

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In re: Vic¹

BSEA #1503712

RULING ON DISCOVERY

On February 3, 2015, after a telephonic motion session, I issued an oral Order in the above-entitled matter upholding Wellesley Public Schools' (WPS) Motion for a Protective Order (MPO) with respect to Parents' Request for Production of Documents (RPD) numbers 16 and 17 and Parents' Interrogatory number 7. I denied WPS' MPO with respect to Parents PRD numbers 15 and 18 and Parents' Interrogatory number 4. In brief, I denied all Parents' requests for discovery except for: copies of Individual Education Programs (IEPs) and Behavioral Plans (BP), if any, appropriately cleansed/redacted of all personally identifiable information of students who would be grouped with Vic for the special education program WPS is proposing for the 2014-2015 school year; and any specialized instructional materials that would be utilized by WPS in instructing Vic and his special education peers.

In seeking IEPs of students who would be grouped with Vic in the proposed special education program, Parents contend that the issue of an appropriate peer group is an essential element of their BSEA appeal. WPS contends that 603 CMR 23.07(4) states that no party shall have access to information from a student's record without the specific, informed written consent of the student or parent, and that no such consent has been received in this case.²

The Family Educational Rights and Privacy Act (FERPA) only precludes the disclosure of personally identifiable information (See 34 CFR 99.3). The removal of personally identifiable information extinguishes the privacy concerns that both FERPA and the Massachusetts Student Records Regulations (603 CMR 23.00 et seq.) are designed to protect. In sum, neither FERPA nor the Massachusetts Student Records Regulations prohibit disclosure of records which do not contain personally identifiable information. The FERPA regulations specifically allow disclosure of such "de-identified" information at 34 CFR 91.31(a)(1)(b)(1):

¹ Vic is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in publicly available documents.

² While not specifically at issue in the instant case as the IEPs are requested via RPD vs. subpoena, 603 CMR 23.07(4)(b) provides that upon court order or lawfully issued subpoena for information regarding a student, the school shall comply provided that the student/parent is notified in advance.

(b)(1) 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 Sec. 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. (Emphasis added.)

The FERPA regulations define "personally identifiable information" to include, but not be limited to, the student's name, names of the student's parents or other family members, the student's address, "personal identifiers" such as Social Security number or student identification number, "indirect identifiers" such as birth date, birthplace, and mother's maiden name. 34 CFR 99.3(a)-(e).

Additionally, the definition includes the following at 34 CFR 99.3(f):

(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...

The state regulations do not track the language of this federal provision; however, the state regulations define "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..." 603 CMR 23.02. Thus, "de-identified records and information" would similarly not be considered "student records" under the state regulations.

In the instant case, the Parents have requested IEPs and other data from which identifying information has been redacted. Based on the foregoing, this information is not protected from release by FERPA or the Massachusetts Student Records Regulations, provided that the other students are "not personally identifiable... taking into account other reasonably available information" even if the documents are redacted. 34 CFR 91.31(a)(1)(b)(1).³ More specifically, as stated above, the information contained in a redacted record must not be "linked or linkable" to the other student at issue such that a reasonable person in the school community without knowledge of the relevant circumstances could identify the student with reasonable certainty. 34 CFR 99.3(f)

WPS argues that redaction of the documents at issue will not prevent the documents from being linked to specific students. While such "linkage" is plausible in certain circumstances, in the instant case, my Order limits the recipients of the documents to persons who are not members of the school community,

³ See, for example, Thomas Loch, et al v. Board of Education of Edwardsville Community School District #7, 49 IDELR 131 (S. District Of Illinois, January 7, 2008) (School could provide IEPs of other students in response to a discovery request without violating FERPA by deleting the students' names and substituting numbers. See also, Ragusa v. Malverne Union Free School District, et al., 549 F. Supp. 288 (W. Dist. NY, February 2008) (Special education records were discoverable if redacted). Where the peer group is a major issue in a student's BSEA Appeal, the BSEA may order the release of redacted IEPs and/or other non-personally identifiable information of the potential peer group. See In re: Mattapoisett Public Schools 13 MSER (22) (2007) ; In re: Mashpee Public Schools BSEA #08-2935(2008); In re: Natick Public Schools BSEA #09-7499 (2009); In re: Amherst-Pelham Regional School District BSEA #11-9418 (2011); In re: Danvers Public Schools, 18 MSER 245 (2012).

i.e., counsel for the Parents and, through counsel, Parents' experts. (See specific provisions as contained in Order, below.)

I thus conclude that in the instant case, no personally identifiable information will be released as a result of my Order, and WPS must therefore provide Parents' counsel with the documents and answers to interrogatories as specified below.

ORDER

WPS shall provide Parents' counsel with the documents requested in Parents' RPD number 15 and number 18 and Parents' Interrogatory number 4, by March 17, 2015.

To reduce any risks of compromise to student privacy, production is subject to the following conditions:

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 student(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 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 may 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.

By the Hearing Officer,

Dated: February 26, 2015