, however, clearly extends to documents and tangible things beyond those education records that they are entitled to inspect and review under FERPA. Parents seek the notes of every member of the District's faculty and anyone who has been involved in the provision of services to Logan, including contracted evaluators, psychologists, speech and language therapists, resource specialists, reading teachers, and members of multidisciplinary teams. Because these notes have not been maintained by the District over time, the process of acquiring and producing these documents for discovery would impose on the District an undue burden, expense, and delay. Accordingly, to the extent that Parents are not otherwise entitled to such documents, and that such documents do not already exist in Logan's record, the District's Motion is ALLOWED.

V. Document Request No. 5

⁷ The District further objects on the grounds that the provision of some notes would violate the attorney-client privilege. For an analysis of this issue, see discussion in section I above.

Parents' Discovery Request seeks standardized testing protocols and score sheets. The District objects on the grounds that such documents are copyrighted materials and to release them would infringe on the legal rights of their respective publishers.

In their Response to the District's Motion, Parents cite a nonbinding policy letter from the US Department of Education's Office of Special Education Programs, according to which:

Federal copyright law protects against the distribution of copies of a copyrighted document, such as a test protocol. Since IDEA and FERPA generally do not require the distribution of copies of an education record, but rather parental access to inspect and review, Federal copyright law generally should not be implicated under these regulations.⁸

Parents also cite a California District Court opinion which holds that giving a copy of test protocols to parents of special education students is not a violation of copyright law, as it falls within 17 U.S.C. § 107, commonly referred to as the "fair use doctrine."⁹

Parents have at a minimum the right to inspect and review those test records containing information that personally identifies Logan, such as his score sheets, in accordance with FERPA.¹⁰ Parents also have a limited right to view the answer booklet if it becomes necessary during the course of an "explanation and interpretation" of Logan's school-maintained answer sheets, if they exist. *See* Shuster letter.¹¹ Although test protocols may be discoverable under other circumstances, they are not relevant to the question of Logan's eligibility for services and as a result are not reasonably calculated to lead to discoverable evidence in this case.

Accordingly, insofar as Logan's score sheets exist in his student record, the District's Motion is DENIED. To the extent that access to a test booklet is required to carry out a proper "explanation and interpretation" of these records, the District's Motion is also DENIED. With regard to test protocols, the District's Motion is ALLOWED.

VI. Document Request No. 6

In their Discovery Request, Parents seek "special education and general education lesson plans and syllabi and individualized trimester assessments for grades kindergarten, first grade and second grade." In their Response to the District's Motion, Parents clarify that they request these documents dating back to 2011. The District objects on the grounds that such request is overly broad and unduly burdensome. To the extent that individualized trimester assessments

⁸ U.S. Dep't of Ed., Shuster Letter Dated 08/07/07 re: Confidentiality of Education Records (2007), <https://www2.ed.gov/policy/speced/guid/idea/letters/2007-3/shuster080707confident3q2007.pdf> (hereinafter "Shuster letter").

⁹ *Newport-Mesa Unified Sch. Dist. v. State of California Dep't of Educ.*, 371 F.Supp.2d 1170 (C.D. Cal. 2005).

¹⁰ See section IV above for an analysis of the scope of Parents' FERPA rights.

¹¹ "Accordingly, if a school were to maintain a copy of a student's test answer sheet (an 'education record'), the parent would have a right under Part B and FERPA to request an explanation and interpretation of the record. The explanation and interpretation by the school could entail showing the parent the test question booklet, reading the questions to the parent, or providing an interpretation for the responses in some other adequate manner that would inform the parent."

exist in Logan's student record, to which Parents have access under FERPA, the District's Motion is DENIED.

With regard to lesson plans and syllabi not contained in Logan's student record, Parents argue that such documents are "relevant to determining whether [Logan] was making effective progress."¹² Logan's effective progress, however, is not at issue in this case; the only question presently before me in this matter is whether Logan is eligible for continued services. As a result, neither lesson plans (general or special education) nor syllabi are probative of Logan's eligibility for special education services on an individual basis. Such documents are not likely to lead to admissible evidence. Moreover, to allow their discovery is unduly burdensome to the District. Accordingly, with regard to special and general education lesson plans and syllabi, the District's Motion is ALLOWED.

VII. Document Request No. 7

Parents seek special education costs for Logan from 2011-2015, arguing that these data are probative of whether or not the District's finding of ineligibility was motivated by cost savings. The District objects on the basis of relevance.

Information relating to special education costs incurred by the District in its provision of services to Logan is not reasonably calculated to lead to admissible evidence regarding Logan's eligibility for services. Even if it could be determined exactly how much the District has spent providing services to Logan on an individual basis, this information makes a finding of Logan's eligibility no more or less likely. Accordingly, the District's Motion is ALLOWED as it relates to special education costs.

VIII. Document Request No. 8

Parents' Document Request includes "how RTI [response to intervention] is determined and developed, how Title I resources are allocated," and "how math fluency and phonetic fluency are determined." The District objects on the grounds that it is overly broad and unduly burdensome, that it is not requested for Logan specifically and thus unlikely to lead to admissible evidence, and that the request is unclear.

I am inclined to allow discovery of documents that contain this information, but only to the extent that they exist. It does not matter that this information is not specific to Logan. This information may be relevant to the District's allocation of resources in general, which may impact Logan specifically. Moreover it could be reasonably calculated to lead to admissible evidence regarding Logan's eligibility, and it does not appear to impose an undue burden on the District to produce such documents to the degree that they exist. Accordingly, to the extent that documents exist that contain this information (e.g. a professional development presentation explaining how RTI is determined), the District's Motion is DENIED.

¹² See Parents' Response to District's Motion.

IX. Document Request No. 9

Parents seek copies of the District's legal bills that relate to Logan or to the rest of their family, asserting that these documents are probative of whether or not the District's finding of ineligibility was motivated by cost savings. The District objects on the grounds of relevance.

Information relating to legal bills incurred by the District as a result of its dealings with Parents, Logan, or their family is not reasonably calculated to lead to admissible evidence regarding Logan's eligibility for services. Even if these bills were itemized in such a way as to make clear exactly how much the District has spent in legal fees relative to Logan and his family, this information makes a finding of Logan's eligibility no more or less likely.¹³ Accordingly, the District's Motion is ALLOWED as it relates to its legal billings.

X. Document Request No. 10

Parents' Document Request includes "documentation as to how grades on report cards evolved, to include, but not limited to, core curriculum grades from each teacher, who formulated [Logan]'s final grades from 2011 to present." The District objects on the basis that it is unclear what Parents are seeking.

In the conference call, Parents clarified that they seek documents showing what factors and assignments make up Logan's final grades. Parents argue in their Response to the District's Motion that this information is relevant insofar as it allows them to "identify what factors are used for grades and if those factors include all aspects of Logan's identified 'weaknesses.'"

To the extent that this information might be contained in a teacher's gradebook, the countervailing privacy concerns are overwhelming. A teacher's gradebook would likely not contain this information for Logan alone, but rather personally identifiable information for the entire class. FERPA precludes the disclosure of personally identifiable information, which it defines as including, but not limited to, the student's name, names of the student's parents or other family members, the student's address, "personal identifiers" such as Social Security number or student identification number, and "indirect identifiers" such as birth date, birthplace, and mother's maiden name. 34 CFR 99.3. To compel discovery of a gradebook that contains the name of any student other than Logan would be to compel a violation of FERPA, and to ask the District to create a new document which contains only Logan's grade information solely for the purpose of this action is beyond the scope of discovery. Additionally, to ask the District to redact such documents for the purpose of discovery is a burden that is not outweighed by the probative value of this information as to the issue of Logan's eligibility for services. As a result, the District's Motion is ALLOWED with respect to such documents.

To the extent that the information the Parents seek is contained in existing documents, such as a syllabus, that are in the District's possession, the District's Motion is DENIED.

XI. Document Request No. 11

¹³ This Request also implicates the attorney-client privilege. For an analysis of this issue, see section I above.

Parents seek copies of annual special education training given to staff which “defines how eligibility is determined, how 504 plans are determined and developed, how individual healthcare plans are developed, how IEPs are determined and developed, how ESY [extended school year] is determined and developed,” and the “process for determining when to go to a due process hearing.” The District objects on the basis that such information is not specific to Logan and is not likely to result in relevant evidence.

First, I am inclined to allow discovery of documents and tangible things related to the eligibility for and development of 504 plans, individual healthcare plans, IEPs, and ESY. It does not matter that this information is not specific to Logan. This information may be relevant to the District’s policies for determining eligibility in general, which would apply to Logan specifically, and could be reasonably calculated to lead to admissible evidence regarding Logan’s eligibility. Additionally, it does not appear to impose an undue burden on the District to produce such documents to the degree that they exist. Therefore, to the extent that documents exist in the District’s possession which enumerate the procedures for determining eligibility for the above-described services, the District’s Motion is DENIED.

Second, Parents’ request for documents related to the process for determining when to go to a due process hearing raises renewed concerns regarding the attorney-client privilege.¹⁴ Even if disclosure of such documents did not violate this privilege, they are not likely to lead to admissible evidence, as they are not relevant to the issue of Logan’s eligibility. Accordingly, the District’s Motion with respect to these documents is ALLOWED.

XII. Document Request No. 12

Parents seek documents demonstrating academic and IEP progress listing all of Logan’s educators, related service providers, and substitutes. The District objects on the grounds that complying with this request would require the District to create documents not already in its possession.

The District cannot be asked to produce documents not under its possession, custody, or control.¹⁵ Information regarding Logan’s academic and IEP progress, however, may be probative of his continued eligibility for services. In its Motion, the District agrees to provide this information to the extent that it exists and in the form in which it exists, even though it may not be in the requested format. Therefore, the District’s Motion with regard to these documents is ALLOWED, with the understanding the information requested will be provided to the extent that it exists in documents in the District’s possession.¹⁶

¹⁴ See section I above.

¹⁵ BSEA *Hearing Rule* VI(B)(2)

¹⁶ The District has agreed to provide a list of Logan’s educators, service providers, and substitutes within the two year statutory period to the extent that such documents exist. Though this information does not appear reasonably calculated to lead to admissible evidence, as the District has itself recognized, producing these documents does not create an undue burden on the District.

CONCLUSION

For the reasons discussed above, upon consideration of the documents submitted by the Parties and the arguments made, the District's Motion for a Protective Order Relative to Parents' Discovery Request is ALLOWED in part and DENIED in part.

ORDER

The District's Motion for a Protective Order Relative to Parents' Discovery Request is hereby ALLOWED in part and DENIED in part as follows:

- I. Document Request 1: ALLOWED
- II. Document Request 2: DENIED
- III. Document Request 3: DENIED
- IV. Document Request 4: ALLOWED in part and DENIED in part
- V. Document Request 5: ALLOWED in part and DENIED in part
- VI. Document Request 6: ALLOWED in part and DENIED in part
- VII. Document Request 7: ALLOWED
- VIII. Document Request 8: DENIED
- IX. Document Request 9: ALLOWED
- X. Document Request 10: ALLOWED in part and DENIED in part
- XI. Document Request 11: ALLOWED in part and DENIED in part
- XII. Document Request 12: ALLOWED in part and DENIED in part

The Hearing in this matter is scheduled for July 13 and 14, 2015.

By the Hearing Officer:

Amy M. Reichbach
Dated: June 12, 2015