**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student v. Attleboro Public Schools BSEA # 2313823**

**RULING ON ATTLEBORO PUBLIC SCHOOLS'**

**MOTION TO QUASH THE *SUBPOENAS DUCES TECUM***

This matter comes before the Hearing Officer on *The Attleboro Public Schools' Motion to Quash the Subpoenas Duces Tecum* (*Motion*) filed Attleboro Public Schools (Attleboro or the District) on September 8, 2023, in part, objecting “to the issuance of such subpoenas as, under the plain language of the BSEA Hearing Rules, the BSEA cannot issue subpoena duces tecum to a party.” Specifically, the District asks for “an order quashing the subpoenas duces tecum relative to: Susan Barclay, Teacher; Christine Brierly, Vice Principal; Jeffrey Cateon, Principal; Maria Crano, Teacher; Christine David, Occupational Therapist; Emma Farland, Paraprofessional; Lauren Kirshner, Teacher; Nellie Nicoloro, Teacher; Brenda Peck, Paraprofessional; Renee Raposa, School Adjustment Counselor; Thomas Silver, Teacher; Michelle Slater, Teacher; Kaitlin White, Teacher.”

On September 11, 2023, Parents responded opposing the District’s *Motion*.

Neither party has requested a hearing on the *Motion*. Because neither testimony nor oral argument would advance the Hearing Officer’s understanding of the issues involved, this Ruling is issued without a hearing, pursuant to Bureau of Special Education Appeals Hearing Rule VII(D).

For the reasons set forth below, the District’s *Motion* is hereby ALLOWED, IN PART, and DENIED, IN PART.

**PROCEDURAL HISTORY AND RELEVANT FACTS:**

These findings are made for the purposes of this Ruling only and are subject to change in future rulings:

1. Student is a fourth grade resident of Attleboro, Massachusetts. Student is eligible for special education services under the primary disability category of Communication.
2. In June 2020, Attleboro proposed, and Parents accepted, an IEP dated June 2, 2020 to June 1, 2021 with full inclusion placement at the District's Willett Elementary School and goals in the areas of: Speech and Language, Physical Therapy, Occupational Therapy, Mathematics, Social Emotional, Reading, and Writing.
3. In December 2020 and January 2021, the District completed a Psychological Assessment, a Physical Therapy Evaluation, an Educational Assessment: Parts A and B, an Academic Assessment, an Occupational Therapy Assessment, and a Speech and Language Assessment.
4. In January 2021, Attleboro proposed, and Parents accepted, an IEP dated January 25, 2021 to January 26, 2022 with full inclusion placement at the District's Willett Elementary School and goals and services in the areas of: Speech and Language, Occupational Therapy, Mathematics, Reading, and Writing. Unlike the prior IEP which Parents had also accepted in full, this IEP did not include a Social Emotional goal.
5. In March 2021, Attleboro proposed an IEP dated March 3, 2021 to March 2, 2022 with goals in the areas of: Speech and Language, Mathematics, Reading and Writing. Parents partially rejected the IEP, noting, in part, that they disagreed with the removal of the Social Emotional goal and services.
6. Subsequently, Parents requested, and the District agreed to fund in full a neuropsychological assessment by the Integrated Center for Child Development ("ICCD"), at a cost above the state rate. On January 19, 2023, the District received the IEE.
7. The Team convened in February 2023 to review the Independent Educational Evaluation (IEE). The District expressed concern with aspects of the evaluation, including, but not limited, to the significant differences between the IEE and the District's January 2021 psychological evaluation. The Team discussed the need for further evaluation and proposed speech and language, psychological, and observation.
8. On February 14, 2023, the District proposed additional testing in the following areas: psychological, observation and speech and language. To date, Parents have not responded to the proposal.
9. On March 2, 2023, the Team met for Student’s Annual Review. The District noted during this meeting that it continued to propose additional evaluations for Student in the following areas: psychological, observation and speech and language. Subsequently, Attleboro proposed an IEP dated March 2, 2023 to March 1, 2024 with goals in the areas of: Speech and Language, Mathematics, Reading and Writing. On March 17, 2023, Parents rejected the IEP and full inclusion placement at Willett Elementary School.
10. On June 30, 2023, Parents filed the instant appeal seeking a finding that the IEE's diagnoses and recommendations are appropriate and should be incorporated into the currently-proposed IEP; specifically, "emotional should be added as an educational impairment" and "goals and direct services should be added for executive functioning, social/emotional functioning and social skills."
11. On September 1, 2023, the Parents requested the Bureau of Special Education Appeals ("BSEA") issue subpoenas and *subpoenas duces tecum* to thirteen (13) Attleboro Public Schools’ staff members, including Susan Barclay, Teacher; Christine Brierly, Vice Principal; Jeffrey Cateon, Principal; Maria Crano, Teacher; Christine David, Occupational Therapist; Emma Farland, Paraprofessional; Lauren Kirshner, Teacher; Nellie Nicoloro, Teacher; Brenda Peck, Paraprofessional; Renee Raposa, School Adjustment Counselor; Thomas Silver, Teacher; Michelle Slater, Teacher; Kaitlin White, Teacher.
12. Each of Parents' requests seeks, in part the following documentation:

"Based on the above, [Student] is requesting that BSEA issue subpoena to appear as a witness at hearing and subpoena duces tecum for any and all records; written and electronic, including digital and recordings of the above named from 9/1/21 to present, be provided prior to hearing to [Student’s] educational advocate.”

1. Each *subpoena duces tecum* asks, in part, that electronic records “be provided to [Student’s] educational advocate no later than September 14, 2023 to email address [].” The BSEA subsequently issued the requested *subpoenas duces tecum*.
2. On September 8, 2023, Attleboro filed the instant *Motion* asserting, in part, that the BSEA lacks the authority to issue a subpoena duces tecum to a party; that the Attleboro witnesses do not have the responsive records in their possession, custody, or control; that, to the extent hearing officer issues subpoenas duces tecum to the witnesses, the subpoenas must be quashed to the extent they order the records to be produced prior to hearing; and, that many of the witnesses are not relevant to the issues at Hearing.
3. The Hearing is scheduled to begin on September 26, 2023.

**LEGAL STANDARDS:**

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

BSEA Hearing Rule V(B) states, in part, that discovery may occur in the form of written questions (interrogatories), written requests for records (production of documents), or testimony under oath taken outside of a hearing (deposition). Pursuant to BSEA Hearing Rule V(B)(1),

“*Requests for Documents.* Any party may request any other party to produce or make available for inspection or copying any documents or tangible things not privileged, not supplied previously, and which are in the possession, custody, or control of the party upon whom the request is made. (A party may request documents from a non-party through a subpoena duces tecum duly issued by the Bureau of Special Education Appeals, and those documents may be delivered to the office of the party requesting the documents prior to the hearing date. See Rule VIII B.)”[[1]](#footnote-1)

Both the BSEA Hearing Rules and the Formal Standard Adjudicatory Rules of Practice and Procedure which govern due process hearings at the BSEA allow Hearing Officers to issue, vacate or modify subpoenas.[[2]](#footnote-2) Pursuant to 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.”[[3]](#footnote-3)

In a motion to quash under the Federal Rules,

“the movant has the burden of demonstrating that the material sought by the subpoena is privileged or protected, or that production would result in an undue burden.  The subpoenaing party has the burden of establishing that the requested information is relevant to its claims or defenses.  The scope of discoverable information is governed by Rule 26, which allows discovery of items reasonably calculated to lead to the discovery of admissible evidence.”[[4]](#footnote-4)

In considering a motion to quash a subpoena, “among the appropriate factors for consideration … are the following: whether (i) the subpoena was issued primarily for purposes of harassment, (ii) there are other viable means to obtain the same evidence, and (iii) to what extent the information sought is relevant, nonprivileged, and crucial to the moving party's case.”[[5]](#footnote-5)

**APPLICATION OF LEGAL STANDARDS:**

I note at the outset that a dispute exists as to whether Laura Kirshner, Susan Barclay, and Emma Farland are District employees. Pursuant to BSEA Hearing Rule VII(C) only “[a] person receiving a subpoena may request that a Hearing Officer vacate or modify the subpoena.” Pursuant to the Federal Rules of Civil Procedure, the “‘general rule is that a party has no standing to quash a subpoena served upon a third party, except as to claims of privilege relating to the documents being sought.’”[[6]](#footnote-6) Only the person or entity to whom a subpoena is directed has standing to file a motion to quash,[[7]](#footnote-7) except where “the movant can demonstrate that the information being sought is privileged” or the party has “some personal right … in the information sought.” [[8]](#footnote-8) As no such assertions have been made in the instant matter, and, if, as the District asserts, Laura Kirshner, Susan Barclay, and Emma Farland “no longer work for the Attleboro Public Schools,” Attleboro has no standing to quash the *subpoenas duces tecum* for these witnesses. Therefore, the District’s *Motion* as to these Laura Kirshner, Susan Barclay, and Emma Farland is DENIED. In the event that Laura Kirshner, Susan Barclay, and Emma Farland are still District employees, as Parents believe, then my analysis *infra* applies to them as well.

I now turn to the remaining 10 *subpoenas duces tecum*.

*1. Subpoenas Duces Tecum.*

I note that I disagree with Attleboro’s interpretation of BSEA Hearing Rule VII B as limiting the Hearing Officer’s authority to issue a *subpoena duces tecum* to a party. BSEA Hearing Rule VII(B) offers the parties a process to “also” obtain documents from non-parties, but it does not limit the use of such process to non-parties only. Because a party has available to it any of the discovery mechanisms contained in BSEA Hearing Rule V(B)(1) through (3), subpoenas are typically used by parties to obtain evidence from non-party witnesses.

The District’s argument that to allow the BSEA to issue a *subpoena duces tecum* against a party “would fundamentally undermine the District's rights as set forth in the discovery process” and that “[s]uch circumvention of the discovery process prevents the District from raising timely objections and responses, depriving it of its rights under the BSEA Hearing Rules, resulting in material prejudice to the District” is unpersuasive, as the inquiry does not end there.[[9]](#footnote-9) Having made the preliminary finding that I have the authority to issue a *subpoena duces tecum* against a party pursuant to the *Hearing Rules for Special Education Appeals*, I now must determine whether, in the instant matter, the *subpoenas duces tecum* are an attempt to circumvent a discovery deadline.[[10]](#footnote-10) Parents’ *subpoenas duces tecum* use broad language, the type often used in production of documents requests; in fact, Parents do not itemize specific documents necessary for use as exhibits at Hearing but rather seek the production of large categories of documents.[[11]](#footnote-11) Moreover, the record does not reflect that Parents attempted to engaged in any discovery within the discovery period, and that by the time that Parents filed the request for the *subpoenas duces tecum*, the discovery timeline had lapsed.[[12]](#footnote-12) In light of these facts, the documents requested are unquestionably sought for discovery purposes.[[13]](#footnote-13) As such, Parents’ *subpoenas duces tecum* requesting that “records be provided to [Student’s] educational advocate” prior to Hearing are hereby quashed, and Attleboro’s *Motion* relative to the production of the documents sought by the *subpoenas duces tecum* relative to Susan Barclay, Christine Brierly, Jeffrey Cateon, Maria Crano, Christine David, Emma Farland, Lauren Kirshner, Nellie Nicoloro, Brenda Peck, Renee Raposa, Thomas Silver, Michelle Slater, and Kaitlin White is ALLOWED.

*2. Subpoenas to Appear and Testify at Hearing*

Whether witnesses 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. At issue in this matter is whether Student’s last proposed IEP is not reasonably calculated to provide Student with a FAPE for failure to incorporate the IEE's diagnoses and recommendations and, specifically, whether "emotional should be added as an educational impairment" and "goals and direct services should be added for executive functioning, social/emotional functioning and social skills."

The District argues that

“Parents seek to subpoena thirteen (13) different District witnesses to ‘appear and testify’ at hearing. Such a number of witnesses are not relevant to the issues in dispute. In Parents' Request for Hearing they seek the addition of the disability category of emotional impairment and seek goals and direct services ‘for executive functioning and social/emotional functioning and social skills.’ In this case, given the allegations, several of the witnesses will not be able to offer any testimony of probative value. Given the nature of the allegations, it is unclear how the testimony of the Occupational Therapist is relevant. Additionally, given the allegations, which are limited in nature and only seek prospective relief, it is unclear why thirteen (13) staff members, seven (7) of whom are teachers and, some of whom, have not taught the student in years, would be relevant to the issues raised in the Parents' Request for Hearing.”

Specifically, the District asserts that Laura Kirschner is a special education teacher who has not worked with Student since the 2020-2021 school year. Similarly, Susan Barclay, Special Education Teacher, has not worked with Student since the 2021-2022 school year. The District also asserts that Kaitlin White, General Education Teacher, has not worked with Student since the 2021-2022 school year and that Student’s art and physical education teachers, Nellie Nicoloro and Thomas Silver, respectively, as well as Christine David, Occupational Therapist, have no “probative” information in the instant matter. Parents respond that these staff members have “knowledge and information regarding parent, staff and student reports of bullying against” Student as well as “knowledge and information regarding parent, staff and student reports of [Student’s] social/emotional functioning throughout the school environment.” In addition,

“Each request for a subpoena *duces tecum* was written specifically for the respective staff members with whom parent relies on to support their position as stated in the Request for Hearing and, to specifically contradict the District’s position that [Student] does have the appropriate skills and proficiencies needed to avoid and respond to bullying, harassment or teasing including self-advocacy and receptive and expressive language skills and that she does not require direct social/emotional support.”

BSEA Hearing Rule VII(C) permits a Hearing Officer to vacate a subpoena upon a finding that the testimony sought is not relevant to any matter in question.[[14]](#footnote-14) Although Ms. White’s, Ms. Kirschner’s, and Ms. Barclay’s experiences with Student are dated, at this time, to the extent that Parents wish to use their testimony for background information, I find that their testimony could be relevant and has the potential to lead to admissible information. Similarly, although Ms. Nicoloro’s and Mr. Silver’s contact with Student may have been infrequent, I again cannot find at this juncture that they have no relevant information relative to the issue in this matter. Nor can I find that Ms. David has no relevant information relative to Student’s executive functioning and social/emotional presentation at school. Nevertheless, Parents will not be allowed to pursue needless, cumulative, or repetitive testimony and should strongly consider which witnesses they, in fact, require and be judicious in whom they call to testify.

Where the District asserts that Renee Bernier, School Adjustment Counselor, “does not work with the Student directly so it is unclear what her relevance is to the issues presented at hearing,” Parent responds that Ms. Bernier “has knowledge and information regarding parent, staff and student reports of bullying against [Student]” as well as “knowledge and information regarding parent, staff and student reports of [Student’s] social/emotional functioning throughout the school environment.” In addition, “[a]ccess to the [School Adjustment Counselor] is part of [Student’s] special education programming and therefore part of her educational record. It is also well documented throughout the record, by the district including the [School Adjustment Counselor] herself that [the School Adjustment Counselor] has met with [Student] on numerous occasions for various amounts of time in a formal capacity.” As such, Ms. Bernier too may have relevant testimony in this matter.

Therefore, the District’s *Motion* relative to Parents’ subpoenas for Ms. Kirshner, Ms. Barclay, Ms. Farland, Ms. Nicoloro, Mr. Silver, Ms.Bernier, and Ms. David to appear at Hearing is DENIED.

**ORDER:**

The District’s *Motion* is hereby ALLOWED, IN PART, and DENIED, IN PART in accordance with this Ruling.

So ordered,

By the Hearing Officer,

s/ *Alina Kantor Nir*
Alina Kantor Nir

Date: September 12, 2023

1. According to BSEA Hearing Rule V(C),

“[t]he party upon whom a request for discovery is served may, within ten (10) calendar days of service of the request, file with the Hearing Officer objections to the request or move for a protective order. Disputes regarding discovery shall be resolved whenever possible by conference call. Protective orders may be issued to protect a party from undue burden, expense, delay, or as otherwise deemed appropriate by the Hearing Officer. Orders of the Hearing Officer may include limitations on the scope, method, time and place for discovery or provisions protecting confidential information.”

Although Hearing Officers are not bound by the Federal Rules of Civil Procedure, we often look to them for guidance. Fed. R. Civ. Pro. 26 through 37 address discovery. [↑](#footnote-ref-1)
2. See 801 CMR 1.01(10)(g) and BSEA Hearing Rules VII B and C. [↑](#footnote-ref-2)
3. See also Fed. R. Civ. P. 45 (d)(3). [↑](#footnote-ref-3)
4. *Jee Fam. Holdings, LLC v. San Jorge Children's Healthcare, Inc.,* 297 F.R.D. 19, 20 (D.P.R. 2014) (internal citations and quotations omitted). [↑](#footnote-ref-4)
5. *Bogosian v. Woloohojian Realty Corp*., 323 F.3d 55, 66 (1st Cir. 2003). [↑](#footnote-ref-5)
6. *U.S. Bank Nat. Ass'n v. James*, 264 F.R.D. 17, 18–19 (D. Me. 2010) (citing to additional caselaw). [↑](#footnote-ref-6)
7. See *id.* at 19(finding that “defendant's argument based on “undue burden” is also not an appropriate basis for granting a motion to quash a subpoena” and that “defendant's assertion that a court ‘may quash a subpoena to protect any person subject to or affected by the subpoena,’ citing Fed. R. Civ. P 45(c)(3)(B), … misconstrues the substance of that subsection of Rule 45, which provides that a subpoena may be quashed on this basis if it requires disclosing a trade secret, disclosing an unretained expert's opinion, or a non-party to travel more than 100 miles to attend trial. None of these circumstances is present in this case”). [↑](#footnote-ref-7)
8. See *Patrick Collins, Inc. v. Does 1-38*, 941 F. Supp. 2d 153, 159–60 (D. Mass. 2013) (internal citations omitted); see also *Jee Fam. Holdings, LLC v. San Jorge Children's Healthcare, Inc.*, 297 F.R.D. 19, 21 (D.P.R. 2014) (“San Jorge, as a party to the lawsuit, has standing to challenge the subpoenas to the extent they (1) seek irrelevant information or, (2) information subject to the party's ‘personal right or privilege’”); *Cabi v. Bos. Children's Hosp*., No. 15-cv-12306, 2017 WL 8232179, at \*3 (D. Mass. June 21, 2017) (finding that defendant had standing to challenge subpoena to third-party that would require production of privileged information that defendant had shared with third-party). [↑](#footnote-ref-8)
9. Even courts that have found that a *subpoena duces tecum* may be issues against a party agree that “[a] Rule 45 trial subpoena . . . cannot be substituted for an untimely Rule 34 document request,” and service of a Rule 45 *subpoena duces tecum* upon a party opponent is only “appropriate when done prior to the close of the discovery period.” *Dear v. Q Club Hotel, LLC*, Case No. 15-60474-CIV-COHN/SELTZER, 2017 WL 5665357, at \*2 (S.D. Fla. May 18, 2017) (referencing caselaw); see *Rice v. United States*, 164 F.R.D. 556, 558 (N.D. Okla. 1995) (Rule 45 subpoenas, however, may not be used to circumvent the Court's discovery deadline); *Dreyer v. GACS, Inc.,* 204 F.R.D. 120, 123 (N.D.Ind.2001) (allowing a party to use Rule 45 to circumvent the requirements of a court-mandated discovery deadline would clearly be contrary to this approach); *Ghandi v. Police Dept. of City of Detroit*, 747 F.2d 338, 354-55 (6th Cir. 1984) ( A Rule 45 trial subpoena cannot be substituted for an untimely Rule 34 document request); Mortgage Info. Services, Inc. v. Kitchens, 210 F.R.D. 562, 566-67 (W.D.N.C. 2002) (quashing a Rule 45 trial subpoena duces tecum served outside the discovery period). Following such time period, parties are permitted to issue *subpoena duces tecum* to another party but only for the purposes of securing materials for memory refreshment, trial preparation, or to ensure the availability at trial of original records previously disclosed in discovery. See *Hatcher v. Precoat Metals*, 271 F.R.D. 674, 675 (N.D. Ala. 2010). When a party serves a Rule 45 *subpoena duces tecum* for trial seeking discovery that should have been secured during the discovery period, the subpoena is properly quashed. See *Q Club Hotel, LLC*, 2017 WL 5665357, at \*2. [↑](#footnote-ref-9)
10. *S*ee *Rice* 164 F.R.D. at 558. [↑](#footnote-ref-10)
11. *Cf. Stern v. United States*, 214 F.3d 4, 17 (1st Cir. 2000) (holding that materials requested with a *subpoena duces tecum* must be relevant, admissible and specific). [↑](#footnote-ref-11)
12. *Mortg. Info. Servs., Inc*., 210 F.R.D. at 568 (“Because the subpoena duces tecum was not timely served in this case, Defendant's Motion for a Protective Order will be granted and the subpoena will quashed”). [↑](#footnote-ref-12)
13. See *Mortg. Info. Servs., Inc.*, 210 F.R.D. at 567 (“situations may arise in which a subpoena duces tecum may not constitute discovery, and therefore may properly be filed and served following the close of the discovery period” such as to secure the production at trial of original documents previously disclosed by discovery or for the purpose of memory refreshment). [↑](#footnote-ref-13)
14. See *Holloman v. Clarke*, 320 F.R.D. 102, 103 (D. Mass. 2017) (“relevance” requirement of Fed. R. Civ. P. 26(b)(1) applies to subpoenas). [↑](#footnote-ref-14)