**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student v. Manchester-Essex Regional School District BSEA# 2403782**

**RULING ON MANCHESTER-ESSEX REGIONAL SCHOOL DISTRICT’S MOTION FOR A PROTECTIVE ORDER**

This matter comes before the Hearing Officer on *Manchester-Essex Regional School District’s Motion for Protective Order* (*Motion*), filed December 26, 2023, seeking a protective order with respect to Request Nos. 15, 18, 19, and 26 of the *Parents’ First Request for Production of Documents* and Request No. 8 of the *Parents’ First Set of Interrogatories* . As grounds there for, Manchester-Essex Regional School District (MERSD or the District) asserts that Parents’ requests for production of documents are irrelevant and immaterial to Parents’ claims, not reasonably calculated to lead to the discovery of admissible evidence, and seek documents that are confidential, privileged, or otherwise protected from disclosure.

On January 10, 2024, Parents filed *Parents’ Opposition To The Manchester-Essex Regional School District’s Motion For A Protective Order* (*Opposition*) asserting MERSD’s *Motion*, which seeks “to withhold from discovery highly probative records

including: (i) records related to [Student’s] proposed peer groupings; and (ii) [Student’s] own disciplinary and bullying records” should be “denied in full” as the

“BSEA has reviewed the issue of providing redacted peer IEPs and records numerous times and has routinely held that Districts may produce redacted peer IEPs and related information during the course of discovery without violating federal or state student record or privacy laws. In this case, peer grouping information is highly relevant given Parents’ assertion that the District is proposing an educational program that is not appropriate, in part, because [Student’s] learning profile and academic needs are substantially different from the other students in the district’s program. In addition, Parents have agreed that MERSD can redact references to other students in any disciplinary or bullying records that are part of [Student’s] student record.”

Because neither testimony nor oral argument would advance the Hearing Officer’s understanding of the issues involved, this Ruling is issued without a hearing, pursuant to *Bureau of Special Education Appeals Hearing Rule* VII(D).

For the reasons articulated below, MERSD’s *Motion* is DENIED, in part, and ALLOWED, in part.

**RELEVANT FACTS AND PROCEDURAL HISTORY:**

On October 18, 2023, Parents filed a Hearing Request in the above referenced matter asserting, in part, that the Individualized Education Program (IEP) dated 3/9/2023 to 3/8/2024, providing for a substantially separate placement in the District's Intensive Reading and Written Language Program (IRWL), a substantially separate in-District language-based program, is not reasonably calculated to provide Student with a free appropriate public education (FAPE). According to Parents, “The District's own data and evaluations, as well as private testing; show that [Student] failed to make effective academic progress within the IRWL program. [Student’s] emotional functioning also declined in the IRWL program as he experienced ongoing frustration and embarrassment as a learner*.*” In part, Parents asserted that the small peer cohort in IRWL did not allow for flexible peer groupings based on abilities*.*

For relief, Parents requested that the BSEA order the District to reimburse Parents for all out-of-pocket costs associated with Student’s unilateral placement at the Landmark School for the 2023-2024 school year including, but not limited to, all tuition, admissions fees, transportation, and/or other costs or fees and require the District to place Student at the Landmark School via an IEP or the remainder of the 2023-2024 school year and to assume all costs including, but not limited to, all tuition, transportation, and/or other costs or fees.

On December 18, 2023, Parents served the District with a First Request for Production of Documents and First Set of Interrogatories. On December 26, 2023, the District filed the instant *Motion*.

This matter is scheduled for hearing beginning on February 5, 2024.

**LEGAL STANDARDS:**

1. *Discovery*

Rule V of the *BSEA* *Hearing Rules* governs the discovery process before the BSEA. Rule V(A) advises that “the parties are encouraged to exchange information cooperatively and by agreement prior to the hearing.” Additionally, parties can request of other parties that they produce documents or answer up to 25 interrogatories within thirty (30) calendar days of being served such requests, unless a Hearing Officer orders otherwise.[[1]](#footnote-1) Where the information or the documents requested are “not subject to any sort of privilege, the accessibility of the documents requested and their relevance to the dispute may militate in favor or against production.”[[2]](#footnote-2) Specifically, the Massachusetts Rules of Civil Procedure expatiates further as to the scope of discovery:

“[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 of defense of the party seeking discovery or to the claim or defense of any 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.”[[3]](#footnote-3)

The parallel Federal Rule permits 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 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.”[[4]](#footnote-4)

Objections to any discovery requests can be made within ten (10) calendar days of service of the request, or parties can move for a protective order within that timeframe as well.[[5]](#footnote-5) Furthermore, 801 CMR 1.01(8)(i) [[6]](#footnote-6) authorizes parties who do not receive some or all the discovery responses or answers requested to file a Motion for an Order Compelling Discovery.[[7]](#footnote-7)

*b. Disclosure of Student Education Records*

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) protects the privacy of student education records, which are defined as “those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.[[8]](#footnote-8) Release of education records (or personally identifiable information contained therein other than directory information) of students without the written consent of their parents to any individual, agency, or organization is generally prohibited.[[9]](#footnote-9) 34 C.F.R. § 99.3 defines “disclosure” as the “release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record” and the term “Personally Identifiable Information” as:

“(a) The student's name;

(b) The name of the student's parent 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; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.”

Nevertheless, FERPA’s implementing regulations specifically allow disclosure of “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.”[[10]](#footnote-10)

In Massachusetts, G.L. c. 71, §34D[[11]](#footnote-11) and 603 CMR 23.00 govern student records and track, to a large extent, the federal law. Specifically, 603 CMR 23.07(4) states, in relevant part, “Except for the provisions of 603 CMR 23.07(4)(a) through 23.07(4)(h[[12]](#footnote-12)), no third party shall have access to information in or from a student record without the specific, informed written consent of the eligible student or the parent.” Although Massachusetts regulations do not reflect the language of 34 CFR 91.31(a)(1)(b)(1), 603 CMR 23.02 defines “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….” Thus, “de-identified records and information” would not be considered “student records” under state regulations.[[13]](#footnote-13)

**APPLICATION OF LEGAL STANDARDS AND CONCLUSIONS:**

After consideration of the relevant procedural history set forth above and the applicable legal standards delineated *supra*, I find it is appropriate, in this situation, to DENY, in part, and ALLOW, in part, the District’s *Motion*.

Specifically, in reviewing Parents’ Interrogatories and the District’s objections thereto, I find as follows:

1. The District’s Objection to Interrogatory No. 8 is DENIED.

Interrogatory No. 8 states:

“Please identify all peers – by IEP reference number or letter assigned in response to Parent’s Document Request No. 18 – who would be participating with Student during any academic instruction period during the 2023-2024 school year. For each peer identified, please clearly state when said peer would be grouped with Student during any instructional period i.e., please be certain to clearly convey Student’s instructional peer groupings for each academic subject and specialized service offered through their IEP.”

The District objected to this request on the grounds that

“it is unduly burdensome, immaterial, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, and, as it relates to the schedules and services of other students, seeks information protected under the laws of the United States and the Commonwealth of Massachusetts, specifically 20 U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4). Here, the issue is whether the District’s proposed program for the student is appropriate for this student. The schedules and services of other students are completely irrelevant to the Parents’ claims and have no bearing on the issue in this matter. The information requested is not proportional to the needs of the case, and the District objects to producing the requested documents. In addition, the District objects to producing the requested documents because the request seeks information protected under the laws of the United States and the Commonwealth of Massachusetts, specifically 20 U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4). 603 CMR 23.07(4) states that no third party shall have access to information in or from a student record without the specific, informed written consent from the eligible student or the parent. There is no exception in the law that permits the District to release the requested documents, nor have the Parents provided written consent from the other students’ parents to release the requested documents, and therefore the District objects to responding to the request.

The District’s argument that the “records, IEPs, services, and schedules of other students are irrelevant to the Parents’ claim because the information requested of the other students has absolutely no bearing on the issue of whether the proposed program is sufficient for this Student” is unpersuasive. Parents’ Hearing Request specifically raises the issue of Student’s peer grouping in the District-based program proposed by the IEP for the 2023-2024 school year. Moreover, Hearing Officers often consider peer groupings when making findings as to appropriateness of programming.[[14]](#footnote-14) As such, the information sought by Interrogatory No. 8 is relevant to the current dispute. Nor is this Interrogatory overly burdensome as Parents’ Interrogatory limits the scope of the information sought to the 2023-2024 school year.

The District’s reliance on 20 U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4) is similarly unpersuasive. Although the student records of Student’s peers are protected by the cited statutes and regulations, in the instant case, Parents requested that the District “identify all peers – **by IEP reference number or letter assigned in response to Parents’ Document Request No. 18** – who would be participating with [Student] during any academic instruction period during the 2023-2024 school year” (emphasis added). Such redacted information falls within the definition of “de-identified information” included in FERPA’s implementing regulations, as no personally identifiable information is sought by Parents to be released.[[15]](#footnote-15) Nor would such redacted information satisfy the “student record” definition included in 603 CMR 27.02. As such, the District’s objection to Interrogatory No. 8 is DENIED, and the District must provide the requested information to Parents.

In addition, in reviewing Parents’ Document Requests and the District’s objections thereto, I find as follows:

1. The District’s Objection to Document Request No. 15. is DENIED, in part, and ALLOWED, in part.

Document Request No. 15 seeks

“[a]ny documents that concern, discuss, or reflect any bullying, behavioral, and/or disciplinary incidents involving Student. Please include in your response both formal documentation e.g., bullying incident forms, data collection, notices, letters, as well as information documentation e.g., internal emails discussing any such incidents, notes from interviews and/or meetings.”

The District objected to this request on the grounds that

“it is overly broad, unduly burdensome and as it relates to other students’ records, seeks information protected under the laws of the United States and the Commonwealth of Massachusetts, specifically 20. U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4). Here, the issue is whether the District’s proposed program for the Student is appropriate for this Student. If any forms, letters, emails, notes, etc., exist that were submitted to the District by another Student or the Parent of another student, the document and/or information within the document is protected under the laws of the United States and the Commonwealth of Massachusetts, specifically 20 U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4). Further, any documents created by the District that concern another student, are organized on the basis of another students’ name, and individually identifies another student is protected under 20 U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4). 603 CMR 23.07(4) states that no third party shall have access to information in or from a student record without the specific, informed written consent from the eligible student or the parent. There is no exception in the law that permits the District to release the requested documents, nor have the Parents provided written consent from the other students’ parents to release the requested documents, and therefore the District objects to responding to the request.”

For the reasons discussed above with respect to Interrogatory No. 8, provided that all personally identifiable information relative to other students is redacted from the documents sought, the District’s FERPA and student record arguments are unpersuasive. However, as the Document Request is not limited in scope of time, it is unduly burdensome. If the request were limited in scope, it would, however, be reasonably calculated to lead to the discovery of evidence relevant to the issue in dispute. Specifically, in their Hearing Request, Parents assert that Student’s “emotional functioning also declined in the IRWL program as he experienced ongoing frustration and embarrassment as a learner*.*” As such “documents that concern, discuss, or reflect any bullying, behavioral, and/or disciplinary incidents involving [Student]” may be relevant, especially if, like my fellow Hearing Officers, I interpret “the applicable discovery provisions liberally, to enable parties to thoroughly prepare for hearing or otherwise resolve the dispute.”[[16]](#footnote-16) Therefore, the District’s objection to Document Request No. 15. is DENIED, in part, and ALLOWED, in part. Provided that all personally identifiable information relative to other students is redacted from the documents sought in this Document Request, and the production is limited to the 2-year period from the date of the filing of the Hearing Request, the District must produce the requested records.

1. The District’s Objection to Document Request No. 18 is DENIED.

Document Request No. 18 seeks

“Legible copies of all IEPs appropriately cleansed of all personally identifying information, but marked for reference by number or letter, for all students with IEPs who would participate with Student during any portion of his educational program in MERSD during the 2023-2024 school year. Please leave grade level and gender legible on such IEPs.”

The District objected to Document Request No. 18 on the grounds that

“it is overly broad, unduly burdensome, immaterial, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence and, as it relates to the IEPs of other students, seeks information protected under the laws of the United States and the Commonwealth of Massachusetts, specifically 20 U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4). Here, the issue is whether the District’s proposed program for the student is appropriate for this student. The IEPs of other students are completely irrelevant to the Parents’ claims and have no bearing on the issue in this matter. The information requested is not proportional to the needs of the case, and the District objects to producing the requested documents. In addition, the District objects to producing the requested documents because the request seeks information protected under the laws of the United States and the Commonwealth of Massachusetts, specifically 20 U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4). 603 CMR 23.07(4) states that no third party shall have access to information in or from a student record without the specific, informed written consent from the eligible student or the parent. There is no exception in the law that permits the District to release the requested documents, nor have the Parents provided written consent from the other students’ parents to release the requested documents, and therefore the District objects to responding to the request. The District further objects to this request to the extent that the Parents have not accepted the District’s proposed services and placement.

Limited in scope of time to the 2023-2024 school year, the request is not overly burdensome. Moreover, as Parents’ Hearing Request raised the appropriateness of available peers for the purpose of grouping as a concern, and Hearing Officers have often considered the appropriateness of peers when making findings as to appropriateness of programming,[[17]](#footnote-17) I find that the document request is reasonably calculated to lead to relevant information regarding the District’s proposed program. In addition, that the Parents have not accepted the District’s proposed services and placement is irrelevant.

As with its objection to Interrogatory No. 8, the District’s reliance on 20 U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4) is unpersuasive. Several courts, in fact, have concluded that “[n]othing in the FERPA would prevent [a school] from releasing properly redacted records.”[[18]](#footnote-18) In addition, the issue regarding release of relevant peer IEPs has been raised and previously addressed in several BSEA rulings, and BSEA Hearing Officers have consistently found that relevant peer IEPs, appropriately cleansed of all potentially identifiable student information, and with appropriate additional protections, are not immune from disclosure in a special education administrative hearing[[19]](#footnote-19). For instance, in *Jerrol v. Haverhill Public Schools*, BSEA #1900557 (2018), Hearing Officer Lindsay Byrne noted that the

“[p]roduction 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. Should there be some exceptional circumstance unique to this case that warrants a higher level of scrutiny or security that should be brought to the Hearing Officer’s attention. Thus far none has.”

Here, too, the District only raised general objections in its *Motion* and did not cite any exceptional circumstance unique to this case which would warrant a higher level of scrutiny or security.[[20]](#footnote-20)

Moreover, in the instant matter, Parents specifically requested that peer IEPs be “cleansed of all personally identifying information.” [[21]](#footnote-21) As such, the release of said redacted IEPs, subject to additional protections which are specified in the Order section of this Ruling *infra*, would violate neither FERPA nor Massachusetts student record law.[[22]](#footnote-22)

Therefore, the District’s objection to Document Request No.18 is DENIED, and, subject to additional protections that are specified in the Order section of this Ruling below, the District must provide the requested documents to Parents.

1. The District’s Objection to Document Request No. 19 is DENIED.

Document Request No. 19 seeks

“[c]omplete daily and weekly schedules for each student with an IEP who was or would be grouped with Student for any educational services or instruction during the 2023-2024 school year at MERSD. Please be sure to redact any personally identifying information prior to producing any responsive records, but please mark each responsive record with the same reference number or letter that MERSD assigned to the student’s redacted IEP pursuant to Document Request No. 18.”

The District objected to this request on the grounds that

“it is overly broad, unduly burdensome, immaterial, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence and, as it relates to the schedules and services of other students, seeks information protected under the laws of the United States and the Commonwealth of Massachusetts, specifically 20 U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4). Here, the issue is whether the District’s proposed program for the student is appropriate for this student. The schedules and services of other students are completely irrelevant to the Parents’ claims and have no bearing on the issue in this matter. The information requested is not proportional to the needs of the case, and the District objects to producing the requested documents. In addition, the District objects to producing the requested documents because the request seeks information protected under the laws of the United States and the Commonwealth of Massachusetts, specifically 20 U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4). 603 CMR 23.07(4) states that no third party shall have access to information in or from a student record without the specific, informed written consent from the eligible student or the parent. There is no exception in the law that permits the District to release the requested documents, nor have the Parents provided written consent from the other students’ parents to release the requested documents, and therefore the District objects to responding to the request. The District further objects to this request to the extent that the Parents have not accepted the District’s proposed services and placement.

As the Document Request is limited in scope of time to the 2023-2024 school year, it is not unduly burdensome. Nor is it relevant that Parents have not accepted the District’s proposed services and placement. In addition, construing liberally the applicable discovery provisions, I find that the request for “[c]omplete daily and weekly schedules for each student with an IEP who was or would be grouped with [Student]” during the 2023-2024 school year is reasonably calculated to lead to the discovery of evidence relevant to the issues in dispute, as the comparability of peer abilities was raised as a concern in Parents’ Hearing Request. Nor would such production violate FERPA or Massachusetts student record law as Parents requested that the District “redact any personally identifying information prior to producing any responsive records”[[23]](#footnote-23). Therefore, the District’s objection to Document Request No. 19 is DENIED, and the District must provide the requested documents to Parents.

.4. The District’s Objection to Document Request No. 26 is ALLOWED.

Document Request No. 26 seeks a “detailed daily or weekly schedule for each teacher, aide, consultant, and/or other staff member who did or would be involved in instructing or supporting [Student] during the 2023-2024 school year.” The District objected to this request on the grounds that

“it is overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence irrelevant, and as it relates to the services provided by staff to other students, seeks information protected under the laws of the United States and the Commonwealth of Massachusetts, specifically 20 U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4). Here, the issue is whether the District’s proposed program for the student is appropriate for this student. The schedules of teachers, aides, consultants, and/or other staff members, which would include information about services currently provided to other students, are completely irrelevant to the Parents’ claims and have no bearing on the issue in this matter. The information requested is not proportional to the needs of the case, and the District objects to producing the requested documents. The District objects to producing the requested documents because the request seeks information protected under the laws of the United States and the Commonwealth of Massachusetts, specifically 20 U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4). 603 CMR 23.07(4) states that no third party shall have access to information in or from a student record without the specific, informed written consent from the eligible student or the parent. There is no exception in the law that permits the District to release the requested documents, nor have the Parents provided written consent from the other students’ parents to release the requested documents, and therefore the District objects to responding to the request. The District further objects to this request to the extent that the Parents have not accepted the District’s proposed services and placement.”

Even if I construe liberally the applicable discovery provisions, I cannot find that the request for a “detailed daily or weekly schedule for each teacher, aide, consultant, and/or other staff member who did or would be involved in instructing or supporting [Student] during the 2023-2024 school year” is reasonably calculated to lead to the discovery of evidence relevant to the issue in dispute in this matter. Therefore, the District’s objection to Document Request No. 26 is ALLOWED[[24]](#footnote-24), and the District is not required to provide the requested documents to Parents.

**ORDER:**

MERSD’s *Motion* is DENIED, in part, and ALLOWED, in part.

Specifically, within 7 calendar days from the date of this Order, or on such other date as the parties agree[[25]](#footnote-25), the District shall provide Parents with a response to Interrogatory No. 8 and all documents responsive to Document Request Nos. 15 (limited to the 2-year period from the date of the filing of the Hearing Request) and 19. The District shall also provide Parents counsel for Parents with the IEPs specified in Parents’ Document Request No. 18, 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 any other person or entity except for Parents’ experts who may be called as witnesses at the hearing, subject to the following provisions:

1. 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. 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 the District 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.

So Ordered by the Hearing Officer

/s/ Alina Kantor Nir

Alina Kantor Nir, Hearing Officer

Dated: January 12, 2024

1. See Rule V(B)(1) and (2). [↑](#footnote-ref-1)
2. *In Re: Dorian and Waltham Public Schools (Ruling),* BSEA # 17-02306 (Reichbach, 2017). [↑](#footnote-ref-2)
3. Mass. R. Civ. P. 26(b)(1). [↑](#footnote-ref-3)
4. Fed. R. Civ. P. 26(b)(1). [↑](#footnote-ref-4)
5. See Rule V(C). [↑](#footnote-ref-5)
6. Pursuant to the Scope of the Rules section introductory to the *Hearing Rules*, “Unless modified explicitly by these *Rules*, hearings are conducted under the Formal Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 *et seq*.” [↑](#footnote-ref-6)
7. In the event an Order is issued granting a Motion to compel, 801 CMR 1.01(8)(i) further authorizes a Hearing Officer, in situations for which good cause does not exist to justify failure to comply with such Order, to issue further orders regarding such failure,

“… as are just, including one or more of the following:

1. An order that designated facts shall be established adversely to the Party failing to comply with the order; or

2. An order refusing to allow the disobedient Party to support or oppose designated claims or defenses, or prohibiting him or her from introducing evidence on designated matters.” [↑](#footnote-ref-7)
8. 20 U.S.C.A. §1232g(a)(4)(A). Exceptions enumerated in in 20 U.S.C.A. §1232g(a)(4)(B) are not relevant to this matter. [↑](#footnote-ref-8)
9. 20 U.S.C.A. §1232g(b)(1). Exceptions enumerated in 20 U.S.C.A. §1232g(b)(1)(A-K)) are not relevant to this matter. [↑](#footnote-ref-9)
10. 34 CFR 91.31(a)(1)(b)(1). [↑](#footnote-ref-10)
11. G.L. c. 71, §34D states that the “board of education shall adopt regulations relative to the maintenance, retention, duplication, storage and periodic destruction of student records by the public elementary and secondary schools of the commonwealth. Such rules and regulations shall provide that a parent or guardian of any pupil shall be allowed to inspect academic, scholastic, or any other records concerning such pupil which are kept or are required to be kept.” [↑](#footnote-ref-11)
12. The exceptions enumerated are not relevant to this matter. [↑](#footnote-ref-12)
13. See *In Re: Student v. Andover Public Schools* (*Ruling On Andover Public Schools’ Motion For A Protective Order*), BSEA # 17-0617(Figueroa 2017); see also *cf*. *Champa v. Weston Pub. Sch.,* 473 Mass. 86, 98–99 (2015) (“personally identifying information in the agreements is subject to redaction, and when the agreements are properly redacted, they must be disclosed”). [↑](#footnote-ref-13)
14. See, e.g., *In Re: Needham Public Schools*, BSEA # 07-2282 (Crane, 2007) (“The evidence relevant to the appropriateness of Needham’s proposed IEPs for 5 th and 6 th grade will focus on expert testimony regarding the three principal aspects of this case that are in dispute – first, whether Needham offered appropriate language-based instruction; second, whether Student may be appropriately educated in inclusion classrooms for science and social studies; and third, whether Needham offered appropriate peer groupings”); *In Re: Student v. Brookline Public Schools*, BSEA # 12-4227 (Figueroa, 2012) (“St. Ann’s would offer Student appropriate instructional and social peer groupings, as well as the type of social and clinical activities that would promote her development”). [↑](#footnote-ref-14)
15. See *In Re: Student v. Andover Public Schools* (*Ruling On Andover Public Schools’ Motion For A Protective Order*), BSEA # 17-0617(Figueroa 2017) (“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”). [↑](#footnote-ref-15)
16. See *In Re: Student v. Andover Public Schools (Ruling On Andover Public Schools’ Motion For A Protective Order),* BSEA # 17-0617 (Figueroa 2017) (citing to *In Re: Mattapoisett Public Schools*, BSEA No. 06-6153 (Crane, 2006)); see also *In Re: Zebulon & Quincy Public Schools (Ruling on School’s Motion for Protective Order)*, BSEA # 16-00059 (Byrne, 2015) (“Liberal discovery practices are intended to uncover information that may shed light on, support, detract, defuse or alter those facts and arguments the parties hold at the beginning of litigation.”); *In Re: Andover Public Schools (Ruling on Andover Public Schools’ Motion for Protective Order)*, BSEA # 1706174 (Figueroa, 2017) (allowing a Parent to discover documents and information relating to children “with whom the Student may be grouped,” as this information was directly relevant to whether the needs of Student’s peers in the proposed program were similar enough to provide the student a FAPE). [↑](#footnote-ref-16)
17. See, e.g., *In re: Student and the Barnstable Public Schools*, BSEA # 2104905 (Kantor Nir, 2021) (finding Parent did not meet his burden to show that the District’s program was inappropriate because, in part, Parent “presented no expert testimony defining an appropriate peer group for Student”); *In Re: Student v. Concord Public Schools*, BSEA # 2100891 (Berman, 2021) (“it is unclear from the record whether there would be appropriate peers for Student in the ACCESS classroom”); *In Re: Longmeadow Public Schools* BSEA # 08-0673 (Crane, 2010) (finding that “Longmeadow’s most recently-proposed placement of Student at the Williams Middle School is inappropriate because it does not allow Student to be educated with an appropriate peer group”).

The District asserts that “[a]t least three United States District Courts have found that information about other students is irrelevant to a claim for FAPE under the IDEA and that the release of such information is a violation of FERPA.” However, these cases, as all IDEA matters, turn on their case-specific facts. See *M.S. ex rel. M.E.S. v. Woodland Hills Sch. Dist*., No. 10-700, 2011 WL 294518, at \*1 (W.D. Pa. Jan. 27, 2011) (“The IDEIA and similar statutes, however, involve highly individualized issues”).

For instance, the District cites to *Loch v. Bd. of Educ. of Edwardsville Community School District No. 7,* No. CIVA 306-CV-17-MJR, 2008 WL 79022 ((S.D. Ill. Jan. 7, 2008) for the proposition that the “district did not have to provide parents with information on any student other than the parent’s daughter because the other student’s IEP data was irrelevant to the parents’ FAPE claim and FERPA precluded the district from producing the information. See also (*Hupp v. Switzerland of Ohio Local School Dist.*, No. 2:07-cv-628, 2008 WL 4186315, at \*1 (S.D. Ohio Sept. 2, 2008). However, the instant matter is distinguishable from both *Loch* and *Hupp*. In *Loch*, Parents sued the District for failure to provide their daughter, Kayla, with her accommodations. They sought information regarding the accommodations and services received by other Students, asserting “that the information sought [was] relevant and that knowledge of other students, who may be similarly situated to Kayla, [was] critical to the prosecution of their action.” While it is true that “the diagnoses of and services offered to other children are simply not particularly relevant to the determination of whether or not the denial of special services [or placement] [is] proper” (*Hupp v. Switzerland of Ohio Local School Dist.*, No. 2:07-cv-628, 2008 WL 4186315, at \*1 (S.D. Ohio Sept. 2, 2008)), the profiles of other children who serve as peers may be a relevant factor in assessing the appropriateness of a placement. Specifically, here, Parents are disputing the appropriateness of a placement due, in part, to inappropriate peers. In the present matter, the profile of the other students is relevant. Moreover, in *Loch*, the Parents sought “to compel LCCC to release student records and reveal the names of students other than Kayla.” The school offered “to give the Lochs' the information they seek, redacted to identify students by a number rather than by name.” The Judge found that this offer was “an appropriate response.” *Loch,* 2008 WL 79022, at \*1. Here, Parents specifically request that all personally identifiable information be redacted, making their request appropriate.

The District also cites to *M.S. ex rel. M.E.S. v. Woodland Hills Sch. Dist*., No. 10-700, 2011 WL 294518 (W.D. Pa. Jan. 27, 2011) for the proposition that “diagnosis, enrollment and therapies of other student[s]

was not relevant on issue of whether child’s placement was appropriate.” Again, the instant matter is distinguishable. In *Woodland Hills Sch. Dist*., Parents interrogatories “request[ed] a fairly broad range of in-depth information regarding the prevalence and educational treatment of other students with Autism or Mental Retardation within the Defendant School District—such as diagnoses, placement, enrollment and registration records, details about programming and therapy, and details about IEPs [on the grounds that this information was] relevant to the Defendant's policies and practices regarding such students, as well as the availability of appropriate treatment for the minor Plaintiff.” *Woodland Hills Sch. Dist*., 2011 WL 294518, at \*1. Here, Parents seek information regarding other students to assess whether Student has an appropriate peer group, not as a fishing expedition regarding what services are available (or not) in the District’s proposed placement. The District further argues that “[i]n *Woodland Hills School District*, the parents argued that one of the reasons the student’s placement was inappropriate was the lack of peers. Accordingly, the court ordered the district to provide the number of student’s [sic] placed in the district’s proposed classroom over the past five years and denied the parents’ request for the disclosure of diagnosis, placement, enrollment and registration records, and details about programming, therapy and IEPs. In producing the number of peers, the court stated the district would not ‘run afoul of privacy restrictions.’” (internal citations omitted). However, the Court’s conclusion is more nuanced; specifically, the Court states,

“Plaintiffs' Complaint alleges that one of the reasons his placement was inappropriate is the lack of peers, or changing group of peers, in the autistic support classroom. He is entitled to discover information relating to these contentions, which is fairly encompassed by Interrogatory No. 1, and the disclosure of which would not run afoul of privacy restrictions. Defendant shall identify the number of students, during the five past academic years (including the current academic year), placed in that classroom. The Motion to Compel is granted solely to that extent.”

*Id*., 2011 WL 294518, at \*2. Hence, the Court agrees that Parent “is entitled to discover information relating to these contentions,” i.e., “the lack of peers, or changing group of peers, in the autistic support classroom.” In *Woodland Hills Sch. Dist*., providing Parents with the *“*number of students” satisfied Parents’ inquiry regarding “lack of peers.” Here, Parents are concerned about the appropriateness of peers for the purpose of peer groupings, not the presence or absence of peers generally. [↑](#footnote-ref-17)
18. *U.S. v. Miami University*, 294 F.3d 797, 824 (6 th Cir. 2002); see also *Osborn v. Bd. of Regents of Univ. of Wisconsin Sys.,* 2002 WI 83, ¶ 22, 254 Wis. 2d 266, 287, 647 N.W.2d 158, 168 (2002) (“Based on this unambiguous language, it is clear that FERPA protects the disclosure of education records. It is also clear, however, that FERPA does not prohibit disclosure of all information contained in such records. The Act itself indicates that directory information, which is part of an education record, is subject to release. Furthermore, as Osborn notes, the parenthetical referring to personally identifiable information would be meaningless if FERPA prohibited disclosure of all information in education records”); *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees*, 787 N.E.2d 893 (Ind.App., 2003) (“ if these notes were properly redacted to eliminate any identifiable student information, they would not be protected by FERPA”); *State ex rel. Miami Student v. Miami Univ.,* 79 Ohio St.3d 168 (1997) *cert. denied* 522 U.S. 1022, 118 S.Ct. 616, 139 L.Ed.2d 502. (university students’ redacted disciplinary records were not education records). [↑](#footnote-ref-18)
19. See e.g., *In Re: Lexington Public Schools* (***Ruling On Lexington Public Schools' Motion For Protective Order***) BSEA # 2211215 (Figueroa 2022); *In Re: Newton Public Schools (Ruling on Newton Public Schools' Motion To Limit The Scope Of Discovery)*, BSEA #2010632 (Figueroa, 2020); *Jerrol v. Haverhill Public Schools*, BSEA #1900557 (Byrne, 2018). [↑](#footnote-ref-19)
20. See *In Re: Lexington Public Schools (****Ruling On Lexington Public Schools' Motion For Protective Order)*,** BSEA # 2211215 (Figueroa 2022); see also *In Re: Mattapoisett Public Schools (Ruling On Motion For Protective)*, BSEA # 06-6153 (Crane, 2007). [↑](#footnote-ref-20)
21. In *In Re: Mattapoisett Public Schools (Ruling On Motion For Protective)*, BSEA # 06-6153 (Crane, 2007) the Hearing Officer addressed the school’s concern that documents sought by Parents, even if properly redacted, may possibly be identifiable to a particular student where the person who sees the redacted record has additional knowledge about the student who is the subject of the redacted document. In its *Opposition*, Parents note that

“Parents’ attorney will agree to abide by the precautions set forth in [*In Re: Mattapoisett Public Schools*] to limit disclosure, and will return copies of all records to MERSD at the conclusion of this action (or destroy them at the district’s request). Parents’ counsel has no direct knowledge of any other students who may be

comparators (other than from families who have self-identified and disclosed personally

identifiable information voluntarily). Therefore, it is not possible for a link to be made by

counsel between any of the redacted records that should be produced and any specific students

residing in the district.”

The precautions to which Parents refer are:

“· Parents’ attorneys may disclose the redacted documents to any of their experts who are assisting Parents in determining appropriate grouping of students and/or who may testify at Hearing regarding appropriate grouping. At the close of the dispute before the BSEA, Parents’ attorneys shall ensure that the experts return the documents to Parents’ attorneys.

· Parents’ attorneys may submit the redacted documents to the Hearing Officer and opposing party as proposed exhibits in this dispute.

· Parents’ attorneys shall take appropriate steps to ensure that there is no further disclosure of these documents, except as may be provided by further Order of the Hearing Officer.”

See *id.* Similar conditions were imposed by the Hearing Officer in *In Re: Nicholas R. v. Dracut Public Schools* *(Ruling on Dracut Public Schools’ Motion for Protective Order and Parents’ Motion for Order for Dracut Public Schools to Send Out Referral Packages*), BSEA # 1903603 (Figueroa, 2018). [↑](#footnote-ref-21)
22. See 34 CFR 91.31(a)(1)(b)(1) and 603 CMR 23.02. [↑](#footnote-ref-22)
23. See 34 CFR 91.31(a)(1)(b)(1) and 603 CMR 23.02. [↑](#footnote-ref-23)
24. Nevertheless, the District’s reliance on 20 U.S.C.A. §1232g, G.L. c. 71, §34D and 603 CMR 23.07(4). 603 CMR 23.07(4) in raising this objection is misplaced. [↑](#footnote-ref-24)
25. Note that exhibit binders and witness lists are due by the close of business day on January 29, 2024. [↑](#footnote-ref-25)