

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

In Re: Dorian

BSEA #1702306

**RULING ON PARENT’S MOTION TO QUASH AND VACATE SUBPOENAS AND  
WALTHAM PUBLIC SCHOOLS’ MOTION TO COMPEL**

This matter comes before the Hearing Officer on two pre-hearing motions: Parent’s Motion to Quash and Vacate Subpoenas Served by the Waltham Public Schools (“the District”) (“Motion to Quash”) filed on May 22, 2017, and the District’s Third Motion to Compel Discovery Responses from Parent and Student (“Motion to Compel”), filed on July 6, 2017. I address these two motions together because they implicate, and require examination of, similar issues.

For the reasons below, Parent’s Motion to Quash is hereby **ALLOWED in part and DENIED in part** and the District’s Third Motion to Compel Discovery is hereby **ALLOWED** with certain conditions.

Furthermore, the District’s request for an order precluding Parent/Student from submitting documents at hearing not previously produced to the District and any witness testimony pertaining to these documents is **ALLOWED** for the reasons outlined herewith.

**I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Parent commenced this action when she filed a *Hearing Request* with the Bureau of Special Education Appeals (“BSEA”) on September 20, 2016 alleging that the program provided by the District was inappropriate and denied Student, a then-eighteen (18) year old resident of Waltham enrolled in the Waltham Public Schools, a free appropriate public education (FAPE). Among other grievances, Parent alleged that the District failed to implement Student’s Individualized Education Program (IEP) properly; breached procedural protocol with regard to the IEP process; disciplined Student without informing Parent; and failed to accommodate Student in accordance with Section 504 of the Rehabilitation Act. As a result, Parent sought an order requiring the District to compensate Dorian for failing to provide him FAPE from 2014<sup>1</sup> to the time of the Hearing Request.

On October 17, 2016, Waltham served Parent with its First Set of Requests for Production of Documents and Interrogatories. Following a Conference Call on that same day, the undersigned Hearing Officer granted the District’s request to postpone the Hearing initially scheduled for November 1, 2016 to allow the parties to address issues central to their dispute and explore informal resolution.

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<sup>1</sup> In her *Hearing Request*, Parent did not specify the date on which the District’s alleged failure to provide Student a free appropriate public education (FAPE) began.

On November 18, 2016, Parent filed her Response to the District's First Request for Production of Documents and Interrogatories. She provided written responses to the District's requests but did not produce any of the requested documents, instead denying her possession as to some requested documents and invoking privilege and confidentiality protections as to the other documents requested by the District. A Conference Call was held on the same day, during which the parties agreed to a Pre-Hearing Conference to be held on December 21, 2016.

On December 2, 2016, the District filed its first Motion to Compel Parent's Discovery Responses. In support of its Motion, the District alleged that Parent's responses deprived the District of the requisite information to prepare its defense against Parent's claim in the litigation. Before the undersigned Hearing Officer issued a ruling on the District's Motion to Compel, the parties requested a continuance and agreed to provide the Hearing Officer with status reports by January 20, 2017.

In the status report it filed on January 20, 2017, the District described referrals it had made for an extended evaluation of Student per its agreement with Parent. On the same day, Parent filed a status report detailing the parties' lack of progress in resolving the dispute, marked by, among other things, difficulties scheduling meetings with the programs to which the District had made referrals and a conflict over whether Student's out-of-district summer school grades from 2016 could factor into or replace failing semester grades.

After a Conference Call on February 3, 2017, with the parties at an impasse, the Hearing Officer ordered both parties to furnish exhibits and witness lists in advance of a Hearing scheduled for May 10 and 11, 2017. Parent was directed to file a status report by March 3, 2017 clarifying requested relief.

The status report filed by Parent on March 3, 2017 requested an Order from the Hearing Officer to "Compel the Waltham Public Schools to provide the Student Emergency Unilateral Placement at a To Be Disclosed Private School at public expense," and an Order directing the District and all of its representatives to "suppress information through signing an agreement similar to a Confidentiality Agreement." The Hearing Officer scheduled a telephonic Motion Session for March 24, 2017. Following the Motion Session, the Hearing Officer issued an Order denying Parent's Motions, explaining that the BSEA cannot order a district to "unilaterally" place a student and clarifying that Parent must amend her *Hearing Request* in order to seek reimbursement for a unilateral placement.

On March 31, 2017, Parent amended her *Hearing Request* to seek compensatory services for the District's alleged failure to provide FAPE to Dorian from September 2013 through his removal from Waltham in February 2017 and subsequent unilateral placement at Fryeburg Academy in Maine. The District submitted its Response on April 10, 2017, challenging Parent's assertions that the District had not provided Student with FAPE and that Fryeburg represented an appropriate placement for Dorian.

On April 3, 2017, the Hearing Officer issued an Order granting the District's Motion to Compel Parent's Discovery Responses, which had been filed by the District on December 2, 2016 and stayed at the parties' request. Parent was directed to file answers to interrogatories and produce

documents responsive to the District's Request on or before April 7, 2017. Parent subsequently requested an extension of this deadline to April 10, 2017, which the Hearing Officer granted. However, Parent did not meet the amended discovery deadline and did not file her answers to interrogatories and responses until April 27, 2017, submitting to the District a fraction of the documents the District expected to receive. On April 26, 2017, per the parties' joint request, the Hearing was continued to May 24, 2017 to allow for the completion of discovery.

On May 4, 2017, the District served subpoenas *duces tecum* upon five different third parties seeking documents related to the litigation.<sup>2 3</sup> Four of these parties are medical professionals or medical facilities and one is the claimant's non-attorney advocate. On May 15, 2017, Parent filed a Motion to Quash and Vacate the District's Subpoenas, arguing that the District sought privileged information. Waltham filed its objection to Parent's Motion to Quash on May 22, 2017, alleging Parent's violation of Rule VII(C) and asserting that the documents it hoped to obtain were central to the dispute and were not protected by any sort of privilege.

Pursuant to the joint request of the parties, the Hearing Officer continued the matter again, this time to June 22, 2017, to allow for the completion of discovery. On May 26, 2017, the District submitted a Second Motion to Compel Discovery Responses asserting that Parent had not fully responded to its first Motion to Compel and had therefore failed to comply with the BSEA's April 3, 2017 Order. To date, the Parent has not responded in writing to the District's Second Motion to Compel.

The Parties and the Hearing Officer participated in a Conference Call to discuss pending discovery motions on June 12, 2017. During the call, the Hearing Officer ordered that Parent produce all documents responsive to Document Request No. 3 by June 21, 2017. As of the date of this Ruling, these documents have not been produced.

Having yet to receive any written response to its Second Motion to Compel, the District filed a Third Motion to Compel Discovery Responses on July 6, 2017, again alleging Parent's violation of BSEA Hearing Rule VI(B).

## **II. PARENT'S MOTION TO QUASH**

On May 4, 2017, the District served subpoenas *duces tecum* on Student's Advocate, Julliana Jennings; Riverside Community Center and Jamie Albert; Dr. Joseph B. Leader at Woburn Pediatrics; Newton-Wellesley Hospital; and Dr. Leon O. Brenner of the Assessment and Consultant Center at William James College. Parent then filed her Motion to Quash and the District filed its Opposition, making the arguments outlined above.

Pursuant to BSEA *Hearing Rule* VIII(C), "[a] person receiving a subpoena may request that a hearing officer vacate or modify the subpoena." Additionally, a hearing officer may quash a

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<sup>2</sup> Bureau of Special Education Appeals *Hearing Rule* VIII(B) allows a party in a BSEA proceeding to serve a subpoena *duces tecum* on a nonparty requesting that documents be produced to the office of the requesting party prior to the hearing.

<sup>3</sup> These subpoenas were not served through the BSEA.

subpoena “upon a finding that the testimony or documents sought are not relevant to any matter in question...”<sup>4</sup> Therefore, reaching a decision on Parent’s Motion to Quash may hinge, in part, upon whether the documents requested by the District are relevant to the appropriateness of Dorian’s IEP and his out of District placement.

#### *A. Subpoena of Documents in Possession of Advocate*

Parent asserts that she need not produce the documents subpoenaed by the District that are in the possession of Dorian’s Advocate, Julliana Jennings, because documents created or maintained by a student’s advocate, as well as any correspondence between a student advocate and independent educational evaluators, are protected by work product privilege under Mass R. Civ. P. 26(b)(3) and Fed. R. Civ. P. 26(b)(3)(A). Parent also argues that case law protects communication between a student or parent and lay advocate from disclosure during discovery. Conversely, the District contends that attorney-client privilege applies only to attorneys and does not extend to non-attorney advocates. Furthermore, the District argues that the work product doctrine governed by Mass R. Civ. P. 26(b)(3) and Fed. R. Civ. P. 26(b)(3)(A) only applies to an *attorney’s* written materials and mental impressions created in anticipation of litigation.

Deeply rooted Massachusetts case law specifies that attorney-client privilege “is confined strictly to [client] communications to members of the *legal profession*...and those whose intervention is necessary to secure and facilitate the communication between *attorney* and client.”<sup>5</sup> The Massachusetts Rules of Evidence, too, limit attorney-client privilege to communications between clients and their attorneys, or their attorneys’ agents.<sup>6</sup>

Past BSEA rulings have drawn the boundaries of attorney-client privilege along the same lines. In *Scituate Public Schools*, BSEA #1702015 (Figuroa 2016), for example, the BSEA denied a non-attorney advocate’s Motion to Quash a subpoena of documents in her possession because non-attorney advocates do not have an attorney-client relationship with the party on whose behalf they advocate.<sup>7</sup>

Both federal and state rules of civil procedure provide protection from discovery for materials prepared in anticipation of litigation.<sup>8</sup> These protections may be overcome, however, by a showing of “substantial need” of materials that cannot be obtained, without undue hardship, by

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<sup>4</sup> *Hearing Rule VIII(C)*.

<sup>5</sup> *Foster v Hall*, 29 Mass. 89, 94 (1831).

<sup>6</sup> See Mass. R. Evid. §502(b)(1) (“A client has a privilege to refuse to disclose and to prevent others from disclosing confidential communications made for the purpose of obtaining or providing professional legal services to the client as follows: between the client or the client’s representative and the client’s attorney or the attorney’s representative”).

<sup>7</sup> The circumstances in *Scituate* are very similar to those in the present case. In *Scituate*, Hearing Officer Figuroa determined that privilege does not protect documents in the possession of an advocate who is not a licensed attorney.

<sup>8</sup> See Fed. R. Civ. P. 26(b)(3)(A) (“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative. . . .”); Mass. R. Civ. P. 26(b)(3) (“Subject to the provisions [regarding experts], a party may obtain discovery of documents and tangible things otherwise discoverable [as relevant] and prepared in anticipation or for trial by or for another person or by or for that other party’s representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case, and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means”).

other means.<sup>9</sup> Even where this standard has been met and the protection abrogated, “mental impressions, conclusion, opinion, or legal theories” are protected from disclosure.<sup>10</sup>

Whereas attorney-client privilege does not apply to communications between non-attorney advocates and their clients, the work product doctrine may protect materials prepared by non-attorney advocates for BSEA proceedings. At least one federal court has recognized as protected work product documents prepared in anticipation of litigation by non-attorneys working at the behest of attorneys,<sup>11</sup> but the scope of the work product doctrine may be more expansive. The language of Mass R. Civ. P. 26(b)(3) protects documents “prepared in anticipation of litigation... by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer, or agent).”<sup>12</sup> In contrast with the language of Mass. R. Evid. §502(b)(1), which limits the scope of attorney-client privilege to communications between clients and “client’s attorney or the attorney’s representative,” the broad language of Mass R. Civ. P. 26(b)(3) and Fed. R. Civ. P. 26(b)(3)(A) suggests that the work product doctrine applies to documents composed in anticipation of litigation by any individual— attorney or non-attorney— acting as a party’s representative in the matter.<sup>13</sup> This interpretation of work product protection in the context of BSEA proceedings serves the important policy goals underlying the provision; to exclude advocates could have a chilling effect on communication among parents, their experts, and advocates; and hamper advocates’ ability to communicate in writing with their clients and maintain records of their work.

It follows that some of the documents in Ms. Jennings’s possession, including communications between Parent or Dorian and Ms. Jennings that were not prepared in anticipation of litigation, do not implicate attorney-client privilege or the work product doctrine. As such, they are

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<sup>9</sup> See Fed. R. Civ. P. 26(b)(3)(A)(ii) (allowing for discovery of otherwise discoverable documents and tangible things prepared in anticipation of litigation if “the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means”); Mass. R. Civ. P. 26(b)(3) (permitting discovery of otherwise discoverable documents and tangible things prepared in anticipation of litigation only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case, and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means”).

<sup>10</sup> See Fed. R. Civ. P. 26(b)(3)(B) (“If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation”); Mass. R. Civ. P. 26(b)(3) (“In ordering the discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation”).

<sup>11</sup> See *U.S. v. ISS Marine Serv.*, 905 F.Supp.2d 121, 134 (D.D.C. 2012) (holding that “materials prepared by non-attorneys supervised by attorneys are capable of enjoying work-product protection”); *Judicial Watch, Inc. v. U.S. Dept. of Homeland Sec.*, 736 F.Supp.2d 202, 209 (D.D.C. 2010) (stating plainly that “attorney work-product privilege protects disclosure of materials prepared by attorneys, or non-attorneys supervised by attorneys...”)

<sup>12</sup> Fed. R. Civ. P. 26(b)(3)(A) contains similar language, providing that “a party may not discover documents and tangible things that are prepared in anticipation of litigation... by or for another party or its representatives (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).

<sup>13</sup> See *Comm’r of Revenue v. Comcast Corp.*, 453 Mass. 293, 314-15 (2009) (noting that the Massachusetts work product doctrine, codified in Mass R. Civ. P. 26(b)(3) “protects a client’s nonlawyer representatives, protecting from discovery documents prepared by a party’s representative ‘in anticipation of litigation,’” and that rather than be limited to attorneys, “[t]his protection applies also to other representatives of a party, provided their work relates to litigation (internal quotations omitted)). Cf. *McKenzie v. McNeil*, No. 4:11cv45—RH/WCS, 2012 WL 695108 at \*1 (N.D. Fla. March 1, 2012) (unreported case) (suggesting, in a case involving a *pro se* litigant, that non-attorneys acting in place of counsel “can assert at least some work-product protection”).

discoverable. To the extent Parent believes any subpoenaed documents constitute protected work product, she bears the burden to demonstrate that they are not discoverable. Therefore, I hereby **ORDER** that within seven (7) calendar days from the date of this Order, Parent shall file a Motion for a Protective Order identifying each document she intends to withhold and showing that each identified document was prepared (1) by Ms. Jennings and (2) in anticipation of litigation and not for the broader purpose of her work with the family, that is, exploring and securing an alternate placement for Dorian.

Should Parent establish that certain materials in Ms. Jennings possession are in fact protected work product, they may still be discoverable if the District “shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”<sup>14</sup> Should the District believe this is the case with respect to any materials withheld by Ms. Jennings on this basis, it will have seven (7) days to submit this argument in writing. Should the District demonstrate that this standard has been met, discovery of these materials will be consistent with limitations of federal and state rules of civil procedure; such disclosure will exclude the “mental impressions, conclusions, opinions, or legal theories of [Ms. Jennings] concerning the litigation.”<sup>15</sup>

For these reasons, and subject to the conditions delineated above, Parent’s Motion to Quash the District’s Subpoena of materials in the possession of Julliana Jennings is hereby **ALLOWED in part and DENIED in part**.

*B. Subpoena of Documents in the Possession of Riverside Community Center and Jamie Albert, Dr. Joseph B. Leader at Woburn Pediatrics, Newton-Wellesley Hospital, and Dr. Leon O. Brenner of the Assessment and Consultant Center at William James College*

Next, I turn my attention to Parent’s argument that documents in the possession of third parties Riverside Community Center and Jamie Albert; Dr. Joseph B. Leader at Woburn Pediatrics; Newton-Wellesley Hospital; and Dr. Leon O. Brenner of the Assessment and Consultant Center at William James College are protected by privilege. Although Parent does not reference any federal or state statutes in her briefs, the Health Insurance Portability and Accountability Act (HIPPA) governs privilege over medical records, while M.G.L. c. 112 § 129A forbids third parties supplying mental health therapy from disclosing sensitive medical information and may be applicable as well.

HIPPA generally forbids the release of “individually identifiable health information without the written authorization of the individual who is the subject of the information,”<sup>16</sup> and other privileges (i.e. psychotherapist/patient) may protect some of this information as well. However, as the District points out, instances may arise in which a student’s “mental health or emotional

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<sup>14</sup> Fed .R .Civ. P. 26(b)(3)(A)(ii); Mass. R. Civ. P. 26(b)(3); see *Comm’r of Revenue*, 453 Mass. at 314 (“The protection is qualified, and can be overcome if the party seeking discovery demonstrates ‘substantial need of the materials’ and that it is ‘unable without undue hardship to obtain the substantial equivalent of the materials by other means.’”)

<sup>15</sup> See *Hickman v. Taylor*, 329 U.S. 495, 508 (1947).

<sup>16</sup> *Worcester Public Schools*, BSEA #1504291 (Reichbach 2015) (denying District’s motion to compel parent’s authorization of release of daughter’s medical records because medical records requested in subpoenas consisted of daughter’s protected health information).

condition is at the core of BSEA proceeding,” making the disclosure of this information to a school district “necessary and therefore exempted from privilege.”<sup>17</sup> In such a situation, where parent has filed a claim against a school district, and the student’s medical, mental or emotional condition lies at the center of the dispute, parent has waived the privilege. Consequently these records should be produced in response to a subpoena.<sup>18</sup>

The facts of the case and pertinent state and federal law weigh in favor of the District and against Parent on this issue.<sup>19</sup> Because the District seeks information related to Student’s recent medical history and disability that may bear directly on whether the District implemented educational arrangements necessary to provide him with FAPE, a question central to the dispute, the District’s requests are relevant to a matter in question and reasonably calculated to lead to the discovery of admissible evidence.

Although M.G.L.c. 112 § 129A states that “[a]ll communications between a licensed psychologist and the individuals with whom the psychologist engages in the practice of psychology are confidential,” Massachusetts law, too, allows for disclosure of medical information under certain circumstances. Under M.G.L.c. 233 § 20B(c), the privilege extended via M.G.L.c. 112 § 129A does not apply

“[i]n any proceeding...in which the patient introduces his mental or emotional condition as an element of his claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected.”

The provision invoked by Parent may not even apply in this instance as it is unclear whether any of those who received subpoenas from the District are licensed psychotherapists. However, even assuming these individuals are in fact licensed psychotherapists, M.G.L.c. 233 § 20B(c) would necessitate disclosure. Here, Parent alleges that Fryeburg Academy, the school at which Parent unilaterally placed Dorian, possesses the supports necessary to provide for his academic, mental health, and emotional needs. Because these needs are at the center of the dispute between the two parties, the exception to M.G.L.c. 112 §129A applies.

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<sup>17</sup> *Scituate Public Schools*, BSEA #1702015 (Figureoa 2016) (ruling that parents waived privilege with respect to medical records because of their reliance upon “information and recommendations allegedly made by the [p]roviders in their quest for the therapeutic placement of their choice,” the disclosure of which was “crucial to adequately inform the Hearing Officer about the issues in dispute”); see *Fields v. West Virginia State Police*, 264 F.R.D. 260, 264 (S.D. W.V. 2010) (“it is well-settled that a party who places his or her physical or mental health in issue waives privileges which pertain to the conditions in issue”). Cf. *Erb v. Novia*, No. WOCV201101871, 2012 WL 1994714 at \*1 (Mass. Super. Ct. April, 11, 2012) (ruling that even when privileges apply, a psychotherapist’s records may “be released if the plaintiff has made her mental or emotional condition an element of her claim”); *Jacobs v. Vachon*, No. 961506, 2000 WL 281665 at \*2 (Mass. Super Ct. Jan. 28, 2000) (finding that the “interests of justice” outweighed psychotherapist-patient privilege and prompted disclosure when the plaintiff’s emotional distress was at the center of her claim).

<sup>18</sup> See, e.g., *Fields*, 264 F.R.D. at 264; *Erb* at \*1; *Jacobs* at \*2; *Scituate Public Schools*, BSEA #1702015.

<sup>19</sup> See *Scituate Public Schools* (articulating that non-privileged documents responsive to discovery requests, relevant to the matter being litigated, must be produced as long as the requests are “reasonably calculated” to result in discovery of admissible evidence).

Although I find that this material is discoverable and must be produced in response to the subpoenas, I acknowledge Parent's concerns regarding the dissemination of sensitive information. During the June 12, 2017 Motion Hearing, Parent emphasized that an order granting the District's Motion to Compel could allow certain District officials, whose perusal of sensitive medical documentation is not necessary to the District's defense, to obtain access to such materials. Parent, therefore, wishes to restrict five named District employees from accessing Dorian's records.

To be sure, the BSEA has issued rulings limiting access to produced documents when circumstances have warranted such orders.<sup>20</sup> Nevertheless, BSEA hearings generally favor liberal discovery practices that "uncover information that may shed light on, support, detract, defuse or alter those facts and arguments the parties hold at the beginning of litigation."<sup>21</sup> These discovery practices aim to foster consensus through a "team approach," encouraging the open exchange of information between parties.<sup>22</sup> Consistent with this liberal approach and in consideration of Parent's privacy concerns, I will allow the third party medical providers to respond to the District's subpoena requests with certain conditions imposed upon the District. After acquiring the sought after documents, the District must not share them with any District employee whose review of Student's medical history or mental health is unnecessary to the District's defense.<sup>23</sup> Furthermore, the District and experts privy to sensitive medical information produced pursuant to this Order must destroy their copy of these records at the conclusion of the Hearing.

For these reasons, and subject to the conditions delineated above, Parent's Motion to Quash the Subpoena of Riverside Community Center and Jamie Albert, Dr. Joseph B. Leader at Woburn Pediatrics, Newton-Wellesley Hospital, and Dr. Leon O. Brenner of the Assessment and Consultant Center at William James College is **DENIED**.

### **III. THE DISTRICT'S MOTION TO COMPEL**

After the Parent failed to respond to its Second Motion to Compel filed on May 24, 2017, the District filed its Third Motion to Compel on July 6, 2017 seeking answers to its interrogatories and production of documents in Parent's possession regarding, among other things, Dorian's educational or accommodation plans; Dorian's medical records; and documents prepared by Dorian or Parent regarding Dorian's emotional health. The District also sought to compel production of correspondence between the Dorian or Parent and the District, Dorian's advocate,

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<sup>20</sup> See *Scituate Public Schools* (ruling that documents received by District containing Student's sensitive medical information must "be handled cautiously" and not disclosed to individuals "not qualified to offer an opinion" on the matter); *Andover Public Schools* BSEA # 1706174 (Figueroa 2017) (granting a Protective Order prohibiting disclosure of documents regarding Student's peers' cognitive assessments because allowing the release of documents to school district "risks intrusion without corresponding benefit.").

<sup>21</sup> *Quincy Public Schools* BSEA #1600059 (Byrne 2015).

<sup>22</sup> See *id.*

<sup>23</sup> Allowing Parent's request that the BSEA bar five (5) specific individuals from viewing subpoenaed documents, might unfairly restrict the District's ability to select and prepare its witnesses and experts prior to the Hearing. Although I will not make rulings as to these specific individuals, the District must nevertheless handle the documents it receives cautiously.



and outside educational evaluators. Lastly, the District sought an order prohibiting the Parent from using testimony and documents at the hearing that she had not previously produced.

Consistent with the analysis above regarding Parent's Motion to Quash, reaching a decision on the District's Motion to Compel depends in part upon the relevance of the requested documents to the matter being litigated and whether the documents are protected by privilege as governed by BSEA *Hearing Rule VI(B)(1)*,<sup>24</sup> Mass. R. Civ. P. Rule 26(b)(1), and Fed. R. Civ. P. Rule 26(b)(1). The relevance and accessibility of the documents requested can override M.G.L.c. 112 §129A and HIPPA, respective state and federal protections over sensitive medical information that may otherwise restrict disclosure. In addition, case law governing the scope of attorney-client privilege and work product informs the BSEA's decisions regarding discovery of materials in the possession of advocates.<sup>25</sup>

#### *A. Request for Production No. 3*

All documents supporting the Parent's and Student's claim(s) than any or all of the accommodation plans, educational plans, programs, placements, and/or services developed or proposed for Student by the Waltham Public Schools since September 1, 2013 were not appropriate, were not implemented, or did not provide the Student with a free and appropriate public education.

### **Discussion**

Although Parent initially stated that she had no documents in her possession responsive to this discovery request, Parent, through her advocate, suggested during the June 12, 2017 Motion Hearing that she possessed or could readily gain access to documents responsive to Request No. 3, and agreed to locate and produce said documentation. The undersigned Hearing Officer ordered Parent to produce documents responsive to Request No. 3 by June 21, 2017. Insofar as Parent has not yet produced these documents to the District or to the BSEA, I hereby reaffirm my oral order issued on June 12, 2017. The District's Motion to Compel with respect to Request for Production of Document No. 3 is hereby **ALLOWED**.

#### *B. Requests for Production Nos. 4, 6 and 7*

### **Request for Production of Documents No. 4**

Complete copies of any and all correspondence and communications, since September 1, 2013, relating to the Student, including but not limited correspondence and communication between the Parents/Student and the Waltham Public Schools.

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<sup>24</sup> BSEA *Hearing Rule VI(B)(1)* stipulates that "Any party may request any other party to produce or make available for inspection or copying any documents or tangible things not privileged, not supplied previously and which are in possession, custody, or control of the party upon whom the request is made."

<sup>25</sup> See *Hickman*, 329 U.S. at 511; *Scituate Public Schools*, BSEA #1702015.

### **Request for Production of Documents No. 6**

All notes, reports, correspondence and/or other documents pertaining to Student created or maintained by any non-attorney advocate, representative and/or consultant since September 1, 2013, including but not limited to Julliana Jennings

### **Request for Production of Documents No. 7**

Complete copies of all correspondence between the Parent(s)/Student and any educational evaluator, advocate, and/or consultant outside the Waltham Public Schools, including but not limited to Julliana Jennings.

### **Discussion**

Parent argues here, as she did in support of her Motion to Quash, that she need not produce the documents responsive to Request Nos. 4, 6 and 7 in Julliana Jennings's possession because the advocate is protected by attorney-client privilege. As it did in its Motion to Compel, the District iterates that the documents it seeks are not protected by attorney-client privilege or work product doctrine, as advocate Julliana Jennings is not an attorney.

The same law governing Parent's Motion to Quash applies here to the District's Motion to Compel.<sup>26</sup> Since Parent's advocate, Julliana Jennings, is not an attorney, the materials the District is attempting to obtain through discovery are not protected by attorney-client privilege.<sup>27</sup> The work product doctrine, however, protects from discovery those documents composed by a parent's non-attorney representative in anticipation of litigation.<sup>28</sup> As a consequence, some of the documents that the District seeks, specifically those created by Ms. Jennings, may be protected from discovery.

As with my Order on the District's Subpoena of Documents in Possession of Student's Advocate, Parent shall include in her Motion for a Protective Order a description of the documents she intends to withhold, if any, and show that each identified document was prepared (1) by Ms. Jennings and (2) in anticipation of litigation and not for the broader purpose of her work with the family, that is, exploring and securing an alternate placement for Dorian.

Should Ms. Jennings establish that certain materials in her possession are in fact protected work product, they may still be discoverable if the District "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."<sup>29</sup> Should the District believe this is the case with respect to any materials withheld by Ms. Jennings on this basis, it will have seven (7) days to submit this argument in writing.

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<sup>26</sup> See *Foster*, 29 Mass. at 94; *Hickman*, 329 U.S. at 511.

<sup>27</sup> See *Scituate Public Schools*, BSEA #1702015.

<sup>28</sup> See *Commissioner of Revenue*, 453 Mass. at 312.

<sup>29</sup> See Fed. R. Civ. P. 26(b)(3)(A)(ii).

Consistent with Fed. R. Civ. P. 26(b)(3), to the extent discovery of these materials is appropriate, such disclosure will exclude the “mental impressions, conclusions, opinions, or legal theories of [Ms. Jennings] concerning the litigation.”<sup>30</sup>

Subject to the conditions delineated above, the District’s Motion to Compel with respect to Requests Nos. 4, 6, and 7 is hereby **ALLOWED in part and DENIED in part**.

*C. Requests for Production Nos. 5 and 9*

**Request for Production of Documents No. 5**

All reports, emails, notes, correspondence and/or other documents created by Parents and/or Student regarding Student’s disability, emotional/psychological status/needs, behavior and/or educational needs since September 1, 2013.

**Request for Production of Documents No. 9**

All documents, medical records, admissions and/or discharge records, reports, correspondence and/or notes pertaining to any hospitalization of the student since September 1, 2013.

**Discussion**

With respect to Request Nos. 5 and 9, Parent objects to producing the requested documents contained within the District’s Motion to Compel on the following grounds: that state law, particularly M.G.L.c. 112 § 129A, precludes her from producing documents containing sensitive medical information originating from Parent, Dorian or Dorian’s health care providers. On the other hand, the District argues that these documents are highly relevant to the case, particularly with respect to determining the appropriateness of Parent’s unilateral placement.

It seems that Parent may have misconstrued the scope of the statute she cites. M.G.L.c. 112 § 129A only applies to communications between psychologists and “the individuals with whom the psychologist engages,” and does not apply to documents created by the Parent or Dorian. To the extent it seeks information beyond that between psychologists and Parent or Dorian, the District’s Request No. 5, therefore, does not seek documents covered by M.G.L.c. 112 § 129A. Since the documents requested are not subject to any sort of privilege, the accessibility of the documents requested and their relevance to the dispute may militate in favor or against production.

The Massachusetts Rules of Civil Procedure expatiates further as to the scope of discovery:

“[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 of defense of the party seeking discovery or to the claim or defense of any party...It is not

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<sup>30</sup> See *Hickman*, 329 U.S. at 508.

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.”<sup>31</sup>

The parallel Federal Rule permits discovery of

“...any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues..., the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information...need not be admissible in evidence to be discoverable.”<sup>32</sup>

Dorian’s mental and emotional needs are of great importance in determining whether his current placement accommodates his particular needs. Therefore, with regard to Request No. 5, documents prepared by Parent or Dorian regarding his mental or emotional state are highly relevant and the District’s request seems “reasonably calculated to lead to the discovery of admissible evidence.”<sup>33</sup> Moreover, because Request No. 5 seeks documents that are presumably in the possession of the Parent or Student, locating and producing these documents to the District would not impose a heavy burden on the Parent.

With regard to Request No. 9, to the extent Dorian’s hospitalizations were psychiatric in nature, the protections afforded by M.G.L.c. 112 § 129A are not absolute.<sup>34</sup> Instances may arise in which a student’s health is at the core given BSEA proceeding, making the disclosure of this information to the District “necessary and therefore exempted from privilege.”<sup>35</sup> Consequently, where a parent files a rearing request alleging that a school district has failed to meet a student’s medical, mental, and/or emotional needs, she has placed the student’s medical, mental, and/or emotional condition in issue and thereby waived privilege as to records regarding those needs.<sup>36</sup>

Here, Parent alleges that Fryeburg Academy, the school at which Parent unilaterally placed Dorian, possesses the supports necessary to provide for his mental health and emotional needs. Documents detailing Dorian’s mental health and emotional needs may elucidate the appropriateness – or inappropriateness – of the Parent’s unilateral placement. Given that the District’s requests pursue information directly related to the dispute between the two parties, the information possessed by psychiatric specialists is not protected and M.G.L.c. 233 § 20B(c) applies.

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<sup>31</sup> Mass. R. Civ. P. 26(b)(1).

<sup>32</sup> Fed. R. Civ. P. 26(b)(1).

<sup>33</sup> Mass. R. Civ. P. 26(b)(1).

<sup>34</sup> M.G.L.c. 112 § 129A allows for release of patient information under certain circumstances, similar to those provided under HIPPA. See M.G.L.c. 233 § 20B(c).

<sup>35</sup> See *Scituate Public Schools*, BSEA #1702015 (ruling that parents waived privilege protecting otherwise protected medical documents because of parents’ reliance upon “information and recommendations allegedly made by the [p]roviders in their quest for the therapeutic placement of their choice,” the disclosure of which was “crucial to adequately inform Hearing Officer about the issues in dispute”); *Doe v. Banach*, No. 20042508C, 2006 WL 620702 at \*2-3 (Mass.Super.Ct. Feb. 2, 2006) (where health care provider’s mental health treatment of plaintiff was related to his claim the “interests of justice” prompted disclosure).

<sup>36</sup> See *id.*

In addition to limiting who may gain access to the documents responsive to Request Nos. 5 and 9, the BSEA agrees with Parent that steps should be taken to reduce the exposure of sensitive medical information contained in documents subpoenaed by the District. Therefore, I issue here the same stipulations attached to my order on the District's Motion to Compel. After acquiring the sought after documents, the District must not share them with any District employee whose review of Student's medical history or mental health is unnecessary to the District's defense. Also, the District and experts who acquire access to sensitive medical information produced pursuant to this Order must destroy their copies of these records at the conclusion of the Hearing.

For these reasons, and subject to the restrictions delineated above, District's Motion to Compel with respect to the District's Request for Production Nos. 5 and 9 is hereby **ALLOWED**.

#### *D. Interrogatories*

The District, once more, calls for Parent to answer the District's Interrogatories contained in its Motion to Compel. Pursuant to BSEA *Hearing Rule* VI(B)(2), parties must respond to each other's interrogatories.<sup>37</sup>

The District issued its First Set of Requests for Production of Documents and Interrogatories on October 17, 2016. To date, the Parent has not responded fully to the District's Interrogatories despite the District's filing of three (3) Motions to Compel and a previous BSEA Order requiring the Parent to file her Answers.<sup>38</sup>

The District accurately points out that the Parent failed to notify the District of her objections or file a Motion for a Protective Order within ten (10) days from the date of the District's Second Set of Discovery Requests and has therefore forfeited her right to object or move for a Protective Order.

For these reasons, the District's Motion to Compel Parent's Responses to the District's Interrogatories is hereby **ALLOWED**.

#### **IV. THE DISTRICT'S PROPOSED ORDER PRECLUDING PARENT FROM SUBMITTING TESTIMONY AND DOCUMENTS AT HEARING**

Waltham Public Schools has requested an order precluding Parent from submitting testimony and documents at hearing that were not previously produced to the District. In considering this request, I emphasize to Parent the importance of adhering to discovery rules and rulings. Full

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<sup>37</sup> "Each interrogatory shall be separately and fully answered under the penalties of perjury unless it is objected to, in which event, the reasons for the objection must be stated in lieu of an answer." BSEA *Hearing Rule* VI(B)(2).

<sup>38</sup> "The party upon whom the request is served shall respond within a period of thirty (30) calendar days unless a shorter or longer period of time is established by the Hearing Officer." BSEA *Hearing Rule* VI(B).

disclosure of non-privileged documents is essential to ensuring a fair BSEA proceeding in which both parties are able to present their strongest case.

Moreover, BSEA Hearing Rules prohibit parties from presenting materials at a hearing that they have failed to produce in discovery. Per *Hearing Rule IX(A)*: “Copies of all documents to be introduced (exhibits)...must be received by the opposing party (ies) and the Hearing Officer at least five (5) business days prior to the hearing...” *Hearing Rule X(C)(1)* presents further guidance: “The parties may offer as evidence documents that they have exchanged prior to the hearing in accordance with these rules.”

For the reasons above, the District’s request for an order precluding Parent from submitting documents at hearing not previously produced to the District and any witness’ testimony pertaining to these documents is **ALLOWED**.<sup>39</sup>

As already noted, Parent has failed to respond in writing to the Hearing Officer’s oral order on June 12, 2017 regarding the District’s Request for Production of Document No. 3. Parent was ordered to provide the BSEA and the District with documents that are—by Parent’s own admission—within Parent’s control. The deadline to respond passed on June 21, 2017. I am also mindful that The District has now filed three (3) Motions to Compel in this matter, all of which have now been granted.

For these reasons and consistent with Mass. R. Civ. P. Rule 37(b)(2)<sup>40</sup>, I hereby **ORDER** that within seven (7) calendar days from the date of this Order, Parent shall file answers to all the District’s interrogatories and produce all documents, except those protected by the work product doctrine, requested by the District in her possession or under her control. Parent’s failure to comply with this Order, absent persuasive mitigating circumstances, will result in the imposition of sanctions on the Parent.

## CONCLUSION

For the reasons above, Parent’s Motion to Quash is **ALLOWED** in part and **DENIED** in part, and the District’s Third Motion to Compel Discovery is **GRANTED** with certain conditions.

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<sup>39</sup> Pursuant to this Order, Parent may not submit documents as exhibits at hearing not produced in accordance with Hearing Rule IX(A) (“the Five Day Rule”) as well as any information withheld from discovery despite orders to the contrary.

<sup>40</sup> Mass. R. Civ. P. 37(b)(2) confers authority upon courts to levy sanctions against a recalcitrant party: “If a party...fails to obey an order to provide or permit discovery...the court in which the action is pending may make such orders in regard to the failure as are just...” The Rule provides a list of penalties that can be implemented at the discretion of the court.

## ORDER

Parent is directed to submit her responses to the District's Requests for Production of Documents and Interrogatories no later than close of business on July 27, 2017.

Parent is directed to submit those records in the possession of advocate Julliana Jennings responsive to the District's discovery requests no later than close of business on July 27, 2017. To the extent she believes any of those records is protected from discovery by the work product doctrine, Parent must file for a Protective Order as to those materials by close of business on July 27, 2017. Parent shall include in her Motion for a Protective Order a description of the documents she intends to withhold, if any, and show that each identified document was prepared (1) by Ms. Jennings and (2) in anticipation of litigation and not for the broader purpose of her work with the family, that is, exploring and securing an alternate placement for Dorian.

To the extent the District believes it has substantial need of any of the records as to which work product protection has been asserted and cannot, without undue hardship, obtain their substantial equivalent, or that these records do not qualify for work product protection, it must file its Opposition to Parent's Motion for a Protective Order on or before close of business on August 3, 2017.

The Hearing in this matter will take place at the BSEA on August 14, 15, and 28, 2017, beginning at 10:00 AM each day. Witness lists and exhibits are due by close of business on August 7, 2017. Any requests for postponement must be in writing.

By the Hearing Officer,<sup>41</sup>

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Amy Reichbach  
Dated: July 20, 2017

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<sup>41</sup> The Hearing Officer gratefully acknowledges the assistance of legal intern Paul Hart in the preparation of this Ruling.