**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

In re: Stewart[[1]](#footnote-1) BSEA **#**2101061

**RULING ON PARENT’S MOTION TO VACATE OR QUASH SUBPOENAS AND ACTON-BOXBOROUGH REGIONAL SCHOOL DISTRICT’S MOTION *IN LIMINE* TO QUASH SUBPOENAS AND EXCLUDE TESTIMONY OF ACTON POLICE OFFICERS**

This matter comes before the Hearing Officer on motions filed by each party on April 28, 2021 to quash subpoenas requested by the other in connection with a Hearing scheduled to begin May 11, 2021.[[2]](#footnote-2) We discussed both motions during a Conference Call that took place May 4, 2021 and, as further formal oral argument would not advance my understanding of the issues involved, I am ruling on both motions without a hearing.[[3]](#footnote-3) For the reasons below, both Parent’s[[4]](#footnote-4) *Motion to Quash Subpoenas* (*PMtQ)* and the Acton-Boxborough Regional School District (ABRSD or the District)’s *Motion to Quash Subpoenas and Exclude Testimony* (*DMtQ*) are DENIED, but the subpoenas are subject to the limitations described below, by agreement and/or on the grounds of relevancy.

1. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The factual background and procedural history of this matter have been described in detail in my previous published Rulings, including my *Ruling on Parent’s Motion to Consolidate*, issued December 23, 2020, my *Ruling on Acton-Boxborough Regional School District’s Partial Motion to Dismiss and Parent’s Motion to Join the Town of Acton*, issued March 12, 2021, and my *Ruling on Parent’s Motion to Sequester Witnesses*, issued April 7, 2021. I need not repeat them here, except to note that the issues for Hearing have been outlined as follows:

1. Whether Acton-Boxborough discriminated against Stewart in violation of §504 of

 the Rehabilitation Act of 1973, through:

1. failure to follow policies and procedures to investigate and address bullying concerns beginning on or about October 22, 2019 through January 2020;
2. changes in Stewart’s IEP services (addition of 1:1 aide, removal from general

education classes) without parental consent between January and March 2020;

1. involvement of the SRO in responding to Stewart’s dysregulation in January 2020; and/or
2. imposition of inappropriate consequences and punishment (i.e., cleaning the classroom, removal from classroom, disallowing bathroom use, preventing access to mother) for manifestations of Stewart’s disability (i.e., behavior dysregulation) between December 2019 and January 2020.
3. Whether Acton-Boxborough denied Stewart a FAPE in violation of the Individuals with Disabilities Education Act by:
4. failing to implement an accepted, expired IEP dated March 28, 2019 to March 27, 2020 through
5. use of the SRO in response to Stewart’s dysregulation in January 2020;
6. alteration of IEP services without the consent of his parent/guardian (i.e., assignment of 1:1 aide, pull-out from general education classes) between December 2019 and March 2020;
7. failure to utilize positive behavior interventions and instead imposing inappropriate consequences and punishment (i.e., cleaning the classroom, removal from classroom, disallowing bathroom use, preventing access to mother) on Stewart between December 2019 and January 2020.
8. failing to follow policies and procedures to investigate bullying concerns between October 2019 and January 2020; and/or
9. failing to address bullying concerns by convening an IEP meeting and reviewing the IEP and changes that were needed, if any, thereto between October 2019 and January 2020.
10. Whether Parent rejected the IEP dated March 28, 2019 to March 27, 2020;
11. If the answer to (C) is “yes,” whether Stewart’s IEP dated 3/28/2019-3/27/2020 was reasonably calculated to provide Stewart with a FAPE in the LRE;
12. If the answer to (A), (B) or (C)(1) is yes, what is the appropriate remedy?

 On or about April 22, 2021, Parent requested that the BSEA issue subpoenas to five Town of Action police officers: Officer Tyler Russell, Lt. Douglas Sturniolo, Officer Tricia Sullivan, Detective Michael Eracleo, and Sgt. Scott Howe. On or about April 27, 2021, ABRSD requested that the BSEA issue subpoenas *duces tecum* to Dr. Jeff Ristaino of Harvard Vanguard Medical Associates and Dr. Laura Frank and Dr. Deborah Greene of the Emerson Hospital Emergency Department (Emerson ED) for documents pertaining to Stewart, including but not limited to records, reports, evaluations, observation notes, assessments, video recordings, photographs, letters, memoranda, and emails, with no beginning or end date. The BSEA processed these requests and issued all subpoenas.

1. DISCUSSION
	1. The BSEA’s Authority to Issue and Quash Subpoenas

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.

 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.

* 1. Parent’s *Motion to Quash Subpoenas Duces Tecum* for Medical Records

On April 28, 2021, Parent[[5]](#footnote-5) filed her *PMtQ.* She argued that the subpoenas *duces tecum* are too broad in temporal scope and seek records not relevant to any matter in question. Furthermore, as she is already producing certified medical records from both Dr. Ristaino and the Emerson ED covering the relevant period in response to ABRSD’s request for production of documents, and there is no indication that the records produced are doctored or incomplete, the requested subpoenas are unnecessary. In the alternative, Parent requested that the BSEA limit the temporal scope of the subpoenas in light of the claims before me. Specifically, she requested that the subpoena issued to Dr. Ritaino be limited to the period from October 22, 2019 up to and including March 31, 2020 and the subpoena issued to Dr. Frank and Dr. Greene be limited to the period from January 9, 2020 to January 10, 2020. Furthermore, Parent requested that the BSEA issue an order limiting the dissemination of such records and ensuring their destruction at the conclusion of the hearing.

As a preliminary matter, I note that BSEA *Hearing Rule* VII(C) provides a mechanism for the person receiving a subpoena to challenge that subpoena by requesting that the BSEA vacate or modify it. Nothing in the language of the rule permits an individual or entity that is a party to the case, but not the recipient of the subpoena, to do so. As such, I view Parent’s *PMtQ* as a challenge to the relevance of the information sought. During the Conference Call that took place on May 4, 2021, ABRSD argued that Stewart’s medical records for the period from October 19, 2019 through March 31, 2020 are relevant to the issues for hearing, including the alleged impropriety of the District’s responses to bullying of Stewart and to his behavioral dysregulation (assignment of a 1:1 aide, removal from the general education classroom, imposition of punishments). I agree.

For these reasons, and with the agreement of ABRSD, the subpoenas *duces tecum* issued to Dr. Ristaino and Dr. Frank and Dr. Greene are limited to the time period from October 19, 2019 through March 31, 2020. As discussed during the Conference Call, Parent, through her attorneys, is directed to draft a protective order regarding dissemination and destruction of Stewart’s medical records and submit it to Counsel for ABSD for her approval before filing it with me by close of business on May 7, 2021.

* 1. *ABRSD’s Motion to Quash Subpoenas to Acton Police Officers*

In its *DMtQ*, also filed April 28, 2021, the District argued that where two of Parent’s

claims that survived its *Partial Motion to Dismiss* involved Officer Russell, the school resource officer (SRO) who served at the Merriam School in January 2020, but none of them involved other members of the Acton Police Department, the BSEA should quash the subpoenas for Lieutenant Sturniolo, Officer Sullivan, Detective Eracleo, and Sergeant Howe.

 On April 29, 2021, Parent filed an *Objection to ABRSD’s Motion to Quash Subpoenas and Exclude Testimony*. She agreed to withdraw subpoenas for Lieutenant Sturniolo and Officer Sullivan, but asserted that Detective Eracleo and Sergeant Howe were percipient witnesses to the events in question and, in addition, had contact with Stewart and his family at ABRSD’s request. Specifically, Parent contends that although Sgt. Howe was not an SRO, he was at school to assist SRO Russell on January 9, 2020, one of the dates on which she alleges that ABRSD, in part through SRO Russell, violated Stewart’s rights under the IDEA and Section 504. Moreover, both Sgt. Howe and Detective Eracleo communicated with ABRSD regarding its use of Acton Police in educational matters involving Stewart, particularly in the aftermath of the January 9, 2020 incident, and Detective Eracleo participated in discussions about the District’s bullying investigation, or lack thereof. Parent also argued that Detective Eracleo’s involvement in a truancy matter is also relevant to the issues before me.

Again, nothing in the BSEA *Hearing Rules* permits ABRSD to request that I quash subpoenas to police officers who work for the Town of Acton, a non-party. For this reason, I view the District’s *DMtQ* as a challenge to the relevance of the information sought. Given Sgt. Howe’s presence at school and observations of the events of January 9, 2020, I believe he may have relevant testimony to offer. As I explained during the Conference Call, no claims regarding a non-SRO member of the Acton Police remain before me following my *Ruling* on ABRSD’s *Partial Motion to Dismiss*. To the extent Parent now asserts that she received new information in discovery indicating that those claims should not have been dismissed, she should have filed a *Motion to Reconsider* my *Ruling* on ABRSD’S *Partial Motion to Dismiss* or a *Motion to Amend* the issues for hearing that were set forth in that *Ruling*. Nevertheless, given Parent’s burden to establish that any actions the SRO took that infringed on Stewart’s rights under the IDEA and Section 504 were taken at the behest of ABRSD, and her burden to prove her bullying claim, I cannot say that Detective Eracleo’s testimony is not relevant.

CONCLUSION

Upon consideration of each party’s *Motion to Quash* and the discussion that took place on May 4, 2021, *Parent’s Motion to Quash* is DENIED, but the medical records sought by ABRSD will be limited to the period from October 22, 2019 through March 31, 2020 and subject to a forthcoming protective order. ABRSD’s *Motion to Quash and Exclude Testimony* is also DENIED, though the subpoenas to Lt. Sturniolo and Officer Sullivan have been withdrawn, and Detective Eracleo’s testimony will be limited to the issues before me.

ORDER

The matter will proceed to Hearing in accordance with the Scheduling Order issued May

3, 2021.

By the Hearing Officer:

/s/ Amy M. Reichbach

Dated: May 7, 2021

1. “Stewart” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public. [↑](#footnote-ref-1)
2. On April 30, 2021, Parent also filed *Objections and Requests for Protective Orders in Response to ABRSD’s First Set of Interrogatories and First Set of Requests for Production.* During the Conference Call that took place on May 4, 2021, the parties reported that they had resolved these discovery issues and would not require a ruling on Parent’s requests. [↑](#footnote-ref-2)
3. BSEA *Hearing Rule* VI(D) provides in relevant part: “A Hearing Officer may rule on a motion without holding a hearing if: delay would seriously injure a party; testimony or oral argument would not advance the Hearing Officer's understanding of the issues involved; or a ruling without a hearing would best serve the public interest.” [↑](#footnote-ref-3)
4. Although this document was filed as *Student’s Motion to Vacate or Quash Subpoenas*, to maintain consistency with previous rulings on the matter I refer to it as Parent’s *Motion*. [↑](#footnote-ref-4)
5. This document was filed as *Parent and Student’s Objection to ABRSD’s Motion to Quash Subpoenas and Exclude Testimony*, but for consistency I refer to it as having been filed by Parent. [↑](#footnote-ref-5)