

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

In re: Preston¹

BSEA #2004002

**RULING ON THREE RIVERS' MOTION TO VACATE AND/OR QUASH SUBPOENAS
AND MOTION TO MODIFY AND LIMIT SUBPOENA *DUCES TECUM*, AND ON
NASHOBA REGIONAL SCHOOL DISTRICT'S SECOND MOTION TO POSTPONE**

This matter comes before the Hearing Officer on two Motions filed by Three Rivers regarding subpoenas issued by the BSEA at the request of Nashoba Regional School District (NRSD or "the District"), and the second Motion of NRSD to postpone the hearing. On or about April 13, 2020, NRSD requested, and the BSEA issued shortly thereafter, a subpoena *duces tecum* to the Keeper of Records at Three Rivers, for a number of documents concerning Preston. On April 23, 2020, subpoenas were issued to CK, RT, AM, NB, and PD, all employees of non-party entity Three Rivers, to appear and testify at the Hearing in this matter on May 13 and 14, 2020. Three Rivers filed its *Motion to Vacate and/or Quash Subpoenas* and its *Motion to Modify and Limit Subpoena Duces Tecum* on May 1, 2020. The same day, Parents filed a letter in support of these motions and NRSD filed an *Opposition to Three Rivers' Motions*. Three Rivers filed two Affidavits in support of its motions on May 4, 2020. In the meantime, on May 1, 2020, NRSD filed its second *Motion to Postpone* the Hearing scheduled to begin May 11, 2020 (*Second Motion*). On May 2, 2020, Parents filed their *Opposition to NRSD's Second Motion*. I heard arguments on all of these issues telephonically on May 1, 2020.

For the reasons set forth below, Three Rivers' *Motion to Vacate and/or Quash Subpoenas* is ALLOWED, and its *Motion to Modify and Limit Subpoena Duces Tecum* is ALLOWED IN PART and DENIED IN PART. Nashoba Regional School District's *Second Motion to Postpone* is hereby ALLOWED.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY²

The procedural history in this matter was set forth in my *Ruling on Nashoba Regional School District's Motion to Postpone*, issued April 22, 2020 and need not be repeated here. I will summarize only the relevant events that were not discussed in my previous Ruling.

Preston was placed by the Department of Mental Health (DMH) at Three Rivers, a program of Cutchins Programs for Children and Families, in June of 2019, and he remains there to date. Three Rivers is a non-profit residential treatment agency located in Springfield, and it is

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

² The information in this section is taken from the parties' pleadings and motions. It is taken as true for the purposes of this *Ruling* only.

the only agency in Massachusetts currently providing critically intensive, residential services to individuals under the age of 13.

As requested by NRSD, the subpoena *duces tecum* issued for the Keeper of Records at Three Rivers included the following:

- (1) Copies of any and all reports, charges, plans, assessments, testing results, evaluations, progress reports, report cards, transcripts, observations, evaluations, correspondence, notes, and/or any other documentation of any kind in the possession of Three Rivers or any of its affiliated programs or affiliated services providers, related to or referencing [Preston].
- (2) Copies of any and all diagnoses, treatments, treatment goals, progress towards treatment goals, and basis for any and all diagnoses, treatments and treatment goals related to [Preston].
- (3) Copies of any and all psychotherapy and/or clinical notes, clinical referrals, the basis for any and all clinical referrals, and any and all clinical information obtained through individual, group and family therapy related to and referencing [Preston].
- (4) Copies of any and all documentation, including but not limited to letters, emails or other correspondence of any kind between and among staff of Three Rivers or any of its affiliated programs and the Parents or the Parents' representative relating to or referencing [Preston].
- (5) Copies of any and all documentation, including but not limited to letters, emails, or other correspondence of any kind between and among staff of Three Rivers or any of its affiliated programs and the Department of Mental Health related to or referencing [Preston].

On April 28, 2020, Parents filed a *Motion in Limine seeking an Order Granting Confidential Status* to confidential records concerning Preston. On the same day, the parties participated in a Conference Call to discuss this *Motion* as well as ongoing discovery issues related to Three Rivers. During the call, we discussed Parents' concerns and ways in which information relevant to the issues before me could be shared with NRSD, but still remain confidential. On April 29, 2020, I issued a Protective Order that applied to all records produced by, or concerning the treatment of, Preston, by several agencies, including Three Rivers. Pursuant to that Order, Parents' attorney would create a secure Dropbox and deposit all documents in her possession from third party agencies that have provided mental health treatment to Preston. She agreed to share that link with counsel for the other parties, who were permitted to share it with only the primary named representatives of their clients. The parties agreed that the documents would be used only for the purposes of this litigation, and they were not to be printed, scanned, stored, or copied except by the attorneys and assistants working at their direction and/or under their supervision. Furthermore, these documents were to be added to the Exhibit Books only by the agreement of all parties or by Order of the Hearing Officer after

all parties had been heard, and they were to be collected back and destroyed by the attorney who disseminated them.

On May 1, 2020, Three Rivers filed a *Motion to Vacate and/or Quash Subpoenas (Motion to Vacate)* arguing that while AM is an individual and family therapist who has firsthand, personal knowledge relative to Preston's care and progress at Three Rivers, CK, RT, and NB are supervisors primarily responsible for administrative duties as opposed to direct patient care. In their positions, they are generally familiar with Preston but have not worked with him directly and could only testify to secondhand information derived from AM. Furthermore, the agency is currently overwhelmed and short-staffed during the pandemic, and requiring all of these individuals to prepare for and attend a hearing would be an enormous burden on the agency financially and from a workload perspective. Finally, both NB and RT are dealing with personal, health-related issues and as such are currently out of the office. Three Rivers also requested that a specific date and time be scheduled for AM's testimony. Three Rivers made no reference to the subpoena served upon PD, though it clarified later, in one of the Affidavits submitted on May 4, 2020, that PD, Lead Teacher, is not an employee of Three Rivers. As such, the agency has no control over her.

On the same day, Three Rivers filed a *Motion to Modify and Limit Subpoena Duces Tecum (Motion to Modify)*, arguing that many of the hundreds of pages of documents requested by NRSD have "no relevance whatsoever to what Three Rivers understands is the central issue in this case; (*sic*) namely, whether [Preston]'s current needs and level of functioning warrant a continued residential placement." Three Rivers also argued that the agency is overwhelmed and short-staffed, due in part to the coronavirus pandemic, and to set aside time to copy these documents would be an enormous burden. Finally, some of the documents requested contain confidential information, including psychotherapy notes and confidential statements made by Preston to Three Rivers staff that are not relevant to this matter. Three Rivers asserted that these records, particularly psychotherapy notes, enjoy a heightened protection under 45 CFR § 164.524(a), and that its practice is not to produce such records without a court order in order to ensure compliance with HIPAA and other regulations. Three Rivers requested that the subpoena *duces tecum* be modified by limiting the records to be produced to the following: (i) quarterly typewritten summaries of individual therapy, (ii) quarterly typewritten summaries of family therapy, (iii) quarterly typewritten milieu reports, (iv) one behavioral incident report, (v) occupational therapy records, and (vi) treatment plans. Three Rivers conditioned its production of these records on receipt of appropriate Releases signed by Preston's legal custodians.

On May 1, 2020, Parents filed a letter indicating their support for Three Rivers' motions. They suggested that Three Rivers produce only one witness, AM, and the documents it had listed in its *Motion to Modify*. Should the Hearing Officer determine during the Hearing that additional documents or witnesses are required in order to make a fair and just determination of the matter, additional subpoenas could be issued at that time, and Three Rivers could then renew its motions.

Also on May 1, 2020, NRSD filed an *Opposition* to both of Three Rivers' motions. With respect to the *Motion to Vacate*, the District indicated that it was not willing to retract all subpoenas, with the exception of AM's. According to NRSD, after a Team meeting earlier in the week attended by several Three Rivers personnel, AM had stated that she could not answer the

question whether Three Rivers believes Preston is ready to be discharged without the input of other people. With respect to the *Motion to Modify*, NRSD asserted that without seeing the records it had requested, the District could not determine whether they are relevant to the issues in the case. Moreover, without access to them, NRSD contended, it would be unable to properly and fully defend itself, and the Hearing Officer might not be able to properly adjudicate the matter.

During a Conference Call that took place on May 1, 2020, the parties discussed their concerns at length, and I indicated how I was likely to rule with respect to Three Rivers' motions. NRSD explained that at the Team meeting, Three Rivers had represented that Preston would not be discharged before his next placement was identified, and Three Rivers' attorney requested additional time to produce records due to pandemic-related staffing shortages. As it became clear that records could not be produced with sufficient time for their inclusion in the parties' Exhibit Books, particularly given the agreed-upon protocol described below, NRSD indicated that it would likely request that the Hearing be postponed.

Later on May 1, 2020, NRSD filed a *Motion to Postpone* the Hearing, scheduled for May 11-14, 2020, because the District was awaiting records from Three Rivers that the agency needed to prepare in order to produce. Moreover, NRSD asserted, at the Team meeting that occurred earlier in the week, Three Rivers stated that Preston's discharge was not imminent and that it would not discharge him until an appropriate placement was available.

On May 2, 2020, Parents filed an *Opposition* to NRSD's *Motion to Postpone*, arguing that the *Hearing Request* had been filed in October, NRSD had never requested a release from Parents in order to obtain records from Three Rivers, and a delay would be both unfair and prejudicial to Preston.

On May 4, 2020, Three Rivers filed CK's Affidavit, asserting that she has never treated Preston and has no independent, firsthand knowledge about him. Three Rivers also filed the Affidavit of Tina Champagne, Chief Executive Officer, who stated that of the four employees who received subpoenas, only AM has treated Preston directly. Ms. Champagne also explained that Three Rivers is overwhelmed and short-staffed, in part because of the pandemic; that requiring so many employees to prepare for and participate in a hearing would be an enormous burden on the agency; that the documents requested by NRSD were comprised of hundreds of pages; and that Three Rivers' policy is to produce confidential information only when provided with a court order, particularly where the matter involves a minor.

II. DISCUSSION

A. Three Rivers' Motions Regarding Subpoenas

1. *Motion to Vacate and/or Quash Subpoenas*

After hearing the arguments of both parties, I have made the following determinations:

- (a) Subpoena of PD is quashed, as she is not an employee of Three Rivers.

- (b) Subpoenas of NB and RT are quashed over the objection of NRSD. Both individuals are dealing with medical issues that require them to be out of the office. Moreover, neither works directly with Preston, and Counsel for Three Rivers has represented that AM can speak to anything NRSD may have wanted to ask them.
- (c) AM will be informed as to the days and times she will be expected to testify. Even if the hearings occur in person, AM will be permitted to testify virtually.
- (d) Subpoena of CK will be quashed, over the objection of NRSD, with the understanding that if, at the Hearing, it appears that her testimony is necessary, a new subpoena will be issued. The Hearing will be continued for a few days such that Three Rivers will have the opportunity to prepare her to testify, and then she may do so virtually.

2. *Motion to Modify and Limit Subpoena Duces Tecum*

Three Rivers will produce to NRSD the six categories of documents it has agreed to produce, no later than May 15, 2020: (i) quarterly typewritten summaries of individual therapy , (ii) quarterly typewritten summaries of family therapy, (iii) quarterly typewritten milieu reports, (iv) one behavioral incident report, (v) occupational therapy records, and (vi) treatment plans. Parents' Counsel agreed to procure signed releases from Parents, on the condition that all records be sent to her as well.

There is no question that resolution of this matter turns largely on Preston's mental health, as I must determine whether he requires a residential therapeutic placement in order to receive a free appropriate public education (FAPE) or for other, non-educational reasons. For this reason, it is likely that I will need to consider records that may be confidential in nature. At the same time, allowing access to notes from Preston's private psychotherapy sessions could damage his therapeutic relationship and may not be necessary, as Three Rivers has agreed to produce quarterly summaries of these sessions. For these reasons, so much of the subpoena *duces tecum* as seeks "copies of any and all psychotherapy . . . notes, and any and all clinical information obtained through individual, group and family therapy related to and referencing," Preston, beyond the information contained in the quarterly summaries of individual and family therapy, is QUASHED.

As the parties discussed during the Conference Call on May 1, 2020, requiring a court order for production of confidential documents regarding Preston would only result in further delay, as courts are currently closed except for emergency matters. Moreover, a court would likely refer the matter back to the Hearing Officer for in-camera review of the contested documents. As such, the parties agreed that the remainder of the materials requested by NRSD, beyond the information Three Rivers agreed to produce and the psychotherapy notes discussed above, would be submitted to the Hearing Officer for in-camera review. These records will all be redacted to remove references to individuals other than Preston and his family and submitted to the Hearing Officer, by close of business on May 22, 2020, by way of a secure file.³ Three

³ I note that on May 5, 2020, Counsel for Three Rivers sent an email to the Hearing Officer and all parties requesting that Three Rivers be relieved of its obligation to produce "milieu notes" due to their sheer volume. On May 6, 2020,

Rivers will also provide the Hearing Officer with a copy of the documents produced to NRSD on May 15, 2020, so that I may consider what NRSD already has, when I determine which, if any, additional documents must be produced to the District. In making this determination, I will not require production of documents that are merely duplicative of information that has already been turned over. I will be mindful of both Parents' concerns about confidentiality, and the fact that NRSD is entitled to information relevant to the decision whether Preston requires a residential therapeutic placement to receive a FAPE or for other, non-educational reasons. Should I determine that any of the records I receive should be excluded from production because they are not relevant to the issues before me, I will note the general category of those documents, and I will not consider them in making my decision.

B. Nashoba Regional School District's *Second Motion to Postpone*

The Bureau of Special Education Appeals (BSEA) has the authority to resolve educational disputes pursuant to M.G.L. c. 71B and its implementing regulations, 603 CMR 28.00. BSEA proceedings are conducted in accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 *et seq.*, Section 504 of the Rehabilitation Act of 1973 (20 U.S.C. § 794), and the regulations promulgated thereunder (34 C.F.R. § 300 and § 104, respectively). Proceedings are governed by the BSEA *Hearing Rules*, which were developed in accordance with 603 CMR 28.00, federal due process procedures, the Massachusetts Administrative Procedure Act, M.G.L. c. 30A, and the Massachusetts Standard Adjudicatory Rules of Practice and procedure, 801 CMR 1.10 *et seq.* Although the parties in the instant matter did not cite to these provisions, I review them here because they informed my decision to allow NRSD's second postponement request.⁴

1. *Postponement Requests*

BSEA *Hearing Rule III* governs requests for postponement. Pursuant to this rule, a party may request postponement of a hearing at least 6 business days before the scheduled hearing date. The Hearing Officer may grant this request for good cause. The decision whether to postpone a hearing is within the discretion of the Hearing Officer, who must give serious consideration to opposition to a request.

2. *Hearing Officer's Obligation to Ensure Fair and Orderly Hearing*

BSEA *Hearing Rule IX* sets forth how a hearing is conducted. According to Rule IX(A), the Hearing Officer "has the authority and obligation to ensure that appropriate standards of conduct are observed and that the hearing is conducted in a fair and orderly manner." Rule IX(B)

the District filed an objection, noting that it could not agree to exclude records it has not had the opportunity to review. Because I have not yet heard arguments on this issue, I do not address it here. A Conference Call will be scheduled within the next week to address this issue, as well as NRSD's *Request to Share Dropbox*, filed on May 7, 2020, and Parents' *Opposition* thereto, filed the same day.

⁴ Although not raised by Nashoba Regional School District as a basis for its postponement request, 801 CMR 1.01(12) provides, "The Presiding Officer, may, if no Party objects, designate that all or a portion of a hearing be conducted with one or more participants situated in different locations and communicating through the medium of one or more telecommunication devices." I do not see this regulation as an absolute bar to proceeding. I would still consider the risk of prejudice to the parties of either course of action, as I have done here.

assigns to the Hearing Officer both the duty and the power to “[r]egulate the presentation of the evidence and the participation of the parties for the purpose of ensuring an adequate and comprehensive record of the proceedings.”

C. Application of Provisions in this Matter, at this Time, Requires that Postponement Be Allowed

Although I denied NRSD’s initial *Request for Postponement* on April 22, 2020, the landscape has changed since then. NRSD will not receive Three Rivers’ records until May 15, 2020, which is after the Hearing is scheduled to conclude. I will not receive additional records until May 22, 2020, at which point I will conduct an in-camera review. Furthermore, although I am concerned about Preston remaining at Three Rivers past the time when clinicians believe discharge is appropriate, Three Rivers personnel indicated at the recent Team Meeting both that discharge is not imminent, and that Preston would not be discharged without a subsequent placement, such that he will not be left without a program. Counsel for Three Rivers confirmed these statements in an email sent to the Hearing Officer and other parties on May 4, 2020.

In these circumstances, the significant risk of prejudice to NRSD of proceeding in the absence of relevant records outweighs the risk of prejudice to Preston of a short delay.

CONCLUSION

Upon consideration of Three Rivers’ *Motion to Vacate and/or Quash Subpoenas*, and its *Motion to Modify and Limit Subpoena Duces Tecum*, Parents’ *Letter of Support* and NRSD’s *Opposition* thereto, and the arguments advanced by all parties, I conclude that the contested subpoenas shall be quashed, and that the *Subpoena Duces Tecum* shall be modified. Upon consideration of Nashoba Regional School District’s *Second Motion to Postpone* and Parents’ *Opposition* thereto, and the arguments advanced by all parties, I conclude that at this time, a brief postponement is warranted.

ORDER

Three Rivers’ *Motion to Vacate and/or Quash Subpoenas* is ALLOWED as to CK, RT, NB, and PD. AM shall be informed, at least one week in advance of the Hearing, as to when she is expected to be available virtually.

Three Rivers’ *Motion to Modify and Limit Subpoena Duces Tecum* is ALLOWED IN PART and DENIED IN PART. The records Three Rivers agreed to produce are due to NRSD and the Hearing Officer no later than close of business on May 15, 2020. The remaining records that were requested by NRSD, with the exception of psychotherapy notes, will be submitted to the Hearing Officer securely by close of business on May 22, 2020.

Nashoba Regional School District’s *Second Motion to Postpone* is hereby ALLOWED. The Hearing will take place on June 15, 16, 18, and 22, 2020, beginning at 10:00 AM each day. It is likely that the Hearing will proceed virtually, in which case we will schedule a practice Zoom session to take place the previous week. Should the Hearing take place in person, it will be at Catuogno Court Reporting in Worcester.

Witness lists and exhibits are due by close of business on June 8, 2020.

By the Hearing Officer:

/s/

Amy M. Reichbach

Dated: May 8, 2020