

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

In Re: Student

&

BSEA No. 2204488

Dracut Public Schools

RULING ON SCHOOL’S MOTIONS TO QUASH SUBPOENAS *DUCES TECUM*

On January 13, 2022, pursuant to the request of the Parent, who is appearing *pro se* in this matter, the BSEA issued subpoenas *duces tecum* directing nine named employees of the Dracut Public Schools to appear and testify at the hearing on January 20, 2022, and to provide Parent with certain documents by January 18, 2022. On January 18, 2022, the School filed a *Motion to Quash the Subpoenas Duces Tecum to the Extent they Seek Documents from a Party*, asserting that “such subpoenas cannot be issued under the BSEA’s Hearing Rules and...801 CMR 1.01...

In its *Motion*, the School asserts that a party “may only request documents from a non-party [emphasis added] through a subpoena *duces tecum* duly issued by the [BSEA].” The School refers to Rule VII.B.1 of the *BSEA Hearing Rules for Special Education Appeals (Hearing Rules)* in support of this position. The School further argues that “[t]o find otherwise would fundamentally undermine the District’s due process rights as set forth in the discovery process in material prejudice to the district.”

Parent’s *Response to the Motion to Quash*, filed on January 18, 2022, counters, in pertinent part, that she disagrees with the School’s position.¹

Legal Framework

Rule VII of the *Hearing Rules* states that at the request of a party, the BSEA must issue subpoenas requiring appearance of witnesses at due process hearings as set forth below:

B. Issuance

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*. [emphasis supplied]. A party may also request that the subpoena *duces tecum* direct that

¹ Parent also argued that none of the individuals to whom subpoenas were issued is listed as a party in the case. However, because these persons are to appear in their capacity as employees of the District, the subpoenas are deemed as being issued to a party, namely, the Dracut Public Schools.

documents subpoenaed from a non-party be delivered to the office of the party requesting the documents prior to the hearing date.

Rule VII.C. describes the process for contesting a subpoena by the person receiving it (or their representative) as follows:

C. When a Person Contests a Subpoena

A person receiving a subpoena may request that a Hearing Officer vacate or modify the subpoena. A Hearing Officer may so do 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.

Analysis and Conclusions

The plain language of Rule VII.B. authorizes the BSEA to issue subpoenas to require “a person” to appear and testify at a hearing, and “if requested, to produce documents at the hearing.” Clearly, “a person” may be a party or non-party witness.

The language referring to a subpoena *duces tecum* issued to a non-party does not limit issuance of such to non-parties. Rather, the language clarifies that the subpoena authority of the BSEA extends to non-parties, including those who may not be asked to testify, and that such persons may be required to provide documents to the requesting party prior to the hearing.²

Finally, the School’s argument that allowing a subpoena *duces tecum* to issue to a District employee would undermine the discovery process and prejudice the District is not persuasive. Rule V.B. of the Hearing Rules makes discovery available to parties in non-expedited BSEA proceedings,³ but does not require parties to conduct discovery at any time and certainly does not designate discovery as the exclusive means of obtaining information. On the contrary, Rule V.A. states that “parties are encouraged to exchange information cooperatively and by agreement prior to the hearing,” and reminds parties that parents are entitled to receive copies of the child’s student record. This provision is consistent with the overall preference in the IDEA for cooperative and informal resolution of disputes.

The only question here is whether the District’s witnesses may be required to produce the requested documents prior to the hearing, or whether it suffices for them to bring the documents on the date of the hearing. While it may be permissible to require party witnesses to produce documents prior to the hearing, for purposes of absolute consistency with the first sentence of Rule VII.B., the subpoenas *duces tecum* are modified to allow the witnesses affected to bring the requested documents for

² In practice, such subpoenas are often directed to a “keeper of the records,” but nothing in the language of the Rule restricts issuance to such persons.

³ The Rule does not address accelerated matters.

production at the hearing. The Parent will be afforded time to review the documents prior to opening of the record and during such breaks as may be necessary. If necessary, an additional day of hearing may be added to ensure that there is sufficient time for such review or otherwise to complete the hearing.

CONCLUSION AND ORDER

For reasons stated above, the School's *Motion to Quash* is DENIED; however, the subpoenas at issue are modified to allow the affected witnesses to produce the documents requested on the date of hearing. The Parent will be allowed a reasonable opportunity to review the documents before the record is opened and, if necessary, during breaks granted during the course of the hearing.

By the Hearing Officer,

/s/ Sara Berman

Sara Berman
Date: January 18, 2022