

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

In Re: Student v.
Andover Public Schools

BSEA #1706174

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

Andover Public Schools (Andover) submits this Motion in connection with discovery requests filed by Parents in the above-referenced matter.

By way of background information, Parents requested a Hearing on January 31, 2017 alleging that the program and placement proposed by Andover in June 2016 for the 2016-2017 school year was inappropriate and denied Student a FAPE. As a result, Parents seek reimbursement for tuition and transportation costs associated with their unilateral placement of Student during the aforementioned school year.

On February 8, 2017, Andover filed its *Response* to Parents' *Hearing Request*, asserting that the proposed IEP and placement were appropriate for Student. The Parties jointly requested a postponement of the initial hearing date, and agreed to proceed to Hearing on May 22, 23, and 25, 2017.

On February 16, 2017, Andover served Parents with a *Request for Production of Documents and Interrogatories*. On March 27, 2017, Parents filed a *Notice of Objection to the District's Discovery Requests*.

On April 4, 2017, Andover forwarded to the BSEA a *Request to Waive Parents' Objections to the District's Discovery Request*. Andover argued that pursuant to Rule VI(C) of the *Hearing Rules for Special Education Appeals*, Parents' *Notice of Objection to the District's Discovery Requests* was a month late and therefore Parents' objections should be deemed waived.

On March 27, 2017, Andover also filed the *Motion for a Protective Order* ("Motion") that is the subject of this ruling. Andover's Motion seeks to preclude Parents' discovery of documents and information relating to children with whom Student may be grouped (under Grid C of Student's IEP) in the program proposed by Andover.¹

Also on March 27, 2017, Parents filed their *Response to Andover's Objection*, and an *Opposition to Andover's Motion*, stating that the information requested (the proposed peers' redacted records) are necessary to determine the adequacy of the Student's proposed placement and "can be released...as part of due process proceedings without violating state law or student privacy."

¹ Andover's Motion for Protective Order specifically refers to Parents' Document Requests #13, #14, and #15 and Parents' Interrogatory Requests #13 and #14.

During a telephone conference call held on April 19, 2017 the Parties' discovery issues were discussed. Andover requested an opportunity to argue the instant *Motion* orally at a later date. Andover however, noted that it had no additional information to offer different from what was included in its written Motion. As such, and relying on Rule VII D of the *Hearing Rules of Special Education Appeals*,² Andover's request was DENIED.

Facts:

The Facts stated below are considered true solely for the purpose of this Motion.

1. Student is an 8-year-old resident of Andover who is attending the second grade at a special education private school pursuant to Parents' unilateral placement. The Parties agree that Student is eligible to receive special education on the basis of a specific learning disability that impacts reading, written expression, and mathematical computation.
2. Student attended Kindergarten and first grade at Andover Public Schools.
3. Following an initial eligibility Team meeting on January 19, 2016, Andover offered Student participation in a partial inclusion program in Andover. Student's IEP offered her special education services in the areas of reading, writing, spelling, and mathematics.
4. In April 2016, Andover proposed an Amendment to the January 2016 IEP. The Amendment offered Student 2x45 minutes per week reading services in a five week extended school year program, which services Parents accepted.
5. On May 25, 2016, the Team reviewed an independent neuropsychological evaluation. At this meeting Parents informed Andover that they were unilaterally placing Student in a private special education school for the 2016-2017 school year.
6. At Parents' request Student's Team reconvened in June 2016, to discuss the services Student would be receiving during the upcoming school year were she to remain in Andover. According to Parents, Andover would be providing Student the same type of services Student had previously received during the 2015-2016 school year. Parents further stated that Andover had noted that any further interventions, such as a language-based programming, would not be available until third grade.³
7. In the summer of 2016, Student attended Andover's extended school year program.

² Addressing Hearings and Rulings on a Motion Rule VII D states that

If a hearing on a motion is warranted, a hearing officer shall give all parties at least (3) calendar days notice of the time and place for hearing. A Hearing Officer may rule on a motion without holding a hearing if: delay would seriously injure a party; **testimony or oral argument would not advance the Hearing Officer's understanding of the issues involved**; or a ruling without a hearing would best serve the public interest. [Emphasis Supplied].

³ According to Parents they were further told that Student would only be allowed to attend the language-based program if she were determined eligible.

8. In September 2016 Student began second grade at a private special education program.
9. In January 2017, Andover scheduled a Team meeting for January 13, 2017 to propose a new IEP. Parents cancelled this meeting and Andover subsequently proposed meeting on January 31, 2017. Parents cancelled this meeting as well and Andover proposed to convene the Team on February 9, 2017.⁴ On or about March 8, 2017, Andover issued a new IEP for 2017-2018.

Disputed Documents:

At issue are the documents named in *Parents' Document and Interrogatories Requests* as follows:

Document Request No. 13

Please provide legible copies of IEPs, appropriately cleansed of identifying names and information but marked for reference by number or letter, of all students assigned to Andover's currently proposed placement for Student and those of any placement Andover intends to offer for the 2017-2018 school year. Such IEPs should include all students scheduled to participate in grid C of the proposed IEP for 2016-2017 and 2017-2018.

Document Request No. 14

By reference to the IEPs provided in response to Request Number 13, please provide a document (or documents) indicating for each student his or her cognitive levels and the date of the last administration of WISC-IV or any other standardized cognitive testing, if any, with the Verbal Comprehension, Perceptual Reasoning, Working Memory and Processing Speed composite scores, Full Scale Scores and all sub-test scores resulting from such testing.

Document Request No. 15

By reference to the IEPs provided in response to Request No. 13, please provide a document (or documents) indicating for each student his/her last applicable academic performance levels in reading, language arts, math and social/communication/behavioral skills, and identify the test or tests that provided such performance levels and the date(s) of administration of such tests.

Interrogatory Request No. 13

If no document is available providing the information requested in Document Request Number 15, by reference to the IEPs provided in response to Document Request Number 13, please indicate for each student his or her cognitive levels and indicate the date of the last administration of the WISC-IV or any other standardized cognitive testing, privately or publically administered if any, with the Verbal Comprehension, Perceptual Reasoning, Working Memory, Processing Speed, Full Scale scores and all sub-test scores resulting from such testing.

⁴ At this time, it appears that Parents have not accepted the proposed IEP covering the period from January 19, 2017 to January 18, 2018.

Interrogatory Request No. 14

If no document is available providing the information requested in Document Request Number 15, for each of the students whose IEPs are provided in response to the Parents' First Request for Documents, Request Number 13, please indicate his/her last applicable academic performance levels in reading, language arts, math and social/communication/behavioral skills, and identify the test or tests that provided such performance levels and the date(s) of administration of such test(s). (If the reported levels are not based on standardized testing, please describe the basis for the determinations of levels and identify the person(s) making such determinations).

Andover objects to producing the requested information on two grounds. First, Andover argues that information regarding potential peers is neither relevant to the appropriateness of the IEP and placement proposed for Student, nor is it likely to lead to the discovery of relevant information in this matter. Second, Andover states that disclosure of the requested information would violate state and federal statutes and regulations protecting the privacy of student information.

In their *Objection* to Andover's Request for a Protective Order, Parents argue that information about potential peers is highly relevant for determining whether Andover's proposed placement is appropriate for Student, and further state that information regarding the proposed peers' cognitive levels and academic skills levels is necessary to determine whether the proposed placement would provide an appropriate peer group for Student. Parents have requested that all documents be cleansed of personally identifiable information. Lastly, Parents have requested that Andover not contact the parents of students whose redacted IEPs are to be released.

DETERMINATION:

Based on a careful review of the Parties' submissions and in light of applicable law, I conclude that Andover's *Motion for a Protective Order* should be **DENIED** with respect to IEPs (i.e., Document Request No. 13), subject to conditions listed later in this Ruling. Andover's *Motion* regarding Document Requests #14 and #15 and Interrogatory Requests #13 and #14 requesting release of the proposed peers' individual behavior plans, grades, cognitive testing results and scores, (except where these are incorporated or reported in the students' IEPs themselves) is **GRANTED**, as explained below.

The *Hearing Rules for Special Education Appeals* allow discovery in BSEA proceedings. Specifically, Rule VI(B)(1) of the *Hearing Rules for Special Education Appeals* 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.

With respect to the scope of discovery, the BSEA looks to Rules 26(b)(1) of both the Massachusetts and Federal Rules of Civil Procedure for further guidance.

Massachusetts Rule 26(b)(1) provides 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)

Guided by the Rules, *supra*, the BSEA has interpreted the applicable discovery provisions liberally, to enable parties to thoroughly prepare for hearing or otherwise resolve the dispute. See *In Re: Mattapoissett Public Schools*, BSEA No. 06-6153 (Crane, 2006). When appropriate, the applicable rules also impose limits on discovery. As such, Rule VI(C) of the *Hearing Rules for Special Education Appeals* provides for issuance of protective orders to

“protect a party from undue burden, expense, delay, or as otherwise deemed appropriate by the Hearing Officer.” Rule VI(C).⁵

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.*⁶

Since Parents challenge the appropriateness of the proposed placement including the peer group, in light of the applicable Rules, Andover’s assertion that the documents sought by Parents are neither relevant to Parents’ claims nor calculated to lead to the discovery of admissible evidence for hearing is not supported by the facts or law.

The instant case concerns a dispute between Parents and Andover over whether the proposed partial inclusion program and extended school year services would be appropriate for Student for the IEP period from January 19, 2016 to January 18, 2017. Information regarding the instructional levels, skills, and needs of the proposed peers in that classroom, as may be gleaned

⁵ 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.”).

⁶ The Federal and Massachusetts Rules, though not identical apart from the quoted language, both suggest factors to be considered prior to issuing a protective order, as well as options for the scope of such an order. *Id.*

from sanitized IEPs, is directly relevant to whether the needs of the peers in the proposed grouping are similar enough to Student's so as to enable the type of group instruction that would benefit Student and address her unique needs.

Having concluded that materials sought in discovery are directly relevant to the central issue in the case, I turn to the School's argument that Federal and state provisions governing privacy of student information preclude disclosure of the requested documents.

The Family Educational Rights and Privacy Act of 1974, 20 USC §1232 (hereafter, FERPA) conditions educational agencies' and institutions' receipt of federal funds on conforming their treatment of student information to FERPA requirements. Among other things, FERPA and its implementing regulations located at 34 CFR §99.1 *et seq.* require educational agencies to safeguard the privacy of student information. 34 CFR §99.2. FERPA and its implementing regulations explicitly prohibit educational institutions from disclosing "personally identifying information" about students without the written consent of parents or eligible students except in circumstances that are clearly delineated in the statute and regulations. 34 CFR §99.30.⁷

The FERPA regulations define "personally identifiable information" as including, but not limited to:

- (a) the student's name;
- (b) the names of the student's parents 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...reasonably believes knows the identity of the student to whom the education record relates. 34 CFR 99.3(a) – (g).

The Massachusetts Student Records Regulations, 603 CMR 23.00 *et seq.*, also prohibit disclosure of student records containing personally identifying information to third parties without parental and/or student consent, with certain limited exceptions. 603 CMR 23(07).

Neither FERPA nor the Massachusetts Student Records Regulations 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

⁷ The FERPA requirements, with some adjustments to reflect reporting requirements under IDEA which are not relevant here, are incorporated into the Federal special education regulations at 34 CFR § 300.610–627; 34 CFR §99.2.

91.31(a)(1)(b)(1):

(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, whether through single or multiple releases, and taking into account other reasonably available information.

The state regulations do not track the language of this Federal provision; however, the state regulations define "the student record" as information "concerning a student that is organized on the basis of the student's name or in a way that such student may be individually identified..." 603 CMR 23.02. Thus, "de-identified records and information" would similarly not be considered "student records" under state regulations.

In the instant case, Parents have requested IEPs (as well as other documents and answers to interrogatories) redacted of all identifying information. As such, those documents fall squarely within the definition of "de-identified information" which may be released pursuant to the pertinent federal and state regulations, subject to additional protections that are specified in the *Order* section of this Ruling below.

Andover first argues that redaction of the documents at issue will not prevent "linkage" to specific students as described in 34 CFR 99.3(f). Andover's argument is not persuasive, as with application of the provisions stated in the *Order* section of this Ruling, the risk of such potential "linkage" is minimal in the instant case. First, the *Order* will limit disclosure of the documents themselves to persons who are not members of the school community, namely, Parents' counsel and their experts. Also, Parents will not be given access to the released documents pertaining to the proposed peers.

Second, the argument that student privacy will be compromised by discussion of the profiles of peers at the hearing or in a publicly-available decision is also not persuasive. In the context of a factually-dense hearing and decision, any information about peers is likely to be so attenuated that the risk of identifying such peers is minimal. Moreover, allowing the discovery sought at this point does not preclude either party from objecting to introduction of testimony or documents at the hearing if that party believes a student's privacy rights will be violated.⁸ Either party may also request imposition of additional safeguards to protect the privacy of third persons/peers.

Upon review of the relevant statutes, regulations and case law, and taking into consideration the particular circumstances in the case at bar, I conclude that the release of sanitized IEPs as

⁸ I note that MGL c. 71B §3 and 603 CMR 28.07(1)(c)(3) give parents of eligible students, as well as their consultants and evaluators, the right to observe any program being attended proposed for their child, provided the school takes steps to ensure confidentiality of personally identifiable information that the parent or observer might acquire incidentally.

requested does not contravene the provisions of FERPA, the IDEA, their implementing regulations, and corresponding state law that prohibit disclosure of personally identifiable information about students. As such, I can find no basis to overturn longstanding BSEA policy in this regard. See, e.g., *Touchstone Public Schools*, and *In Re: Wellesley Public Schools*, *supra*, and cases cited therein. Based on the foregoing, the *School's Motion for a Protective Order* is DENIED with respect to the IEPs.

Next, I turn to Andover's *Motion for a Protective Order* with respect to release of the remaining documents requested, specifically, "individualized behavior plans, cognitive testing results and scores, grades" of proposed peers.

As stated in *Danvers Public Schools*, BSEA No. 12-3302, documents such as evaluations containing cognitive test results will often also include a history inclusive of highly sensitive but usually irrelevant information about the child and other family members (e.g., birth circumstances, health conditions, psychiatric history, custodial issues, family problems and the like). Once redacted to disclose only cognitive test results, such documents would be unlikely to yield any meaningful information that is not already provided in an IEP or 504 Plan. Allowing the release of these documents risks intrusion without corresponding benefit. Similar concerns apply to cognitive, behavioral, academic, and speech-language assessments.

As for grades and testing scores, grades received by potential peers are of limited if any relevance to the issue of peer appropriateness. Especially at the early elementary school level, teachers rely on a variety of evaluative methods to determine whether a student has mastered the given material, which oftentimes includes more soft-skill evaluations as opposed to formal tests. In turn, there are usually multiple factors contributing to how a teacher grades a student (e.g., formal tests, class participation, individual and group projects, etc.). In the instant case, the grade a particular student who is enrolled in the partial inclusion program receives in his or her classes has little bearing on that student's potential appropriateness as a peer for Student.

Andover's *Motion for a Protective Order* is therefore GRANTED with respect to release of the remaining documents requested, specifically, "individualized behavior plans, cognitive testing results and scores, grades" of proposed peers, except insofar as such information is already contained in an IEP as explained below. Similarly, Andover's *Motion for a Protective Order* is also GRANTED with respect to Interrogatories #13 and #14. Andover is not required to create a document responsive to the aforementioned Interrogatories.

ORDER

Within ten (10) calendar days from the date of this *Order*, or on such other date as the parties agree, Andover shall provide counsel for Parents with the IEPs specified in Parents' Document Request #13, subject to the following restrictions:

1. The documents 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, 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, subject to the following provisions:

- a. No copies will be made of the redacted documents except that Parents' counsel may provide Parents' experts with copies of the documents, but shall instruct the experts that they may not further copy or distribute such copies and shall destroy or return all such copies to counsel for the Parents upon the conclusion of this case by hearing or settlement.
- b. Parents' counsel will advise Parents' experts not to discuss the peer IEPs with Parents.

3. Prior to hearing, the parties shall discuss whether either party intends to use peer documents as exhibits at the hearing. 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 Andover 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,

Rosa I. Figueroa
Dated: April 20, 2017