

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In Re: Flavio¹

&

BSEA #1810763

Beverly Public Schools

ORDER

This matter comes before the BSEA on the School's Motion for a Protective Order and the Parents' Opposition thereto. At issue are two of the Parents' discovery requests seeking production of accepted IEPs and Amendments, appropriately redacted, of the peers with whom the Student was grouped in Beverly's substantially separate elementary language-based program during the 2017-2018 school year (RPD#11) as well as those with whom Beverly is proposing to group the Student in accordance with his rejected 2018-2019 IEP (RPD#12). The appropriateness of the peer composition of Beverly's language-based program for Flavio was placed in issue by the Parents' Hearing Request.

The School argues that the information the Parents seek is intrusive, irrelevant and overly burdensome. It also contends that production of sensitive information about other students would violate the privacy rights of those students without any countervailing benefit to Flavio. The Parents argue that information about the cognitive, educational and behavioral characteristics of the Student's peer grouping is critical to their assessment of the appropriateness of Beverly's special education program for Flavio. They also contend that the documents sought, appropriately cleansed of all potentially identifying student information, are not immune from disclosure in special education administrative hearings.

¹ "Flavio" is a pseudonym selected by the Hearing Officer to protect the privacy of the Student in documents available to the public.

These arguments are revisited frequently in BSEA matters and have spawned a long line of consistent decisions from which I will not depart here. *Manchester-Essex R.S.D.*, 23 MSER 8 (2017); *Andover Public Schools*, 22 MSER 148 (2016); *Touchstone Public Schools*; 21 MSER 137 (2015); *Wellesley Public Schools and Vic.* 21 MSER 39 (2015); *Mattapoisett Public Schools*, 13 MSER 22 (2007). So long as the requested documents are appropriately cleansed of all personally identifiable references, their release for discovery purposes in an administrative hearing before the BSEA is not barred by 603 CMR 23.07 (4). If the school district cannot determine what information on any given student's IEP is "personally identifiable" it may request further guidance from the Hearing Officer. As the School has not proposed any less intrusive method of obtaining the identical information, its concerns about the potential impact on the privacy rights of the affected students and their families resulting from disclosure and the loss of direct control of the student information, may and will be addressed in a less restrictive manner than full refusal to comply with legitimate discovery requests.

Furthermore, as the information requested by the Parents goes to the heart of their assertion that the peer group in which Beverly proposes to educate the Student is inappropriate for him, the Parents' discovery requests are directly relevant to one of their primary claims. The Parents' discovery request is carefully limited in time, nature and scope and is thus not overbroad to accomplish its stated purpose in this administrative hearing. Arguing educational incompatibility is a common, and important, element of many FAPE claims. The accepted peer IEPs sought by the Parents provide critical information known to the School, and not otherwise readily ascertainable by the Parents before hearing, about the level, materials and strategies of instruction, as well as student/adult presence, movement, behaviors and expectations. Anyone reasonably familiar with the development and implementation of individualized education programs in Massachusetts can glean the necessary relevant information from those documents without reference to, or knowledge of, any individual student.

Therefore, the School's Motion for a Protective Order is DENIED. The School shall provide Parents' counsel with documents responsive to the Parents' Requests for Production of Documents #11 and #12 no later than September 13, 2018. The following conditions apply to the release, receipt, custody and maintenance of the School's document response:

- 1.) The documents requested shall be cleansed of all identifying information, including, at minimum, the name of the child, name(s) of parent(s) or other family members, address, date and place of birth, gender, race/ethnicity, any language(s) other than English that are spoken by student and/or parents; and any student number(s) assigned to such student(s).

- 2.) The redacted documents shall be provided solely to counsel for the Parents, and not to the Parents, Student, or any other person or entity. Counsel for the Parents may disclose the redacted documents to experts who are assisting Parents regarding appropriate peer groupings for Student and related issues and/or who may testify at the Hearing.
- 3.) Counsel for the Parents may submit copies of some or all of the redacted documents as exhibits at hearing.
- 4.) Except as described in (2) and (3) above, counsel shall not disclose the documents or information therein to any other person or entity.
- 5.) Upon the close of the record in this matter, counsel for the Parents shall ensure that any copies of documents that may have been provided to experts per Paragraph 2 are returned to counsel.

By the Hearing Officer

Lindsay Byrne
Dated: August 14, 2018