

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

In Re: Student	)	
	)	
&	)	BSEA # 2202940
	)	
Quincy Public Schools	)	
	)	
&	)	
	)	
League School of Greater Boston	)	
	)	

**RULING ON LEAGUE SCHOOL OF GREATER BOSTON’S OPPOSITION
TO PARENTS’ REQUEST FOR SUBPOENA *DUCES TECUM*
FOR VIDEO/AUDIO OF MAY 10, 2021 INCIDENT**

This matter comes before the Hearing Officer on the League School of Greater Boston’s (League’s) *Opposition to Parents’ Request for Subpoena Duces Tecum for Video/Audio of May 10, 2021 Incident* (Opposition), filed with the BSEA on October 26 2021. Parents’ Subpoena *Duces Tecum* (Subpoena) was originally filed with the BSEA on October 25 2021 and a revised Subpoena was filed on October 26, 2021 clarifying the name and address to send the Subpoena to¹. As grounds for its Opposition, League asserts that since the fact that an injury occurred on May 10, 2021 is not disputed, “ ... any probative value of the video is far outweighed by the fact that disclosure of the video and related information would violate [an] employee’s fundamental right to privacy under the Massachusetts ‘General Right to Privacy Law’ as well as the Massachusetts Workers’ Compensation Law”. Further, League submits that the subpoenaed documents “are not relevant to any matter in question” (emphasis theirs).

For the reasons articulated below, League’s *Opposition* is **DENIED** and the Subpoena *Duces Tecum* requested by the Parents is Ordered to issue forthwith.

RELEVANT PROCEDURAL HISTORY

On October 4, 2021, Parent filed an *Expedited Hearing Request* (Hearing Request), asserting that at a meeting on September 23, 2021 League notified Parents and Student of its intention to terminate Student from its residential program. League allegedly advised the Parents that due to

¹ Parents’ Subpoena, as revised, seeks “5.10.21 Video from League: to ... Keeper of the Records of the League School ..., subpoena *duces tecum* for the video/audio [(]and all other information relating directly or indirectly to this incident[)] of the incident that occurred on or about May 10, 2021 at the League where a League staff member had her finger allegedly bitten by [Student].”

ongoing safety concerns that impede Student's academic progress, Student is no longer suitable for its program. Termination was sought on October 23, 2021.

Parents further submitted they "vehemently disagree" with the proposed termination given that Student will be "aging out" of special education when he turns 22 in September 2022. Parents also submitted that Student was appropriate for League,² that any issues Student was having were due to League "failing to address his needs and medications" and that Student "should be maintained in this placement, which provides FAPE and is in the least restrictive setting"³.

On October 14, 2021 League filed its *Response* to the Hearing Request (Response), admitting some of the allegations and denying others. Notably, for purposes of this Ruling, League admitted it no longer identified Student as suitable for its day school and residential program due to ongoing safety concerns impeding his educational progress, and it was requesting termination of Student on October 23, 2021. It also admitted Parents "vehemently disagreed" with this change in placement and further admitted Student would be "aging out" of special education in September 2022. It denied, however, that League is "well suited to meet [Student's] needs". It also denied that any issues Student was having was due to League "failing to address [Student's] needs and medications" and further denied Student should be "maintained in this placement [at League], which provides FAPE and is in the least restrictive setting."

Additionally, in its Response, League set forth forty-six numbered paragraphs of "Factual Background". Paragraphs 26-30 were dedicated to summarizing the incident of May 10, 2021; characterized in the Response to be "one of [Student's] most serious incidents". Paragraph 30 stated that "as a result of [the May 10, 2021 incident], League, the parents and district all agreed at an IEP meeting on May 17, 2021 that the League School was no longer an appropriate placement for [Student]."

During a Conference Call on October 25, 2021, the Parties discussed the Parents' request for a copy of the video recording and related information of the May 10, 2021 incident. League advised that it opposed producing the requested video primarily on the grounds of privacy concerns on behalf of the League employee involved in the incident. Thereafter, Parents filed the underlying Subpoena and League filed the underlying Opposition.

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² Parents also disputed the appropriateness of a then-proposed alternative placement, which is no longer available.

³ The Hearing Request was ultimately found by the BSEA to meet the threshold for an accelerated Hearing not an expedited Hearing. An accelerated Hearing date was scheduled for November 3, 2021. Simultaneous with filing the Hearing Request, Parents filed a Motion for Stay Put. League filed an Opposition to the Motion for Stay Put on October 13, 2021, and a motion hearing was scheduled for October 15, 2021. Upon learning that the alternative placement's opening was no longer available, the parties agreed to convert the October 15, 2021 motion hearing into a Pre-Hearing Conference and to add an additional day of Hearing on November 2, 2021. Without waiving its objection to the Motion for Stay Put, League agreed to "temporarily stay the original termination date of October 23, 2021, pending issuance on the decision on the merits after the November 2, and 3, 2021 hearing."

Pursuant to Rule VII of the *Hearing Rules for Special Education Appeals* and 801 CMR 1.01(10)(g), a hearing officer may issue a subpoena *duces tecum* “upon request of a party”. Rule VII(C) provides for a requested subpoena to be vacated or modified “... upon finding that the ... 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.” 801 CMR 1.01(10)(g) similarly authorizes vacating or modifying a subpoena “in accordance with the provisions of M.G.L. c. 30A §12”.

M.G.L. c. 30A §12(4), in turn, provides, in relevant part, that evidence which is subpoenaed in an administrative agency proceeding, such as a BSEA Hearing, may be “vacate[d] or modif[ied] “[a]fter [an] investigation ... upon a finding that the ... evidence whose production is required, does not relate with reasonable directness to any matter in question, or that a subpoena for the ... production of evidence is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested”. As League’s Opposition does not raise concerns with the timeliness or breadth of the request, and since I do not find the Subpoena to be overly broad or submitted in an unreasonable period in advance of the accelerated Hearing, I focus my analysis on whether the requested videotape is relevant, mindful of the alleged privacy implications to the League employee.

With this framework in mind, I now turn to examine the arguments submitted by League in its Opposition.

APPLICATION OF LEGAL STANDARD

Although a Hearing Officer has a duty to ensure the security and introduction of relevant evidence in a Hearing, pursuant to Rule IX(B)(8) of the *Hearing Rules of Special Education Appeals*, this obligation is not limitless. Thus, I must carefully consider League’s legal arguments in opposition to the requested subpoena, and address them in turn, below.

Argument 1. Production of the Requested Videotape Violates the Employee’s Right of Privacy Guaranteed by M.G.L. c. 214 §14.

League initially opposes producing the videotape of the May 10, 2021 incident on the grounds that such production would violate the legal right of privacy of the League employee involved in the incident with Student guaranteed by M.G.L. c. 214 §14. This statute creates a private right of action enforceable in the Superior Court for an “unreasonable, substantial or serious interference with [a person’s] privacy.” *Id.* Notwithstanding the fact that the Commonwealth is immune from liability for intentional tort claims, including claims of invasion of privacy under M.G.L. c.

214 §1B⁴, after considering the applicable case law, I do not find the requested video recording to implicate a protected privacy interest of the employee, either.

The applicability of the statutory privacy right protected by M.G.L. c. 214 §1B has not been analyzed with regard to producing a record in a BSEA proceeding. However, both federal and state courts of the Commonwealth have considered employee claims of this privacy protection in other contexts that are instructive. The Massachusetts Supreme Judicial Court recently recognized that the Commonwealth has long interpreted the rights protected by M.G.L. c. 214 §1B to be the right to prohibit “disclosure of facts ... that are of a highly personal or intimate nature when there exists no legitimate, countervailing interest”⁵. Moreover, activity in the presence of another who owes no duty of confidentiality to the person claiming the invasion of privacy eliminates the activity from being protected by the statute, as that activity is not “private” to the employee. *French v. United Parcel Serv., Inc.*, 2 F.Supp.2d 128, 131 (D.Mass.1998).

In *French*, the United States District Court for the District of Massachusetts considered whether an after-hours incident of an employee, that the employer disclosed, constituted a violation of the employee’s statutory right to privacy. *Id.* In holding that there was no such violation, the Court reasoned, in part, that the fact that three other colleagues, who did not owe the employee a duty of confidentiality, also participated in the incident resulted in the incident not being the type of “highly personal” or “intimate” event that the statute protects. *Id.* Similarly, the First Circuit Court of Appeals, relying on *French*, also found that a videotape of an employee engaging in prohibited conduct was not considered the type of “private” information protected by the statute because the employee’s actions occurred “... in the presence of others who owe no duty of confidentiality ...”. *Dasey v. Anderson*, 304 F.3d 148, 154 (1st Cir. 2002).

Here, it is undisputed that, at a minimum, both the League employee and Student are present in the video in question. It is similarly undisputed that Student owes no duty of confidentiality to the League employee. As such, the video recording is not “highly personal” or “intimate” to the employee, and, therefore, is not protected by M.G.L. c. 214 §1B⁶. Additionally, as discussed further below, there is a legitimate countervailing interest in the production of the video, namely the likelihood that it contains evidence that is highly relevant to the issues in dispute in this matter⁷. Thus, League’s objection to the Subpoena based on M.G.L. c. 214 §1B is DENIED.

⁴ M.G.L. c. 258 §10(c); *Mason v. Massachusetts Dep’t of Env’t Prot.*, 774 F. Supp. 2d 349, 356, Ftn 62 (D. Mass. 2011) (holding that the Commonwealth cannot be held liable for any claim arising out of an intentional tort and invasion of privacy is a tort claim subject to the Massachusetts Tort Claims Act (MTCA)); see *Cloutier v. City of Lowell, et al.*, 115 LRP 57300 (D. Mass. 2015) (dismissing Plaintiff’s claim for a violation of the statutory right of privacy under M.G.L. c. 214 §1B as the City was immune from liability for this intentional tort under the MTCA.)

⁵ *Commonwealth v. McCarthy*, 484 Mass. 493, 511, (2020) quoting *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 616 (D. Mass. 2016), quoting *Dasey v. Anderson*, 304 F.3d 148, 153–154 (1st Cir. 2002).

⁶ *Dasey*, 304 F.3d at 154; *French*, 2 F.Supp.2d at 131; see *McCarthy*, 484 Mass. at 511 quoting *Doe v. Brandeis Univ.*, 177 F. Supp. 3d at 616 (D. Mass. 2016).

⁷ *McCarthy*, 484 Mass. at 511 quoting *Doe v. Brandeis Univ.*, 177 F. Supp. 3d at 616 (D. Mass. 2016) quoting *Dasey*, 304 F.3d at 154.

Argument 2. M.G.L. c. 152 §25I Prohibits Production of the Requested Videotape.

League's alternative privacy argument in opposition to the Subpoena, that M.G.L. c. 152 §25I, prohibits disclosure of the video recording, also does not support vacating. Here, League argues that the employee involved in the May 10, 2010 incident with the student suffered a permanent injury that has resulted in the employee remaining out of work on worker's compensation⁸. League then argues that the provisions of M.G.L. c. 152 §25I provide a privacy right protecting disclosure of the video by subpoena⁹. However, a careful analysis of that statute leads me to conclude that it does not create a privacy right in the video as is claimed by League.

M.G.L. c. 152 §25I, entitled "Examination of affairs, transactions, accounts, records and assets of each group; confidentiality and privilege", under the Worker's Compensation Act, establishes at its outset, a statutory obligation of the commissioner of insurance to "examine the affairs, transactions, accounts, records and assets *of each group* as often as the commissioner deems advisable, but not less than once every three years." (emphasis added). "Group" is defined earlier in the statutory scheme, in M.G.L. c. 152 §25E, entitled "Self-insurance groups, definitions" as,

"a public employer group or a not-for-profit unincorporated association or a corporation formed under the provisions of chapter one hundred and eighty consisting of five or more employers who are engaged in the same or similar type of business, who are members of the same bona fide industry, trade or professional association which has been in existence for not less than two years or who are parties to the same or related collective bargaining agreements, and who enter into agreements to pool their liabilities for workers' compensation benefits and employer's liability in this state."

Thus, a close reading of the provisions of M.G.L. c. 152 §25I establishes that the confidentiality provisions which League relies upon apply to the records obtained by the commissioner of insurance in completing his or her statutory obligation of examination of the "group" rather than

⁸ Although it is not completely clear from the Opposition, I assume for purposes of this Ruling that the videotape was produced by the employee to the worker's compensation agency as part of her worker's compensation claim.

⁹ Specifically, League cites to the following statutory language:

"Documents, materials or other information, including but not limited to, all working papers and copies thereof in the possession or control of the National Association of Insurance Commissioners and its affiliates and subsidiaries shall be confidential by law and privileged, shall not be subject to subpoena and shall not be subject to discovery or admissible in evidence in any private civil action if they are:

(i) created, produced, obtained by or disclosed to the National Association of Insurance Commissioners and its affiliates and subsidiaries in the course of the National Association of Insurance Commissioners and its affiliates and subsidiaries assisting an examination made pursuant to this section or assisting the commissioner in the analysis of the financial condition or market conduct of a group; or

(ii) disclosed to the National Association of Insurance Commissioners and its affiliates and subsidiaries pursuant to this section by any member of the National Association of Insurance Commissioners." M.G.L. c. 152 §25I.

to records submitted by an employee to the worker's compensation commission in a worker's compensation claim, as League argues¹⁰.

Additionally, the legislative history of the statutory language relied upon by League indicates that the general intention of the confidentiality protection was to prohibit otherwise privileged and confidential records from becoming public records due solely to these records coming into the possession of the department of industrial accidents in the course of the agency carrying out its examination duties. Reference to these records being excluded from the Public Record Law (M.G.L. c. 66 and M.G.L. c. 4 §7 cl. 26) is expressly established in M.G.L. c. 152 §25I. Further, these confidentiality provisions were established in the statute as part of a comprehensive bill providing for confidentiality of financial examinations of various types of insurance programs not just the "group" referenced in M.G.L. c. 152 §25I¹¹.

Finally, even if the video were to be a record protected as confidential under this statute, the protection only prohibits subpoenas in "any private civil action". BSEA hearings are not private civil actions, but rather administrative proceedings addressing disputes over "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child". 20 U.S.C. §1415(b)(6)(A)¹². For these reasons, League's request to vacate the Subpoena due to alleged violation of M.G.L. c. 152 §25I is also DENIED.

Argument 3. The Requested Videotape is Not Relevant to Matters in Question.

Finally, League argues that the subpoenaed information is not relevant "to any matter in question." (emphasis added). I disagree. League is correct that the fact that an injury occurred is not disputed, however, there are other disputes in this matter for which the video likely offers relevant evidence. League specifically dispute's Parents' contention in the Hearing Request that it is "well suited to meet [Student's] needs". It also disputes Parents' claim that any issues Student was having was due to League "failing to address [Student's] needs and medications". Further it denies that Student should be "maintained in this placement [at League], which provides FAPE and is in the least restrictive setting."

Several FAPE-based questions exist in this matter, including a determination as to whether League is providing Student with a FAPE, if not, whether there is a way for Student to receive a FAPE at League, and, if not, what other options exist for Student to receive a FAPE at a placement other than League. What occurred before, during and after what has been identified

¹⁰ In fact, the language quoted by League specifies that the "documents" established as being "confidential by law and privileged and not subject to subpoena ... discovery or admissible in evidence in any private civil action" are only so confidential "if they are" given to the insurance commission "in the course of" the insurance commission "assisting in an examination made pursuant to this section...". M.G.L. c. 152 §25I.

¹¹ Specifically, House Bill No. 4324 entitled "An ACT relative to confidentiality in financial examinations" creates substantially similar confidentiality provisions for the following other statutes: M.G.L. c. 40M §6, M.G.L. c. 152 §52C, M.G.L. c. 174B §7A, M.G.L. c. 175 §4, M.G.L. c. 175 §206C, M.G.L. c. 175A §14, M.G.L. c. 175C §5, M.G.L. c. 176 §44, M.G.L. c. 176 §45, M.G.L. c. 176A §7, M.G.L. c. 176B §9, M.G.L. c. 176C §10, M.G.L. c. 176E §9, M.G.L. c. 176F §9, M.G.L. c. 176G §10, and M.G.L. c. 176P §36. 2014 Mass.Legis.Serv., 2nd Ann. Sess. c. 409 §2 (H.B. 4324) (Mass., 2014).

¹² See M.G.L. c. 71B § 2A(a); 603 CMR 28.08(3).

as “one of [Student’s] most serious incidents” while attending League, and what supports and accommodations were or were not provided to Student, is highly relevant evidence to these FAPE issues. Video evidence of the incident is the most direct and informative evidence of what took place, and would not be cumulative or redundant. Testimony by the employee or Student as to what occurred, albeit unlikely to be provided in this matter, or a written summary of the incident prepared after the fact, cannot replace the contemporaneous nature of the video.

Moreover, League acknowledges that the May 10, 2021 incident was the impetus for the parties agreeing League “was no longer an appropriate placement for [Student]”, which rationale is the basis for League’s termination of Student. Whether League is an appropriate placement is now disputed, though, even if it was not so disputed at the May 17, 2021 IEP meeting. Thus, video evidence of the incident that led to this initial position of League and/or conclusion of all the parties is, again, highly relevant to disputes in this matter. I therefore consider the videotape to be relevant to the FAPE matters in question. I also believe it may be informative with regard to the dispute over the type of placement Student needs, as well as what accommodations may be needed to support Student both in the interim and in any required placement.

Finally, although I do not find any privacy interest or right to support vacating the Subpoena, I am aware of the likely sensitivity of the information that may be contained within the video recording. Despite my Ruling, League’s opposition to producing this videotape is understandable. Although I believe the videotape to be relevant to the FAPE matters in question, the specific identity of the employee involved in the May 10, 2021 incident is not relevant to these matters, and is not essential or necessary to share beyond the Hearing process. While evidence submitted in the record of BSEA proceedings is confidential, rulings, orders and decisions are public. For this reason, although not legally required, in order to mitigate any unnecessary disclosure of irrelevant information, the name of the employee will not be specified in any rulings, orders or decisions issued in this matter.

ORDER

1. League’s Opposition to Parents’ request for a Subpoena *Duces Tecum* for video/audio of the May 10, 2021 incident involving Student is **DENIED**.
2. Parents’ requested Subpoena shall issue forthwith, and League shall thereafter produce the requested video/audio for the Hearing in this matter.
3. This matter will proceed to Hearing in accordance with the provisions outlined in my October 26, 2021 Ruling.

By the Hearing Officer,

/s/ Marguerite M. Mitchell

Date: October 27, 2021