# **COMMONWEALTH OF MASSACHUSETTS**

# **DIVISION OF ADMINISTRATIVE LAW APPEALS**

# **BUREAU OF SPECIAL EDUCATION APPEALS**

# **In Re**: Student v. **BSEA #** 2211215

# Lexington Public Schools

# **Ruling on Lexington Public Schools’ Motion for Protective Order**

# On May 27, 2022, Parents requested a Hearing in the above-referenced matter. Parents challenged the appropriateness of the programs proposed by Lexington over the past two years and sought compensatory services and reimbursement for Parents’ unilateral residential placement of Student at Keswick School in Virginia, starting in the fall of 2021.

# During the years in question Lexington offered Student participation in full inclusion programs with varied levels of push in and substantially separate services and supports. Most recently, Lexington offered Student participation in its Intensive Learning Program (ILP) at Lexington High School, pursuant to an IEP drafted in December of 2021.

In its Response to the Hearing Request, Lexington argued that to the extent that Parents’ claims involved accepted, implemented, expired IEPs, those claims could not now be revisited.

In mid-June 2022, the Parties initiated Discovery in preparation for the Hearing scheduled for September 27, 28 and 29, 2022. On June 24, 2022, Lexington filed general responses and a Motion for Protective Order,[[1]](#footnote-1) noting that,

…the District is not seeking an order at this time as the district hopes to resolve any disagreements regarding discovery directly with Parents’ counsel.

# On August 9, 2022, Parents filed a Motion to Compel Lexington’s Responses to Parents’ Request for Production of Documents & Interrogatories. Parents acknowledged that they received the response as well as some responsive documents on or about August 1, 2022. Parents however, further stated that

# Several categories of documents were not included, such as resumes of staff (RPDS #10 & #15), redacted IEPs of other students (RPDs #11, #13, #14), and additional emails involving Lexington (RPDs #7 & #8), as Parents already have in their possession emails that were not provided and they are concerned other communications were also omitted. Lastly, Lexington has not provided any responses to the Interrogatories.

# Parents sought clarification from the Hearing Officer during the Pre-hearing conference scheduled to take place a few days later as well as an Order addressing outstanding Discovery issues.

# The Parties participated in a Pre-hearing Conference on August 15, 2022, at which time Discovery was discussed. Lexington noted its intention to comply with production of documents and answers to interrogatories. Lexington also agreed to conduct an exhaustive search for emails regarding Student involving Parents and staff. Regarding production of the peer IEPs, after discussion, the parties were encouraged to work on limiting language acceptable to both and were told to notify the Hearing Officer. Lexington agreed to draft the proposed language and send it to Parents’ counsel. If the Parties could not reach consensus regarding the peer IEPs, they would inform the Hearing Officer and an Order would be issued.

On August 29, 2022, Parents wrote to the Hearing Officer and to Lexington’s counsel noting that he had not received the proposed language. He also acknowledged having received Lexington staff’s resumes.

On September 3, 2022, this Hearing Officer wrote to the Parties advising them that she had not received the proposed language, and seeking clarification as to whether they required a ruling.

On September 6, 2022, Parents’ counsel emailed the Hearing Officer, noting that the Parties had not been able to agree on language and thus required a ruling. Parents’ counsel inquired as to the need for a conference call and if additional submissions should be provided. This Hearing Officer responded that there was no need for a call, that the BSEA had issued numerous rulings addressing peer IEPs (the item they could not agree on) and that unless there was a novel issue there was no need for the parties to provide anything further.

On September 7, 2022, Lexington’s counsel offered to forward the proposed order reviewed by the parties. She was informed that this would be acceptable. The proposed order was never forwarded nor received by the Hearing Officer. Parents’ counsel also offered to submit his response and proceeded to explain that he awaited the redacted IEPs and emails, noting that he had received the resumes. He further noted that he sought an order regarding responses to interrogatories. Lexington’s counsel answered that she was out of the office and that she was sending the answers to interrogatories that morning as she had not been able to secure them owing to school personnel being on vacation. She noted that Parents’ counsel would also be receiving updated responses to the documents request, including the IEPs to which they agreed (the IEPs of the peers in Student’s ILP program).

On September 9, 2022, Parents filed a Supplement to their Motion to Compel Lexington’s Responses to Parents’ Request for Production of Documents & Interrogatories. This submission was unnecessary as the Parties had been advised that nothing further was required from them[[2]](#footnote-2).

Specifically, the relevant document requests sought:

#11. For the 2020-2021 school year, copies of IEPs cleansed of identifying names and information for every student [Student] was placed with at Lexington High School in the general and special education settings prior to his placement in the Intensive Learning Program (ILP) program.

#13. For the 2020- 2021 school year, copies of IEPs cleansed of identifying names and information for every student [Student] was placed with at Lexington High School in the general and special education settings while placed in the ILP program.

#14. For the 2021-2022 school year, copies of IEPs cleansed of identifying names and information for every student [Student] would have been placed with at Lexington High School in the general and special education settings.

Regarding Interrogatories, while Parents received responses, they asserted that no answers were provided for Interrogatories #1, #2, #4, #6, #7, 9, #11, #13, #14, and #15, and thus sought to compel answers to the same. According to Parents, the interrogatories were “clearly defined, not unduly burdensome and relevant to the claims at issue” in the instant matter. Parents sought responses forthwith so that they could properly prepare for Hearing.

# **Facts[[3]](#footnote-3):**

Student has been diagnosed with Autism Spectrum disorder, Attention Deficit Disorder- Combined Presentation (ADHD), Disruptive Mood Dysregulation Disorder, Oppositional Defiant Disorder, Generalized Anxiety Disorder and Major Depressive Disorder. He is described as extremely bright, rigid, perseverative, immature, socially awkward with impulse control and executive functioning deficits among other deficits. Irritability, emotional dysregulation and property destruction caused him to require psychiatric hospitalization and Community Based Acute Treatment (CBAT) in June of 2017, prior to his referral and finding of eligibility for special education services in April of the 2019-2020 school year.[[4]](#footnote-4)

As a result of a Team meeting in December of 2020, Lexington offered Student participation in the High School’s ILP program. Parents fully accepted this IEP in December of 2020. Thereafter, Student participated in an FBA conducted by Lexington and an independent neuropsychological evaluation between April and June of 2021.

Between April and May of 2021, Renee Marchant, Psy.D., of NESCA, conducted a neuro-psychological evaluation of Student, concluding that Student required “placement in a small, highly specialized and intensive therapeutic educational program designed for the needs of exceptionally bright adolescents with significant deficits in emotion regulation, social pragmatics, attention and executive functioning.” She further noted that the peer population must include high-average to gifted skill individuals, who presented with weaker social communication skills and related social challenges, and recommended that the program weave social skills instruction throughout the day with in-the-moment, in person, structured and unstructured social opportunities. Parents argue that consistent with Dr. Marchant’s (above you spelled it Merchant-not sure which is correct) report, Student is at risk for “recurrent psychiatric hospitalizations, social victimization, academic underachievement, functional impairments in daily living skills and ingrained hopelessness and depression”.

During the summer of 2021 Student attended a two-week residential camp which Parents indicated helped with socialization and a two-week program at Lexington, which, according to Parents, was not productive. In July of 2021, Dr Jonathan Bass, M.D., psychiatrist, evaluated Student and recommended that he be placed in a 24/7 year-round milieu which integrated psychotherapy, academics and which offered emotional supports. A few days later Parents placed Student residentially at the Keswick School in Virginia, starting on August 9, 2021.

On August 18, 2021, Parents rejected Lexington’s IEP calling for the ILP program as amended in June of 2021. At present, Student continues to attend Keswick School. Parents seek reimbursement for their unilateral placement of Student at this school.

# **Discussion**:

In their Motion to Compel and Supplement, Parents seek responses to the Interrogatories and the outstanding documents so they can properly prepare and present their case at Hearing.

The sole remaining dispute regarding documents involves Parents’ request for sanitized copies of the peer IEPs (redacted of all personally identifiable information) for the 2020-2021 and 2021-2022 school years.[[5]](#footnote-5) I note that the documents sought by Parents are in Lexington’s custody, and the question is whether these documents would lead to the discovery of relevant, admissible evidence.

The issue regarding release of relevant peer IEPs has been raised and previously addressed in several BSEA rulings, and BSEA Hearing Officers have been consistent in their treatment of this issue. See e.g., *In Re: Newton Public Schools*, *Ruling on Newton Public Schools’ Motion To Limit The Scope Of Discovery*, BSEA #2010632 (2020); *Beverly and Flavio*, 24 MSER 156 (2018); *Jerrol v. Haverhill Public Schools*, BSEA #1900557 (2018); *Manchester-Essex R.S.D*., 23 MSER 8 (2017); *Andover Public Schools*, 22 MSER 148 (2016); *Touchstone Public Schools*, 21 MSER 137 (2015); *Wellesley Public Schools and Vic.* 21 MSER 39 (2015*)*; *Mattapoisett Public Schools*, 13 MSER 22 (2007). In essence, these Rulings have found that relevant peer IEPs, appropriately cleansed of all potentially identifiable student information, and with appropriate additional protections (*infra*), are not immune from disclosure in a special education administrative hearing, and that nothing in 603 CMR 23.07 (4) bars their release. As noted by Hearing Officer Byrne in *Jerrol, supra,* when addressing this type of request,

Production of the peer IEPs is no more intrusive when sought by the Parents in discovery than when reviewed by school staff and its legal representatives in preparation for a hearing. Nor is proper preparation of the documents for release unduly burdensome in the context of a contested special education matter.

I note that Lexington only raised general objections in its Motion for Protective Order and did not cite any exceptional circumstance unique to this case which would warrant a higher level of scrutiny or security.

Lexington’s objections/ Motion for Protective Order raised the fact that Parents fully accepted the 2020-2021 IEP in December of 2020 and that this IEP had been implemented through August of 2021, thus rendering the release of any peer IEPs for this time-period irrelevant. I agree. Lexington’s objection to Parents’ Document request #11 and #13 is **SUSTAINED** and Lexington’s request for a protective order is **ALLOWED**.

Regarding document request #14, involving the 2021-2022 school year, Lexington shall produce the properly sanitized IEPs of students with whom Student was grouped in the special education settings if different from the peers in Student’s ILP program. With respect to the general education setting, Lexington shall release the properly sanitized IEPs of peers whose IEPs involve similar disability categories as those identified in Student’s IEP. Other general education peer IEPs are not likely to lead to the discovery of relevant, admissible evidence and the request is overly burdensome. Thus, Lexington’s objection to document request #14 is **SUSTAINED in Part** and Lexington’s motion for a protective order is **ALLOWED in Part**.

Consistent with the additional conditions set forth below, to the extent that Lexington is ordered to provide the documents described above, these shall be appropriately redacted of names and personally identifiable information with a number (or letter) assigned to each student’s IEP for reference.

Regarding Interrogatories #1, #2, #4, #6, #7, #9, #11, #13, #14, and #15, Lexington’s objection is **SUSTAINED** and its motion for protective order **ALLOWED**. I note that Lexington agreed to provide partial responses to interrogatories #11 and #13. Regarding interrogatory #15, this information is contained in the portion of document request #14 that has been allowed.

The following conditions will apply to the release, receipt, custody and maintenance of the District’s documents and interrogatory responses:

1. The documents requested shall be cleansed of all identifying information, including, at minimum, the name of the child, name(s) of parent(s) or other family members, address, date and place of birth, gender, race/ethnicity, any language(s) other than English that are spoken by student and/or parents; and any student number(s) assigned to such students(s).

2. The redacted documents shall be provided solely to counsel for the Parents, and not to the Parents, Student, or any other person or entity. Counsel for the Parents may only disclose the redacted documents to experts who are assisting Parents regarding appropriate peer groupings for Student and related issues and/or who may testify at the Hearing.

3. Counsel for the Parents is granted permission to submit copies of some or all of the redacted documents as exhibits at hearing.

4. Except as described in (2) and (3) above, counsel shall not disclose the documents or information therein to any other person or entity.

5. Upon the close of the record in this matter, counsel for the Parents shall ensure that any copies of documents that may have been provided to experts per Paragraph 2 are returned to counsel, and subsequently to the school district/or by agreement of counsel, properly destroyed.

**Order**

In consideration of the pleadings, the Parties’ Motions and submissions, Lexington’s Motion for Protective Order is **ALLOWED** in **PART** andParents’ Motion to Compel Discovery is **ALLOWED** in **PART,** consistent with the terms of this Ruling. Lexington is Ordered to produce the documents allowed per this Ruling, consistent with the additional safeguards delineated above, by the close of business on **September 15, 2022.**

So Ordered by the Hearing Officer,

Rosa I. Figueroa

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# Rosa I. Figueroa

Dated: September 9, 2022

1. Parents did not file an opposition to Lexington’s Motion for Protective Order. [↑](#footnote-ref-1)
2. Parents’ counsel could have easily sent a brief email noting that the only pending issues were the protective order on the peer IEPs Document Requests (Request #11, #13 and #14) and answers to Interrogatories #1, #2, #4, #6, #7, 9, #11, #13, #14, and #15. [↑](#footnote-ref-2)
3. The Facts appearing in this section are only intended for purposes of this Ruling. [↑](#footnote-ref-3)
4. In 2018 Student received accommodations pursuant to a Section 504 Plan. [↑](#footnote-ref-4)
5. Parents have not amended the Hearing Request to include the 2022-2023 school year, and do not intend to do so. [↑](#footnote-ref-5)