**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

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In Re: Student

& BSEA No. 2004105

Malden Public Schools

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

On October 22, 2020, Parents filed a hearing request in this matter. At issue is, first, whether the Malden Public Schools (Malden or School) first, failed to provide safe and consistent physical access for Student to the school building in which his special education services were delivered, and, second, whether Student requires classroom and pool-based instruction in water safety and swimming in order to receive FAPE.

With respect to the physical access issue, Parents allege, in general, that the specialized transportation provided by Malden has failed to get Student consistently to and from school safely and on time. Parents further allege that Malden has failed to provide sufficient handicap-accessible parking to enable them to safely drop Student off at school and pick him up on days when Student does not or cannot use the specialized transportation. Finally, Parents’ claim that Malden’s failure to include an appropriate water safety program in Student’s IEP deprives him of a FAPE. A hearing in this matter is scheduled for August 18, 20 and 21, 2020.

On August 10, 2020, Parents requested the BSEA to issue subpoenas for several employees of the Malden Public Schools and the City of Malden to appear and testify at the hearing. On August 11, 2020,, Malden filed a *Motion to Quash* the subpoenas for the following individuals: John Oteri, Superintendent, Malden Public Schools, and Elizabeth Cushinsky, former Assistant Special Education Superintendent, Malden Public Schools.

In its *Motion*, the School argued that Superintendent Oteri had neither evaluated nor provided services to Student, was not a member of his IEP Team, and, could not provide relevant testimony in this matter. As for Ms. Cushinsky, the School argued that while she had attended either a Team or resolution meeting, she had done so in an administrative capacity only, and had made no recommendations regarding Student’s programming. Further, the School’s witness list includes several Team members who will provide testimony on Student’s educational profile and needs. Finally, the School noted that Ms. Cushinsky had left her employment with Malden on June 22, 2020, and that Malden was unable to accept service of a subpoena on her behalf.

Parents’ *Response* to the *Motion to Quash*, filed on August 11, 2020, countered that Superintendent Oteri had authored some 16 emails on the subjects addressed in the hearing request, and that Parents had included these emails in their exhibit book. Parents further stated that Ms. Cushinsky had attended a Team meeting in September 2019, and had made statements and written emails to the Team chair, Ms. Dana Marie Brown, that reflected decision-making by Ms. Cushinsky. Parents further requested that a subpoena issue to Ms. Brown in the event that Ms. Cushinsky could not be reached.

On August 12, 2020, Parents filed a revised subpoena request for Ms. Cushinsky with her current address as well as a subpoena request for Ms. Brown. Malden responded on that day with a *Motion to Quash* the request with respect to Ms. Brown on grounds of untimeliness and irrelevance of Ms. Brown’s testimony, since she was Student’s team chair until January 2020 but never evaluated or provided services to Student. This Ruling addresses both of the School’s *Motions*.

**Legal Framework:**

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Rule VII of the *Hearing Rules for Special Education Appeals (Hearing Rules)* requires the BSEA, at the request of a party, to 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. 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.

The request, which must be simultaneously sent to the opposing party and the Hearing Officer, must be received by the Hearing Officer at least ten (10*)* calendar days prior to the hearing; shall specify the name and address of the person to be subpoenaed; and shall describe any documents to be produced. Subpoenas may be issued independent of the BSEA and shall be governed by the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01(10)(g). The BSEA may also issue a subpoena *sua sponte*, that is, on its own initiative without a formal request from a party.

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**

Whether the witnesses at issue should be compelled to attend and testify at the hearing in this case depends on whether their testimony is relevant to the issues for hearing, namely, whether Student was denied FAPE because of lack of consistent physical access to his school building and/or because his IEP did not include swimming and/or water safety instruction. After reviewing the School’s *Motions* and Parents’ responses in light of the above-quoted Rule and the issues for hearing, I conclude the following:

1. Superintendent Oteri: As stated by the School in its initial *Motion to Quash*, Superintendent Oteri has neither evaluated Student nor provided him with services. I am not persuaded that his testimony would be relevant to the issues in this case regarding whether or not Student was denied a FAPE due to either the access issues or the swimming/water safety instruction issues to be addressed at hearing, or that the information contained in any such testimony could not be provided by other witnesses who have actually had direct contact with Student. In an abundance of caution, I conclude that the *Motion to Quash* should be granted at this time, subject to reconsideration if a party can demonstrate that Superintendent Oteri possesses necessary information that cannot be provided by witnesses who already are present at hearing.
2. Elizabeth Cushinksy: Elizabeth Cushinsky is no longer employed by the Malden Public Schools, and the District lacks standing either to accept service of a subpoena on her behalf or to object to the subpoena issued. Pursuant to Rule VII.C., it is Ms. Cushinsky—not Malden—who has standing to make such an objection. She has not done so, which would be expected since the subpoena was issued on August 12, 2020, just one day ago. In these circumstances, the School’s *Motion to Quash* should be denied. Any future objection to the subpoena by Ms. Cushinsky will be addressed if and when it is received.
3. Dana Marie Brown: As Student’s former Team chair, Ms. Brown appears to be in a position to provide relevant testimony regarding the development of Student’s IEP. While the request for the subpoena is untimely, I conclude that it is a proper exercise of my discretion not to vacate the subpoena on timeliness grounds, in light of the extenuating circumstances,[[1]](#footnote-1) as well as my responsibility to receive and consider all relevant and reliable evidence[[2]](#footnote-2) and my authority to issue a subpoena sua sponte when necessary or appropriate.[[3]](#footnote-3) Because Ms. Brown will have received her subpoena at a late date, efforts will be made to accommodate her scheduling needs.

**CONCLUSION AND ORDER**

For reasons stated above, the School’s *Motion to Quash* is GRANTED with respect to Superintendent Oteri, subject to the conditions stated above. The Motion is DENIED as to Elizabeth Cushinsky and Dana Marie Brown.

By the Hearing Officer,

/s/Sara Berman

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Sara Berman

Date: August 13, 2020

1. Parents proposed substituting the testimony of Ms. Brown for that of Ms. Cushinsky after learning of the latter’s leaving the District. Neither Parents, counsel for Malden, nor the hearing officer were aware of Ms. Cushinsky’s departure until on or about August 10-12, 2020. [↑](#footnote-ref-1)
2. See 603 CMR 28.08(5)(c) [↑](#footnote-ref-2)
3. Rule VII.B of the *Hearing Rules for Special Education Appeals*, quoted above. [↑](#footnote-ref-3)