

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

In Re: Student v.
Medford Public Schools

BSEA# 2002451

RULING ON PARENTS' REQUEST TO HOLD AN OPEN HEARING

On August 29, 2019, Parents requested a Hearing in the above-referenced matter. On September 25, 2019, Parents requested a postponement of the Hearing on the basis of unavailability of their expert witness. Parents' September 25, 2019 communication also requested that a stenographer be present at the Hearing, and that the Hearing be open to the public. Medford Public Schools (Medford) responded via letter dated September 25, 2019, objecting to Parents' request to hold an open hearing.

The case proceeded as a Pre-hearing Conference on October 23, 2019, at which time Medford was informed that the determination to hold an open hearing was within the Parents' purview. Parents were informed that they would be permitted to bring specific individuals to assist them or offer them support, and have their expert witness(es) stay throughout the Hearing even without designating that the hearing be open. A lengthy discussion regarding the possible implications of holding an open hearing ensued. An open hearing and the logistics associated with holding one were thoroughly discussed.¹ Additional issues regarding the hearing process, subpoenas, and the like were discussed and timelines were established to assist with the process. Parents were given an extension until November 5, 2019 to advise the BSEA as to their decision to hold an open hearing. By agreement of the Parties during the Pre-hearing Conference, the Hearing was scheduled for November 19, 2019.

On October 31, 2019, Parents filed an amended motion for an open hearing, limiting their request to "the hearing itself, not the internet, social media, BSEA decision, etc." Parents also sought the Hearing Officer's assistance to address discovery concerns. On November 1, 2019, Medford objected to Parents' requested limitations on the open hearing and moved for a protective order regarding Parents' discovery requests.

Since Parents did not specifically state the nature of their discovery issues in their October 31, 2019 communication, a telephone conference call was held on November 6, 2019. The Parties' positions and concerns were thoroughly discussed and oral rulings were issued. The rulings are restated at the end of this Ruling.

¹ Parents further noted that they had received guidance from BSEA staff other than this Hearing Officer.

Legal Standards:

The Individuals with Disabilities Education Act (20 USC 1415(f)(1), grants parents and school districts the right to proceed to an impartial due process hearing to resolve disputes regarding special education. Moreover; 34 CFR 300.509(c)(1)(ii) specifically grants parents the right to open the hearing to the public. I note that Massachusetts defers to the federal statute and regulations regarding this matter.

Federal and Massachusetts special education laws and regulations offer no further guidance regarding the handling of or disclosure of information resulting from an open IDEA hearing. As agencies and institutions receiving funds under the programs administered by the Secretary of Education, both, the BSEA and Medford Public Schools are subject to the requirements of the Family Educational Rights and Privacy Act (FERPA), 20 USC §1232g. Generally, FERPA prevents an educational agency or institution from disclosing personally identifiable information from education records without the prior written consent of a parent/student except where the law specifically provides otherwise. 34 CFR §99.3.

I find guidance in ascertaining the guidelines for conducting an “open hearing” before the BSEA in an OCR letter written by LeRoy S. Rooker, Director of Family Policy Compliance Office, to James Schad, Esq. dated December 23, 2004 (Letter). The Letter sought to explain a public school district’s responsibility regarding disclosure of testimony and evidence from a due process hearing in circumstances where a news media organization sought a copy of the transcript of an open due process hearing and/or sought to inspect the exhibits. The OCR Letter explains that

Transcripts and exhibits from a Part B due process hearing that are maintained by a public school district subject to FERPA qualify as “education records” if they contain information that is directly related to a student.

Under FERPA, a parent (or eligible student) must provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from a student’s education records. Assuming that the transcripts and exhibits from the Part B due process hearing are “education records” (because they contain information directly related to a student), a public school district that maintains these records may not disclose them in response to a State FOI request without the parent’s prior written consent even if they were created or submitted into evidence in a hearing that was open to the public at the parent’s request.

... News media organizations may indeed have grounds to obtain records maintained by a *court* that conducted a hearing in which a party waived

privileges to keep the information confidential. However, there is no basis in FERPA or Part B for concluding that education records maintained by a school district may be disclosed without prior written consent because a parent previously permitted them to be submitted into evidence at an open public hearing, or the transcripts of the district's open hearing that contain information directly related to a student are not entitled to protection as education records under FERPA.

With this guidance I discuss Parents' requests.

Discussion:

As noted earlier in this Ruling, Parents specifically request to limit the open hearing to the proceeding itself, but not the BSEA decision, the internet or social media. I do not know what Parents mean by "etc.", therefore, I limit this Ruling to the four areas specified in their Motion.

Regarding the Hearing, it has already been established that Parents have a right to open the hearing to the public and therefore, this matter will proceed on November 19, 2019, as an open hearing. In this regard, Parents' request to hold an open hearing is **GRANTED**.

Opening the hearing to the public does not in any manner prevent the Hearing Officer from discharging her responsibility to ensure that the hearing proceed in an orderly fashion in accordance with 603 CMR 28.08(6)(c).²

Since this matter will proceed as an open hearing at Parents' request, the portion of the October 24, 2019 Order requiring the Parties to submit a list of all Hearing attendees by the close of business on November 12, 2019 is rescinded.

I next address the Decision. The issue of whether the student's name would appear or not in the decision was first raised as a question by Parents during the Pre-hearing Conference. At that time, the Hearing Officer indicated that if the matter was open that may include the name of the student in the decision. The district then raised the question whether the exhibits would also be public. This Hearing Officer noted that it would be difficult to manage confidentiality of the information in the context of an open hearing. Reluctant to leave

² "The Special Education Appeals hearing officer shall have the power and the duty to conduct a fair hearing; to ensure that the rights of all parties are protected; to define issues; to receive and consider all relevant and reliable evidence; to ensure an orderly presentation of the evidence and issues; to order additional evaluations by the school district or independent education evaluations at public expense when necessary in order to determine the appropriate special education for the student; to take such other steps as are appropriate to assure the orderly presentation of evidence and protection of the parties' rights at the hearing; to ensure a record is made of the proceedings; and to reach a fair, independent, and impartial decision based on the issues and evidence presented at the hearing and in accordance with applicable law." 603 CMR 28.08(5)(c).

Parents with a false sense of reliance on the BSEA's ability to control discussions or dissemination of information by attendees not directly connected with the hearing, this Hearing Officer's first impression was that Parents should assume that anything could be public. However, upon reviewing the OCR Letter discussed *supra*, and in light of the limitations established under FERPA, I am persuaded that Student's name should not appear in the Decision and that neither the BSEA nor Medford, may release the transcript or exhibits related to this Hearing without first obtaining written, express consent from Parents. I note that Parents are excluded from this limitation. Therefore, Parents' request to keep Student's name confidential in the Decision is **GRANTED**.

Finally, I turn to Parents' last request regarding maintaining the student's confidentiality *vis a vis* the internet and/or social media. While the BSEA can assure Parents that none of the documents stemming from, or published by the BSEA, will contain Student's name, the BSEA lacks authority to order anyone not directly connected with the Hearing to abstain from discussing or publishing on social media what they heard at the open hearing. The only way to maximize the likelihood that Student's confidentiality will be preserved in the context of a BSEA hearing is by holding a closed hearing. Once the hearing is open, Parents must be prepared for the possibility that attendees who are neither employees of Medford nor the BSEA, may discuss and divulge information related to the open hearing, and the Hearing Officer lacks authority to prevent or sanction said discussions in any context, including internet and/or social media.

Discovery:

Upon consideration of the requests and arguments by the Parties, Parents' discovery requests are **ALLOWED** in part. Medford's request for a protective order is **GRANTED** in part. To the extent that Parents' requests seek information that is relevant or likely to lead to the discovery of relevant information, their request is allowed for the period covering the 2018-2019 school year and the summer of 2019. In this regard, Medford is ordered to produce the documents sought by Parents if they exist, but need not create any new documents. To the extent that Medford already produced some of the information listed below, it need not produce it again. Medford need only produce the following documents if they exist:

- a. The 2019 summer program progress notes.
- b. The results of the WADE administered during the relevant time period.
- c. CVs for Laureen Trio and for the individual who offered Student services during the 2019 summer program.
- d. Emails by school personnel involving Student.
- e. Meeting notes.

- f. Information regarding the Wilson reading program offered Student.³
- g. Information regarding Medford's response to PRS.

Lastly, as discussed during the Pre-hearing conference and the telephone conference call of November 6, 2019, the issue for hearing is:

- 1) Whether Medford failed to deliver the 45 minutes, four times per week of Wilson reading instruction to Student during the 2018-2019 school year, as called for by his IEP, thereby denying Student a FAPE; and if so,
- 2) Whether Student is entitled to 111 hours of compensatory services at a rate higher than the Massachusetts approved rates.

The Parties are in agreement that as a result of Student's teacher leaving abruptly during the 2019 extended school year program, Student is owed three additional hours of services.

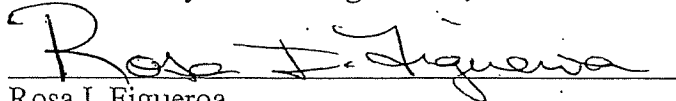
The Parties are reminded that given the narrow issue before me, the exhibits should include documents relevant to the issue and the established time period. Parents are further reminded that, as the moving party challenging the implementation of reading services in the IEP, they carry the burden of persuasion at the Hearing.

All attendees are expected to behave with decorum and abide by the instructions read by the Hearing Officer at the beginning of the Hearing. No attendee may record any portion of the Hearing. A stenographer will be provided by the BSEA. The transcript and documents admitted in evidence are the official record of the Hearing.

ORDERS:

1. Parents' request to hold an open hearing is **GRANTED**.
2. Parents' request to keep Student's name confidential in the Decision is **GRANTED**.
3. Parents' request to eliminate discussions of the open hearing on the internet and/or social media by all attendees is **DENIED**.
4. Parents' discovery requests are **ALLOWED** in part.
5. Medford's request for a protective order is **GRANTED** in part.

So Ordered by the Hearing Officer,



Rosa I. Figueroa

Dated: November 6, 2019

³ During the call, Medford's attorney stated that she was in the process of forwarding additional information to Parent, responsive to her email noting discovery requests, which would likely answer Parents' questions regarding the Wilson reading program.