**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re**: **Student & Dracut Public Schools BSEA #2207202**

**RULING ON PARENT’S REQUEST FOR AN OPEN HEARING**

**AND FOR A COURT REPORTER**

This matter comes before the Hearing Officer on the Parent’s *Request for Open Hearing* (*Open Hearing Request*) and the Parent’s *Request for Court Reporter* (*Court Reporter Request*) filed with the BSEA on May 31, 2022. Specifically, as to the *Open Hearing Request*, Parent sought “… that the above referenced hearing be open to the public. We request the public hearing to be held virtually and that the link for the virtual hearing be provided to us at least 2 business days in advance.” As to the *Court Reporter Request*, Parent sought to have the “… BSEA provide a court reporter for all hearings and conference calls in the above-referenced matter.”

On June 2, 2022, Dracut Public Schools (District) filed the *Dracut Public Schools’ Opposition to Parents’ (sic) Request for Open Hearing* (*Opposition*), opposing the *Open Hearing Request* as Parent did not provide a reason for her Request in the filed document[[1]](#footnote-1). Thereafter, on June 2, 2022, Parent filed her *Response to the Dracut Public Schools Opposition to Open Hearing* (*Response*) clarifying that she was seeking to exercise her right to an open hearing provided to her in the IDEA and its associated regulations[[2]](#footnote-2).

On June 3, 2022, the parties participated in a previously scheduled Conference Call. During this Call, among other matters, the Parties discussed the *Open Hearing Request*, and the District’s *Opposition*. The District’s attorney clarified that the District opposed the request given the young age of Student and due to concerns related to disclosure of confidential information about Student. The District’s attorney further noted that this matter was already being “advertised” as an open hearing on a specific social media page and there was concern with the virtual link being publicized. Parent’s advocate responded by confirming that Parent understands the confidentiality risks associated with an open hearing and was waiving her right to confidentiality. However, Parent would agree to have the parties use initials rather than the Student name, and to limit the number of public participants to comply with the virtual hearing platform limitations.

During the Conference Call the parties also discussed the *Court Reporter Request*. The District had not filed any opposition to this *Request* as of the time of the Call.

For the reasons articulated below, Parent’s *Open Hearing Request* is **ALLOWED with conditions,** and Parents *Court Reporter Request* is **ALLOWED in part and DENIED in part**.

DISCUSSION

In accordance with the IDEA, parents have the right to request an impartial due process hearing “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child”[[3]](#footnote-3). At the choice of the parents, such an impartial due process hearing can be open to the public[[4]](#footnote-4). Additionally, parties to an impartial due process hearing have the right to receive a stenographically recorded record of the hearing, at no cost[[5]](#footnote-5). Massachusetts defers to the federal law with regard to these rights.

Notwithstanding these rights, the IDEA and its regulations also require that due process hearings maintain student confidentiality as does the Family Educational Records Privacy Act (FERPA) and the Massachusetts student record laws and regulations[[6]](#footnote-6). Additionally, regardless of whether a hearing is open to the public or not, Hearing Officers remain responsible for ensuring that a hearing proceeds in an orderly manner pursuant to 603 CMR 28.08(5)(c)[[7]](#footnote-7).

The BSEA has addressed requests for an open hearing both prior to and since the start of the COVID-19 pandemic, after which virtual hearings began to occur[[8]](#footnote-8). Although recognizing parental rights to have a hearing open to the public, Hearing Officers imposed certain conditions on how the open hearing would proceed to fulfill their obligation of ensuring that order and appropriate decorum was maintained during the hearings. I concur with my sister Hearing Officers both with regard to their analysis and their reasons[[9]](#footnote-9) and, therefore, adopt in the instant matter, the conditions they imposed for those open hearings. I also impose the following additional conditions so as to further ensure that order and decorum is maintained throughout the virtual open hearing.

All participants and observers, with the exception of the Hearing Officer, Parent’s advocate, the District’s attorney, the Court Reporter and the testifying witness will be muted at all times, unless otherwise invited to unmute by the Hearing Officer. The chat feature on the virtual platform will be disabled. To the extent it is not disabled, no one shall be allowed to use this feature during the Hearing. The virtual Hearing “host”[[10]](#footnote-10) will be asked to prepare a back-up virtual link that will not be shared with anyone, including the Hearing Officer, unless it is necessary to terminate the open virtual Hearing and reconvene without participation by the public (Back-Up Virtual Hearing). Both parties will prepare a list of participants, including the email address for each participant, who they would like to attend the Back-Up Virtual Hearing, should it become necessary, and share that with the virtual Hearing “host” at least five (5) business days before the start of the Hearing. The virtual Hearing “host” will be prepared to email these specific participants the back-up virtual link should it be necessary to convene the Back-Up Virtual Hearing. The Hearing Officer retains sole discretion to determine if or when it is necessary to convene the Back-Up Virtual Hearing.

Finally, I grant Parent’s request for this hearing to be stenographically recorded by a court reporter with a copy to be provided to the parties at no cost[[11]](#footnote-11), however, I deny Parent’s request that a court reporter also stenographically record all conference calls held in this matter. Conference call discussions are informal, and the information discussed is not part of the record. There is no legal requirement for a verbatim record to be made of conference calls, and I decline to approve this request in this case. To the extent anything discussed by the parties during a conference call is sought by Parent to be made part of the record in this matter, Parent should submit her request in writing and a written Ruling will be issued, or the request will be further discussed verbally on the record during the stenographically recorded Hearing.

In conclusion, the *Open Hearing Request* is hereby **ALLOWED with conditions** as set forth below. Additionally, the *Court Reporter Request* is also hereby **ALLOWED**with respect to the Hearing in this matter, but is **DENIED** with respect to any conference calls in this matter.

The matter will proceed as follows:

1. The Hearing remains scheduled to take place on September 29 and 30, 2022, virtually. It will begin at 8:30 a.m. A virtual link will be provided separately.
2. Said hearing will be stenographically recorded by a court reporter, and will be open to the public under the following conditions:
   1. 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. The transcript and documents admitted in evidence are the official record of the Hearing[[12]](#footnote-12);
   2. To ensure that, to the extent possible on an electronic platform, confidentiality provisions are observed and that the necessary participants have priority access to the electronic platform, the Parties shall forward to the Hearing Officer and to the court reporter/videoconference administrator the email address of every person it requires to be in attendance at the hearing along with their exhibits and witness lists. The Parties will then be informed of the number of remaining “slots” and any other information a member of the public might need to access the Hearing. The Parties may then share that information as they wish[[13]](#footnote-13);
   3. All individuals who intend to attend the Hearing for any reason, and for any period of time, must be present at the beginning of the Hearing for identification, equipment check and Hearing Officer instructions. Any person not then present will not be permitted to join later[[14]](#footnote-14);
   4. The Parent must affirm, orally on the record and in writing, her knowing and voluntary request to open the Hearing to the public, her waiver of any privacy rights that might inure to her or Student and to their personal information under any applicable federal or state statute or regulation, her waiver of any right to contest or litigate any issue that may arise from intentional or unintended disclosure of their personal information by a member of the public attending the Hearing and, in particular, her assent to holding the BSEA, the District and Veritext/Doris O. Wong, Associates, Inc. and their affiliated personnel and contractors harmless for any publication, dissemination, alteration, use or misuse of their personal information, audio and images that may be made available to the public through this virtual Hearing as a result of the participation of any individual not affiliated with the BSEA, District and Veritext/Doris O. Wong, Associates, Inc[[15]](#footnote-15).
   5. All participants and observers, with the exception of the Hearing Officer, Parent’s advocate, the District’s attorney, the Court Reporter and the testifying witness will be muted at all times, unless otherwise invited to unmute by the Hearing Officer.
   6. The chat feature on the virtual platform will be disabled. To the extent it is not disabled, no one shall be allowed to use this feature during the Hearing. If anyone needs to address the Hearing Officer during the Hearing, they will find an alternative way outside the virtual hearing platform to message the Parent’s advocate or District’s Attorney who will inform the Hearing Officer of the message, accordingly.
   7. The virtual Hearing “host” will be asked to prepare a back-up virtual link that will not be shared with anyone, including the Hearing Officer, unless it is necessary to terminate the open virtual Hearing and reconvene without participation by the public (Back-Up Virtual Hearing). Both parties will prepare a list of participants, including the email address for each participant, who they would like to attend the Back-Up Virtual Hearing, should it become necessary, and share that with the virtual Hearing “host” at least five (5) business days before the start of the Hearing. The virtual Hearing “host” will be prepared to email these specific participants the back-up virtual link should it be necessary to convene the Back-Up Virtual Hearing.
   8. The Hearing Officer retains sole discretion to determine if or when it is necessary to convene the Back-Up Virtual Hearing.

So Ordered by the Hearing Officer

/s/ Marguerite M. Mitchell

Marguerite M. Mitchell

Dated: June 14, 2022

1. The District also opposed holding the Hearing virtually and had contemporaneously filed a separate request to have the Hearing held in-person. This was discussed during the June 3, 2022 Conference Call wherein Parent’s advocate explained the reason for her request for a virtual Hearing. Although the District officially opposed this request for a virtual hearing, it noted during the Conference Call that it would not “press this issue” given Parent’s reason for the request and would “respect” the request to hold it virtually. Parent’s request for a virtual hearing was granted for the reasons set forth in my June 7, 2022 *Ruling on Joint Request to Postpone Hearing, Remove Matter from Accelerated Calendar and Hold Hearing Virtually – Revised.*  [↑](#footnote-ref-1)
2. Parent referenced “U.S.C. 1415(f)(1); 34 CFR 300.509(c)(1)(ii)” and *Student v. Medford Public Schools*, BSEA #20-02451, (Figueroa, *Ruling* November 6, 2019). [↑](#footnote-ref-2)
3. 20 USC 1415(b)(6)(a). [↑](#footnote-ref-3)
4. 34 CFR 300.512(c)(2); *see* 20 USC 1415(f)(1). [↑](#footnote-ref-4)
5. 20 USC 1415(h)(3); 34 CFR 300.512 (a)(4) and (c)(3). [↑](#footnote-ref-5)
6. 20 USC 1232(g); 34 CFR 300.99 M.G.L. c. 71 §34D; 603 CMR 23.00; *see* 20 USC 1415(b)(7)(a) and (h)(4)(a); *Letter to Schad*, 105 LRP 4654 (Family Policy Compliance Office, 2004)“Transcripts’ and exhibits from a[n open IDEA] 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” and the District must obtain written parental consent prior to disclosing the same. [↑](#footnote-ref-6)
7. 603 CMR 28.08(5)(c) stating,

   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 reconvene the hearing at any time prior to the issuance of a decision; 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; *see also* Rule IX(B)(15) of the BSEA’s *Hearing Rules for Special Education Appeals*, advising that one of the powers and duties of Hearing Officers is to “Censure, reprimand, or otherwise ensure that all participants conduct themselves in an appropriate manner.” [↑](#footnote-ref-7)
8. *Student v. Medford Public Schools*, BSEA #20-02451, 26 MSER 40 (Figueroa, *Ruling* November 6, 2019); *In Re: Ollie v. Springfield Public Schools*, BSEA #21-02164, 27 MSER 33 (Byrne, *Ruling*, January 19, 2021). [↑](#footnote-ref-8)
9. As Hearing Officer Figueroa reasoned,

   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 [the District] 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. *Student v. Medford Public Schools*, *supra*.

   Similarly, Hearing Officer Byrne explained,

   When a hearing is limited to participants who are actually involved in the day-to-day life of the student and have pertinent knowledge of the history and parameters of the dispute, the Hearing Officer, the Parties and their lawyers may exercise a degree of supervision and/or control over the disclosure of the confidential student and family information that is routinely and necessarily discussed during an IDEA Hearing.  For example, unauthorized disclosure of confidential student information by school personnel may result in serious professional consequences. (See *e.g*., FERPA) [(citation omitted)]. That control evaporates when a hearing is open to the public.  And that lack of control over student information and family privacy expands exponentially when sensitive information is available to unknown parties on electronic platforms.  The BSEA has no authority to enforce restraints on the recording, duplication, exchange, publication, dissemination, disclosure, alteration, use or misuse of student or family information, images or voices.  It is reasonably foreseeable that highly sensitive personal information about Ollie and the Parent could be made public and could result in significant personal and professional harm. It is doubtful that the framers of the IDEA anticipated the sort of information world in which we currently find ourselves. Nevertheless, the plain language of the governing statute offers no alternative to granting the Parent’s open hearing request. *In Re: Ollie v. Springfield Public Schools*, BSEA #21-02164. [↑](#footnote-ref-9)
10. In this matter the virtual “host” will be the Court Reporter. [↑](#footnote-ref-10)
11. 20 USC 1415(h)(3); 34 CFR 300.512 (a)(4) and (c)(3). [↑](#footnote-ref-11)
12. *See* *Student v. Medford Public Schools*, BSEA #20-02451. [↑](#footnote-ref-12)
13. *See* *In Re: Ollie v. Springfield Public Schools*, BSEA #21-02164. [↑](#footnote-ref-13)
14. *Id*. [↑](#footnote-ref-14)
15. *Id*. [↑](#footnote-ref-15)