**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re**: RH & North Attleboro Public Schools **BSEA** #2308812

**RULING ON MULTIPLE MOTIONS AND REQUESTS AND PRE-HEARING ORDER**

On June 22, 2023, the Parties participated in a Conference Call for the purpose of discussing logistics pertaining to the then-scheduled Hearing dates of July 10 and 14, 2023. During this Call they verbally jointly agreed to changing the Hearing dates to July 10 and 13, 2023, for the Hearing to be held virtually, and to commence each day of Hearing at 8:30 a.m. Additionally, Parent advised that she intended to request the hearing be stenographically recorded. Further, the Parties discussed Parent’s intention to file a request for a public hearing and agreed to a schedule for Parent to file this request, the District to file any written objection and a Ruling to issue. The Parties also discussed potential District witnesses and the need to seek subpoenas for their testimony at the Hearing. Finally, the Parties discussed the hearing process and schedule for the presentation of evidence by each Party.

Thereafter, on June 23, 2023, Parent filed a joint *Request* to change the Hearing dates to July 10 and 13, 2023, to hold the hearing virtually and to commence the Hearing each day at 8:30 a.m.[[1]](#footnote-1). Additionally, in this *Request*, Parent advised that she sought to have the Hearing stenographically recorded, and to have a “public hearing”. Also on June 23, 2023, Parent filed a *Request* for the issuance of subpoenas for the testimony of four (4) district staff members to testify on July 10 and 13, 2023.

On June 26, 2023, the Parties participated in a further Conference Call. During this Call, among other things, the Parties discussed potentially scheduling an additional day of Hearing. Although the Hearing Officer is available on August 4, 2023, at 2:00 p.m., the Special Education Administrator (who would be scheduled to testify on this date) is not available. As such, the Parties were advised that the Hearing Officer would entertain a written request for an additional hearing day on a date when the Parties were mutually available between August 21, 2023, and September 1, 2023.

Additionally, the Parties reviewed the availability schedule of the four subpoenaed district staff members. Parent also advised that she intended to request a subpoena for a fifth staff member, - the School Nurse, and made a verbal offer of proof that the Nurse’s testimony would relate to Student’s attendance at school, as well as her interactions with Student in the Nurse’s office as they pertain to the appropriateness of his placement during the 2022-2023 school year.

Thereafter, on June 26, 2023, the District filed a letter objecting to Parent’s request for a “public hearing”, objecting to the inclusion of the School Nurse as a witness in this matter, and requesting clarification as to the issues for Hearing[[2]](#footnote-2). Regarding the testimony of the School Nurse, the District argued that her participation was not necessary, as the information she would testify to would be contained in attendance records that could be submitted. The District also objected to this request having been made on “short notice” given the “timing of the hearing”. The District further noted its concern with completing the Hearing in two days, given the number of witnesses it anticipates Parent will be calling as well as anticipated pre-hearing issues that will need to be addressed. However, the District did not request to have an additional day scheduled.

On June 26, 2023, Parent filed a *Motion to Request an Additional Day of Hearing* (*Additional Hearing Day Motion*), for what she alleged was “an offered date of” August 4, 2023, so as to “accommodate all witness’ (sic)”. On June 26, 2023, Parent also filed a “*Motion request Order/Subpoena ‘Student Record Request’”* (*Records Motion/Subpoena Request*) seeking an Order for the District to “provide all records to (I) the parent” due to the District’s alleged “continued denial of student records”. No specific information as to what had been requested, provided or not provided was included in this *Records Motion/Subpoena Request[[3]](#footnote-3)*.

On June 27, 2023, Parent also submitted a *Request* for the issuance of a subpoena for the School Nurse who is the subject of the District’s June 26, 2023, objection.

Given that exhibits and witness lists are due in this matter to be filed by the close of the business day on June 30, 2023, I find it is warranted to shorten deadlines for submission of written objections to the *Additional Hearing Day Motion* and to the *Records Motion/Subpoena Request*. Moreover, I do not find that a hearing on either *Motion* is warranted as it will not advance my understanding of the issues involved[[4]](#footnote-4).

Joint *Requests*

The Parties joint request to change the dates for Hearing to July 10 and 13, 2023, convene the hearing virtually, and commence each Hearing date at 8:30 a.m. is **GRANTED**. As this will result in the Hearing ending a day earlier than currently scheduled, the current IDEA timeline and deadline for issuance of the Decision is accordingly advanced by one day.

Parent’s *Request for a Stenographer*

Parent’s request for the Hearing to be stenographically recorded, unopposed by the District, is also **GRANTED**, consistent with the right afforded parties under both the IDEA and the *Hearing Rules for Special Education Appeals[[5]](#footnote-5)*.

Parent’s *Request* for Issuance of Subpoenas/District’s Objection to Testimony of School Nurse

Parent’s June 23, 2023, request for issuance of testimony subpoenas to 4 District staff members, unopposed by the District, is also **GRANTED**, and testimony subpoenas will be issued by the BSEA to each of these 4 witnesses at the address provided by Parent in her request.

The District’s objection to issuance of a subpoena for the testimony of the School Nurse is **DENIED without prejudice**. Contrary to the District’s contention, Parent’s verbal offer of proof involves testimony areas for the School Nurse beyond Student’s attendance. As such, at this time, prior to receiving proposed exhibits from the Parties, I cannot find that the Nurse’s testimony will all be duplicative of documents that will be in evidence in this matter. I also disagree that the request was provided on “short notice”. Although the Hearing is scheduled to occur during the summer, when school is not in session, these hearing dates were established on May 24, 2023 (subject to the joint request to change July 14 to July 13), at the joint request of the Parties. Moreover, the request does not violate any procedural timelines, as, under *Hearing Rule VII (B)*, testimony subpoenas must be filed at least ten (10) calendar days prior to the hearing, which date has not yet passed. Accordingly, the BSEA will issue the requested testimony *subpoena* for the School Nurse to the address provided by the Parent.

District Request to Clarify Issues for Hearing

The issues for Hearing in this matter as well as the applicability of the two-year statute of limitations[[6]](#footnote-6) have been discussed with the Parties numerous times, including as recently as the June 26, 2023, Conference Call. They are the issues identified in the *Hearing Request* which was filed on March 17, 2023. No amendments to the *Hearing Request* have been filed in this matter, thus the issues have not changed since this matter was filed. However, so as to ensure that both Parties are fully aware of the issues for Hearing, they are set forth in the *Pre-Hearing Order* at the conclusion of this *Ruling*, along with their applicable timeframes.

*Additional Hearing Day Motion*

Parent’s request to add August 4, 2023, as an additional Hearing day is **DENIED as to the specific date requested, only.** Both Parties agree as to the need to schedule an additional Hearing day to ensure sufficient time for proposed witness testimony, and I find such need would constitute good cause for postponing the Hearing. However, I disagree with Parent that August 4, 2023, was an “offered date”. Although it was discussed during the June 22, 2023, Conference Call, the witness who would be testifying that day is not available on August 4, 2023. The Parties are again advised that they may file a written request to add an additional Hearing day, for any mutually agreeable date between August 21, 2023, and September 1, 2023.

*Records Motion/Subpoena Request*[[7]](#footnote-7)

Parent’s *Record Motion/Subpoena Request* is **DENIED** **without prejudice**. The *Motion* fails to specify what records have been requested by Parent, when they were requested, and what records she alleges were not received. As Parent acknowledges receipt of “some” of the records she has requested, it appears the dispute pertains only to allegations of some student records.

Student records are protected by both federal and state laws and regulations[[8]](#footnote-8) and FERPA’s confidentiality provisions are specifically incorporated into the IDEA[[9]](#footnote-9). However, this does not mean that every student record violation claim is within the jurisdiction of the BSEA. Other forums exist to address student record violations that are not within the BSEA’s jurisdiction[[10]](#footnote-10). For the BSEA to have jurisdiction over student record disputes, the violation or failure to receive the record must have impacted a Student’s right to a FAPE[[11]](#footnote-11). No such claim or allegation is made in Parent’s *Record Motion/Subpoena Request,* nor can one be inferred[[12]](#footnote-12).

Further, to the extent that the *Record Motion/Subpoena Request* was intended to be a *subpoena deuces tecum*, under *Hearing Rule VII*, it is also denied, as it does not comport with the requirements for seeking a *subpoena deuces tecum* under *Hearing Rule VII*.

Thus, the above-referenced matter will proceed in accordance with the following *Pre-Hearing Order*:

1. The Hearing will take place on July 10 and 13, 2023 starting at 8:30 a.m. until 5:00 p.m[[13]](#footnote-13). each day, virtually. A virtual link will be provided separately.
2. The Hearing will be stenographically recorded.
3. The issues for Hearing are as follows:
4. Whether North Attleborough's IEPs and proposed placements for the period from March 17, 2021, through March 17, 2023, were inappropriate to meet Student’s needs;
5. Whether North Attleborough must reimburse Parent for all expenses for services that Parent provided or will provide to meet Student’s needs between March 17, 2021, and March 17, 2023;
6. Whether North Attleborough provided Student with the special education services, program and placement necessary to meet his unique needs and to provide him with a FAPE by locating an intensive, comprehensive, specialized program where his learning and social-emotional challenges can be addressed and mastered such as Learning Prep School;
7. Whether Student is entitled to compensatory education services between March 17, 2021, and March 17, 2023.
8. Absent an *Order* postponing the Hearing to add an additional Hearing day, as set forth above, consistent with the discussion during the June 22 and June 26, 2023 Conference Calls, and District’s indication it intends to only call one witness in this matter, Parent will have from the commencement of the Hearing[[14]](#footnote-14) on July 10, 2023, until conclusion of the Hearing that day, and from commencement of the Hearing on July 13, 2023 until noon on July 13, 2023 to present her case, inclusive of reasonable breaks. The District will have from noon on July 13, 2023, until 5:00 p.m. to present its case, inclusive of reasonable breaks. The Parties shall prepare the presentations of their cases accordingly in compliance with these timeframes.
9. Exhibits and witness lists are due by the close of the business day on June 30, 2023[[15]](#footnote-15). The address for providing the stenographer’s copy of the exhibits and witness lists will be provided separately. The Parties have already been informed and agreed to the address to file exhibit books with each other and the address to file with the Hearing Officer.
10. With the exception of *Motions in limine* relating to objections to proposed exhibits or proposed witnesses, or a request for an additional day of Hearing as noted above, no other *Motions* or requests will be entertained by either Party as the time for responding to a *Motion* under *Hearing Rule VI* cannot be met prior to the due date for exhibits and witness lists.

The Parties are reminded that all requests for postponements must be in writing and specify the reasons for requesting the postponement and the length of the postponement desired/agreed upon. Should the Parties reach a settlement agreement prior to the Hearing, the moving party shall submit a written withdrawal of the hearing request. Failure to appear at the Hearing may result in dismissal of the matter with or without prejudice. The Parties are encouraged to review the *Hearing Rules for Special Education Appeals*, the *BSEA Reference Manual*, and the *BSEA Pro Se Guide* which can be found at https://www.mass.gov/lists/bsea-forms-and-publications. Technical assistance is also available by contacting the BSEA by phone at 781-397-4750.

So Ordered by the Hearing Officer,

/s/ Marguerite M. Mitchell

Marguerite M. Mitchell

Dated: June 27, 2023

1. The *Request* actually asked for the Hearing to be scheduled from 8:30 a.m. to 6:00 p.m., however, during the June 22, 2023, Conference Call, the District’s attorney advised that she had a hard stop of 5:00 p.m. on July 13, 2023 but could be flexible until after 5:00 p.m. on July 10, 2023. As such, I do not consider the request for the Hearing to end at 6:00 p.m. on each Hearing day to be “joint”. [↑](#footnote-ref-1)
2. The District’s letter also withdrew a *Motion for Summary Judgment* that it had filed on June 23, 2023, but which it had agreed to withdraw after further discussion at the June 26, 2023, Conference Call. [↑](#footnote-ref-2)
3. Prior to filing this document, Parent had submitted a letter indicating she was informed by the District that “the records were not in fact available or ready for pick up. [She] was given ‘some’ of the record request.” No other information as to what records were or were not received by Parent has been provided. [↑](#footnote-ref-3)
4. My *Ruling* on Parent’s request for a “public hearing” and the District’s objection, thereto, will be addressed separately, on or before June 29, 2023 in accordance with the schedule agreed to by the Parties regarding this request during the June 22, 2023 Conference Call. [↑](#footnote-ref-4)
5. 20 USC 1415(h); *Hearing Rule X(A)(7).* [↑](#footnote-ref-5)
6. 20 USC 1415(f)(3)(C); 34 CFR 300.507(a)(2); 34 CFR 300.511(e). Massachusetts does not have a different limitation period for special education due process proceedings. [↑](#footnote-ref-6)
7. On June 27, 2023, Parent requested a Conference Call to address her student record concerns. Given the pending hearing date, and the limited availability of the Hearing Officer and both Parties the remainder of this week, this request is denied. The Parties are encouraged to work collaboratively to resolve Parent’s concerns. To the extent a specific record exists, is relevant to the issues for the Hearing, but has not been provided, it will be addressed on a case-by-case basis during the Hearing. [↑](#footnote-ref-7)
8. In the federal law, these rights are protected by the Family Education Rights and Privacy Act (FERPA) 20 USC 1232(g); 34 CFR Part 99. In Massachusetts, student records are protected by M.G.L. c. 71 §34D; 603 CMR 23.00; see M.G.L. c. 71 §34F. [↑](#footnote-ref-8)
9. 20 USC 1417(c); see 20 USC 1412(a)(8). [↑](#footnote-ref-9)
10. For instance, although a private right of action does not exist under FERPA, parents/students claiming violations of this law can request an investigation and determination from the “Family Policy Compliance Office”. 34 CFR 99.63; see *Frazier v. Fairhaven Sch. Comm*., 276 F.3d 52, 69, holding that there is no private right of action under FERPA, but recognizing that FERPA provides “… parents and students [the option to] file written complaints through this administrative machinery”. Additionally, claims of violations of the Massachusetts student record laws and policies can be appealed to the superintendent of schools and thereafter the school committee. 603 CMR 23.09. [↑](#footnote-ref-10)
11. See *In Re: Boston Pub. Sch.,* BSEA # 1900241, 24 MSER 241 (*Ruling*, Berman, 2018), addressing a claim involving student record issues surrounding parents’ participation in the Team process

    “where procedural safeguards, including parental access to student records, are deemed an essential component of FAPE, such safeguards should be treated as encompassed in ‘the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child…’. As such, the alleged failure of a school district to implement these safeguards may be the proper subject for a due process hearing, particularly when a parent alleges that such failure has deprived a child of FAPE or prevented meaningful parental participation in the Team process”. [↑](#footnote-ref-11)
12. Notwithstanding, I recognize that *Hearing Rules V(A) and X(B)(3)* grant parents the right under the Massachusetts Student Record Regulations (603 CMR 23.00) to receive a copy of the student’s student records, however, this does not automatically deem all student records admissible in a due process proceeding, nor does it grant jurisdiction to the BSEA over disputes pertaining to receipt of all of a student’s student records. As noted above and given that the Hearing is scheduled to start in under two weeks, if a particular student record exists, was not provided, but is relevant to the issues for the hearing in this matter, it will be addressed during the Hearing, on the record, on a case-by-case basis, and the “five-day rule” will be waived as necessary is such a circumstance. *Hearing Rule VIII(A)*. [↑](#footnote-ref-12)
13. The July 10, 2023, end time is subject to modification if a later end time is agreed upon by the Parties and the Hearing Officer. [↑](#footnote-ref-13)
14. The Hearing will commence when all pre-hearing issues or requests that need to be put on the record, have been addressed. [↑](#footnote-ref-14)
15. This is 5 business days prior to the start of the Hearing in light of the July 4th holiday. [↑](#footnote-ref-15)