**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student v. Arlington Public Schools BSEA # 2503543**

**RULING ON ARLINGTON PUBLIC SCHOOLS’ MOTION TO QUASH**

**AND**

 **ARLINGTON PUBLIC SCHOOLS’ RESPONSE TO PARENTS’ PRIVILEGE LOG**

This matter comes before the Hearing Officer on the October 29, 2024 *Arlington Public Schools* *Motion to Quash* (*Motion*) filed by Arlington Public Schools (Arlington or the District) seeking to quash Parents’ October 22, 2024 request that the Bureau of Special Education Appeals (BSEA) issue subpoenas for Doreen Crowe, Director of Nursing, and Alison Elmer, Assistant Superintendent of Student Services, to testify as witnesses in this matter.[[1]](#footnote-2) According to Arlington, Ms. Crowe

“has absolutely zero knowledge about the need for or costs accrued for nursing services at the Carroll School. Although she [] participated in one zoom meeting and had 2 or 3 phone conversations with the Parents, … [s]he manages the nurses and schedules all the nurses in the school buildings throughout the district but does not provide services to students. Additionally, through conversations with the Parents about Discovery and the documentation in their possession, Parents have alluded several times that her medical diagnosis is not the focus of the hearing and the focus is instead on her academics (i.e. her reading). If that is true, Nurse Crowe has absolutely no knowledge about Student’s academic services and therefore her testimony is irrelevant to the issues at hearing…. Her testimony could cause an undue burden on her, as the Director of Nursing for the entire district, to attend the hearing for a student she has had such limited involvement with [sic] [her].”

Similarly, Ms. Elmer

“has never participated in a team meeting, she has not conducted an evaluation or observation of the Student, nor has she given any input into the development of her IEP, services, schedule or peer cohort for the Student. She has not consulted with the team around placement decisions or any other decisions regarding IEP services for the Student. When the Parents gave notice of unilateral placement, Ms. Elmer responded with a form letter that is given to all families when they give notice of unilateral placement.… Her testimony is not relevant to the issues at hearing and she should not be compelled to testify.”

On October 30, 2024, Parents filed *Objection [to Motion to Quash],* asserting, in part, that their Hearing Request specifically alleged that

“[o]n several occasions, the district failed to intervene on dangerously low blood glucose values….While Ms. Crowe did not provide direct care for [Student], she was very familiar with [Student’s] concerns, our concerns, the concerns of [Student’s] team at Boston Children’s Hospital, and the concerns of the Dallin nurse and nurses in the substitution pool. As the Director of Nursing, her responsibilities include oversight of staffing, holding nurses accountable for implementation of 504s, medical IEPs, individual health plans, and following medical orders.”

Parents further disputed “the district’s claim that [Student’s] disabilities can be viewed in isolation. Glucose has direct impacts on physical well-being, emotional regulation AND processing speed (a large component of a RAN deficit dyslexic child).” With regards to Ms. Elmer, Parents contended that following Parents’ rejection of Student’s IEP on April 22, 2024,

Chris Carlson, Team Chair, and Thad Dingman, Principal, “acknowledged that they had not involved the team in any discussions regarding placement, but that they were unilaterally rejecting our OOD proposal because Ms. Elmer had already denied placement.” As such, Ms. Elmer’s testimony was relevant and necessary.

In addition, on October 29, 2024, the District filed *Arlington Public Schools’ Response To Parents’ Privilege Log* (hereinafter, *Arlington’s Motion to Produce Documents Identified in Parents’ Privilege Log*).[[2]](#footnote-3) Arlington disputed Parents’ assertion that “they requested a school observation in anticipation of litigation,” contending instead that the

“purpose of the school observation is to determine the appropriateness of the District’s programming. The observation was not conducted in preparation for the Hearing itself. Therefore, any information related to the school observation is relevant to the issues for hearing, including the report itself, email correspondence between the parents and the evaluator, discussions regarding schedule and logistical matters, any sharing of information between the Parents and their evaluator (including a settlement agreement from another family in the District), etc. Any communication between the Parents and their evaluator is not protected by any privilege and is all highly relevant to the issues for hearing because it speaks directly to the credibility of the evaluator and is necessary for the District to properly defend itself and its case at hearing. It must all be turned over.”

Moreover, the District “dispute[d] the fact that the evaluator, educational consultant and tutor do not have one single note, document, email communication, or any other documentation regarding Student” and “request[ed] that the Hearing Officer remind the Parties, including the Parents, they will be testifying under oath as to their submission of Discovery documentation.”

For the reasons set forth below, Arlington’s *Motion to Quash* is DENIED, in part, and ALLOWED, in part. *Arlington’s Motion to Produce Documents Identified in Parents’ Privilege Log* is ALLOWED, in part.

**PROCEDURAL HISTORY AND RELEVANT FACTS:**

The factual background and procedural history of this matter have been described in detail in my previous published rulings and need not be repeated here. I note only that Student is a nine-year-old fourth grader currently enrolled at the Carroll School where she was placed unilaterally by Parents at the beginning of the 2024-2025 school year. Student is diagnosed with dyslexia and type one diabetes. On September 17, 2024, Parents filed a Hearing Request with the BSEA alleging procedural and substantive denials of a FAPE to Student since February 2023. On September 30, 2024, I issued *Ruling on Arlington Public Schools’ [Partial] Motion to Dismiss* in this matter, dismissing certain claims and delineating the issues that survived for hearing, to wit: whether Arlington Public Schools violated Student’s rights under IDEA and MGL c. 71B by failing to find Student eligible prior to February 2023 and/or by failing to propose IEPs and placements during the period of February 2023 until the filing of the complaint that were/are reasonably calculated to provide Student with a FAPE.

The Hearing in this matter is scheduled to begin on November 14, 2024.

**LEGAL STANDARDS AND DISCUSSION:**

1. **Arlington’s Motion to Quash Subpoenas**
	1. *Legal Standards:*

Both the BSEA Hearing Rules and the Formal Standard Adjudicatory Rules of Practice and Procedure which govern due process hearings at the BSEA allow Hearing Officers to issue, vacate or modify subpoenas.[[3]](#footnote-4) Under BSEA Hearing Rule VII B:

“Upon the written request of a party, the BSEA shall issue a subpoena to require a person to appear and testify and, if requested, to produce documents at the hearing. A party may also request that the subpoena duces tecum direct the documents subpoenaed from a non-party be delivered to the office of the party requesting the documents prior to the hearing date.”

According to BSEA Hearing Rule VII C:

“A person receiving a subpoena may request that a Hearing Officer vacate or modify the subpoena. A Hearing Officer may do so upon a finding that the testimony or documents sought are not relevant to any matter in question or that the time or place specified for compliance or the breadth of the material sought imposes an undue burden on the person subpoenaed.”

* 1. *Application of Legal Standards:*

Whether Ms. Crowe and/or Ms. Elmer should be compelled to attend and testify at the hearing in this case depends on whether their testimony is relevant to the issues for hearing, namely, whether Arlington violated Student’s rights under IDEA and MGL c. 71B by failing to find Student eligible prior to February 2023 and/or by failing to propose IEPs and placements during the period of February 2023 until the filing of the complaint that were/are reasonably calculated to provide Student with a FAPE. After reviewing the *Motion* and Parent’s *Objection* in light of the above-quoted legal standards and the issues for hearing, I conclude that the District’s *Motion* *to Quash* as to Ms. Crowe must be DENIED but that the District’s *Motion* *to Quash* as to Ms. Elmer must be ALLOWED.

Although Ms. Crowe has not provided direct service to Student, she appears to have been involved in the matter by speaking to Parents and participating in one or two meetings with them about their concerns regarding Student’s needs and the District’s response thereto. Although Ms. Crowe may not be able to testify about any direct services to Student, her testimony may be relevant to the issues at Hearing, specifically those relating to Parents’ claim that “the extended school year was inaccessible to [Student ]because there was … no nursing on staff.” Arlington’s argument that Student’s “medical diagnosis is not the focus of the hearing and the focus is instead on her academics” is unpersuasive since Parents specifically raised concerns regarding the District’s handling of Student’s T1D in their Hearing Request. Similarly unpersuasive is the District’s assertion that Ms. Crowe’s testimony will impose an undue burden on her. In determining whether a subpoena subjects a witness to undue burden , I must “consider whether the information is necessary and whether it is available from any other source, which is obviously a highly case specific inquiry and entails an exercise of judicial discretion.”[[4]](#footnote-5) Here, Ms. Crowe’s testimony may include relevant information, and such information is not available from any other source.[[5]](#footnote-6) Therefore, the District’s *Motion* *to Quash* as to Ms. Crowe is DENIED.

In contrast, Ms. Elmer’s testimony does not emerge as relevant to the issues in this matter. Except for the form letter sent by Ms. Elmer to Parents, it does not appear that either Parents or Student had any contact with Ms. Elmer relative to Student’s needs or the District’s FAPE proposal. To the extent that following Parents’ rejection of Student’s IEP on April 22, 2024,

Mr. Carlson and Principal Dingman “acknowledged that … they were unilaterally rejecting [Parents’ out-of-district] proposal because Ms. Elmer had already denied placement,” Parents have requested that the BSEA issue subpoenas for both Mr. Carlson and Principal Dingman to testify at Hearing, and said subpoenas have been issued. As such, Mr. Carlson and Principal Dingman will be testifying at Hearing and may be questioned on the rejection of Parents’ out-of-district proposal. Therefore, the District’s *Motion to Quash* as to Ms. Elmer is ALLOWED.

1. **Arlington’s Motion to Produce Documents Identified in Parents’ Privilege Log**
	1. *Legal Standards:*

The work product doctrine limits the access of an opponent to materials “prepared in anticipation of litigation or for trial.”[[6]](#footnote-7) Federal Rule of Civil Procedure Rule 26(b)(3) and most courts distinguish between “opinion” work product, which includes “materials that contain the mental impressions, conclusions, opinions, or legal theories of an attorney,” and “ordinary” work product, which includes everything else that is eligible for protection as work product, and accord greater protection to the former; this bifurcation makes sense, because more than with ordinary work product, “[t]he substantive content of ... so-called opinion work product is almost certainly of no legitimate use to an opponent.”[[7]](#footnote-8) In order for a document to be eligible for protection as work product, the claimants need not establish that the document was prepared “primarily or exclusively to assist in litigation”; rather, they need only show that “in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained *because of* the prospect of litigation.”[[8]](#footnote-9)  In other words, “the ‘because of’ standard does not protect from disclosure documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.”[[9]](#footnote-10)

As the party asserting work product protection, Parents bear the burden of demonstrating that the documents were “prepared in anticipation of litigation.”[[10]](#footnote-11)  Once work-product protection has been established, the burden to overcome it rests on the District, the party seeking the materials, to establish not only that what is sought are merely facts (rather than opinions or mental impressions), but also that the claimant has a substantial need and no substantial equivalent for the material.[[11]](#footnote-12)

* 1. *Application of Legal Standards:*

Here, Parents seek work product protection for the following documents:

“1. Electronic correspondence re: “School Observation” (16 messages 2/8/2024 – 5/30/2024) between Timothy DeLuca, Ph.D., CCC-SLP; [Parents]. Discussion includes forthcoming litigation, scheduling of the observation at Dallin, [Student’s] schedule at Dallin, logistics for the day of observation, scheduling an evaluation, scheduling a follow-up phone call after observation.

a. Attachment: redacted settlement agreement between district and family, obtained in a public record request.

2. Electronic correspondence re: “Scheduling Pediatric Evaluation” (7 emails: 5/8/2024 –6/12/2024) between: Timothy DeLuca, Clinical Supervisor, BU; Katie Nerlino, Program Manager; [Parents]. Discussion includes scheduling, consent and case history forms.

a. Attachments: case history forms.

3. Electronic correspondence re: “Reports” (10 emails: 6/18/2024 – 7/29/2024) between Timothy DeLuca, Clinical Supervisor, BU; [Parents]. Discussion includes timeline for production of reports, discussion of evaluation results.

a. Attachment: ﬁnal report (which will be provided).

4. Electronic correspondence re: “Report” (8 emails: 7/29/2024 – 8/2/2024) between Timothy DeLuca, Ph.D, CCC-SLP; [Parents]. Discussion includes school observation report, scheduling a call to discuss contents, invoice and updated report.

a. Attachments: invoice (which will be provided), report, updated report (which will be provided).”

Parents assert that these documents were “prepared in anticipation of litigation” because, in essence, they would not have sought the school observation but for anticipating their due process hearing. However, if Parents intend to offer Mr. Deluca’s oral testimony as to his school observation, including any conclusions or recommendations made as a result thereof, they may not rely on the work product doctrine to prevent discovery of the documents and communications listed in the Privilege Log. Specifically, “plaintiffs should not, [], be able to use the privilege as both a sword and a shield. They should not be allowed to disclose some selective communication for self-serving purposes and at the same time use the privilege to prejudice their opponent's case by denying defense counsel the right to review [the evaluator’s] file for the purpose of cross-examination.”[[12]](#footnote-13)

In addition, while it may be true that Parents sought the School Observation because they had litigation in mind, email communications and attachments relating to “scheduling of the observation at Dallin, [Student’s] schedule at Dallin, logistics for the day of observation, scheduling a follow-up phone call after observation”; “scheduling, consent and case history forms”; “timeline for production of reports”; “school observation report, scheduling a call to discuss contents, invoice and updated report” appear to be routine communications which have been created in the ordinary course of Mr. Deluca’s business and/or would have been made regardless of the prospect of litigation, and not created specifically in preparation for a hearing.[[13]](#footnote-14) Disclosure of such documents or communications would not reveal Parents’ thought processes or the strategy that they intend to pursue at hearing and hence would not prejudice them.[[14]](#footnote-15) Parents have not alleged that Mr. Deluca’s involvement was to assess, prepare, or aid in forming a legal argument for a potential due process hearing nor that communications with him are part of the strategy for the case or discuss case theory, anticipated legal issues, or planned arguments.[[15]](#footnote-16)

As such, the only communications and/or documents which would be protected by the work product privilege are Parents’ own notes from their discussions with Mr. Deluca/ and or his associates and Parents’ impressions, questions and comments to Mr. Deluca regarding his observation, evaluation results, draft reports, and upcoming litigation.[[16]](#footnote-17)

**ORDER:**

Arlington’s *Motion to Quash* is DENIED, in part, and ALLOWED, in part. Specifically, the District’s Motion as to Ms. Crow is DENIED, and the BSEA will issue a subpoena for Ms. Crowe to appear and testify at the Hearing in this matter. The District’s *Motion* as to Ms. Elmer is ALLOWED.

*Arlington’s Motion to Produce Documents Identified in Parents’ Privilege Log* is ALLOWED, in part. Specifically, Parents must produce the communications/documents referenced in their Privilege Log with the exception of Parents’ own notes from their discussions with Mr. Deluca/ and or his associates and Parents’ impressions, questions and comments to Mr. Deluca regarding his observation, evaluation results, draft reports, and upcoming litigation.

So ordered,

By the Hearing Officer,

s/ *Alina Kantor Nir*
Alina Kantor Nir

Date: October 31, 2024

1. Specifically, Parents requested that the BSEA issues subpoenas for the following witnesses:

1. Ms. Doreen Crowe, Director of Nursing

2. Ms. Alison Elmer, Assistant Superintendent of Student Services

3. Mr. Chris Carlson, Team Chair

4. Mr. Thad Dingman, Principal at Dallin Elementary School

5. Ms. Samantha Karustis, Vice-principal at Dallin Elementary School

6. Ms. Jenny Loop, Social worker at Dallin Elementary School. [↑](#footnote-ref-2)
2. Arlington’s Document Request #12 seeks all notes, reports, correspondence and/or other documents pertaining to the Student created or maintained by any non-attorney advocate, representative, evaluator, and/or consultant since September 15, 2022. Arlington’s Document Request #16 seeks all documents concerning any observations of the Student in any educational setting by any person other than the Arlington Public Schools, including but not limited to any and all notes taken in the course of any such observation(s) since September 15, 2022. Arlington’s Document Request #17 seeks all documents concerning any observations of programs and/or classrooms within the Arlington Public Schools, including but not limited to any and all notes taken in the course of any such observation(s) since September 15, 2022. On October 21, 2024, I issued *Ruling on Multiple Motions* in this matter in which I ordered Parents to produce a privilege log that identified all documents and materials withheld from production on the basis of the work product doctrine in response to Arlington’s Document Request Nos. 12, 16, and 17. I found that “[t]o the extent that any of the ‘notes, reports, correspondence and/or other documents pertaining to the Student created or maintained by any non-attorney advocate, representative, evaluator, and/or consultant,’ ‘documents concerning any observations of the Student in any educational setting by any person other than the Arlington Public Schools, or documents concerning any observations of programs and/or classrooms within the Arlington Public Schools were created in anticipation of litigation, they need not be produced. All documents created in the normal course of business and not in anticipation of litigation must be produced.” On October 26, 2024, Parents submitted a privilege log, asserting, in part that they had “request[ed] a school observation and evaluation in anticipation of litigation” and were not seeking “privilege for the [] correspondence and all attachments, with the exception of the paid invoices and ﬁnal reports,” relative to their communications with Timothy DeLuca, Ph.D., CCC-SLP and Katie Nerlino, Program Manager. Parents also indicated that they had “conﬁrmed with the evaluator and/or consultant and [Student’s] tutor that they have not maintained any working notes, correspondence, documentation, etc.” [↑](#footnote-ref-3)
3. See 801 CMR 1.01(10)(g) and BSEA Hearing Rules VII B and C. [↑](#footnote-ref-4)
4. *Vesper Mar. Ltd. v. Lyman Morse Boatbuilding, Inc.,* No. 2:19-CV-00056-NT, 2020 WL 877808, at \*1 (D. Me. Feb. 21, 2020) (internal citations and quotations omitted). [↑](#footnote-ref-5)
5. Parents are cautioned that Ms. Crowe may only testify based on her own personal knowledge. See Mass.R.Evid. 602 (a witness can only testify to a matter if there is evidence that supports a finding that the witness has personal knowledge of the matter). As such, Ms. Crowe may or may not have personal knowledge with respect to Parents’ claim that the “district failed to create a safe learning environment for [Student]” because “[o]n several occasions, the district failed to intervene on dangerously low blood glucose values” and “failed to respond to [Student’s] high blood glucose values, even when [Student] was symptomatic.” [↑](#footnote-ref-6)
6. Fed.R.Civ.P. 26(b)(3); *see also Hickman v. Taylor,* 329 U.S. 495, ----(1947) (“materials obtained or prepared by an adversary's counsel with an eye toward litigation”). [↑](#footnote-ref-7)
7. *In re Grand Jury Subpoena*, 220 F.R.D. 130, 144 (D. Mass. 2004) (internal citations omitted). [↑](#footnote-ref-8)
8. *Id.*, 220 F.R.D. at 151 (internal quotation marks omitted). [↑](#footnote-ref-9)
9. *Id.*, 220 F.R.D. at 146. [↑](#footnote-ref-10)
10. *Conoco, Inc. v. United States Dep't of Justice,* 687 F.2d 724, 730 (3d Cir.1982). [↑](#footnote-ref-11)
11. *Havener v. Gabby G. Fisheries, Inc.,* 615 F. Supp. 3d 1, 6 (D. Mass. 2022). [↑](#footnote-ref-12)
12. I.D. v. Westmoreland Sch. Dist., 17 IDELR 417 (D.N.H. 1991) (finding that plaintiffs failed to make a strong showing that they are likely to succeed on the merits where at Hearing the district requested to review the files of an expert witness called by the parents, and the hearing officer held that the parents waived any privilege by offering the expert's oral testimony). [↑](#footnote-ref-13)
13. See *Felisberto v. Dumdey,* 541 F. Supp. 3d 142, 153 (D. Mass. 2021); see also J*.L. ex rel. J.P. v. New York City Dep't of Educ*., 122 LRP 48176 (S.D.N.Y. 2022) (finding that emails were a “necessary follow- up with a nurse and [were] not privileged or protected work product. No legal advice is conveyed or requested and the emails would have been written in similar form regardless of the existence of the lawsuit. Similarly, two emails[were] simple communications confirming pick up of the same student as the above-discussed emails. No legal advice [was] conveyed or requested and the emails would have been written in similar form regardless of the existence of the lawsuit. These too [had to] be produced”); *United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999) (when a document would have been needed to be prepared regardless of any prospect of litigation, they are not protected by the work-product privilege). In contrast, see *Felisberto v. Dumdey,* 541 F. Supp. 3d 142, 153 (D. Mass. 2021) (finding emails protected as work product where “they contemplate[d] future litigation and discusse[d] preparation for such litigation, and would not have been created without the prospect of litigation”). [↑](#footnote-ref-14)
14. See *Flag Fables, Inc. v. Jean Ann's Country Flags & Crafts, Inc.,* 730 F. Supp. 1165, 1187 (D. Mass. 1989) (“The defendants are correct in asserting that a party may not use the liberal rules of discovery to engage in inquiry about the way the other side intends to conduct its case.  The Court is at a loss to determine exactly what trial strategy faces the risk of being unfairly exposed…. Production of the documents requested by the plaintiff will in no way prejudice the defendants, and will promote a swifter resolution of this matter”). [↑](#footnote-ref-15)
15. See *Consolidation Coal Co. v. Bucyrus-Erie Co.,*89 Ill. 2d 103, 109, 432 N.E.2d 250, 59 Ill. Dec. 666 (1982) finding that the notebook of an employee who was assigned a fact-finding mission about the accident at issue was not attorney work product as it did "not reflect or disclose the theories, mental impressions or litigation plans of [defendant's] attorneys. Not [was] it the product of the attorney's mental processes. [The employee] never communicated with the legal department prior to preparing this material, nor was he advised by his superior, who had requested [his] help, as to what the theories or plans of the attorneys were relative to this litigation. He was simply asked to analyze pieces of machinery and render an opinion as to what had occurred. When his report was transferred to the legal department some six months to a year after it had been made, it did not, as [defendant] argues, thereby become part of the attorney's thought processes”). [↑](#footnote-ref-16)
16. I see no reason at this juncture to question Parents’ affirmation that “the evaluator and/or consultant and [Student’s] tutor … have not maintained any working notes, correspondence, documentation, etc.” If such evaluator/consultant or tutor testifies at Hearing, Arlington may question them relative to the existence of any “working notes, correspondence, documentation” regarding Student. [↑](#footnote-ref-17)