

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

In Re: Student v.
Duxbury Public Schools

BSEA #1803977

**RULING ON THE ADVOCATE’S MOTION FOR PROTECTIVE ORDER
& OTHER ORDERS**

On December 6, 2017, Parents in the above-referenced matter filed Objections to Discovery Requests of Duxbury Public Schools (Duxbury). On December 11, 2017, Duxbury filed Objections to Parents’ Discovery Requests and Motion for a Protective Order. Parents filed a Response to Duxbury’s Motion on December 18, 2017, Thereafter the Parties have been attempting to resolve their discovery dispute.

On or about December 19, 2017, Duxbury privately served a subpoena to Kathleen F. Bach, Parents’ special education advocate, commanding her to produce documents to Duxbury’s attorney’s office by the close of business on January 5, 2018 (Dux.E-A and Dux.E-B). On January 5, 2018, Ms. Bach filed a Motion for Protective Order seeking to bar Duxbury from discovery of documents in her possession other than her Team meeting notes. Ms. Bach argued that she had been retained by the family after the family had engaged the services of an attorney, noting her understanding that all of her work with the family would be protected because it was in preparation for Hearing. Ms. Bach seeks to have all documents (other than her Team meeting notes) considered work product pursuant to Mass. R. Civ. P. 26(b)(3) and the Fed. R. Civ. P. 26(b)(3)(A).¹ Ms. Bach is not an attorney and as such is not claiming any privilege under the attorney-client privilege.

Duxbury filed an Opposition to the Motion for Protective Order and Memorandum of Law in Support of the Motion on January 11, 2018. In it, Duxbury argues that: a) its subpoena was properly served; b) the documents sought (documents and communications related to Student created and maintained by the advocate on behalf of Student) are limited and relevant to the issue before the BSEA, (i.e., reimbursement for unilateral placement of Student) and/or may lead to the discovery of admissible evidence; and c) no privilege applies to the documents sought, that is, the communications are not protected consistent with the attorney client privilege or the work product doctrine.

Contrary to Ms. Bach’s assertions, Duxbury argued that Ms. Bach had been working with the family since at least 2016 noting that she attended at least four (4) Team meetings prior to commencement of the instant action.

¹ Both of these rules protect written materials and mental impressions which are created in anticipation of trial as discussed later in this ruling.

According to Duxbury, the advocate's relationship with Parents and Student is directly related to the special education process, including advocacy on behalf of her clients regarding Student's program and placement, which is precisely the subject of this appeal.

Duxbury seeks denial of Ms. Bach's Motion for Protective Order and also seeks an Order that Ms. Bach responds to Duxbury's request for production of documents.

On January 18, 2018, Parents' attorney filed a request to join Kathleen Bach's Motion for Protective Order stating that the record being subpoenaed pertained to Student and included communications with Parents. The attorney also noted that his clients had standing to move to preclude the records. Parents' attorney requested an opportunity to be heard orally on the Motion which request was granted.

An Order scheduling the Motions Session for February 12, 2018, was issued on January 23, 2018. Said Order instructed the attorneys to continue to work cooperatively to resolve the remaining discovery disputes and re-submit any items on which they were unable to reach agreement to the Hearing Officer by February 2, 2018.

A hearing on the motion was held on February 12, 2018. This Ruling takes in consideration the written submissions and oral arguments made by the Parties.

On February 28, 2018, Duxbury renewed its Opposition to Ms. Bach's Motion for Protective Order advancing substantially the same arguments as before.

Discussion:

Ms. Bach's and Parents' attorney's arguments center on Fed. R. Civ. P. 26(b)(3) addressing trial preparation materials states at section A,

(A) *Documents and Tangible Things*. 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 (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1) and

(ii) 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.

(B) *Protection Against Disclosure*. 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.

The record shows that Parents' Hearing Request, dated November 3, 2017, was received at the BSEA on or about November 6, 2017 (Administrative Record). The Hearing Request was filed by Attorney Goguen, a duly licensed attorney in the state of Massachusetts, who has been representing Parents at all times since initiation of the BSEA case.

Ms. Bach has been working with Parents as an advocate since September 2016. During that time she has attended numerous Team meetings and has communicated extensively with Parents. She did not file the Hearing Request nor is she representing Parents before the BSEA. Ms. Bach claimed that all of her involvement with the family was in preparation for a potential hearing at the BSEA and as such, her work product should be protected.

Attorney Goguen stated that he is a litigator and does not get involved in the day-to-day responsibilities. He noted that he seldom attends IEP meetings and does not conduct many of the other functions typically ascribed to advocates. For this reason, he often recommends that his clients engage advocates to guide and help them navigate the process while he monitors the case in the background. In the instant case, Attorney Goguen recommended that Parents engage Ms. Bach as their advocate. Attorney Goguen noted that he and Ms. Bach often refer clients to one another. Ms. Bach is not an employee or agent of Attorney Goguen. Attorney Goguen further asserted that Ms. Bach is not an expert, but rather a consultant who provides guidance in special education. Ms. Bach holds licensure as a physical therapist in Massachusetts.

Attorney Goguen argued that the key issue is that the documents created by Ms. Bach were created in anticipation of litigation and since he recommended that Parents hire her, all communications between Parents and Ms. Bach and between Ms. Bach and he are protected. Lastly, he argued that the documents between he, Parents and Ms. Bach are not relevant and the District does not have a substantial need for these materials.

Duxbury argued that consistent with case law, the work product rules are to be given narrow interpretation. Duxbury noted that Parents were represented by Attorney Goguen, not by Ms. Bach. Despite Ms. Bach having being referred to Parents by Attorney Goguen this did not necessarily mean that her 14 months of involvement with the family was "in contemplation of litigation." Rather, the role of an advocate, according to Duxbury, was typically to assist families and work with school districts to resolve matters so as to avoid litigation. With this understanding, Duxbury noted that it had been working with Parents in good faith. Duxbury further argued that even if Ms. Bach's materials were protected, they were relevant to the hearing and Duxbury had a substantial need for them in order to properly defend itself.

The law is clear that the communications and work product pertaining to attorneys is protected. As such, any communication between Parents and Attorney Goguen is protected. In contrast, Ms. Bach is neither an attorney nor Parents' representative in the BSEA case. Her involvement with the family preceded initiation of the present dispute by approximately 14 months and appears to extend beyond the current BSEA case. In her role as advocate she assisted Parents through the Team process on at least four occasions and likely helped them with other issues typically encountered in special education disputes. As an advocate, her

functions would likely extend beyond the services offered by an attorney in the context of litigation.

The myriad services offered by advocates may include participation at most or all Team meetings so as to present, explain or otherwise support parents as they navigate the Team process. They also assist parents in their search for evaluators and may research, observe, inquire about and evaluate possible placements for students. They may assist parents and students in engaging state agencies. They also make recommendations to parents regarding programmatic options, services and placements, and the like. In this context, it is reasonable to expect that advocates would commonly maintain a record of their involvement and communications in the ordinary course of business. Even if a family chooses to engage in litigation, or is engaged in litigation by a school district, it does not mean that *all* of an advocate's involvement in every situation occurs in anticipation of litigation.

Here, other than a blanket statement and Ms. Bach's "understanding" that her communications would be protected, Ms. Bach offers nothing to suggest that all of her involvement with Parents/Student was "in anticipation of litigation" or "because of the prospect of litigation" within the context of state and federal rules of civil procedure on which she relies. See *Commissioner of Revenue v. Comcast Corp.*, 453 Mass. 293 (2009) (citing *United States v. Textron Inc.*, 553F.3d. 87 (1st Cir. 2009) which stressed as a determining factor whether documents would have been prepared "irrespective of the prospect of litigation"). Moreover, such a statement would be contrary to the intent of the IDEA that all parties work cooperatively to make important educational decisions for students with disabilities as Duxbury correctly argues.

To facilitate informal resolution of disputes the IDEA offers several mechanisms that foster cooperation between and among parties. This preference for informal resolution is poignantly seen in the 2004 reauthorization of the IDEA which incorporated a resolution session period in all parent initiated hearings, presumably to encourage parties to come together and resolve matters prior to hearing while continuing to offer other avenues for informal resolution of disputes such as mediation.

Duxbury correctly argues that to assume that every time a Parent engages an advocate is because they know that they will proceed to hearing is contrary to the spirit of the IDEA, which encourages parents and school districts to work cooperatively for the educational benefit of eligible students.² Moreover, Duxbury is further persuasive in arguing that often, when parents engage advocates instead of attorneys, they do so to have a knowledgeable person in the field guide them through the process and advise them and to avoid, rather than initiate, a due process hearing.

² See 34 CFR §300.321 (requiring that parents, educators, service providers and relevant individuals knowledgeable about the student, the evaluative measures used in assessing the student, special and general education curriculum, available services though outside agencies and if appropriate the student, convene to discuss and make the necessary decision to develop a student's IEP).

Duxbury further persuasively argued that Ms. Bach's work was conducted in the context of her usual business as an educational advocate. Courts have established a difference between documents prepared for the purpose of litigation and those prepared in the regular course of business, even if litigation was a prospect. See *Diversified Industries, Inc., v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977); *Simon v. G. D. Searle*, 816 F.2d 397, 401 (8th Cir. 1987). The records sought by Duxbury under its subpoena were created by Ms. Bach in the regular course of her advocacy work and not because of the prospect of litigation. Parents were already being represented by Attorney Goguen in the context of litigation and it was he who requested the BSEA Hearing on Parents' behalf and has continued to represent them at all times.

Ms. Bach is not a representative of Attorney Goguen, nor is she his employee, something that may arguably protect her records/documents against discovery.³ During the Motion Session Attorney Goguen noted the aforementioned and stated that *he* is the individual responsible for the litigation. Moreover, during the majority of Ms. Bach's involvement, litigation was not pending and neither party had made assertions regarding their intent to file a claim. As such, even if the work product doctrine could be successfully raised under a separate set of facts, it would not apply to Ms. Bach's work in the instant case; therefore, I decline to extend work product protection to Ms. Bach's work. Her belief that it ~~she~~ was protected in this regard was misplaced.

Similarly, Ms. Bach and Attorney Goguen cannot successfully argue that there is a relationship between them that would somehow protect Ms. Bach's email communication with him as she is not his employee, representative or client. In this too, her belief that her communications were protected is misplaced.

Duxbury further argued that regardless of whether the work product doctrine applied to Ms. Bach's work, certain documents would be excluded; namely, Ms. Bach's communications with Dr. Amity Kulis, Dr. Drew Coman, Dr. Jocelyn R. Healey, Dr. Michael Schonberg, Dr. Lynn Ruth Grush, the Department of Developmental Services, and ARC of Greater Plymouth because Parents placed the records pertaining to the aforementioned providers at issue.⁴

Ms. Bach bore the burden of demonstrating that any of the documents in her possession subject to Duxbury's subpoena are protected by the work product and hence, not discoverable. She conceded that some of the documents, such as her Team meeting notes, were relevant and discoverable and she had forwarded them to Duxbury shortly before the

³ 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"; see also *Judicial Watch, Inc. v. U.S. Dept. of Homeland Sec.*, 736 F.Supp.2d 201 209 (D.D.C. 2010) reaching the same conclusion.

⁴ Here, Parents specifically claim that Duxbury failed to propose an educational program that effectively addresses Student's mental health, emotional and behavioral needs. Furthermore, Parents have raised Student's mental, emotional and behavioral needs as an element of their claim and have relied on the recommendations of the aforementioned providers to support their position and request public funding for a year-round out of district placement.

Motion Session. She stated that she also released a log identifying which documents she believed were protected, but Duxbury's attorney had not yet seen any of this information. However, on February 28, 2018, Duxbury's renewed Opposition noted that Ms. Bach produced only her notes from four (4) Team meetings, and that her fifteen pages log noted that she had withheld the following documents:

Narrative descriptions and IEPs (11 items), Team meeting summaries (6 items), IEP progress reports and report cards (10 items), drafts (2), consultant reports (9), school evaluations (6), independent educational evaluations (10), work samples, miscellaneous items, and 10 pages listing the dates and subjects of email communications between Ms. Bach and Parents, and Ms. Bach and Attorney Goguen.

Duxbury argued that if it were denied the ability to thoroughly review the requested records in Ms. Bach's possession, including those involving the providers mentioned above, Duxbury would be unable to "evaluate the accuracy, validity or comprehensiveness of the providers' recommendations and respond to those recommendations for the purposes of this dispute." Duxbury noted that Parents cannot on the one hand rely on the recommendations and favorable communications of the aforementioned providers and then claim that the records are protected. In relying on said individuals and their recommendations, Duxbury asserted that Parents have waived any protections regarding the requested records.⁵

Lastly, Duxbury asserted that it has a substantial need for the documents in preparing for Hearing and would suffer undue hardship in obtaining substantially equivalent information.⁶ Duxbury required the information which it is unable to obtain from other unprotected sources in order to respond to the allegations that it failed to offer Student an appropriate program that addressed his social, emotional, behavioral and academic needs allegedly resulting in Student's failure to make effective progress, or whether Student's alleged lack of progress was due to Student's "increasingly complex and non-educational needs." I agree. As such, Ms. Bach's Motion for a Protective Order Relative to Duxbury's Subpoena is **DENIED**.

ORDER:

Ms. Bach shall produce the records requested by Duxbury pursuant to the Subpoena *Duces Tecum* served on December 19, 2017, by the close of business on March 12, 2018.

By the Hearing Officer,

Rosa I. Figueroa

Dated: March 1, 2018

⁵ See *Cherkaoui v. City of Quincy*, No. 14-CV-10571-LTS, 2015 WL 4504937, at *2 (D. Mass. 2015) ("Where a patient uses the substance of the psychotherapist-patient relationship to further his or her own cause, they cannot claim that the communication is privileged, because the privilege cannot and should not at once be used as a shield and a sword.") (internal quotation marks omitted).

⁶ See FED.R.CIV. P. 26(B)(3)(A)(II).