COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Newton Public Schools **BSEA #1602067**

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act or IDEA (20 USC Sec. 1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or "Chapter 766" (MGL c. 71B), the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes.

On September 3, 2015 Parents filed a Hearing Request with the Bureau of Special Education Appeals (BSEA). This initial request alleged that the Newton Public Schools (Newton or School) denied Student a free, appropriate public education (FAPE) by determining Student's placement for the 2015-2016 school year without involving Parents in that process. On September 14, 2015 Parents filed an Amended Hearing Request in which they elaborated on their initial Request, alleging that Newton had improperly determined that Student was required to attend Newton South High School ("Newton South" or "South") for the 2015-16 school year, contrary to alleged prior promises to allow Student to attend Newton North High School ("Newton North" or "North").

Parents' Amended Hearing Request further explained that although Student's unique special educational needs required placement at North, Newton unilaterally decided to place Student at South on the basis of an arbitrary application of a district policy that determines high school placement on the basis of the student's residence, and thereby denied Student a FAPE. Parents further asserted that Newton prevented Parents from meaningfully participating in the Team process and also alleged additional, related procedural violations by Newton, including failure to provide Parents with Student's complete student record.

Newton filed a timely response in which it denied Parents' allegations of denial of FAPE and contended that all decisions regarding Student's special education services and placements were made on the basis of Student's documented special education needs through properly constituted Teams or through the BSEA mediation process. Newton stated that at all relevant times, parents were full and active participants in the decision-making process.

On January 8, 2016 Parents filed a second Amended Hearing Request in which they withdrew all pending motions (related to discovery) and all claims except for the alleged failure of Newton to provide Parents with the Student's entire, unredacted student

record. It is this second Amended Request that was the subject of the hearing in this matter.

The parties requested and were granted several postponements of the original hearing dates for purposes of discovery, clarification of issues, and both telephonic and in-person pre-hearing conferences.

The BSEA conducted an evidentiary hearing on March 21 and 22, 2016. The first day of hearing was conducted at the offices of the BSEA in Boston, MA. At the request of the parties, the second day was conducted by speaker phone. Newton was represented by counsel and one Parent proceeded *pro se* on behalf of both Parents and Student. Both parties had an opportunity to examine and cross-examine witnesses as well as submit documentary evidence for consideration by the Hearing Officer. The parties requested and were granted a postponement until April 1, 2016 for submission of written closing arguments and the record closed on that day.

The record in this case consists of the Parents' exhibits P-1 through P- 27 School's exhibits S-1 through S-7, and several hours of tape-recorded testimony and argument.

Those present for all or part of the proceeding were:

Parent	
Judith Levin-Charns	Assistant Supt. for Student Services, Newton Public Schools
Jill Murray, Esq.	Attorney for Newton Public Schools
Scott Heslin	Former Assistant Dept. Head for Special Education, Newton North H.S. (Testified by telephone)
Victoria Vendola	Assistant Principal for Student Services, Day Middle School, Newton (Testified by telephone)
Sara Berman	BSEA Hearing Officer

ISSUE PRESENTED

The sole issue for hearing is the following: whether, from January 2013 to June 30, 2015 the Newton Public Schools violated Parents' and/or Student's rights under federal and state special education statutes by denying Parents access to records pertaining to Student to which they are entitled, thereby impeding their ability to participate in developing the Student's special education programming.

POSITION OF PARENTS

Pursuant to the IDEA, Parents are entitled to have access to Student's entire educational record. During the period at issue, Newton has violated Parents' and Student's rights by persistently failing and/or refusing to provide Parents with Student's complete educational records, including in particular email correspondence mentioning Student. The records that Newton has provided to Parents are redacted or sanitized. Because

Parents have not been able to examine, in a timely matter, all records in Newton's possession pertaining to Student, Parents have lacked information that they have needed to meaningfully participate in the Team process for the period at issue. Moreover, Newton's refusal to give Parents access to Student's complete record has placed Parents at an unfair disadvantage and prevented Parents from being able to determine the full extent of their potential claims against Newton regarding Student's special education services and placement. Parents seek a finding that Newton violated Parents' rights under the IDEA to have access to Student's complete record.

POSITION OF SCHOOL

The Parents have not met their burden of demonstrating that Newton both failed to provide them with access to Student's educational records as required by federal and state law and that by so doing Newton prevented Parents from participating meaningfully in the development of Student's educational programming. At all relevant times, Newton provided Parents with access to Student's full physical school record, which contained all evaluations, progress reports, IEPs, report cards, and related documents pertaining to Student's special education services.

Further, if any failure of Newton to produce emails containing Student's name until shortly before the hearing was a violation of the IDEA's requirements regarding student records, the violation was merely technical and *de minimis*. The omission in no way diminished Parents' ability to participate meaningfully in the Team process or affected the educational services offered and provided to Student. The emails at issue contained little or no information necessary for the Team process and/or of which Parents were not aware. Moreover, at all relevant times, Parents were actively engaged in Student's special education, both through their participation in the Team process and in their consistent communication with Student's teachers and administrators.

SUMMARY OF THE EVIDENCE

1. Student is a fifteen-year-old ninth grader who resides with Parents in Newton. The Newton Public Schools is the Local Education Agency (LEA) responsible for providing special education services to Student pursuant to federal and state special education statutes. On or about June 30, 2015, Parents withdrew consent for special education services for Student. From that time forward, Student has attended Newton South High School as a general education student. The parties do not dispute, however, that at all relevant times prior to that date, Student was a child with disabilities who was eligible for, and received, special education services from Newton.

2. The Newton school district is divided into "North" and "South" zones. With certain exceptions not relevant here, Newton students are assigned to schools located within their respective zones of residence. (Parent, Vendola). At all relevant times, Parents and Student have lived in the "South" zone. Based on residence, Student's "home" middle and high schools are, respectively, Oak Hill Middle School and Newton South High School. (Parent, Vendola, Heslin)

3. Student attended Oak Hill for seventh grade (2013-2014 school year). During the spring of 2014, the Team determined that for eighth grade (2014-2015), Student's special educational needs could be better met at the Day Middle School, which is located in the North zone. A major reason for this recommendation was that Student had problematic relationships with many peers and some staff at Oak Hill, and Team members felt that a "fresh start" with a new cohort would be appropriate. (Parent, P-14, P-23)

4. Parents attended the meetings at which the school transfer was discussed, and also communicated with various School representatives about this proposal. (Parent, Vendola, Ex. P-14, P-23) Despite some initial concerns, Parents came to agree with the School that the transfer would benefit Student. (Parent, P-14, P-23)

5. On June 19, 2014 Newton issued an IEP proposing a placement in a full inclusion setting at the Day Middle School for eighth grade. Parents accepted this IEP and placement on June 24, 2014. (P-20)

6. Newton duly transferred Student to the Day Middle School for the 2014-2015 school year. (P-20) Shortly after the school year started, confusion arose on the precise nature of Student's placement. Correspondence from Day Middle School staff to Parents indicated that Student was enrolled in the "Bridge" program at Day, which is a city-wide inclusion program to support students with emotional and behavioral disabilities. (P-14)

7. Parents were not aware, at least initially, that Student would be placed at Bridge, and stated that they did not consent to it. Parents had understood, based on the IEP issued in June 2014, that Student would continue in a full inclusion placement with academic support. (Parent, P-23)[1] Nonetheless, Student completed the 2014-15 school year at the Day Middle School, primarily in inclusion classes with support from the Bridge program. (Parent, Vendola)

8. Between at least January and June of 2015, Parents and Day staff members communicated frequently (sometimes daily) and in detail by telephone, meetings and emails, regarding Student's academics, behavior, and emotional adjustment. (Parent, Vendola, S-7)

9. In an email dated February 5, 2015 to the Day Middle School principal, Parent requested "access to [Student's] entire student record." (Parent, Vendola, S-7)

10. In an email dated February 6, 2015, the principal directed Day staff to "prepare [Student's] file for sharing with his dad." (S-3)

11. Parent examined Student's physical file at Day Middle School. This file included evaluations, IEPs, progress reports, report cards, discipline reports, and other, similar

[1] Resolution of this dispute is beyond the scope of this Decision. This information is included to provide some background for the instant dispute about education records.

documents. The file did not contain printed email correspondence or reference to such emails. Parent had not specifically requested to examine emails. (Parent, Vendola, S-3)

12. On or about March 16, 2015, Parent sent an email to the Day principal requesting removal of multiple documents from Student's student record file. Parent withdrew this request by email dated April 4, 2015 after exchanges of correspondence with Newton officials. (Parent, Vendola, S-5, P-23)

13. On March 18, 2015, Newton convened a "high school transition meeting" at the Day Middle School to discuss Student's transition to high school. Newton conducted such meetings for most or all eighth-grade special education students who would be moving on to one of the district's high schools for ninth grade. (Heslin) Parents and School had multiple email exchanges about the timing, purpose, and attendance at this meeting before it took place. (Parent, Vendola, P-23) Parent and Student attended the meeting by speaker phone. (Parent, Vendola)

14. Beginning at the time the Team proposed the change in middle schools for eighth grade, was Parents' understanding that after completing eighth grade at Day, Student would move on to Newton North High School for ninth grade and beyond. Parents recall that School members of the IEP Team had made this representation while Student was still at Oak Hill. (Parent) The School witnesses do not recall promising a placement at North. (Vendola)[2]

15. During and following the meeting of March 18, consistent with their prior understanding, Parents and Student indicated that they expected and wished Student to attend Newton North High School, based on what they viewed as his need to continue with the "fresh start" peer cohort at Day. (Day is usually a "feeder" school for Newton North. (Parent, Vendola, Heslin)

16. Newton personnel expressed that a therapeutic program ("Southside") located within Student's "home" high school, Newton South, would be an appropriate placement, and proposed an IEP to this effect shortly after the meeting. (Parent, Vendola, Heslin, P-22) Parents rejected this IEP and requested a hearing (BSEA No. 1507504, ultimately withdrawn).

17. Pursuant to a mediation agreement, Parents and Student investigated the Southside program as well as a similar program ("Pilot") at Newton North. Ultimately, Parents felt that neither program would be appropriate for Student and so informed Newton at a Team meeting held on June 18, 2015. (Parent, Heslin, Vendola, P-23) Shortly thereafter, Parents rejected Newton's proposed IEP for the Southside program at Newton South. (P-23, Parent, Vendola, Heslin)

18. The gist of the dispute between Parents and the School over Student's placement was that Parents felt that Student would be harmed by placement in "therapeutic" programs at either North or South High Schools. Rather, they felt Student needed to

[2] See Note 1, above.

continue to be away from his former "cohort" that would be attending South. Rather, they believed that Student should move to North with his new "cohort" from Day, consistent with the rationale for the original change in middle schools. Parents felt that Student should be in an inclusion program at North, that is, a general education placement for all classes supplemented by academic support, rather than in a therapeutic program within either high school. Among other concerns, Parents felt that Student would refuse to participate in a therapeutic program, would find it stigmatizing, and that his behavior and emotional status would deteriorate. (Parent, Vendola, Heslin, P-23)

19. Newton personnel, on the other hand, felt that Student needed therapeutic supports in addition to academic support. They also believed that there was no educational need for Student's continued separation from his "old" cohort of peers students at Newton South, his home high school. Newton noted that Student had had behavioral and peer struggles with his "fresh start" cohort at Day. (Vendola, Heslin, Parent, P22)

20. At some point in March or April 2015 Parents retained counsel. In a letter dated April 23, 2015 Parents requested that a copy of Student's record be sent to their attorney. Newton's counsel mailed a copy of the physical school record to Parents' attorney on May 5, 2015. (Parent, S-6)

21. In a letter dated June 30, 2015 Parent withdrew Student from all special education services. Parents would prefer that Student receive special education services, but feel that the services and placement currently offered by Newton would be inappropriate and detrimental to him. (Parent, P-23)

22. Newton provided CDs containing emails (and some printed emails) to Parents after commencement of the hearing in this matter, in November 2015 and March 2016 as a resolution to discovery disputes. Specifically, Newton sent CDs containing email correspondence from, to and among Newton staff members that identified Student, by full name or initials, from the email accounts of approximately 46 current and former Newton employees (with the exception of emails subject to attorney-client privilege, which were listed on a "privilege log.") (Administrative Record, Parent)

DISCUSSION

While it is clear that Parents have substantive disagreements with Newton over the type, configuration, and location of services that are appropriate for Student, the subject of this hearing is purely procedural. The sole issue before me is whether Newton deprived Parents of a meaningful opportunity to fully participate in Student's special education planning and programming by failing and/or refusing to provide all email correspondence in the School's possession pertaining to Student until the hearing process had begun. As the moving party, Parents have the burden of proving this claim by a preponderance of the evidence. *Schaffer v. Weast*, 126 S. Ct. 528, 441 IDELR 150 (2005).

After reviewing the record in this case and considering the arguments of the parties, I conclude that Parents have not met this burden. Parents have presented no evidence suggesting that they were denied the opportunity to participate in the special education process during the period in question. On the contrary, the overwhelming, uncontroverted weight of the evidence presented at hearing is that at all relevant times, Parents have been actively involved in Student's educational programming, not only at Team meetings, but between formal meetings, through regular, consistent communication about their son's needs with direct service providers and with Newton. My reasoning follows.

As the parties well know, the IDEA requires school districts to provide each eligible child within their boundaries with a free, appropriate public education (FAPE). 20 USC §1400 *et seq*. It is well settled that the right to a FAPE entails not only the substantive right to an individual education plan (IEP) that is tailored to meet the unique needs of the child, but also to procedural protections. See e,g., *Roland M. v. Concord School Committee*, 910 F.2d 983, 994 (1st Cir. 1990); *Maine School Admin. Dist. No. 35 v. Mr. R.*, 32 F.3d 9, 12 (1st Cir. 2003). These protections include the right of parents to "examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a [FAPE] to such child" 20 USC Sec. 1415 (b)(1); *Shaffer v. Weast*, 546 US 49, 60 (2005)

Federal regulations at 34 CFR §§300.501 and 300.610-624 implement the statutory provisions regarding educational records. In particular, §300.611 incorporates the broad definition of "education records" set forth in the Family educational Rights and Privacy Act, 20 USC §1232g ("FERPA") and its implementing regulations (34 CFR §334 CFR Part 99, which includes "records, files, documents and other materials which contain information directly related to a student; and are maintained by an educational agency or institution…" 23 USC §1232(a)(4)(A).[3]

Further, 34 CFR 300.613 provides that school districts must (a)…permit parents to inspect and review any education records relating to their children that are collected, maintained or used by the agency under this part…without unnecessary delay and before any meeting regarding an IEP or any hearing…or resolution session….and in no case more than 45 days after the request has been made…" *Id*. Additionally, pursuant to 34 CFR §300.616, school districts "must provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency." *Id.*

The above-cited provisions could plausibly be viewed to include electronic records, including email correspondence, within the definition of "student records," at least under some circumstances. See, for example, *Jaccari J. and Sandra J. v. Bd. of Education of the City of Chicago, et al*. 52 IDELR 280 (N.D. IL, 2009) In that case, the District Court ordered the school district to produce electronic data containing reports of

[3] The school asserts, correctly, that the BSEA lacks authority to determine whether Newton violated FERPA or analogous Massachusetts provisions, MGL c. 66§10, 603 CMR 23.00 *et seq*., *In Re Taunton Public Schools*, BSEA No. 1304738, 19 MSER 34 (Byrne, 2013). The IDEA's implementing regulations have adopted FERPA's definition of "education records, " however.

Student's aggressive behavior and subsequent restraint. The district was maintaining this data in a centralized electronic storage system. In ruling in the plaintiff parents' favor, the Court stated that not only was the information relevant to the student's educational needs and therefore subject to discovery, but also "under the IDEA Plaintiffs have a right to review the reports concerning [the child]…" *Id.*, p. 282.

While it is not definitively clear whether the email correspondence among staff sought by Parents in the instant case (as opposed to the discipline/restraint reports at issue in *Jaccari, supra,* constitutes a student record within the meaning of the IDEA, it is clear that the pertinent statutes and regulations are broadly written and do not exclude such correspondence from their purview. At issue here however, is whether, assuming that the correspondence at issue constituted education records, Newton committed an actionable procedural violation by any failure or delay in providing those records to Parents.

The answer to this question requires reference to the major purpose of the IDEA's mandate to furnish parents with education records; that is, to enable parents to fully participate in the development of their children's special education programming, consistent with the over-arching scheme of the IDEA to engage parents and school districts in a collaborative process. See, *e.g., Amanda J. ex rel. Annette J. v. Clark Ct. School Dist.,* 267 F.3d 877, 9892-893 (9th Cir. 2001), *Schaffer v. Weast, supra*. The question in this case is whether Newton prevented Parents from engaging in that process by its actions or failures to act with respect to the emails.

Here, there is no evidence on the record that Parents were unable to obtain access to, and copies of, Student's "physical" or "paper" student record in a timely manner. The crux of Parents' dispute with Newton is that the large volume of email correspondence pertaining to or mentioning Student, existed, that they did not know to ask for this information when making their initial records requests because they were unaware of its existence, and that they did not receive this information until shortly before the hearing. Parents argue that this email correspondence may contain information relevant to the underlying dispute over Student's educational placement and/or giving rise to additional legal claims by Parents against Newton.[4]

Assuming, arguendo, that emails are "student records" within the meaning of the IDEA and implementing regulations, the applicable federal regulation at 34 CFR §300.616, supra, certainly seems to suggest that districts are obligated to inform parents of the existence of such information. In the instant case, Newton did not volunteer to Parent that this body of electronic correspondence was in existence at the time they made their records requests, although Newton did eventually produce a large volume of such data during the course of this proceeding. It can be argued that this failure to affirmatively inform Parents of the emails mentioning Student's name was a technical violation of the provisions at issue.

[4] As of the time of the hearing, Parents had actually submitted into evidence few or no email items that it had received from Newton. There is no evidence that the emails contained reports, evaluations, or the like pertaining to Student's needs with which Parents were not already familiar.

Even if such violation occurred, however, there is no evidence whatsoever that Parents were hampered in their ability to actively participate in the IEP process for the period at issue, or that Student was denied educational benefits as a result. On the contrary, as stated elsewhere in this Decision, the documentary and testimonial record is replete with evidence that Parents had full access to all reports and evaluations concerning Student. The record further contains ample evidence of Parents' regular attendance at and participation in meetings, communication with teachers and administrators, and, generally, active, sophisticated, and well-informed involvement with their son's education. Any violation of the relevant provisions was of the "*de minimis*" variety that does not give rise to a claim under the IDEA. *Murphy v. Timberlane Regional School District*, 22 F.3d 1186, 1196 (1st Cir. 1994) and cases cited therein.

Parents disagree with Newton's decisions regarding Student's IEP and placement for ninth grade. This Decision in no way reaches the merits of their disagreement, or the substantive appropriateness of the IEPs and placements at issue. Rather, this Decision simply determines that Parents had a meaningful opportunity to participate in the process of developing Student's programming, despite possible technical violations by Newton, and despite Parents' disagreement with the outcome of the Team process.

CONCLUSION

Based on the foregoing, the Parents have not demonstrated that Newton's failures and/or delays in providing them with the electronic information referred to above constituted a violation of their rights under the IDEA that prevented them from participating meaningfully in Student's special education planning or deprived Student of educational benefits.

By the Hearing Officer,

_____ Dated:_____

Sara Berman