**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re**: RH & North Attleboro Public Schools **BSEA** #2308812

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

This matter comes before the Hearing Officer on the Parent’s *Request* for an Open Hearing (*Open Hearing Request*) filed with the BSEA on June 23, 2023[[1]](#footnote-1). Specifically, Parent stated that “Additionally … Parents (sic) Request for “Public Hearing” dates of 7/10/2023 and 7/13/2023[[2]](#footnote-2).”

On June 26, 2023, North Attleboro Public Schools (District) filed its *Response* to the *Open Hearing Request*, objecting “vehemently” to the request as it would require the District to “defend its case and therefore share confidential, personally identifiable information about the student in a public forum” which, the District contends, is “a complete violation of the privacy of the student”[[3]](#footnote-3). The District also advised it was concerned that Student, who has not reached the age of majority, is not old enough to “consent to this request nor is he of age to understand the long-term implications of such a request.” It further submits that having the hearing open to the public is “not in the best interest of the student, now or years from now.” Finally, the District requested that if an open hearing was allowed it be made “known to the public that allowing this request is over the strong objection of the District.”

For the reasons articulated below, Parent’s *Open Hearing Request* is **ALLOWED with conditions**.

DISCUSSION[[4]](#footnote-4)

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”[[5]](#footnote-5). At the choice of the parents, such an impartial due process hearing can be open to the public[[6]](#footnote-6). Massachusetts defers to the federal law with regard to this right. Notwithstanding this right, the IDEA and its regulations also require that due process hearings maintain student confidentiality, as do the Family Educational Records Privacy Act (FERPA) and the Massachusetts student record laws and regulations[[7]](#footnote-7).

The BSEA has previously addressed requests for an open hearing[[8]](#footnote-8). While recognizing the parental right to an open hearing, Hearing Officers, including the undersigned, have imposed certain conditions on how the open hearing would proceed, so as to fulfill their obligation to ensure an orderly presentation of the evidence, and that appropriate decorum and order are maintained during the hearings[[9]](#footnote-9). I continue to concur with my sister Hearing Officers’ reasoning and analysis in this regard[[10]](#footnote-10).

Therefore, despite the risks to Student that inure from allowing the public to participate in this due process hearing, I must defer to Parent’s *Open Hearing Request*. However, so as to ensure that Parent is making a knowing and voluntary waiver on behalf of herself and Student of all confidentiality, privacy and student record protections she and Student are otherwise entitled to in a closed hearing, and so as to ensure my ability to maintain appropriate decorum should the public participate in the upcoming virtual hearing, I allow the *Open Hearing Request* only under certain conditions.

The *Open Hearing Request* is hereby **ALLOWED with conditions** as set forth below:

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;
2. To ensure that, to the extent possible on an electronic platform, the necessary participants have priority access to the electronic platform, the Parties shall forward to the Hearing Officer and to the stenographer/videoconference administrator the email address of every person it requires to be in attendance at the hearing. 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;
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;
4. Prior to commencement of the Hearing, and using a separate link that will not be open to the public, Parent shall affirm, orally on the record and in writing, her knowing and voluntary request to open the Hearing to the public; her waiver of any confidentiality, privacy and student record rights that she and Student would otherwise have as to her own or Student’s personally identifiable information under any applicable federal or state statute, regulation, or procedure; her waiver of any right to contest or litigate any issue that may arise from intentional or unintended disclosure of her or Student’s personally identifiable information by a member of the public; her agreement to hold the BSEA, the District and Veritext Legal Solutions and their affiliated personnel and contractors harmless for any publication, dissemination, alteration, use or misuse of their personally identifiable information to a member of the public, and her understanding that the loss of confidentiality, privacy and student record rights that occurs if the Hearing is open to the public cannot be undone. Student (as he is over 14) will be invited and strongly encouraged to participate in this proceeding.
5. After providing the knowing and voluntary waiver orally on the record, and in writing, should Parent wish to proceed with the open hearing, the proceedings will reconvene, and the Hearing will commence using an additional pre-created virtual link that can be shared with the public. A sufficient break period will be provided for this to happen. At the start of the public hearing, the Hearing Officer will inform participating members of the public that this hearing is being held with the participation of the public over the strong objection of the District.
6. All participants and observers, with the exception of the Hearing Officer, Parent, the District’s attorney, the Stenographer and the testifying witness will be muted at all times, unless otherwise invited to unmute by the Hearing Officer.
7. 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, (s)he will find an alternative way outside the virtual hearing platform to message the Parent or District who will inform the Hearing Officer of the message, accordingly.
8. The virtual Hearing “host[[11]](#footnote-11)” 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.
9. The Hearing Officer retains sole discretion to determine if or when it is necessary to convene the Back-Up Virtual Hearing in order to ensure the hearing is proceeding in an orderly manner.

So Ordered by the Hearing Officer,

/s/ Marguerite M. Mitchell

Marguerite M. Mitchell

Dated: June 29, 2022

1. The *Request* was submitted in letter form by Parent and also contained other requests, including but not limited to a joint request for the hearing to be held virtually, that were addressed in the June 27, 2023, *Ruling on Multiple Motions and Requests and Pre-Hearing Order.* [↑](#footnote-ref-1)
2. Although Parent did not provide any reason or cite to any rule, regulation or law in support of her request, in recognition of her *pro se* status and based on extensive conversations she has had with the District and Hearing Officer on several Conference Calls that have been held in this matter, I understand and treat Parent’s statement to be written confirmation she is exercising her right to an open hearing under the IDEA and consider it accordingly. [↑](#footnote-ref-2)
3. The *Response* was submitted in letter form by the District and also included other requests and objections, which were addressed in the June 27, 2023 *Ruling on Multiple Motions and Requests and Pre-Hearing Order.*  [↑](#footnote-ref-3)
4. I have already considered and issued a published *Ruling (*In Re: Dracut Public Schools, BSEA #2207202, *Ruling on Parent’s Request for an Open Hearing and For a Court Reporter*, 28 MSER 147 (2022)) addressing a parental request for an open hearing in a prior due process proceeding. I set forth the applicable legal analysis from that matter, here, as it has not changed since I issued this *Ruling.* [↑](#footnote-ref-4)
5. 20 USC 1415(b)(6)(a). [↑](#footnote-ref-5)
6. 34 CFR 300.512(c)(2); *see* 20 USC 1415(f)(1). [↑](#footnote-ref-6)
7. 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. See Health Insurance Portability and Accountability Act (HIPAA), Public L. 104-191, providing additional confidentiality protections for any of a student’s medical and health information discussed during due process hearings [↑](#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. 603 CMR 28.08(5)(c) states, in pertinent part,

“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 ensure an orderly presentation of the evidence and issues… 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;…””;

*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-9)
10. As Hearing Officer Figueroa reasoned,

“… 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 [the Student] 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-10)
11. In this matter the virtual “host” will be the Stenographer. [↑](#footnote-ref-11)