

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS**

Bureau of Special Education Appeals

In Re: Student

&

BSEA #1702730

Manchester-Essex Regional
School District

**RULING ON MOTION OF MANCHESTER-ESSEX REGIONAL SCHOOL DISTRICT
FOR PROTECTIVE ORDER**

Student is a seventh grader who lives with her parents (Parents) within the Manchester-Essex Regional School District (MERSD or District). The parties agree that Student attended MERSD public schools through the 2012-2013 school year. In approximately May 2013, MERSD developed a §504 Plan for Student to accommodate a chronic health condition, which condition still exists.

In or about July 2013, Parents withdrew Student from the District and placed her at a private school at their own expense. Student has attended this private school as a day student from that time to the present, funded entirely by Parents. There is no dispute that Parents have neither sought nor received any funding or other assistance or endorsement from MERSD for Student's private placement, and do not intend to do so in the future.¹ Further, the parties do not dispute that at all relevant times, Student has continued to be a resident of the District. The parties have stipulated, however, that since Parents placed Student in private school, Student has not enrolled or attempted to enroll in the District as a so-called "dually enrolled" student or in any other capacity.

In or about early September 2016 Student signed up for the MERSD middle school field hockey team. (The private school does not offer field hockey). MERSD initially accepted payment of the required fees and allowed Student to practice with the team and ride the team bus. In mid-September 2016, MERSD informed Student and Parents that Student could no longer participate in field hockey because she was not enrolled in the District, and that such enrollment was a threshold requirement for participating on the field hockey team.

¹That the private school happens to be a DESE-approved special education school is irrelevant to the central issues of the case because MERSD has never had any involvement with Student's placement there.

On October 3, 2016 Parents filed the instant hearing request in which they allege that MESRD's removal of Student from the field hockey program constituted discrimination against Student based on her health disability. Parents assert that there are other MERSD resident children who are enrolled in private schools at parental expense who are allowed to play sports for the District. Parents allege that MERSD's has treated Student differently from such similarly situated students (hereafter "comparators" or "comparator students") and has done so on the basis of her disability, thereby violating her rights under §504 of the Rehabilitation Act.

On or about October 7, 2016 Parents filed their first request for production of documents and first set of interrogatories with MERSD. On October 17, 2016 MERSD filed timely objections to Parents' discovery requests as well as the *Motion for a Protective Order* that is the subject of this *Ruling*. The *Motion* seeks to preclude Parents' discovery of information relating to access to MERSD sports programs by members of the comparator group.

Disputed Requests

The Parents' disputed discovery requests are as follows:

Document Request No. 3:

"...all documents....that discuss or reflect any discussion and/or deliberation by MERSD regarding the ability of students who reside in the district but attend private school at parental expense to be able to access extra-curricular and/or athletic programs offered by MERSD...[including] any internal communications among school committee members, the superintendent, the athletic department and/or any other party..."

Document Request No. 6:

"...all documents...reflecting or concerning any communication(s) between MERSD and the MIAA concerning the participation of any student who resides or who has resided in the district but attends or attended a private school at parental expense since September 1, 2006...[including] copies of any informal inquiries...[and] requests for waivers submitted by MERSD to the MIAA..."

Document Request No. 7:

"...any documents reflecting or concerning requests, waivers, inquiries, complaints...and/or communications made by any other resident family of MERSD who has a child who attended or attends a private school at parental expense, and who have asked MERSD to allow...access to extra-curricular and/or athletic programs offered by MERSD...."

Document Request No. 8:

"...any records that reflect the total number of students who currently reside within MERSD but who attend private schools at parental expense."

Document Request No. 9

“...any records that reflect the total number of students who currently reside within MERSD but who attend private schools at parental expense who have requested that MERSD allow their child to participate on a MERSD athletic team and/or extracurricular activity.”

Interrogatory No. 5

“Please identify the total number of students who reside within MERSD but who attend a private school fully at parental expense who have requested permission from MERSD to participate on one of the MERSD’s athletic teams...[specifying] the total number of requests...per year, the grades of the students, the specific sports..., and how many of such requests were made by students with 504 plans or IEPs...how [sic] were granted...and how many were denied during each school year. For each request that was granted....whether or not the student was eligible for a 504 plan or IEP.”

District’s objections to discovery

MERSD puts forward the same objection to each request on two general bases. First, the District argues that the information sought is “irrelevant, overly broad and burdensome, not proportional to the needs of the case” and “immaterial and not reasonably calculated to lead to the discovery of admissible evidence.” Second, MERSD asserts that disclosure of information related to other students would violate state and federal statutes and regulations protecting the privacy of student information.

Parents’ response to Districts objections

In their *Objection* to the School’s *Motion*, Parents argue that information about policies and practices of the District towards students who are similarly situated to the Student in this case (*i.e.*, private school students who live within District boundaries) is relevant to Parents’ claim that the District treated Student differently on the basis of her disability. As to the School’s second basis for requesting a protective order, Parents argue that they have requested that all documents be cleansed of personally identifiable information before production, and that production of such “de-identified” information complies with the requirements of the statutes at issue. Parents further agree to “abide by the precautions set forth in *Mattapoisett*² to limit disclosure, and will return copies of all records to MERSD at the conclusion of this action (or destroy them at the District’s request).” See Parents’ *Opposition* at p. 9.

DISCUSSION

Based on a careful review of the parties’ submissions in light of applicable law, I conclude that MERSD’s *Motion for Protective Order* should be DENIED, subject to conditions that will be listed below.

² *In Re: Mattapoisett Public Schools, Ruling on Motion for Protective Order*, BSEA No. 06-6153 (Crane, 2006)

The BSEA *Hearing Rules* allow discovery in BSEA proceedings.³ Rule VI(B)(1) states 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.” Additionally, under Rule VI(B)(2), “a party may serve on any other party written interrogatories for the purpose of discovering relevant, not privileged, information not supplied previously through a voluntary exchange of information.”

To define the scope of discovery, the BSEA looks for guidance to Rules 26(b)(1) of both the Massachusetts and Federal Rules of Civil Procedure. Massachusetts Rule 26(b)(1) states that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...It is not ground for objection that the information sought will be inadmissible at the trial if...[it]...appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* (as amended, effective July 1, 2016).

The corresponding Federal rule allows discovery of “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues..., the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information...need not be admissible in evidence to be discoverable.” Fed. R. Civ. P., Rule 26(b)(1) (as amended effective December 1, 2015)

The BSEA, following the guidance of the courts, has interpreted these discovery provisions liberally, to enable parties to thoroughly prepare for hearing or otherwise resolve the dispute. See, e.g., *Mattapoissett, supra*. On the other hand, the rules allow limits on discovery when appropriate. Accordingly, Rule VI(C) enables hearing officers to issue protective orders to “protect a party from undue burden, expense, delay, or as otherwise deemed appropriate by the Hearing Officer.”⁴ Similarly, Rule 26(c) of both the Massachusetts and Federal Rules of Civil Procedure allow for protective orders “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *Id.*

The District’s assertion that the disputed information is neither relevant to Parents’ claims nor calculated to lead to the discovery of admissible evidence is not supported by the facts or law. Parents have alleged that the District unlawfully denied Student access to one of its programs or activities (field hockey) on the basis of her disability, in violation of §504 of the Rehabilitation Act. In order to prove their claim, Parents must show that the District treated Student’s attempts to participate in field hockey differently from how it treated such requests from comparator students who are not disabled. In addition, Parents must demonstrate that if such differential treatment occurred, it was

³ See also 801 CMR 1.01(8)(a)-(i)

⁴ 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.”).

based on Student's disability. Information about policies and practices of the District in this regard as well as on its treatment of non-disabled comparators is directly relevant to this core issue in the case.

Moreover, the privacy issues raised by MERSD do not justify the protective order sought by the District. As a threshold matter, these privacy-based objections are inapplicable to Requests Nos. 3, 8 and 9, which do not appear to seek information pertaining to particular students. Request No. 3 concerns policies and activities of the District. Requests 8 and 9 seek statistical information that can be provided without reference to particular students.

Requests Nos. 6 and 7 as well as Interrogatory No. 5 do seek information regarding particular students and/or families. It is well settled, however, that such information is discoverable at the BSEA if it is adequately sanitized or "de-identified." See, for example, *In Re: Wellesley Public Schools and Vic (Ruling on Discovery)*, 21 MSER 39 (2015); *Touchstone Public Schools*, 21 MSER 137 (2015), and *Andover Public Schools*, 22 MSER 148 (2016). Consistently, hearing officers, guided by applicable statutes, regulations and case law, have determined that such "de-identified" student information (in those cases, IEPs and §504 Plans of potential peers) is generally discoverable.⁵ At the same time, hearing officers have been cognizant of school district privacy concerns; while allowing discovery of peer information, hearing officers have also issued comprehensive protective orders designed to enable necessary discovery while safeguarding the privacy of sensitive information. *Id.* See also *In Re: Mattapoisett Public Schools*, BSEA No. 06-6153 (Crane, 2006).

In the instant case, any student information that Parents seek would be "de-identified" and, therefore, not immune from discovery. Further, most of the student-specific information that the Parents seek concerns residency, the existence of private school enrollment, and communication with the District regarding waivers. While such information must be de-identified prior to disclosure, it certainly appears to be less personal and sensitive than the IEPs, §504 plans, behavior plans and evaluations that are routinely subject to discovery in "typical" special education litigation. Even Interrogatory No. 5, which mentions IEPs and §504 Plans seems to inquire only whether such plans exist, with no mention of their content.

⁵ Neither FERPA nor the Massachusetts Student Records Regulations at 603 CMR 23.00 *et seq.* prohibits disclosure of records which do not contain personally identifiable information, because the removal of such information extinguishes the privacy concerns that these provisions are designed to protect. The FERPA regulations specifically allow disclosure of such "de-identified" information at 34 CFR 91.31(a)(1)(b)(1) as follows:

(b)(1) De-identified records and information: An educational agency or institution or a party that has received education records or information from education records under this part, may release the records or information without the consent required by §99.30 after the removal of all personally identifiable information provided that the educational agency or institution has made a reasonable determination that a student's identity is not personally identifiable...

CONCLUSION AND ORDER

Based on the foregoing, the *School's Motion for a Protective Order* is DENIED. Within ten (10) calendar days from the date of this *Order*, or on such other date as the parties agree, MERSD shall provide counsel for Parents with the documents and answers to interrogatories that are the subject of this Ruling, with the following restrictions:

1. Any documents and answers to interrogatories that refer to a particular student or family shall be cleansed of all identifying information, including, at minimum, the name of the child, name(s) of parent(s), guardians, or other family members, address including city or town (other than a notation indicating residence in a MERSD member community) date and place of birth, gender, race/ethnicity, any language(s) other than English that are spoken by the student and/or parents, student identification number, Social Security number, and involvement with a court or state agency. The documents also shall be cleansed of any and all information pertaining to family members other than the child, including but not limited to medical, social, educational, employment or demographic information, whether or not such information actually or potentially identifies the person at issue.
2. The redacted documents shall be provided solely to counsel for the Parents, and not to the Parents or Student, or any other person or entity except for Parents' experts who may be called as witnesses at the hearing. No copies will be made of the redacted documents other than copies made by Parents' counsel for the use of Parents' experts. Parents' counsel shall instruct the experts that they may not further copy or distribute the documents and that they shall destroy or return all copies to Parents' counsel upon the conclusion of this case by hearing or settlement.
3. Prior to hearing, the parties shall discuss whether either party intends to use as hearing exhibits any documents referring to individual students. If so, the parties shall determine whether additional protections are necessary before including such documents as hearing exhibits.
4. The redacted documents will be destroyed or returned to MERSD upon conclusion of this matter. The matter will be deemed concluded after a decision has issued and the period for appeal has expired, or after conclusion of an appeal of a BSEA decision, or after final disposition of the case via settlement, withdrawal, and/or dismissal.

Nothing in the foregoing order precludes the parties from crafting a mutually-agreeable

protective order that addresses the concerns of both parties.

By the Hearing Officer,

Dated: January 26, 2017