

17-004.13 ✓

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

HOUSING COURT DEPARTMENT  
CITY OF BOSTON DIVISION  
CIVIL ACTION  
NO. 11H84CV000313

STEVEN SAPIENZA,

Plaintiff

VS.

MATTHEW BEAULIEU, as Personal Representative of the ESTATE OF  
CATHERINE FARRELL, and PETER RYAN, Contractor, doing business as  
PETER RYAN DE-LEADING CO.

Defendants

**ORDER RELATING TO DISCOVERY OF SCHOOL RECORDS OF  
PLAINTIFF'S SIBLING**

The plaintiff, Steven Sapienza, has alleged in this civil action that he suffered lead poisoning by ingesting lead while residing at an apartment owned by Catherine Farrell. He claims that as a direct and proximate result of this lead poisoning he has suffered injuries including cognitive impairments.

Sapienza has a ten-year old sibling who attends the Henderson Inclusion School located in the Dorchester section of Boston. In the course of discovery defendant Beaulieu served a deposition subpoena duces tecum to the keeper of records of the Henderson Inclusion School seeking the school records pertaining to Sapienza's sibling. Sapienza filed a motion seeking to quash that subpoena claiming that the records sought are outside the scope of discovery because the information contained in those records would not be relevant to the issue of whether factors other than lead poisoning caused or

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contributed to Sapienza's cognitive injuries and would not be reasonably likely to lead to the discovery of admissible evidence relevant to that issue.

School records are ordinarily not subject to public disclosure. G.L. c. 66, §10. They are treated as "confidential." 603 C.M.R. 23.01. However, there is no recognized privilege that would prevent a third party from obtaining such school records by subpoenaing them during discovery or at the time of trial. *Commonwealth v. Beuchemin*, 410 Mass. 181, 185 (1991). In ruling on the plaintiff's motion the standard to be applied is the discovery standard set forth in M.R.Civ.P. 26(b)(1). [*Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information appears reasonably calculated to lead to the discovery of admissible evidence.*"]. While school records are not generally subject to a statutory privilege, they may contain information or reports prepared by third parties that may be subject to a statutory privilege. Accordingly, the Court shall apply the guidelines and procedures set forth in *Commonwealth v. Bishop*, 416 Mass. 169 (1993) with respect to the review and disclosure of these documents.

In her affidavit the neuropsychologist retained by the defendant, Martha A. Collette, states that "[t]here is a known familial association for such things as attention deficit disorder, specific learning disabilities, such as speech delay, and mental illness. The expected occurrence of these kinds of conditions is influenced by whether such conditions are present in other family members . . . Therefore, it is imperative to evaluate the available medical and educational records for other family members for whom there is no evidence of elevated blood lead levels . . . [The sibling's] records would be highly relevant to an understanding of the genetic influences and environmental forces that contributed to Mr. Sapienza's school achievement and general neuropsychological functioning." Dr. Collette also states that the sibling's school records would "likely provide objective and detailed documentation of educational attainment and performance . . ." However, Dr. Collette does not state that access to information pertaining to "educational attainment or performance" alone (meaning the sibling's grades untethered from behavioral or learning disability factors) would be a necessary or useful component

of her evaluation of Sapienza. I will hold Dr. Collette to her limited proffer. I am satisfied that Dr. Collette has presented sufficient basis grounded in science to allow her to review the sibling's school records only to the extent that the records include information pertaining to "attention deficit disorder, specific learning disabilities, such as speech delay, and mental illness." To the extent the school records include such information, the records may lead to the discovery of admissible evidence, and are likely to be relevant to an issue in this case. The production and review of the sibling's school records shall be subject to the Court's *in camera* review as set forth below.

Accordingly, the defendant's Motion to Quash Subpoena Duces Tecum is DENIED. The defendant may proceed to depose the keeper of records of the Henderson Inclusion School to obtain the school records of the plaintiff's siblings. However, the production, release, review and disclosure of these records shall be subject to the strict procedures set forth below.

**Procedure For Review of School Records**

- a. Defendants' COUNSEL shall direct the keeper of records of the Henderson Inclusion School to present the sibling's school records in a sealed envelope that shall be marked at the deposition as Exhibit A. Neither Defendants' COUNSEL nor anyone else shall open the sealed envelope or otherwise view the school records produced at the deposition. The school records marked as Exhibit A shall be delivered directly to the Court under seal in complete and unredacted form. I shall review the records *in camera*. The school records shall initially be reviewed by me for the purpose of determining whether the records or any portion thereof contain information subject to a statutory privilege. With respect to any school records found to be subject to a privilege, I shall make an initial determination as to whether those records are actually relevant to the subject matter involved in the pending action in accordance with the *Bishop* guidelines, meaning whether they contain information pertaining to "attention deficit disorder, specific learning disabilities, such as speech delay, and mental illness." With respect to any school records that are not subject to a privilege I shall review such records to

make an initial determination as to whether they are relevant or likely to lead to the discovery of relevant evidence to the extent the records contain information pertaining to "attention deficit disorder, specific learning disabilities, such as speech delay, and mental illness." All privileged or unprivileged records that I determine are not subject to disclosure shall be so identified, set aside and sealed, and in the event of an appeal, shall be transmitted by the Clerk to the reviewing Court.

- b. If I make an initial determination that any of the school records are relevant or likely to lead to the discovery of relevant evidence, I shall appoint a guardian ad litem to represent the interests of the minor sibling. I shall then schedule a hearing to allow the guardian ad litem to present any motions and arguments on behalf of the minor sibling pertaining to the disclosure of those specific school records.
- c. Subject to any limiting orders I may issue that address the minor sibling's privacy interests, all school records that I determine are relevant or likely to lead to the discovery of relevant evidence shall be provided to COUNSEL for the defendant and plaintiff in their capacity as officers of the Court. Defendants' COUNSEL may provide Dr. Collette with copies of the records. However, defendants' COUNSEL, plaintiff's COUNSEL and Dr. Collette shall not copy, disclose or disseminate any portion of the records (or information contained in those records) to any other person without prior application to and an order from this Court. No portion of the school records shall be quoted in or appended to any other document. The records, and the contents of the records, shall not be disclosed to or reviewed by any other experts, consultants or other person without prior approval of the Court. COUNSEL shall not contact or communicate with any third person identified in the records without prior approval of the Court.
- d. Should COUNSEL for either party seek to copy, disclose or disseminate any portion of the records (or information contained in those records) to any

person other than Dr. Collette, COUNSEL shall by motion request permission and an order from this Court. If either COUNSEL believes that a third-party (other than members of the immediate family) referred to in those records may be adversely affected by disclosure of information in the records to the person(s) identified in such disclosure motion, s/he should bring it to the attention of the Court by means of a written objection to the disclosure motion.

- e. COUNSEL shall not offer any portion of the sibling's school records (or information contained in those records) obtained pursuant to this order in evidence at trial or in connection with any other proceeding without prior application to and an order from this Court.
- f. At the conclusion of any trial or other disposition of this action, COUNSEL shall deliver to the Clerk all originals and all copies of any sibling school records produced to COUNSEL pursuant to this or any subsequent order of the Court. The Court shall enter appropriate orders for the final disposition of such records.

**SO ORDERED.**

  
**JEFFREY M. WINIK**  
**ASSOCIATE JUSTICE**

**March 6, 2013**

cc: **Ralph C. Sullivan, Esquire**  
**Linda M. Smith, Esquire**  
**Jotham Kinder, Esquire**