

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

Student

&

BSEA No. 1904777

Montachusett Regional Vocational
Technical School

**RULING ON SCHOOL'S AMENDED MOTION TO DISMISS, CONSTRUED AS
AN AMENDED MOTION FOR SUMMARY JUDGMENT**

On December 17, 2018, Montachusett Regional Vocational Technical School ("Monty Tech") filed a Motion to Dismiss Mother's hearing request. On December 21, 2018, this Hearing Officer issued an order stating that Monty Tech's request for dismissal would be construed as a Motion for Summary Judgment and setting a deadline for Mother's response. On January 11, 2019, after considering the School's Motion and Mother's Opposition, I issued a Ruling denying the School's Motion for Summary Judgment based on the existence of an apparent dispute of material fact regarding the scope of a District Court abuse prevention order which was the primary basis for the School's Motion. Specifically, Mother had submitted copies of correspondence between her and Monty Tech that appeared to show that until October 2018, the School was furnishing Mother with some of Student's education records and allowing limited participation in the Team process despite its knowledge of the abuse prevention order. The Ruling of January 11, 2019 is incorporated by reference herein.

On January 11, 2019, the same day that I issued the foregoing Ruling, the School filed an Amended Motion to Dismiss which noted that the Student had turned 18 years of age on that date (January 11, 2019) and had decided to retain all educational decision-making authority himself, rather than to delegate such authority to, or share it with, either Parent. Additionally, the school elaborated on the legal basis for the its original Motion, including a discussion of MGL c. 71 §34H(a)—(e), which addresses certain rights of non-custodial parents.

In sum, in both its original and amended Motions, the School argues that the abuse prevention order to which Mother has been subject since September 2017 strips her of any right of access to Student's educational records or to

participation in the IEP process. As such, the School contends that it is prohibited from providing Mother with such access. Monty Tech relies on several provisions of the Family Educational Rights and Privacy Act (FERPA), 20 USC §1200 et seq., and its regulations, as well as portions of the IDEA which incorporates pertinent provisions of FERPA. In addition, the School refers to MGL c. 71, §34H, which sets forth certain rights of non-custodial parents, arguing that by operation of this statute, Mother has no right to access Student's records.

The Mother filed an Opposition to the Amended Motion on January 11, 2019, in which she argued that the abuse prevention order at issue did not specifically bar Mother from access to records or from participating in Team meetings via teleconference when Student was not present in the room. Mother reiterated that she had exercised these rights until approximately mid-October 2018 when she filed a complaint with the Program Resolution System (PRS) of the Department of Elementary and Secondary Education (DESE). Mother argues that Monty Tech stopped providing her with Student's education records after she filed her complaint with DESE in retaliation for such filing. Finally, Mother argued that Student's having reached the age of majority did not render this matter moot, as her claims arose during his minority.

I will construe the School's Amended Motion to Dismiss as an Amended Motion for Summary Judgment, and will consider each of its arguments in turn.

1. **Do state and federal law prohibit Mother from access to Student's educational records as a non-custodial parent?**

There are several sources of law governing access of non-custodial parents to their children's student records. The Federal provisions that relate to all students, whether or not they are eligible for special education services, are contained in FERPA, 20 USC §1232 et seq., and its regulations at 34 CFR Part 99. The corresponding Massachusetts law is set forth in MGL c. 71§34H and the corresponding regulations at 603 CMR 23.01. These statutes and regulations provide that all parents—both custodial and non-custodial—may view their children's educational records, unless the parents are specifically prohibited from doing so by court order, state statute, or other "legally binding document." The relevant FERPA regulation states the following:

An educational agency or institution shall give full rights under the Act [FERPA] to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation or custody that *specifically revokes these rights.*

34 CFR Part 99.4 (Emphasis supplied).

The relevant Massachusetts statute, MGL c. 71, §34H provides as follows regarding non-custodial parents:

(a)...For purposes of this section, any parent who does not have physical custody of a child shall be eligible for the receipt of [certain student] information unless: (1) the parent's access to the child is currently prohibited by a temporary or permanent protective order, *except where the protective order, or any subsequent order which modifies the protective order, specifically allows access to the information....*All such documents limiting or restricting parental access to a student records...shall be placed in the student's record.

(b) ...

(c) Upon receipt of a request for information under this section, the school shall review the student record for any documents limiting or restricting parental access to a student's records...and shall immediately notify the custodial parent of the receipt of the request..[and the information] shall be provided to the requesting parent after 21 days *unless the custodial parent provides...documentation of any court order which prohibits contact with the child, or prohibits the distribution of the information...or which is a temporary or permanent court order...to provide protection to the child...from abuse by the requesting parent unless the protective order or any subsequent order which modifies the protective order, specifically allows access to the information...*

[there is no subsection (d)]

(e) At any time the principal of a school is presented with an order of a probate and family court judge which prohibits the distribution of information pursuant to this section, the school shall immediately cease to provide said information and shall notify the requesting parent that the distribution of information shall cease... (Emphasis supplied)

The corresponding state regulation at 603 CMR 23.07(5)(a) provides that a “non-custodial parent is eligible to obtain access to the student record unless”

1. the parent has been denied legal custody or has been ordered to supervised visitation based on a threat to the safety of the student and the threat is specifically noted in the order pertaining to custody or supervised visitation, or
2. the parent has been denied visitation, or
3. the parent's access to the student has been restricted by a temporary or permanent protective order, *unless the protective order (or any subsequent order modifying [it]) specifically allows access to the information contained in the student...*

603 CMR 23.07(5)(a) (Emphasis supplied)

Consistent with MGL c. 71 §34H, the above-quoted regulation requires a school to notify the custodial parent of a request for student records by the non-custodial parent, and shall provide the non-custodial parent with such records in 21 days unless the custodial parent provides documentation of the non-custodial parent's ineligibility for information for one of the above-listed reasons. 603 CMR 23.07(5)(b)-(f).

In light of the above-cited statute, it is clear that Mother would not have been entitled to access to Student's educational records if he had not been receiving special education services. Although the divorce decree issued by the Probate and Family Court in August 2016, which became final in November 2016, did not prohibit—and in fact explicitly allowed—Mother's access to Student's educational record, that portion of the decree was superseded by an abuse prevention order that was issued by the Gardner District Court in September 2017 and extended twice, in October 2017 and October 2018. There is no dispute that this abuse prevention order directed Mother to refrain from contacting Student (unless he initiated the contact) and stay away from Monty Tech.

Significantly, the abuse prevention order did not and does not contain any language specifically allowing access to Student's records as required by MGL c. 71, §34H(a) and (c) and 603 CMR 23.07(5)(a)(3). Although the initial protective order allowed for modification by the Probate Court, neither party has submitted evidence that either the Probate Court or the District Court modified the abuse prevention order at any time. The abuse prevention order, which was issued subsequent to the original divorce decree and which has never been modified, falls within the purview of MGL c. 71 §34(c) and 603 CMR 23.07(5)(a)(3). As such, upon receipt of documentation of the abuse prevention order, Monty Tech was not obligated to continue providing Mother with student record information pursuant to MGL c. 71, §34H(c) and 603 CMR 23.07(5)(a)(3).

Mother argues that the Massachusetts student record regulations do not allow schools to withhold student records from non-custodial parents unless there exists a written court order to that effect in the school's possession. It is true that 603 CMR 23.07(5)(f)¹ requires schools to cease providing records to non-custodial parents upon receipt of "court order that prohibits distribution of information pursuant to MGL c. 71, §34H," and the protective order at issue does not contain such a prohibition. Notwithstanding this provision, the statute at MGL c. 71, §34H(a) and state regulations at 603 CMR 23.07(5)(a)(3) state unequivocally that the very existence of a protective order may bar access to student records unless that order explicitly states otherwise.

¹ Mother cited to 603 CMR 23.02 in support of her argument, but that citation appears to have been made in error.

The only remaining issue with respect to records is whether Student's eligibility for and receipt of special education services leads to a different result. As stated in the original Ruling, the IDEA, MGL c. 71B, and the regulations implementing each of these statutes, grants parents of special education students the right to view their children's complete education records. In the special education context, this right to view records is particularly important, and is deemed one of the key procedural protections granted to parents of students with disabilities, essential to ensure that parents can fully participate in the process of developing their children's educational programming. (See citations in Ruling of January 11, 2019.) Given the importance of this right for parents of special education students, any proposed restrictions must be reviewed carefully. The applicable federal special education regulation states the following:

an [educational] agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have this authority under applicable State law governing such matters as guardianship, separation and divorce.

34 CFR 300.613(c). In this case, the abuse prevention order from the Gardner District Court does not explicitly deprive Mother of the authority to "inspect and review" Student's records; however, this order prohibits or restricts contact with Student. Under the "applicable State law," which is MGL c. 71, §34H(c), and 603 CMR 23.07(5)(a)(3), Mother lacks authority to review Student's records despite his status as a special education student.

In her Oppositions to the School's original and Amended Motion, Mother suggested that the District Court did not intend to restrict her access to Student's educational records, and that various School employees were aware that this was the case. Mother may be correct; however, neither the District Court nor the Probate Court memorialized its intention to allow Mother access to school records in writing, either via a written modification of the abuse prevention order or even another document such as a letter from a court official. As a matter of law, Monty Tech cannot be found in violation of applicable law for relying on the official, unmodified written orders from the District Court.² And while the intended meaning and scope of the abuse prevention order may be subject to dispute, that dispute must be resolved in the District Court that issued the order, not at the BSEA. Based on the foregoing, I find that as a matter of law, Mother is not entitled to Student's educational records for the period in question.

² Similarly, Mother's retaliation claim cannot lie against the School for its compliance with relevant statutory and regulatory requirements, regardless of the temporal proximity of Mother's filing her complaint with DESE and the School's decision to begin withholding student record information from her.

2. Does the Mother have standing to contest whether her procedural rights have been violated?

Prior to October 2018, Mother gave her input to the Team by telephone conference, either before or after Team meetings pursuant to her right to “consult and confer” as stated in the Probate Court decree. In her hearing request, Mother’s complaint seems to be that this limited participation was hampered by her lack of access to Student’s records. (It is not clear whether she sought additional participation in the meetings themselves.) While a parent’s custodial status does not necessarily deprive that parent of standing to assert procedural rights under special education statutes and regulations, in the instant case, the restriction on Mother’s access to records and to participation in Team meetings comes from the Probate and District Courts, and not from the School. As such, the relevant courts, not the BSEA, are authorized to address these restrictions.

3. Can the BSEA order the relief requested by the Mother?

The BSEA cannot order prospective relief in the form of a new IEP meeting in which Mother participates because Student is now 18 and has retained educational decision-making authority. The only way that Mother can participate in future Team meetings is if Student consents to her participation. Additionally, if Mother seeks to physically attend meetings, as opposed to conferring with Team member as she has done in the past, she would also need to get the permission of the District and/or Probate Court in addition to that of her son.

4. Can the BSEA order financial compensation to Mother?

The BSEA has authority to order school districts to fund evaluations, placements³ or services that a hearing officer finds are necessary to provide a child with a free, appropriate public education. The BSEA has absolutely no authority to award monetary damages to parties. *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 45 IDELR 268 (1st Cir. 2006).

CONCLUSION AND ORDER

For the foregoing reasons, upon further consideration, I find that there is no dispute of material fact that is within the scope of the BSEA’s authority to consider, that any such dispute must be resolved by the District Court and/or the Probate and Family Court, and the School must prevail as a matter of law. As such, my ruling of January 11, 2019 is Vacated, the School’s Amended Motion to Dismiss, construed as an Amended Motion for Summary Judgment of Monty Tech is GRANTED.

³This includes reimbursement to parents for the cost of a unilateral placement when the district has failed to offer or provide an appropriate IEP and placement.

By the Hearing Officer,

Sara Berman

Dated: January 28, 2019