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

In Re: **Student v. Springfield Public Schools** **BSEA # 2208440**

RULING ON PARENT'S MOTION TO COMPEL AND MOTION FOR SANCTIONS

This matter comes before the Hearing Officer on Parent's *Motion to Compel and Motion for Sanctions* (the *Motion*), filed with the BSEA on October 25 2022. In it, Parent asserts that on October 25, 2002, in response to her Discovery Request No. 1, she received an email

> "titled 'Email Discovery Production' [which] contain[ed] a Sharepoint.com file. In Order to access the file [Parent was asked to] sign into a contract with the Springfield Public School in Order to access any of [the] discovery. It [stated,] 'you should only accept if you trust Springfield Public Schools. Springfield Public Schools has not provided a link to their privacy statement for you to review.[']"

Parent's *Motion* continues,

> "In the interest of maintaining integrity and not providing false and misleading statements I will not lie and say I trust the Springfield Public Schools, because I do not trust them neither does the parent. This is a clear attempt to encroach upon our rights to privacy and my right to work product. The other requirements to access my discovery is to allow them to collect my personal data including my photos, collect and log my activity also known as agreeing to be spied on all are serious violations or the discovery process…."

In addition, Parent asserts that the District failed to include "text messages" in response to Parent's Discovery Request No. 2. She indicates that she "has received text messages from teachers[, and there] are several executive staff, sped supervisors, superintendent, related staff, Administrative staff and teachers who communicated via text and email regarding student and [she is] entitled to that discovery."

On October 26, 2022, the District responded to the *Motion* (*Response*) asserting that Parent's document request in this matter included two years of emails, and the search "produced approximately 1860 email documents, many with attachments" requiring "countless hours" to review, redact, convert to PDFs, date stamp in order to produce them in a form the Parent can access. The District also asserts that on October 25, 2022 at 4:28 p.m. the District produced 1258 pages of emails to Advocate "via SharePoint, a widely used Microsoft document sharing system, designed to secure documents," and by 4:57 p.m. had sent them to Advocate's email "in a less secure manner, over the internet," making Parent's "complaint about access to the produced discovery moot and misleading." The District also indicates that it "is still working on producing approximately 8 months of emails from April 2021 to November 2021 and expects to produce

several hundred more email documents this afternoon." Acknowledging that the District is "beyond the deadline of October 25 at 5:00 p.m.," the District stresses "the tremendous labor-intensive work involved in this process." Regarding Parent's Discovery request No. 2, the District argues that Springfield "does not have access to or authority over employee emails or text messages sent from personal handheld devices which are not linked to an SPS email account."

Parent requested a public hearing on the *Motion*. However, because a motion would not advance the Hearing Officer's understanding of the issues,[1] Parent's request for a hearing on the *Motion* is DENIED, and this Ruling is issued in accordance with BSEA Hearing Rule VII(D).

For the reasons articulated below, Parent's *Motion* is **ALLOWED, IN PART.** Immediately, but no later than close of business day on October 28, 2022, Springfield will produce to Parent all outstanding emails and any responsive texts. If no responsive texts exist, the District will affirm in writing by same date that a diligent and reasonable inquiry has been made in an effort to comply with Parent's demand.

RELEVANT FACTS AND PROCEDURAL HISTORY[2]:

On April 26, 2022, Parent filed a Request for Hearing in this matter. On September 15, 2022, Parent sent the District her discovery requests, seeking the following:

> "1. Emails regarding [Student], [Student's Parent], [Advocate] in his case dating back two years from today.
> 2. Text messages regarding [Student], [Student's Parent], [Advocate] dating back two years
> 3. Redacted IEP's[sic] for all students in the Springfield Kiley SEBBS[sic] program
> 4. Ms. Harris's Title IX certification
> 5. Title IX trainings in the district dating back two years
> 6. [R]edacted title IX complaints for 2021-2022 school year
> 7. [C]opy of student access log for his special education file[.]"

On September 19, 2022, the District filed a motion seeking a protective order relative to Discovery Requests No. 5 and 6. A *Ruling on Multiple Motions*, issued on October 21, 2022, ALLOWED Springfield's request for a protective order relative to Discovery Requests No. 5 and 6, and instructed the parties to file all subsequent pleadings in accordance with BSEA Hearing Rules.

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[1] See BSEA Hearing Rule VII(D); see also 801 Mass. Reg. 1.01(7)(a)(2) ("The Agency or Presiding Officer shall, unless the Parties otherwise agree, give at least three days' notice of the time and place for the hearing when the Agency or Presiding Officer determines that a hearing on the motion is warranted….The Agency or Presiding Officer may rule on a motion without holding a hearing if delay would seriously injure a Party, or if presentation of testimony or oral argument would not advance the Agency or Presiding Officer's understanding of the issues involved, or if disposition without a hearing would best serve the public interest. The Agency or Presiding Officer may otherwise act on a motion when all Parties have responded or the deadline for response has expired, whichever occurs first") (emphasis added).

[2] The facts delineated in prior rulings in this matter are hereby incorporated by reference. The facts herein are for the purposes of this Ruling only and are subject to change after a Hearing.

On October 13, 2022, the District provided Parent with the redacted IEPs in accordance with Discovery Request No. 3.

On October 18, 2022, the District provided Parent with Student's access logs in accordance with Discovery Request No. 7.

Via email on October 20, 2022, the District indicated that Discovery Request No. 1 emails was the only outstanding item. Although the District had accumulated the emails, they required a high level of redaction as to attorney/client privilege and names of other students.

Via email on October 21, 2022, the District indicated that Springfield does not issue work cell phones, and that only Directors and Principals receive stipends for the use of their phones for work related matters. In addition, it was not anticipated that there were any texts responsive to Discovery Request No. 2.

On October 12, 2022, Parent filed *Parent's Motion to Compel Discovery*, which was allowed on October 24, 2022. The District was ordered to produce all documents by the close of business day on October 25, 2022.

On October 25, 2022, Parent filed the instant *Motion*.

LEGAL STANDARDS:

1. *Discovery and Sanctions*

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.[3] 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.[4]

Furthermore, 801 CMR 1.01(8)(i) [5] authorizes parties who do not receive some or all of the requested discovery responses or answers to file a Motion for an Order Compelling Discovery. The United States Supreme Court explained in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), that a party may be excused from compliance with a court's order where failure to comply "was due to inability fostered neither by its own conduct nor by circumstances within its control."[6]

[3] See BSEA Hearing Rule V(B)(1) and (2).
[4] See BSEA Hearing Rule V(C).
[5]Pursuant to the Scope of the Rules section introductory to the BSEA 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."
[6] *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958).

However, in situations for which good cause does not exist to justify failure to comply with an Order granted pursuant to a Motion to Compel, 801 CMR 1.01(8)(i) further authorizes a Hearing Officer, to issue 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."

APPLICATION OF LEGAL STANDARDS:

1. <u>The District Has Produced The Emails Sought In Parent's Discovery Request No. 1 In An Appropriate Form.</u>

As BSEA Hearing Rules are silent as to discovery of electronically stored information (ESI), I turn to the Federal Rules of Civil Procedure for guidance. Federal Rule of Civil Procedure 34(b)(2)(E) addresses production of ESI, stating

> "Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
> (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
> (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
> (iii) A party need not produce the same electronically stored information in more than one form."[7]

The producing party has the discretion to choose between the two options presented by section (b)(2)(E)(i).[8] However, where the request does not specify a form for producing ESI, "searchability and sortability" are key when determining whether a given production format is "reasonably usable" under the rules.[9] Moreover, while Rule 34(b)(2)(E)(ii) requires a party to produce documents in a "reasonably usable" format, Federal Rule of Civil Procedure 34(b) Advisory Committee's Notes warn that it is not permissive to "convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation."[10] In the absence of an agreement as to the form of ESI and/or a specific request,

[7] Fed. R. Civ. Pro. 34(b)(2)(E).
[8] See, e.g., *Suarez Corp. Indus. v. Earthwise Techs., Inc.,* No. CO7-5577RJB, CO7-2020RJB, 2008 U.S. Dist. LEXIS 66560 (W.D. Wash. July 17, 2008).
[9] See *David A. Johnson & Alda, Inc. v. Italian Shoemakers, Inc.,* Case No. 3:17-cv-00740-FDW-DSC (W.D.N.C. Oct. 22, 2018)
[10] Fed. R. Civ. P. 34(b) Advisory Committee's Note (2006).

courts are unlikely to order a party to reproduce electronic documents in their original or native format if documents were already produced via another form.[11]

Here, Parent asserts that access to the Sharepoint.com file requires that she "sign into a contract with the Springfield Public School[s]." Specifically, she states that she was instructed to "accept [the agreement] if [she] trust[s] Springfield Public Schools. Springfield Public Schools has not provided a link to their privacy statement for [her] to review.['] In the interest of maintaining integrity and not providing false and misleading statements [Parent could not] say [she] trust[s] the Springfield Public Schools, because [she does] not trust them." Parent alleges, "This is a clear attempt to encroach upon our rights to privacy and my right to work product. The other requirements to access my discovery is to allow them to collect my personal data including my photos, collect and log my activity also known as agreeing to be spied on all are serious violations or the discovery process…."

Parent's allegations are unsupported. Parent's Discovery Request No. 1 does not indicate the format in which she seeks to have the emails produced.[12] In addition, Parent has not asserted, much less demonstrated, that Springfield produced the emails in a form in which they are not ordinarily maintained or in a form that is not reasonably usable.[13] Therefore, I am disinclined to order the District to reproduce them in a different format[14] and find that the District's production format in response to Discovery Request No. 1 is appropriate.[15]

2. <u>To The Extent That They Are Available, The District Must Provide Parent With "[T]Ext Messages Regarding [Student], [Student's Parent], [Advocate] Dating Back Two Years" In Response To Discovery Request No. 2.</u>

Under the Family Educational Rights and Privacy Act (FERPA), Parent has the right to inspect and review the education records of her child.[16] The statute defines "education records" 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."[17] FERPA exempts from inspection and review "records of instructional, supervisory, and administrative personnel and educational personnel ancillary

[11] See, e.g., *D'Onofrio v. SFX Sports Group, Inc.*, 247 F.R.D. 43 (D.D.C. 2008); *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350 (S.D.N.Y. 2008); *Covad Communications. Co. v. Revonet, Inc.*, 254 F.R.D. 147 (D.D.C. 2008); *In re Classicstar Mare Lease Litigation*, MDL No. 1877, No. 5:07-cv-353-JMH, U.S. Dist. LEXIS 9750 (E.D. Ky. Feb. 2, 2009).
[12] See Fed. R. Civ. Pro. 34(b)(1)(C) (the request "may specify the form or forms in which electronically stored information is to be produced").
[13] Fed. R. Civ. Pro. 34(b)(2)(E)(ii).
[14] See, e.g., *D'Onofrio v. SFX Sports Group, Inc.*, 247 F.R.D. 43 (D.D.C. 2008); *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350 (S.D.N.Y. 2008); *Covad Communications. Co. v. Revonet, Inc.*, 254 F.R.D. 147 (D.D.C. 2008); *In re Classicstar Mare Lease Litigation*, MDL No. 1877, No. 5:07-cv-353-JMH, U.S. Dist. LEXIS 9750 (E.D. Ky. Feb. 2, 2009).
[15] The District actually provided the requested discovery in two formats: a secure Sharepoint file and 9 separate email attachments which, albeit less secure than the Sharepoint format, did not require Parent to sign a contract.
[16] See 20 U.S.C. § 1232g(a)(1)(A).
[17] 20 U.S.C. § 1232g(a)(4)(A).

thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute."[18]

In *Arlington Public Schools (Ruling on Arlington Public Schools' Motion for Protective Order)*, BSEA # 1611465, Hearing Officer Rosa Figueroa applied this regulatory framework to the production of text messages:

> "At times, information shared informally between teachers/service providers and parents/ students or between school personnel may not be maintained in the ordinary course because the communication occurs via a private telephone, or computer, and is discarded or may be kept in a private device. This is particularly so with information shared via emails or text messages. While much of this information may be inconsequential, some may be relevant as to the student's academic and/or emotional functioning, and or a staff's impressions or concerns regarding the student. These snapshots may bear direct relevance to the appropriateness of a student's program and placement as they may provide insightful information as to what works or not with a student, and therefore, should be part of the student's record. However, because of the private nature of the device used for communicating, there may be a false sense of privacy regarding those communications; while the device may be private, the communications are not. As such, the communications are discoverable whether or not they are contained in the student record."

Here, Parent is requesting that the individuals who taught or serviced Student during the past two years be asked to release available texts containing information about Student, Parent and Advocate. Because communication regarding a student's educational performance bearing on Student's areas of need and functioning may lead to discovery of relevant information regardless of the manner of communication, it is discoverable.[19]

The District's argument that Springfield "does not have access to or authority over employee emails or text messages sent from personal handheld devices which are not linked to an SPS email account" is unpersuasive. Although the federal courts are divided on when and how a party seeking discovery can access ESI stored on an employee's personal device,[20] in the present matter, the District can comply with Parent's Discovery Request No. 2 without seeking access to employees' personal electronic devices.[21] Instead, the District can instruct all relevant staff

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[18] 20 U.S.C. § 1232g(a)(4)(B)(i).

[19] See *Arlington Public Schools (Ruling on Arlington Public Schools' Motion for Protective Order)*, BSEA # 1611465, (Figueroa, 2016).

[20] Compare . *Alter v. Rocky Point Sch. Dist.*, No. 13 Civ. 1100, 2014 WL 4966119, at *10 (E.D.N.Y. Sept. 30, 2014) ("However, to the extent that the School District employees had documents related to this matter, the information should have been preserved on whatever devices contained the information (e.g. laptops, cellphones, and any personal digital devices capable of ESI storage).") with *Cotton v. Costco Wholesale Corp.*, No. 12-2731, 2013 WL 3819974, at *6 (D. Kan. July 24, 2013) (rejecting document request for text messages on employees' personal phones).

[21] *Cf. Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S. Ct. 2309, 2316, 129 L. Ed. 2d 304 (1994) (a property owner's right to exclude others from his or her property is recognized as "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

members to produce any texts responsive to Discovery Request No. 2 to District's counsel, who will then produce them to Parent.[22]

Therefore, the District must produce all responsive texts to Parent no later than close of business on October 28, 2022.

3. The District Is In Violation Of The October 24, 2022 Order, But No Sanctions On The District Are Imposed At This Time.

It is clear that the District is currently making a good faith attempt to produce all the emails sought by Parent in Discovery Request No.1. Although the District had requested an extension until October 28, 2022 to produce discovery, it did not make its motion until October 24, 2022, almost a week after discovery was due to Parent. Therefore, the District's request was not timely.

At this time, the District is in violation of the BSEA's October 24, 2022 Order which instructed Springfield to produce all outstanding emails by the close of business day on October 25, 2022. Although 801 CMR 1.01(8)(i) authorizes me to issue further orders regarding the District's failure to comply with my Order, at this time, I decline to do so as this is the first and only failure on the part of Springfield to comply with BSEA orders in this matter.[23] However, I admonish the District to file all future motions in a timely manner in accordance with BSEA Hearing Rules.

As there are still outstanding emails that require production, the District must produce them to Parent immediately.

ORDER:

Parent's *Motion* is **ALLOWED, IN PART.**

Accordingly, immediately, but no later than close of business day on October 28, 2022, Springfield will:

1. Provide Parent with all outstanding emails as they become ready for production.
2. Produce any responsive texts to Parent. If no responsive texts exist, the District will affirm in writing by same date that a diligent and reasonable inquiry has been made in an effort to comply with Parent's demand.

So ordered,
By the Hearing Officer,

[22] Under Fed. R. Civ. P. 26(g)(A)(1), producing counsel must certify that they made "a reasonable inquiry" and that, to the best of their knowledge, information and belief, the discovery response is "complete and correct at the time it is made."

[23] Had there been a showing of prejudice to Parent and intent by the District to deprive Parent of evidence, I would be more inclined to consider sanctions. See *Hefter Impact Techs., LLC v. Sport Maska, Inc.*, No. CV 15-13290-FDS, 2017 WL 3317413, at *9 (D. Mass. Aug. 3, 2017).

s/ *Alina Kantor Nir*
Alina Kantor Nir
Date: October 27, 2022