

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals Bureau of Special Education Appeals

In Re: Xalvador and Touchstone Public Schools¹

BSEA#1507990

Discovery Rulings

These matters come before the Hearing Officer on the School's Motion's for a Protective Order permitting it to withhold redacted IEPs sought by the Parent in discovery, and to Compel the Parent to produce documents in his possession, and/or to provide appropriate releases for information, concerning the Student's involvement in services provided by the Department of Children and Families ("DCF"), the Department of Developmental Services ("DDS") and the Massachusetts General Hospital ("MGH"). The Motions and Oppositions were argued during a conference call held on July 1, 2015. The matter is scheduled for Hearing beginning July 13, 2015.

- A. Protective Order - The School argued that it cannot be compelled to produce the sensitive, personally identifiable, information contained in the IEPs and Behavioral Intervention Plans ("BIP") of student peers in Xalvador's special education program because the documents are protected by The Family Educational Rights and Privacy Act ("FERPA") and Massachusetts Student Records Regulations. The Student asserts that when the requested documents are appropriately cleansed of any and all "personally identifiable" information, their disclosure does not implicate either FERPA or the Commonwealth's student record protections. The tension between the Student's need for information in anticipation of litigation consistent with liberal discovery practice, and

¹ The Student, the Family and the School have been assigned pseudonyms by the Hearing Officer in order to protect their privacy interests when documents discussing them are available to the public.

the interest of all parties in preserving the privacy of vulnerable students and families is real. It has also been the subject of a consistent line of Orders and Rulings at the BSEA. Most recently, in a matter presenting similar facts and arguments, Hearing Officer Oliver summarized the prevailing law in this jurisdiction and concluded that when the documents sought in discovery in a BSEA matter are appropriately redacted, their release to counsel for the student and use as hearing exhibits does not violate FERPA or the Massachusetts Student Records regulations.² I am persuaded, after an independent review of the relevant statutes, regulations, and decisions that BSEA practice is on solid legal footing. Touchstone Public Schools has not, in this instance, raised any facts or circumstances unique to this matter sufficiently compelling to overcome the weight of decisional history and to justify a different result.

The School also argues that the information sought by the Student is not relevant to the Student's claim as set out in the initial hearing request, and therefore is overbroad and burdensome. I disagree. The Student's Hearing Request, on its face, exceeds the "notice pleading" requirements of 20 U.S.C. 1415(7) and implicates the appropriateness of the Student's peers as one component of the Student's comprehensive claim that the special education program proposed by Touchstone Public School is not reasonably calculated to meet the Student's special learning needs.

I find, after careful consideration of the Parties' thoughtful arguments, that the information sought by the Parent is relevant to the FAPE claim he seeks to present to the BSEA and that limited disclosure of that information in the context of a BSEA proceeding is not barred by FERPA or the Massachusetts Student Records Regulations.

² In Re: *Wellesley Public Schools and Vic*, 21 MSER 39 (2015). See also: Citations therein.

B. The information now sought by the School concerning the Student's participation in services provided by DCF, DDS and MGH may provide relevant support for its position that its current program proposal is capable of meeting the Student's special education needs in the least restrictive setting. The Parent does not oppose disclosure of this information as it pertains directly to the Student. He seeks to limit disclosure of irrelevant information those agency documents may contain about other family members. Those concerns may be addressed through appropriately drafted releases and careful redaction. Information about family members other than Xalvador is not relevant to the claims of either party to this appeal.

ORDER

A. The School's Motion for a Protective Order is DENIED. The School shall provide Parent's counsel with the documents requested in the Parent's First Request for Production of Documents numbers 16 and 17 and the Parent's First Set of Interrogatories numbers 9, 11, 14, and 16, no later than July 8, 2015.

The following additional conditions attach to the documents the School sought to withhold:

1. The documents released pursuant to this Order shall be cleansed of all identifying information, including, at minimum, the name of the child, name(s) of the 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; any student number(s) assigned to such student(s); and any reference to a uniquely identifiable physical or medical characteristic.
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

disclose the redacted documents to experts who are assisting Parents regarding appropriate peer groupings for Student and related issues and/or who may testify at the hearing.

3. Counsel shall maintain control of all documents produced pursuant to this order and must be present when they are reviewed by any other individual. No copies shall be made except for use as hearing exhibits.
 4. Counsel for the Parents may submit copies of some or all of the redacted documents as exhibits at hearing.
 5. Except as described in (2) and (3) above, counsel shall not disclose the documents or information therein to any other person or entity.
- B. The School's Motion to Compel is GRANTED, in part. The Parent shall produce all information in his possession concerning the Students' participation in services and programs operated by DCF, DDS and MGH from January 2013 until the present. The Parent shall also execute releases for similarly circumscribed information in the possession of DCF, DDS and MGH. Should there be any questions about the relevance of the information sought or produced to the issues raised in this due process proceeding or to the nature or extent of redaction necessary, the Hearing Officer will meet with the parties and conduct an in camera inspection of the affected documents on July 13, 2015 at 10:00 a.m.

July 3, 2015

Lindsay Byrne, Hearing Officer