

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

In re: Faye¹

BSEA #1504291

**RULING ON WORCESTER PUBLIC SCHOOLS' MOTION TO REQUIRE PARENT
TO AUTHORIZE RELEASE OF RECORDS SUBPOENAED BY WORCESTER
PUBLIC SCHOOLS PURSUANT TO BSEA HEARING RULE VII**

This matter comes before the Hearing Officer on the Motion of the Worcester Public Schools to Require Parent to Authorize Release of Records Subpoenaed by Worcester Public Schools Pursuant to BSEA Hearing Rule VIII, filed on January 15, 2015. Neither party has requested a hearing on the Motion, and as testimony or oral argument would not advance the Hearing Officer's understanding of the issues involved, this Ruling is being issued without a hearing pursuant to *Bureau of Special Education Appeals Hearing Rule VII(D)*. For the reasons set forth below, Worcester Public Schools' Motion to Require Parent to Authorize Release of Records Subpoenaed by Worcester Public Schools Pursuant to BSEA Hearing Rule VIII is hereby DENIED.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On December 12, 2014 Faye's legal guardian² (hereinafter "the Parent") filed a Request for Expedited Hearing with the Bureau of Special Education Appeals (hereinafter "BSEA") against the Worcester Public Schools (hereinafter "the District"). Among other things, the Parent alleged that Faye – whose current residential placement within the therapeutic program at Devereux is funded by the Department of Developmental Services – was experiencing severe behaviors and failing to make educational progress in her current educational placement at a day program within the Central Massachusetts Special Education Collaborative (hereinafter "CMSEC"), and that she required a residential school program in order to receive a Free Appropriate Public Education (FAPE).

The District opposed the Parent's request for expedited status in writing on December 15, 2014. The matter was initially denied expedited status and a hearing was scheduled for January 16, 2015. On December 16, 2014 the Parent renewed her request for expedited status, providing documentation from CMSEC of six instances of aggression, assault, or self-harm since Faye's placement in her then-current day school on or about September 20, 2014. On December 22,

¹ "Faye" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

² Although Faye's guardian is not her legal parent, she is referred to in filings by both parties as the Parent, and in some of her own filings as the Guardian. For ease of reference, I shall refer to her throughout this Ruling as the Parent.

2015 the District renewed its objection to expedited status. Also on December 22, 2014 the District filed its Response to the Parent's Hearing Request, as well as a Motion to Continue Automatic Hearing Date and a Motion to Continue Pre-Hearing Conference Call, seeking additional time to prepare in advance of a hearing in the matter. A Conference Call was scheduled for December 23, 2015 to address the status of the Hearing Request as well as the Motions pending before the BSEA.

After hearing arguments from both parties on the matter, this Hearing Officer granted expedited status to the Hearing Request pursuant to *Bureau of Special Education Appeals Hearing Rule II(C)(1)(b)*.³ Consequently the District's Motions were denied, as the matter was placed on the expedited hearing schedule outlined in *Bureau of Special Education Appeals Hearing Rule II(C)(3)*. The parties agreed that the timeline would run from December 23, 2014, the date of the change in status, and the Hearing was subsequently scheduled for January 9 and 12, 2015.

On December 23, 2014 the District filed a Motion to Shorten Time for Discovery.⁴ In the absence of a response from the Parent, that Motion was allowed by Order on December 30, 2014. On December 30, 2014, after receiving the Order, the Parent filed a Motion for Reconsideration of the ruling on the Motion to Shorten Time for Discovery. The District then filed an Objection to Parent's Motion for Reconsideration on the same day. Upon review of the Parent's Motion for Reconsideration and the District's Opposition thereto, the Parent's Motion was denied on December 30, 2014.

On January 7, 2015, the parties requested a continuance of the matter in order to allow for an extended evaluation of Faye to occur prior to hearing. That continuance was allowed, also on January 7, 2015.

On January 15, 2015, the District filed the Motion that is the subject of the instant ruling: Worcester Public Schools' Motion to Require Parent to Authorize Release of Records Subpoenaed by Worcester Public Schools Pursuant to BSEA Hearing Rule VIII [hereinafter "Motion to Require Release"]. On January 20, 2015 the Parent filed a motion in Opposition to School's Motion to Require Parent to Authorize Release of Records Subpoenaed by Worcester Public Schools. On January 22, 2015 the District filed a Response to Parent's Opposition to School's Motion to Require Parent to Authorize Release of Records Subpoenaed by Worcester Public Schools.

DISCUSSION

In support of its Motion to Require Release, Worcester supplied the following facts, which were not disputed by the Parent:

³ *Bureau of Special Education Appeals Hearing Rule II(C)(1)(b)* provides for expedited status, in pertinent part, "[w]hen the person or entity requesting the hearing asserts that: (i) the health or safety of the student or others would be endangered by delay; or (ii) the special education services the student is currently receiving are sufficiently inadequate that harm to the student is likely."

⁴ On that date the Worcester Public Schools (hereinafter "the District") also filed its First Request for Production of Documents and First Set of Interrogatories.

1. Pursuant to *Bureau of Special Education Appeals Hearing Rule VIII(B)*, Worcester issued a subpoena *duces tecum* to the Keeper of Records for the Joy and Robert Wetzel Center for Children/YOU, Inc. [hereinafter “Wetzel Center”] and had it served on December 23, 2014.⁵ This subpoena, which was not issued by the BSEA, directed that the Wetzel Center produce medical and related records from 2011 to the present pertaining to Faye and her past psychiatric hospitalizations.
2. On or about December 21, 2014 the District received communication from the Keeper of Records for the Wetzel Center stating that he was unable to provide the subpoenaed records without a signed release from Faye’s parent/legal guardian or a court order. The Keeper of Records subsequently sent written correspondence dated January 7, 2015 to this effect to Worcester.
3. On or about January 2, 2015 the District provided Parent’s counsel with a Release of Records authorizing the Keeper of Records for the Wetzel Center to release those records responsive to the District’s subpoena *duces tecum* to counsel for Worcester.
4. Although the parties have been in communication with each other regarding the release sought by Worcester, to date no such release has been signed.⁶

According to the District, it is entitled to subpoena records from a non-party, and it will commence action in Superior Court to obtain a court order if the Parent is unwilling to authorize the release of the records. By way of its Motion to Require Release, however, the District is requesting that the BSEA order the Parent to sign and return the authorization for release of records that the Keeper of Records at the Wetzel Center has determined is required before he may release the subpoenaed records to the District.

In her Opposition, the Parent argues that where she and the District have voluntarily entered into an agreement to resolve the immediate issue of Faye’s interim placement during the pendency of an extended evaluation and that agreement does not mention the Wetzel Center records; the Parent is cooperating with the school in requesting and reviewing the records the

⁵ Pursuant to *Bureau of Special Education Appeals Hearing Rule VIII(B)*, “[u]pon 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 that documents subpoenaed from a non-party be delivered to the office of the party requesting the documents prior to the hearing date. . . Subpoenas may be issued independent of the BSEA and shall be governed by the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 101.01(10)(g).”

⁶ According to the District on January 9, 2015 it contacted Parent’s counsel to ascertain the status of the Release of Records. Parent’s counsel “indicated that if there were specific records Worcester believed it required in order to provide appropriate educational services to [Faye], to inform her; and that she would review these records with Parent and provide the District with a copy of same to facilitate [Faye]’s education.” Worcester Public Schools Motion to Require Parent to Authorize Release of Records Subpoenaed by Worcester Public Schools Pursuant to BSEA Hearing Rule VIII [hereinafter “Motion to Require Release”] at p. 2.

District seeks; and there is no hearing date currently scheduled, a BSEA Order to the effect the District requests would be heavy-handed.

In its Response to the Parent's Opposition the District asserts that if there is a dispute about placement at the end of the extended evaluation the parties will promptly schedule an expedited BSEA hearing, the records it seeks are relevant to the matter pending before the BSEA, and these records will be important in the preparation of its case.

The District is correct that it may subpoena records under *BSEA Hearing Rule VIII(B)*, and may be correct in its assertion that the records it seeks from the Wetzel Center are relevant and important to its case. The records sought by the District, however, comprise protected health information. With limited exceptions not relevant here, the federal Health Insurance Portability and Accountability Act (HIPPA) prohibits use or disclosure of "individually identifiable health information" without the written authorization of "the individual who is the subject of the information (or the individual's personal representative)."⁷ "Individually identifiable health information" is information, including demographic data, that relates to: the individual's past, present or future physical or mental health or condition; the provision of health care to the individual; or the past, present, or future payment for the provision of health care to the individual, and that identifies the individual or for which there is a reasonable basis to believe can be used to identify the individual.⁸ HIPPA does not allow for an override of an individual's consent under the circumstances presented in this matter.

Moreover much of the information sought from the Wetzel Center by the District is likely covered by doctor/patient and/or psychotherapist/patient privilege.⁹ The District's subpoena *duces tecum* also includes communications between the Parent's attorney and the Wetzel Center that are likely protected from discovery as work product.¹⁰ Privileges should not be taken lightly.

In fact the BSEA Hearing Rules make no provision for the BSEA to order a parent to authorize release of her child's protected health information. This does not leave the District without recourse, however, as the Hearing Rules include a mechanism for the enforcement of a subpoena: "If any person fails to comply with a properly issued subpoena, the party requesting the issuance of the subpoena may petition the Superior Court for an order requiring compliance with the terms of the subpoena." *BSEA Hearing Rule VIII(D)*.¹¹ Should the District wish to

⁷ 45 C.F.R. § 164.502(a).

⁸ 45 C.F.R. § 160.103.

⁹ See Fed. R. Evid. 501; Mass. Guide to Evid. § 503.

¹⁰ See Fed. R. Civ. P. 26(b)(3); Mass. R. Civ. P. 26(b)(3); *Comm'r v. Comcast Corp.*, 453 Mass. 293, 314 (2009).

¹¹ The BSEA may act upon a subpoena under certain circumstances, but only to vacate or modify it, and only upon request of the person who received the subpoena. See *Bureau of Special Education Appeals Rule VIII(C)* (providing that a person receiving a subpoena may request that a Hearing Officer vacate or modify the subpoena, and that the 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"). To the BSEA's knowledge, the Keeper of Records for the Wetzel Center has not contested the subpoena officially, and it is not clear that the BSEA would be informed if he had, given that the BSEA did not issue the subpoena. See *id.*

enforce its subpoena in the face of noncompliance by the non-party it served (herein the Wetzel Center), it must follow that procedure.

CONCLUSION

Upon consideration of the District's Motion to Require Parent to Authorize Release of Records Subpoenaed by Worcester Public Schools Pursuant to BSEA Hearing Rule VIII and the Parent's Opposition thereto, as well as the relevant documents submitted by the parties, I find that I cannot grant the District's request that I order Faye's Parent to authorize release of the records that it subpoenaed from the Wetzel Center. I conclude that even if I were so inclined there is no mechanism within the *BSEA Hearing Rules* that would allow me to issue such a ruling.

ORDER

The District's Motion to Require Parent to Authorize Release of Records Subpoenaed by Worcester Public Schools Pursuant to BSEA Hearing Rule VIII is hereby DENIED.

A status report is due by close of business on February 17, 2015 unless the *Hearing Request* is withdrawn by that date.

By the Hearing Officer:

Amy M. Reichbach
Dated: January 30, 2015