

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

In Re: Student v. Northborough Public Schools

BSEA # 2201162

**RULING ON THE DEPARTMENT OF ELEMENTARY AND SECONDARY
EDUCATION'S
MOTION TO VACATE OR QUASH THE SUBPOENA
AND
PARENT'S MOTION TO QUASH SERVICE AND TO DISMISS**

This matter comes before the Hearing Officer on the October 26, 2021 Motion to Vacate or Quash the Subpoena *Duces Tecum* (Motion) by the Department of Elementary and Secondary Education (DESE), a non-party entity, regarding a subpoena (the Subpoena) issued by the Bureau of Special Education Appeals (BSEA) at the request of the Northborough Public Schools (the District or Northborough). As grounds thereof, DESE asserted that DESE is prohibited from producing the requested records without an order requiring such production and that the subpoena is unduly burdensome on DESE because the school district can obtain the information directly from the Parent.

On October 25, 2021, Parent filed a Motion to Quash Service and to Dismiss, requesting that the subpoena at issue “be quashed.”¹ Parent argued that “that the matter can be vacated if *‘the documents sought are not relevant to any matter in question.’*”

On or about November 1, 2021, the District responded, arguing that the information sought is relevant to this proceeding and the subpoena does not pose an undue burden on DESE.

The parties did not request a hearing on the Motion, and I found that a hearing was not needed because it was not likely to advance my understanding of the issues.² For the reasons set forth below, DESE’s *Motion to Vacate or Quash the Subpoena* is DENIED. Parent’s *Motion to Quash Service and to Dismiss* is also DENIED.

RELEVANT FACTS³ AND PROCEDURAL HISTORY:

1. Student is a resident of Northborough, Massachusetts and is currently being homeschooled.
2. On August 4, 2021, Parent filed a Request for Hearing in the above referenced matter asserting, in part, that the District failed to provide Student with special education

¹ Parent’s *Motion to Quash Service and to Dismiss* also sought that “the action be dismissed,” but Parent later clarified that this was not her wish, and the statement was merely part of a template she had utilized.

² See BSEA Hearing Rule VI D.

³ The following facts are not in dispute and are taken as true for the purposes of this Ruling. These facts may be subject to revision in subsequent proceedings.

services from March 2021 to June 2021 “without any communication to” Parent. In her Request for Hearing, Parent indicated that she had filed a complaint with DESE on May 31, 2021 after Student’s special education services were halted following an alleged inappropriate communication between a special education teacher and Student on Zoom. DESE investigated the matter and found in favor of the District. In the Request for Hearing, Parent asserted that the PRS investigator failed to consider document and information submitted to PRS by Parent. She alleged that the PRS investigator acted with “obvious negligence and bias” against Parent and in favor of the District.

3. On October 1, 2021 at the request of the District, the BSEA issued a Subpoena *Duces Tecum* to Barney Barnett, Director of the Problem Resolution System Officer at DESE, which was received by DESE on October 6, 2021. A copy of the Subpoena was sent to Parent at the same time.
4. The Subpoena sought, in part, the following documents: “[A]ny and all email communications or other written communications to and/or from [Parent] relative to PRS Intake #5813, any and all PRS’s staff notes relative to any communication to and from [Parent] since January 1, 2021....” The Subpoena further states that the District does “not seek production of documents produced by [the District] to PRS or the Department of Elementary and Secondary Education in the [District’s] June 21, 2021 Response to the Parent’s Statement of Concern in PRS Intake #5813.”
5. On October 25, 2021, Parent filed a Motion to Quash Service and to Dismiss arguing that the requested documents are not relevant to the instant matter.
6. On October 26, 2021, DESE filed the instant Motion arguing that the records requested are protected by the Fair Information Practices Act, MGL c. 66A, and the Massachusetts Right to Privacy Law, MGL c. 214, sec. 1B, and the parent, who along with her child are the data subjects, have objected to DESE’s production of the records via an email dated October 20, 2021. DESE also argued the Subpoena is overly burdensome.
7. On November 1, 2021, the District responded, asserting that the information sought is relevant to the current proceeding because in her Request for Hearing, Parent asserts, in part, negligence and bias on the part of DESE’s investigator.

LEGAL STANDARDS:

A. The BSEA's Authority to Issue and Quash Subpoenas

Both the BSEA Hearing Rules and the Formal Standard Adjudicatory Rules of Practice and Procedure which govern due process hearings at the BSEA allow Hearing Officers to issue, vacate or modify subpoenas.⁴ Under BSEA *Hearing Rule* VII B:

Upon the written request of a party, the BSEA shall issue a subpoena to require a person to appear and testify and, if requested, to produce documents at the hearing. A party may also request that the subpoena *duces tecum* direct the documents subpoenaed from a non-party be delivered to the office of the party requesting the documents prior to the hearing date.

⁴ 801 CMR 1.01(10)(g) and BSEA Hearing Rules VII B and C.

According to BSEA *Hearing Rule VII C*:

A person receiving a subpoena may request that a Hearing Officer vacate or modify the subpoena. A Hearing Officer may do so upon a finding that the testimony or documents sought are not relevant to any matter in question or that the time or place specified for compliance or the breadth of the material sought imposes an undue burden on the person subpoenaed.

B. Fair Information Practices Act, MGL c. 66A

Pursuant to MGL c. 66A sec. 2(c), holders maintaining personal data systems may not allow any other agency or individual not employed by the holder to have access to personal data unless such access is authorized by statute or regulations which are consistent with the purposes of this chapter or is approved by the data subject whose personal data are sought if the data subject is entitled to access. A holder must also inform in writing an individual, upon his request, whether he is a data subject⁵ and maintain procedures to ensure that no personal data are made available in response to a demand for data made by means of compulsory legal process, unless the data subject has been notified of such demand in reasonable time that he may seek to have the process quashed.⁶

C. Massachusetts Right to Privacy Law, MGL c. 214, sec. 1B

Pursuant to MGL c. 214, sec. 1B, a person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

APPLICATION OF LEGAL STANDARDS AND CONCLUSION:

After considering the arguments of DESE, the Parent, and the District, DESE's *Motion to Vacate or Quash the Subpoena* is DENIED. Parent's *Motion to Quash Service and to Dismiss* is also DENIED. My reasoning is as follows.

In order for me to grant DESE's Motion pursuant to BSEA *Hearing Rule VII C*, I must find that the "documents sought are not relevant to any matter in question or that the time or place specified for compliance or the breadth of the material sought imposes an undue burden on the person subpoenaed."⁷ In this matter, I cannot find that either circumstance exists. In her own Request for Hearing Parent makes the PRS investigation relevant by raising questions of negligence, bias and inadequate investigation on the part of PRS. Moreover, both the PRS complaint and the Request for Hearing relate to the same series of facts which Parent alleges resulted in a denial of a free appropriate education to Student and which are the subject of the present dispute. Hence, I find that the documents requested by the District in the Subpoena are relevant to the instant matter.

⁵ MGL c. 66A sec. (i).

⁶ MGL c. 66A sec. (k).

⁷ *Hearing Rule VII C*.

In addition, the District limited the Subpoena by time (i.e., since January 1, 2021) and breadth (i.e., not seeking production of documents produced by the District to PRS in relation to PRS Intake #5813). I cannot find that such request is unduly burdensome on DESE.

Although DESE argues that the records sought are protected by the Fair Information Practices Act, MGL c. 66A, and the Massachusetts Right to Privacy Law, MGL c. 214, sec. 1B, and the parent who along with her child are the data subjects have objected to DESE's production of the records, I find these arguments unpersuasive. MGL c. 66A requires DESE to contact "data subjects" prior to releasing records, but it does not bar production of said records.⁸ In the present matter, Parent was informed by DESE of the Subpoena, and Parent had an opportunity to voice her objection. Her objection has been considered and is overruled on the grounds of relevance. DESE's argument with respect to the Massachusetts Right to Privacy Law, MGL c. 214, sec. 1B, is similarly unpersuasive as Parent herself has raised the PRS complaint and the resulting investigation in her Request for Hearing, and, as such the release of records relating thereto to the District is not an unreasonable, substantial or serious interference with her or her child's privacy.

ORDER:

DESE's *Motion to Vacate and/or Quash Subpoena* is DENIED. Parent's *Motion to Quash Service and to Dismiss* is also DENIED.

DESE shall comply with the Subpoena *Duce Tecum* within 3 calendar days of the issuance of this Ruling. If the District requires additional time to review the documents produced in compliance with the Subpoena *Duce Tecum* in preparation for the Hearing which is currently scheduled for November 12, 2021, the Hearing Officer will entertain a short postponement of the Hearing.

So Ordered by the Hearing Officer,

/s/ Alina Kantor Nir

Hearing Officer

Dated: November 3, 2021

⁸ See MGL c. 66A sec. 2(k).