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

In Re: Student & Boston Public Schools **BSEA No. 2301267**

RULING ON BOSTON PUBLIC SCHOOLS' OBJECTIONS TO CERTAIN OF PARENT'S REQUESTS FOR PRODUCTION OF DOCUMENTS

This matter comes before the Hearing Officer on *Boston Public Schools' Objections to Parent's Discovery Requests and Motion for Protective Order* (*Objection*). Although, since the *Objection* was filed, the parties have worked collaboratively to resolve many of the issues and objections raised by the Boston Public Schools (Boston or District)[1], in accordance with Rule V(A) of the *Hearing Rules for Special Education Appeals*, this *Ruling* addresses the remaining unresolved issues. For the reasons articulated below, Boston's *Objection* is **ALLOWED in part and DENIED in part**, and a Protective Order is issued as to the documents to be produced by Boston or allowed for production after an *in camera* review, in accordance with this *Ruling*.

RELEVANT PROCEDURAL HISTORY

On August 5, 2022, Parent filed a *Request for Hearing* challenging Boston's provision of special education and related services to Student from the 2019-2020 school year through the proposed program for the 2022-2023 school year. Specifically, Parent alleges Boston had not provided Student, an English Learner (EL) with a disability whose native language is Toishanese, with a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Act (IDEA), and the Massachusetts special education laws, and resulting in unlawful discrimination based on Student's disability in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA). Parent's challenges pertain to the appropriateness of Boston's evaluations of Student, its failure to consider Student's dual language and disability status in issuing IEPs, its refusal to provide Student with special education and related services in his native language, and its failure to provide Student with sufficient speech-language services to address his diagnosis of childhood apraxia of speech by a bilingual (Toishanese-English) educator.

Parent also alleges Boston discriminated against Student on the basis of his disability in violation of Section 504 by denying him access to nondisabled EL students with the same English language development (ELD) level as Student in his receipt of English-language services. Finally, Parent claims Boston continues to "… deny [Student] communication as effective as communications with other persons" as required by [the ADA] by failing to provide him with an AAC device programmed in Toishanese, as well as in English." Parent requests that Student receive instructional services and support and speech-language therapy in Toishanese by

[1] The parties also resolved a dispute with regards to certain *subpoenas duces tecum* requested by Boston on September 15, 2022 from Dr. Haley Duncanson, of Boston Neuropsychological Services, Northeastern University Speech-Language and Hearing Center and Dr. Marilyn C. August of Boston Medical Center. In light of this agreement, the dispute over these *subpoenas* is not set forth here, however I incorporate their agreed Protective Order provisions into the Protective Order issued below.

qualified fluent bilingual Toishanese educators; additional speech-language therapy services 5 x 60 minutes/week focusing on addressing Student's severe childhood apraxia of speech; an AAC device dually programmed in English and Toishanese; direct 1:1 support from a qualified English as a Second Language (ESL) educator in collaboration with a bilingual Toishanese educator to improve his ELD level; 800 hours of compensatory educational services and 250 hours of compensatory speech-language services by bilingual Toishanese-English educators as a result of Boston's denial of a FAPE to Student during the 2020-2021 and 2021-2022 school years; and an order requiring Boston to administer the MCAS Grade Level and Competency Portfolio rather than the MCAS-ALT to Student. At all times prior to the *Hearing Request*, Student has attended a substantially separate program at one of Boston's elementary schools. Student currently attends a substantially separate program at one of Boston's middle schools by virtue of his "stay put" IEP; however, Boston has proposed a different substantially separate program in one of its other middle schools.

On August 22, 2022, Boston filed its *Response to Hearing Request* denying all of Parent's allegations and asserting that its IEPs and proposed placements have always been and continue to be reasonably calculated to provide Student with a FAPE. All special education and related services were provided to Student in accordance with his accepted IEPs and comport with state and federal special education laws and regulations. Boston contends that Student has made and continues to make effective progress with his current programing. Thus, Boston disputes Student's need for the increased instructional services and supports or speech-language services by bilingual Toishanese educators or a dually programmed English-Toishanese AAC device, as overly restrictive in contravention of the IDEA's least restrictive mandate. Further, Boston denies it failed to provide Student with appropriate ESL instruction.

On September 12, 2022, Boston filed the instant *Objection* to Parent's first *Request for Production of Documents* served on Boston on or about August 31, 2022. On September 19, 2022, Parent filed *Parent's Response to Boston Public Schools' Objection to Parent's Discovery Request and Request to Deny District's Motion for Protective Order* (*Response*). A Conference Call was held on September 20, 2022, during which the parties also participated in a motion hearing session supplementing the *Objection* and *Response* orally and were able to resolve some of the disputed issues. Pursuant to that resolution, on September 23, 2022, Parent filed a status report advising as the parties' agreement and remaining areas of dispute over a Protective Order. On September 24, 2022, the District filed its proposed revised Protective Order (Revised Protective Order).

Thereafter, on September 26, 2022, Parent filed *Parent's Supplemental Response to the District's Objections to Parent's Discovery Request and in Support of Parent's First Production of Documents, Specifically Paragraphs XIII through XVII with Modified Protective Order* (*Supplemental Response*). At the request of the Hearing Officer a further Conference Call was held on September 30, 2022, wherein the parties clarified the remaining discovery issues in dispute and developed a schedule for the final written arguments each party would file on the remaining disputed issues. In accordance with the agreed deadlines, on October 7, 2022, Parent filed *Parent's Further Clarification of Paragraphs XVI & XVII of Parent's Request for Production-I* (*Further Clarification*), and on October 14, 2022, the District filed *Boston Public*

Schools' Supplemental Objections to Parents' Discovery Requests (*Supplemental Objections*)[2]. On October 18, 2022, the parties participated in another Conference Call, during which they confirmed the final disputed discovery requests, and the provisions of the Revised Protective Order that remain in dispute[3].

DISPUTED REQUESTS AND POSITION OF THE PARTIES

The instant discovery disputes pertain to three different types of documents, namely, redacted documents other than redacted IEPs pertaining to EL information of peers grouped with Student; redacted special education and EL information documents for all ELSWDs attending Student's elementary school for the 2019-2020, 2020-2021 and 2021-2022 school years; and certain redacted staff communications, including all attachments, relating to the provision of special education and related services to ELSWDs attending Student's elementary school from 2019 through the present. The specific disputed requests and the parties' positions are as follows:

1. Documents Other Than Redacted IEPs for Student's Peers.

Through Requests XIII, XIV and XV, Parent seeks to obtain "for students who were grouped with [Student]", "for students who will be grouped with [Student]" and "for students proposed to be grouped with [Student]" (collectively, "Peer Students") "data disaggregated by EL status, native language, English language development level, disability type, ACCESS participation (ACCESS or ACCESS-Alt), and scores, and state and district-wide assessment participation (MCAS, MCAS-portfolio on grade level or MCAS-Alt) and scores". Boston agrees to produce redacted IEPs for such Peer Students, pursuant to a Protective Order, but objects to producing any further information. While Boston acknowledges Parent's right to receive redacted Peer Student IEPs, it claims, generally, that any other information is irrelevant, overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence and consists of confidential student record information prohibited from disclosure by both the Family Educational Rights and Privacy Act (FERPA) and the Massachusetts student record laws and regulations.

Specifically, Boston argues that the redacted IEPs it has agreed to produce provide sufficient information from which, "the appropriateness of Student's peer group can be satisfactorily demonstrated". These redacted IEPs will also likely contain all of the requested additional information sought other than ACCESS participation and scores data.

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[2] In its *Supplemental Objections* Boston also seeks an award of attorney fees "to compensate for having to respond to numerous briefs regarding the same topic". I am unable to issue any award of attorney fees, (See 20 USC Sec. 1415(e)(3); 34 CFR Sec. 300.517(a); *In Re: Springfield Public Schools*, BSEA No. 11-4290, 17 MSER 81 (Berman, 2011); *In Re: Lincoln-Sudbury Public Schools*, BSEA No. 11-2546, 16 MSER 424 (Figueroa, 2010) and cases cited therein). Furthermore, as I find each of the discovery dispute documents filed by the parties to provide further development and clarification of their respective positions, I also decline to order any other sanctions.

[3] Based on the discussion during that Conference Call, on October 21, 2022, the District also submitted via email a chart identifying the annual enrollment of ELs with disabilities (which the parties refer to as "ELSWDs"), in Student's prior, current and proposed school placements for the 2019/2020, 2020/2021, 2021/2022 and 2022/2023 school years. I have also considered this information in issuing this *Ruling.*

Further, Boston contends that even if the requested additional information is produced via a BSEA Order, under the Massachusetts Student Record laws, Boston must first inform the Peer Students' parents/guardians of the required disclosure, prior to producing the records. Since the Peer Students consist of an "already vulnerable population …, some of whom are undocumented persons, who deserve the utmost protection", and given that the additional information sought is specific to the Peer Students' status as EL students, Boston argues that the required notice to these parents/guardians could have substantial and "chilling" consequences for the Peer Students' education. In support, Boston advises it experienced high levels of absenteeism among its EL population recently when national challenges to undocumented persons were prevalent.

According to Boston, the potential prejudice to Peer Students and their families is significant and is not outweighed by Parent's reasons for seeking the requested information. Moreover, the risk associated with releasing the requested Peer Student confidential information is greater than the potential relevance to the issues for hearing, especially given the likelihood that this information would not be admissible at a Hearing in this matter[4]. Finally, Boston notes that there are other publicly available options for obtaining the requested information[5].

In her *Response* and *Supplemental Response,* Parent disputes Boston's claims that the redacted Peer Student IEPs are sufficient to demonstrate the appropriateness of Student's peer groupings. The Peer Student's English language status, their ELD levels, and ACCESS participation and scores, provide relevant information as to the language proficiency of Student's peers, the appropriateness of Student's IEPs and Student's ability to participate in and make meaningful progress and access the curriculum in his program. This is especially important for Student, Parent argues, whose severe communication disability and verbal proficiency needs require that he have appropriate models for speech production and that he learns from age and grade-level appropriate English-speaking peers in his special education program.

Parent also argues that the additional Peer Student information may be relevant to her 504 Claims that Student was treated differently from his peers by being deprived native language assistance or being required to take the ACCESS-Alt and MCAS-Alt assessments because of the severity of his disability, or due to the uncommonness of his native dialect. Student's disability impacts his intelligibility in both his native language and English. The requested additional Peer Student information may provide evidence of Student being treated differently from other native-English or bilingual speakers of different languages and give insight into whether such treatment was related to his disability.

2. <u>Redacted Documents of All ELSWD Attending Student's Elementary School.</u>

Through Request XVI, Parent also seeks to obtain "[f]or each school year from August 1, 2019 to the date of this request non-personally identifiable data of [ELSWD] enrolled at [Student's

[4] Citing to various secondary sources addressing the factors that impact the acquisition of English as a second language, Boston submits that ACCESS scores or other ELD information regarding Peer Students is not admissible at a hearing as it would require testimony explaining the meaning of this data for each student, which testimony is not relevant to whether Student has been receiving a FAPE from Boston.

[5] Boston notes that "school and district-wide MCAS scores are readily available on the DESE website which has similar data and would be infinitely less intrusive than producing individual student MCAS reports."

elementary school (hereinafter "Elementary ELSWD Student")] by native language, ELD level, disability type, placement in special education setting (full inclusion, partial inclusion, substantially separate), ACCESS participation (ACCESS of (sic) ACCESS-Alt), and state and district-wide assessment participation (MCAS, MCAS-portfolio on grade level, or MCAS-Alt)". Boston objects to this request in its entirety (other than producing Peer Student redacted IEPs, as set forth above). Boston contends that the requested Elementary ELWDS Student information is irrelevant to the issues in this matter and not "reasonably tailored to the discovery of admissible evidence". According to Boston, information about students in different grade levels and developmental stages from Student would never be admissible at a hearing, nor is it relevant to showing that Boston has discriminated against Student on the basis of Student's disability.

Moreover, this request also seeks confidential student record information, and, thus the arguments Boston makes against producing the requested additional Peer Students data applies equally if not more significantly to this request. Noting that the BSEA does not consider systemic claims, Boston contends that the highly confidential and sensitive information sought regarding Elementary ELSWD outweighs the speculative reasons Parent has provided for seeking this information. Thus, as Parent's request is made only "… with the hope that this evidence would support the conclusion that Boston has an unlawful systemic policy or practice" of discrimination towards all EL students with disabilities, including Student, Boston objects to producing this information as outside the BSEA's jurisdiction.

In her *Response*, *Supplemental Response* and *Further Clarification*, Parent first disputes Boston's claims that she is only able to seek documents that are "reasonably tailored to the discovery of admissible evidence". Rather, Parent contends that the scope of discovery should be liberally construed, and, provided documents are not privileged, she is broadly able to obtain any information relevant to "the claims and/or defenses raised by the parties which may, but need not necessarily, lead to the discovery of admissible evidence". The burden is on the objecting party to prove the need for a protective order due to actual potential harm, not just via conclusory statements, argues Parent, rather than on Parent to show the potentially relevant information sought would be admissible.

Parent advises that she seeks the Elementary ELSWD Students' data to determine the "characteristics of ELSWDs at [Student's Elementary School] who are placed in inclusion, partial inclusion and substantially separate classrooms and are assigned to take either the traditional ACCESS/MCAS or ACCESS/MCAS-Alt assessments". Parent contends that this information will, in turn, "shed light" on whether the District's actions towards Student were due to his disability, the rarity of his native dialect, or some other reason. Additionally, Parent advises that this information also "may suggest the existence of one or more policies or practices, criteria or methods of administration" used by Student's elementary school that may have resulted in a predetermination of Student's special education program.

3. Staff Communication Documents.

Finally, through Request XVII, Parent seeks "[f]rom August 1, 2019 through the date of this request all physical and electronic communications … [inclusive of all attachments to such communications] sent or received by Principal [X], assistant principal(s) of [Student's

elementary school], coordinator(s) of special education at [Student's elementary school] ([XX]), language access team facilitator at [Student's elementary school], and assistant director for K-8 schools responsible for [Student's elementary school] ([XX]) relating to the provision of special education and related services in an EL with a disability's native language"[6].

Boston objects to this request in its entirety, as well (including the production of any of the documents that may be elicited via the agreed-upon electronic search). According to Boston, Parent's reason for seeking this information is overly broad and too tenuous to support production[7]. Boston emphasizes that the BSEA's jurisdiction is limited in a Section 504 context to claims for which "a student *with a disability* has been denied a FAPE" (emphasis in original). Additionally, the requested staff communications likely include privileged information regarding other students, such as information protected by HIPPA, FERPA, or the Massachusetts Student Record laws. Further, the requested communications are "too far attenuated and [are] not causally connected to Student's status as a student with a disability, nor [are they] related to the school's obligations specific to Student under the IDEA, Section 504 or M.G.L. c. 71B" and thus are not likely to lead to the discovery of admissible evidence.

Parent contends that the requested staff communications are relevant and discoverable in this matter as, consistent with the liberal approach to discovery that should be applied, they "may provide insight and be reasonably likely to reveal admissible evidence showing whether the District treated [Student] differently from his peers in violation of Section 504 by depriving [Student] of native language supports". Further, the requested information "may reveal" a *de facto* policy or practice towards all ELSWDs, like Student, that would have affected Boston's proposals for and delivery of special education services to Student and also constitute inappropriate pre-determination of services to be offered to Student[8].

Finally, Parent submits that the requested staff communication information in Request XVII, provides relevant information separate from the Elementary ELSWD information sought in Request XVI. Thus, both are necessary as together they provide information that "may be critical to Parent's demonstrating the existence of a policy or practice that [Student's elementary school] in fact, implemented and applied to Student".

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[6] Upon further discussion of this request, and without waiving its overall objections, the parties have agreed to having Boston's information technology (IT) department use specific search terms in locating responsive documents. Specifically, unless otherwise limited or prohibited through this *Ruling*, the parties agree to run a search within the electronic database of each identified staff member for the timeframe in question, using the SSID or student name of each specific ELSWD at Student's elementary school along with the terms "bilingual", "native language" or the actual native language of the student.

[7] Boston also argues that the request itself is overly broad and would result in a substantial number of documents that would be too burdensome to redact and produce. Boston was provided with an opportunity to develop this argument further by submitting an estimate as to the number of documents that were found using the agreed upon search terms for one of the requested staff members but has not done so to date. As this argument is only speculative at this point and not sufficiently developed, I do not analyze it substantively in reaching my conclusions.

[8] Parent cites to *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 857-58 (6th Cir. 2004) wherein the Court found the District inappropriately had an "unofficial policy" wherein it "pre-decided not to offer Zachary intensive ABA services regardless of any evidence concerning Zachary's individual needs and the effectiveness of his private program".

LEGAL STANDARDS

A. BSEA Jurisdiction and Procedural Protections.

The Bureau of Special Education Appeals (BSEA) is the administrative body in Massachusetts charged with adjudicating "disputes between and among parents, school districts, private schools and state agencies…"[9]. Lacking a grant of general jurisdiction, the BSEA maintains jurisdiction solely over those disputes which are specifically prescribed by the state and federal special education laws and regulations[10]. Specifically, under the IDEA, the BSEA has jurisdiction to resolve complaints filed by a parent or guardian or a school district "with respect to the identification, evaluation, or educational placement of the child, or the provisions of a free appropriate public education to such child"[11]. Further, 603 CMR 28.08(3), grants the BSEA jurisdiction over disputes involving "... the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities."

The BSEA is also explicitly permitted to exercise jurisdiction over claims by a parent or student regarding "any issue involving the denial of the free appropriate public education guaranteed by Section 504 …"[12]. In other words, to the extent that a claim involves an individual student's access to a FAPE, Section 504 claims are properly before the BSEA. Section 504 prohibits a program from discriminating, on the basis of handicap, against an otherwise qualified individual with a handicap[13]. It also requires public entities (including schools) to make reasonable modifications, including support services, to their existing practices in order to accommodate such disabled persons to have access to these public schools[14]. To prove a claim under this Act, the moving party must show that the student was excluded from or denied the benefits of the educational program at issue based solely upon his disability[15].

The IDEA contains both substantive and procedural requirements to effectuate the statute's ultimate purpose of ensuring a FAPE is provided to all eligible students with disabilities[16]. IDEA procedural protections are guaranteed to students whenever special education

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[9] M.G.L. c. 71B §2A(a); see 20 USC § 1415(b)(6); MGL c. 71B, s. 3; 603 CMR 28.08(3).

[10] *In Re: Greater New Bedford Regional Voc. Tech,* BSEA No. 1308227, 19 MSER 220 (Crane, 2013) ("The BSEA's jurisdiction is limited to what can be found within state and the federal special education laws and their implementing regulations."); see *In Re: Holyoke Public Schools & Jamal*, BSEA No. 1606553, 22 MSER 174 (Byrne, 2016) (dismissing tort claims unrelated to disability status or district IDEA responsibilities.)

[11] 20 USC § 1415(b)(6); see M.G.L. c. 71B, § 2A(a); MGL c. 71B, s. 3; 603 CMR 28.08(3).

[12] 603 CMR 28.08(3)(a); see M.G.L. c. 71B §2A(a)(ii).

[13] 29 USC §794(a).

[14] See *Fry v. Napoleon Cmty. Sch*., 137 S. Ct. 743, 756 (2017) (holding that "… both inside and outside of school, … [although] the IDEA guarantees individually tailored educational services, [ ] Title II and § 504 promise non-discriminatory access to public institutions"); see also *Alexander v. Choate*, 105 S. Ct. 712, 720 (1985) (Section 504 requires an entity receiving federal grants to make reasonable modifications so as to ensure "that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers".)

[15] See *Campbell v. Bd. of Educ.*, 58 Fed. Appx., 162, 165 (6th Cir. 2003) (explaining elements of prima facie case for § 504 discrimination claim), *D.R. v. Mich. Dept of Educ*., 2017 WL 4348818, *9 (E.D. Mich. 2017) (applying same prima facie standard); *In Re: Stewart v. Acton-Boxborough Reg. Sch. Dist.*, BSEA No. 21-01061, 26 MSER 334 (Reichbach, 2021).

[16] 20 U.S.C. 1400 *et seq.*

programming and placement decisions are made. Procedural errors only amount to a deprivation of a FAPE if "the procedural inadequacies – (I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits"[17]. Violations of the IDEA's procedural requirements occur when a school district is found to have pre-determined the program, services, or placement outside the Team process. As the Ninth Circuit recognized,

> "predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. In such case, regardless of the discussions that may occur at the meeting, the School District's actions would violate the IDEA's procedural requirement that parents have the opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child"[18].

However, where meaningful communications have occurred between the school and a parent at the Team meeting, and the Team has properly considered alternatives to the District's proposal, improper pre-determination has not been found even where district staff communicated outside the Team meeting, or where the Team proposal was contrary to a parent's request[19].

B. Scope of Discovery.

BSEA *Hearing Rule V* governs the discovery process before the BSEA. Specifically, *Rule V(B)(1)* provides all parties the opportunity to request disclosure of "documents or tangible things" from another party. In addressing discovery issues, the BSEA is guided by the Massachusetts and Federal Rules of Civil Procedure. Consistent with Rule 26(b)(1) of the Massachusetts Rules of Civil Procedure:

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[17] 20 U.S.C. §1415(f)(3)(E)(ii); 34 CFR 300.513(a)(2); see R*oland M. v. Concord School Committee*, 910 F.2d 983, 994 (1st Cir. 1990) (holding that "[b]efore an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits" (citations omitted).)

[18] *H.B. v. Las Virgenes Unified School Dist.,* 239 Fed. Appx., 342, 344-346 (9th Cir. 2007); see *Deal*, 392 F.3d at 858 (finding unlawful predetermination where "the School System had an unofficial policy of refusing to provide one-on-one ABA programs and that School System personnel thus did not have open minds and were not willing to consider the provision of such a program" with the "clear implication … that no matter how strong the evidence presented by the Deals, the School System still would have refused to provide the services".)

[19] *In Re: Student & Mendon-Upton Regional School District*, BSEA No. 2203125, 28 MSER 40 (Mitchell, 2022); *In Re: Haverhill Public Schools*, BSEA No. 20-06314, 26 MSER 176 (Berman, 2020) (finding that where the District has sufficiently considered appropriately placement for a student, no predetermination has been found based upon an allegation that the District did not consider or propose "the entire universe of possible placements for Student"); see *Hazen v. South Kingstown Sch. Dept.*, 2010 WL 5558912, *7-*11 (Dist. R.I., 2010) *adopted by sub nom. Hazen ex rel. R.H. v. South Kingstown School Dept.,* 2011 WL 63499 (Dist. R.I., 2011) (finding no predetermination to the District's proposal to eliminate a 1:1 aide, despite it having been discussed by school staff prior to the Team meeting, as changes to the proposal were made at the Team meetings to increase service time based on parental and teacher input, and no "unofficial policy" evidence of fading aides existed.)

> "[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 or defense of the party seeking discovery or to the claim or defense of any other 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."

In addition, the Federal Rules of Civil Procedure require that discovery requests be "proportional to the needs of the case"[20]. Furthermore, the information sought "need not be admissible in evidence to be discoverable"[21]. Following the guidance from the referenced Rules, *supra*, the BSEA has interpreted discovery provisions liberally[22]. However, discovery requests must encompass relevant information related to the claims and defenses involved in the underlying matter[23]. Additionally, federal and state privacy laws preclude discovery of privileged information, including but not limited to education records containing personally identifiable information without obtaining the parent or guardian's prior informed consent[24].

In considering the appropriateness of requested discovery, Hearing Officers balance the need for and relevance of the requested information against whether the disclosure sought is intrusive, irrelevant, overly burdensome or harassing[25]. Hearing Officers must also consider whether the

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[20] Federal Rule of Civil Procedure Rule 26(b)(1).

[21] *Id.*

[22] *In Re: Zebulon & Quincy Public Schools*, BSEA No. 16-00059, 21 MSER 206 (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."); see *In Re: Student v. Springfield Public Schools*, BSEA No. 2208440 (Kantor Nir, 2022); *In Re: Andover Public Schools*, BSEA No. 1706174, 23 MSER 55 (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); *In Re: Mattapoisett Public Schools*, BSEA No. 06-6153, 13 MSER 22 (Crane, 2006).

[23] See *In Re: Logan & Grafton Public Schools,* BSEA No. 15-06275, 21 MSER 131 (Reichbach, 2015) (denying discovery of test protocols, general education lesson plans and syllabi and individualized trimester assessments for grades kindergarten, first grade and second grade, and a teacher's gradebook as, although potentially discoverable in other matters, they were not deemed relevant to the underlying claims in that matter); see also *Artuso v. Vertex Pharmaceuticals, Inc.*, 637 F.3d 1, 8 (1st Cir. 2011) (upholding a dismissal of the matter despite Plaintiff's suggestion that discovery would provide evidence of the legitimacy of the claim, in part because "a plaintiff whose complaint does not state an actionable claim has no license to embark on a fishing expedition in an effort to discover a cause of action" (internal citations omitted).)

[24] Family Educational Rights and Privacy Act (FERPA) 20 U.S.C. § 1232(g)(b)(1); M.G.L. c. 71, § 34F; 34 CFR § 99.30(a) (requiring that, except in specific situations, parental consent be obtained before personally identifiable information is disclosed to third parties"); 603 CMR 23.07(4); see 20 U.S.C. § 1232(g)(a)(4)(A) (defining as educational records "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"); see also 20 USC 1232(g)(a)(1)(A) ("If any material or document in the education record of a student includes information on more than one student, the parents of one such student shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material").

[25] See e.g., *In Re: Flavio and Beverly Public Schools*, BSEA No. 1810763, 24 MSER 156 (Byrne, 2018) (denying the school's motion for a protective order of redacted peer IEPs where the parents sought highly relevant information and carefully limited the request in time, nature, and scope and the school did not propose less intrusive methods of obtaining identical information); *In Re: Zebulon and Quincy Public Schools*, ("Information that is, or may be, relevant to any aspect of a Student's appeal, no matter how tangential, should be shared absent a reasonable

discovery request is proportional to the needs of the case. If a determination is made that the scope of discovery should be limited, a Hearing Officer may also issue a protective order for the purpose of protecting "a party from undue burden, expense, delay, or as otherwise deemed appropriate by the Hearing Officer"[26].

In some cases, to fully safeguard against the risk of breaching confidentiality, especially where potential exists for a chilling effect, Hearing Officers will review the requested information *in camera* to ensure that only discoverable information, even that for which a protective order is ultimately issued, is released[27]. *In camera* review is the "proper procedure to be utilized in making determinations of this nature" in situations where highly sensitive and confidential information is involved[28]. As a threshold question, prior to utilizing *in camera* review, a Hearing Officer should first determine whether the requested evidence is relevant[29]. If so, *in camera* review of the requested documents will allow the Hearing Officer to decide if the "interests of justice" require disclosure, for those cases where this statutory standard applies[30], as well as whether anything should be redacted from the responsive records prior to their production[31].

Guided by this legal authority, I turn to Boston's *Objection*.

DISCUSSION

Despite the parties' collaborative resolution of many discovery disputes, three types of documents remain at issue – additional information beyond redacted IEPs of Peer Students

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showing of privilege, harassment, intrusiveness or unequivocal irrelevance"); *In Re: Mattapoisett Public Schools*, (although the district concern that redacted IEPs "may *possibly* be identifiable to a particular student" was appropriately raised, disclosure was not precluded so long as additional efforts were in place to minimize the possibility of a breach of confidentiality.)

[26] BSEA *Hearing Rule VI(C)*. See also 801 CMR 1.01(8)(a) (protective order may be issued "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense".)

[27] *In Re: Scituate Public Schools*, BSEA No. 1702015, 23 MSER 102 (Figueroa, 2017) (*in camera* review will occur upon parental request of any requested "psychologist/clinical social worker/psychiatric notes and hospitalization records"); *Touchstone Public Schools and Xalvador*, BSEA No. 1507990, 21 MSER 137 (Byrne, 2015) (ordering *in camera* review of any DCF, DDS and hospital records requested which Parent challenged as irrelevant or in need of redaction prior to their introduction into evidence at the due process hearing); *In Re: Wilmington Public Schools*, BSEA No. 97-3289, 4 MSER 60 (Erlichman, 1998) (Ordering *in camera* review of records implicating the social worker-client statutory privilege so as to apply the balancing test applicable to one of the exceptions to this privilege and to also "prevent unwarranted 'fishing expeditions'".)

[28] *In Re: Wilmington Public Schools*; see *In Re: Student and Nashoba Regional School District*, BSEA No. 03-0860, 10 MSER 98 (Crane, 2003) *(In camera* review may also be appropriate for broad discovery requests of confidential information after first determining that Nashoba is not simply seeking 'an unrestrained foray into confidential records in the hope that the unearthing of some unspecified information would enable' Nashoba to defend its [case]".)

[29] *In Re: Nashoba Regional School District* quoting *People v. Gissendanner*, 48 N.Y.2d 543, 549 (1979); see *In Re: Albert and Boston Public Schools*, BSEA No. 06-6508, 12 MSER 221 (Crane, 2007) (recognizing that an "initial showing of likely relevance of the privileged documents prior to disclosure to the Hearing Officer must occur for an *in camera* review" (citations omitted)); *In Re: Plymouth Public Schools & Mass. Dept. of Mental Health*, BSEA No. 06-2584, 12 MSER 33 (Crane, 2006) (ordering *in camera* review of psychotherapist and social worker records after a preliminary finding of relevancy, so that privileges are not "pierced unnecessarily", so as to determine if "in the interests of justice" any records were within the statutory exception for disclosure (citations omitted).)

[30] *In Re: Albert and Boston Public Schools*; *In Re: Plymouth Public Schools & Mass. Dept. of Mental Health*,.

[31] *In Re: Touchstone Public Schools*; *In Re: Plymouth Public Schools & Mass. Dept. of Mental Health*.

requested by Requests XIII, XIV and XV; information of other Elementary ELSWD Students attending Student's elementary school requested by Request XVI; and certain identified staff communications requested by Request XVII. Upon consideration of the applicable legal standards, and the arguments offered by the parties, Boston's *Objection* is **ALLOWED** as to Requests XIII, XIV and XV, as well as to Request XVI. With regard to Request XVII, Boston's *Objection* is **DENIED;** however, Boston is ordered to produce the requested information to me for an *in camera* review first. Further, all requested documents produced by Boston, or allowed for production after my *in camera* review, are to be so produced in accordance with the Protective Order set forth at the conclusion of this *Ruling*. My reasoning follows.

1. Additional Information Regarding Peer Students.

Parent requests disaggregated redacted data of Peer Students specific to their EL status, information related to their ACCESS performance, and information related to their MCAS performance. Parent contends this information is relevant to her claims that Boston discriminated against Student on the basis of his disability in violation of Section 504 by denying him access to nondisabled EL students with the same English language development (ELD) level as Student in delivery of his s English-language services. She further asserts it is relevant to her challenges to Student's required participation in the MCAS-Alt. Boston agrees to produce, under a Protective Order, redacted IEPs of Peer Students, but objects to producing any other confidential student records, given the unintended substantial educational consequences the release of this requested information, even if redacted and under a protective order, could have on the continued education of the Peer Students.

I agree with Boston's concerns. The requested information involves highly sensitive privileged documents pertaining to many immigrant students. Under the Student Record Laws, Boston must provide prior notification to the Peer Student families even if the requested information is produced via a BSEA Order[32]. Both Massachusetts and federal law prohibit discriminating against students on the basis of immigration status in their access to public education[33]. Recent updated guidance from the Massachusetts Attorney General's Office, issued this past spring, reinforces the obligation to enroll, educate and not discriminate against students in the provision of their education based on their immigration or citizenship status[34]. As the Guidance advises,

> "it is critical that school districts and officials in the Commonwealth ensure that all children residing in their jurisdictions have equal access to public education by: … (2) avoiding information requests that have the purpose or effect of discouraging or denying access to school on the basis of race, national origin, immigration status or citizenship status …"[35].

[32] 34 CFR 99.31(a)(9); 603 CMR 23.07(4)(b).
[33] 42 USC 2000(c), *et seq.*; M.G.L. c. 76 §5; see 20 USC 1701 et seq.; 42 USC §2000(d) *et seq.*; M.G.L. c. 71 §37O; *Plyer v. Doe*, 102 S.Ct. 2382, 2401-02 (1982) (holding that public school districts may not deny any child residing therein with public education even if the child or his or her family is not present in the country legally).
[34] *Attorney General Advisory: Equal Access to Public Education for All Students Irrespective of Immigration Status*, Updated April 2022.
[35] *Id.*

Boston notes that it has experienced substantial absenteeism among immigrant families in the past when such families were concerned that their immigration status was a source of focus in the schoolhouse. For this reason, Boston is correctly concerned that there could be a "chilling effect upon this group's access to public education" should they be notified that an Order has issued requiring production of their child's student record information beyond redacted IEPs, which are more typically provided in special education disputes[36]. Thus, while the requested information may be relevant to Parent's claims in this matter, it will not advance my understanding of said claims, and is outweighed by the overly intrusive and potentially harmful impacts that its production may have.

Moreover, the majority of the requested information is likely already contained within the redacted IEPs, except the ACCESS participation and score information, and there are less intrusive ways for the ACCESS participation information to be obtained, that would not violate student record confidentiality[37]. Thus, Boston's *Objection* to providing the additional information requested for Peer Students is **ALLOWED**, and Boston is only obligated to produce the redacted Peer Student IEPs, pursuant to the Protective Order provided at the conclusion of this *Ruling* in Response to Requests XIII, XIV and XV.

2. Information of Elementary ELSWD Students.

Parent also requests disaggregated redacted data of all Elementary ELSWD Students who attended Student's elementary school from 2019 through 2022. Parent contends that this information is sought to "shed light" on whether special education programming decisions were made for improper discriminatory reasons, or were based on an inappropriate "policy, practice, criteria or method of administration" of refusing to provide special education services to any student in his or her native language, regardless of an individual student's need, thereby resulting in a predetermination of Student's special education program. Boston asserts the confidentiality and "chilling effect" concerns it maintains with regard to the additional Peer Student requested information, apply here. Boston also objects to producing any of the requested Elementary ELSWD Student information as irrelevant and beyond the scope of discovery. Boston advises

[36] See *In Re: Manchester-Essex Regional School District*, BSEA No. 1702730, 23 MSER 8 (Berman, 2017) (recognizing that "IEPs, §504 Plans, behavior plans and evaluations are "routinely subject to discovery in "typical" special education litigation".)

[37] For instance, more generalized interrogatories asking about the total number of Peer Students who participated in the ACCESS or ACCESS-Alt or scored above a certain level would provide the information sought by Parent. See *In Re: Uriel & Westwood Public Schools*, (Order), BSEA No. 1503636, 21 MSER 51 (Byrne, 2015) (disallowing discovery of school board minutes and committee reports, as well as the identification of students who a certain district expert may have had a treatment or referral relationship as "… overly intrusive and burdensome without countervailing benefit" and reasoning that "[w]hile the existence of relationships that could affect the credibility of any witness … is an appropriate avenue for exploration, it suffices for BSEA purposes to elicit acknowledgement of those relationships through testimony or less intrusive discovery devices.") Compare *In Re: Manchester-Essex Regional School District*, (documents and communications about the District's policies and practices related to allowing students attending private schools who reside in the district to participate in the District's extra-curricular activities, was relevant to Parents' Section 504 claims, and discoverable. Although such communications may consist of confidential student record information of other students, Parent agreed personally identifiable information would be redacted, and the requested confidential information was also "less personal and sensitive" than information often produced in BSEA proceedings.)

that there were 69 ELSWD students at Student's elementary school in 2019, 61 in 2020, 57 in 2021 and 59 in 2022.

First, contrary to Boston's contention, the Elementary ELSWD Student information is both relevant and within the scope of discovery[38]. Parent raises legitimate predetermination claims that Student's receipt of his special education program in English was based on an actual or unwritten policy or practice by Boston and/or Student's elementary school to not provide any special education or related services to students with disabilities in their native language, despite Student's particular disability and needs. If proven, this would contravene both the IDEA's procedural requirements and Section 504. Parent has the burden of proof in this matter[39]. Discovery requests seeking information that could provide evidence of Parent's claims are, therefore, relevant and within the scope of discovery[40]. However, this does not the end the analysis.

Nothing has been presented, even in a preliminary way, by Parent, at this time, beyond the claim itself, which has been wholly denied by Boston, to indicate that the requested information would actually provide evidence to support Parent's suggestion of inappropriate predetermination.

Also, as discussed *supra*, I agree with Boston that the Elementary ELSWD Student information sought would require production of highly sensitive, confidential student record information of a substantial number of immigrant students. I consider seriously the duty the Attorney General's Advisory imposes on me, as an official of the Commonwealth, to "avoid[ ] information requests that have the purpose or effect of discouraging or denying access to school on the basis of race, national origin, immigration status or citizenship status" [41]. Additionally, there are alternative less intrusive discovery options, as discussed below, available to Parent not involving student record documents of immigrant students. Thus, I find the obligation to protect the student record information of immigrant students to outweigh Parent's potential benefits to receiving the relevant requested documents. As such, Boston's *Objection* to producing the requested Elementary ELSWD Student information is **ALLOWED**, and it is not required to respond to Request XVI.

3. Staff Communications.

Finally, Parent requests communication documents since August 1, 2019 of certain identified staff at Student's elementary school, relating to the provision of special education and related

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[38] In Boston's *Supplemental Objection* it suggests that discovery requests must be "*tailored* to the discovery of admissible evidence" (emphasis added). I disagree that this is a correct analysis for admission of discovery, or even a correct statement of the standard. Rather, consistent with the BSEA's liberal interpretation of discovery provisions, I analyze Parent's discovery requests using the language of Mass.R.Civ.P., 26(b)(1) providing for discovery of information "*reasonably calculated* to lead to the discovery of admissible evidence" (emphasis added).

[39] *Schaffer v. Weast*, 126 S.Ct. 528, 534, 537 (2005).

[40] See *In Re: Manchester-Essex Regional School District*; *In Re: Grafton Public Schools* (allowing discovery in a matter disputing Logan's finding of ineligibility, of annual special education training information as to how to determine eligibility for special education, and development of IEPs, 504 Plans and ESY services, although not specific to Logan, as relevant to District policies and not burdensome to produce.)

[41] *Attorney General Advisory: Equal Access to Public Education for All Students Irrespective of Immigration Status*, Updated April 2022.

services in an ELSWD's native language, utilizing agreed upon search terms. Boston objects to producing any of the requested staff communications, (although without waiving this objection it agreed to the search terms) on the basis that such documents are irrelevant, "too far attenuated and not causally connected to Student's status as a student with a disability" and would not likely lead to the discovery of admissible evidence. Boston also contends that the staff communications could likely include privileged information protected from disclosure by HIPPA, FERPA or the Massachusetts Student Record laws of other non-peer students.

Just as I found the Elementary ELSWD Student documents requested to be relevant and within the scope of allowable discovery, as to Parent's claims of inappropriate predetermination and violations of Section 504 (albeit not producible at this time given the highly sensitive and confidential nature of the documents themselves that outweighs the benefit to Parent in reviewing them), so too do I find the requested staff communications to be relevant to these same claims. However, unlike the requested Elementary ELSWD Student documents, there are ways to avoid production of confidential student record information that may be contained in the requested staff communications.

First, it is reasonable to expect that at least some of these communications do not contain any otherwise-privileged information, while other communications likely will. Those communications not containing any privileged information must be produced. The communications containing privileged information, however, deserve further analysis, particularly since the privileged information is particular to immigrant students, which, as I have already discussed and explained, I consider to be highly sensitive and owed a substantial degree of protection. Thus, production of these communications is only appropriate if the confidential student record information can be excluded. As a preliminary point, I note that, unlike the Elementary ELSWD Student documents, the confidential student-specific privileged information is not essential to the staff communication and that communication could still be useful and beneficial to Parent if all student record information, not just identity-specific information, is fully redacted.

Thus, given the potential relevance that the privileged communications may have, and the highly sensitive nature of the privileged information contained in them, an *in camera* review of these communications is also necessary[42]. It is not yet known whether the requested communications actually contain information supportive to Parent's claims or what privileged information of immigrant students is included in them, and *in camera* review will help clarify both of these outstanding questions. Boston will, therefore, produce these communications to me, first, for an *in camera* review. If I determine any communication is, in fact, relevant to Parent's claims and otherwise "reasonably calculated to lead to the discovery of admissible evidence", I will approve their production to Parent after fully redacted them of any of the privileged information. As such, Boston's *Objection* to producing the requested staff communications is **DENIED** and Boston must produce the documents requested in Request XVII, which contain the agreed upon search terms, to me, first, for an *in camera* review consistent with this *Ruling*.

[42] *In Re: Wilmington Public Schools*; see *In Re: Plymouth Public Schools & Mass. Dept. of Mental Health*; *In Re: Nashoba Regional School District*.

ORDER[43]

Boston's *Objection* to Requests XIII, XIV, XV (as to the additional information beyond redacted peer-student IEPs) and Request XVI is **ALLOWED**. Boston's *Objection* to Request XVII is **DENIED**; however, Boston will produce the requested documents containing the agreed-upon search terms to me for an *in camera* review, first. Further, all documents produced by Boston, and any documents I review *in camera* that are subsequently produced upon being redacted of any privileged information, are subject to the following Protective Order[44]:

1. The following definition will apply to the terms used in this Protective Order : Consistent with 20 U.S.C.§ 1232g; 34 CFR § 99.3 "personally identifiable" means 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, and "indirect identifiers" such as birth date, birthplace, and mother's maiden name.

2. Boston will produce to Parent's Counsel the following redacted of personally identifiable information:
    a. All IEPs redacted of personally identifiable information of students who were grouped with Student for the 2019-20, 2020-21, and 2021-22 school years at Student's elementary school.
    b. All IEPs redacted of personally identifiable information of students who will be grouped with Student for the 2022-23 school year at the school Student is currently attending.
    c. All IEPs redacted of personally identifiable information of students proposed to be grouped with Student for the 2022-23 school year at the School Boston proposes Student to attend.
    d. From August 1, 2019 through the date of this request all physical and electronic communications in any written, recorded or other form, including but not limited to emails and chat logs, sent or received by the Principal of Student's elementary school, assistant principal(s) at Student's elementary school, coordinator(s) of special education at Student's elementary school, language access team facilitator at Student's elementary school, and assistant director for K-8 schools responsible for Student's elementary school relating to the provision of special education and related services in an English learner with a disability's native language approved for production after *in camera* review by the Hearing Officer. This request includes all attachments to any such communications. In responding to this Request, Boston will run a search within the electronic database of each identified staff member for the timeframe in question, using the SSID or student name of each specific ELSWD at Student's elementary school along with the terms "bilingual", "native language" or the actual native language of the student.

[43] I greatly appreciate the assistance of BSEA Intern, Teddy Hereid, on this *Ruling.*

[44] I purposefully omit any references to names of staff or school buildings for purposes of confidentiality. They were specified in the original *Requests for Production of Documents*, and the parties are expected to comply with those specifications.

3. Boston shall provide the redacted information in Paragraphs (2)(a) through (d) of this Protective Order solely to Counsel for Parent, and not to Parent, Student, or any other person or entity. Counsel for Parent may disclose the redacted IEPs to expert witnesses.

4. Boston, in lieu of personally identifiable information, shall assign a number instead of a name for records pertaining to each individual student implicated in Paragraphs (2)(a) through (c) of this Protective Order. This number shall be used to identify the same individual across documents and throughout the course of this litigation.

5. Counsel shall maintain a record of the persons to whom this information is delivered and impose like restrictions upon persons receiving it, and at the time this information is delivered to such persons, counsel shall also deliver to them a copy of this Hearing Officer's Order, thereby placing them on notice that the failure to comply with this Order will constitute a contempt of this administrative body.

6. All documents obtained by Parent's Counsel under Paragraph two (2) of this Order and all copies of such documents shall be destroyed or returned by Parent's Counsel to Boston immediately following the conclusion of this action; provided, however, that if a hearing is held and any party appeals from the Hearing Officer's decision, the redacted documents will be destroyed or returned to Boston upon conclusion of all court proceedings.

7. All documents obtained by Parent's Counsel under Paragraph two (2) of this Order and copies of such documents shall not be able to be used, referred to or otherwise relied upon by Parent, Parent's Counsel or any other persons in any other proceeding other than in this proceeding and appeals therefrom, if any, unless they are otherwise legally able to be discovered or obtained separately and distinctly from this proceeding.

8. The materials to be produced pursuant to the *subpoena duces tecum* issued to the Keeper of the Records for Boston Medical Center dated September 15, 2022, will be produced first to Parent's Counsel for inspection as to whether any privilege would preclude production. Parent's Counsel will forward to the District's Counsel any documents to which no privilege objection applies, and forward to the Hearing Officer any documents objected to production on grounds of privilege for an *in camera* review of the same.

By the Hearing Officer,

/s/ *Marguerite M. Mitchell*
Marguerite M. Mitchell

Date: November 7, 2022