

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

In re: Rand¹

BSEA #1912408

**RULING ON PARENTS' MID-HEARING REQUEST FOR *SUBPOENA DUCES TECUM*
AND SHARON PUBLIC SCHOOLS' MID-HEARING REQUEST TO AMEND
WITNESS LIST**

This matter, filed on June 19, 2019, is currently in hearing before Hearing Officer Amy Reichbach. Following the first day and a half of hearing, and prior to the third and final day, scheduled for July 2, 2020, both parties filed motions seeking to add documents and/or witnesses.

For the reasons below, both motions are hereby DENIED.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 19, 2019, Parents filed a *Hearing Request* against Sharon Public Schools (Sharon, or the District) alleging that the Individualized Education Program (IEP) proposed for Rand for the period from June 20, 2017 to June 19, 2018 was not appropriate for him. Furthermore, Parents asserted that an independent observation report they obtained, which was delivered to Sharon on or about June 13, 2017, was not given full consideration by the District. They requested reimbursement for a private social skills program and social skills groups Rand attended in the summer of 2017 and private social skills groups he attended in the fall and winter of 2017/2018. Furthermore, they requested reimbursement for the observation report they obtained and/or a District-funded observation of Rand by the same provider. Sharon filed a *Preliminary Response* on June 24, 2019, indicating that it wished to explore informal resolution, and on June 27, 2019, Parents indicated that they too wished to attempt to resolve the dispute informally. The Hearing was scheduled for July 24, 2019.

On July 1, 2019, Sharon requested that the Hearing be postponed for ten weeks, as Counsel was not available on the scheduled date, and because such a postponement would permit the parties to work together toward resolution. On July 8, 2019, Parents agreed to the postponement request. A Pre-Hearing Conference was scheduled for August 8, 2019, and the Hearing was scheduled for October 1 and 2, 2019.

On August 7, 2019, Parents requested that the Pre-Hearing Conference be postponed, as Rand's mother had been ill and Parents were working to gather documentation to provide to Sharon. The District assented. On August 29, 2019, Sharon requested a Conference Call, as District personnel had been unable to reach Parents regarding documentation and discussion of

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

potential resolution. When the BSEA Scheduling Coordinator attempted to schedule a Conference Call, Parents were unavailable for several weeks. On September 11, 2019, the District indicated that it had not been able to communicate with Parents and requested a further postponement of the Hearing. Parents did not respond. The Hearing was postponed to November 25 and 26, 2019. On October 31, 2019, Sharon again requested a Conference Call, as personnel had heard nothing from Parents. The BSEA was, similarly, unable to reach them for some time, and on November 18, 2019, Sharon requested the issuance of a 14-day *Order to Show Cause*, arguing that Parents had failed to effectively prosecute the matter. In the meantime, on November 19, 2019, I issued an Order indicating that as the parties had failed to submit timely exhibits and witness lists, they would be precluded from introducing evidence at the hearing in the absence of mitigating circumstances. A Conference Call was scheduled for November 22, 2019.

Following the Conference Call, I allowed the parties' joint written request for postponement of the hearing until February 27, 2020 to permit them to work together to exchange documentation and otherwise explore informal resolution. On January 27, 2020, the District advised the BSEA that it had not received any of the paperwork discussed during the Conference Call that took place on November 22, 2019. Following a Conference Call on February 5, 2020, the parties jointly requested that the Hearing on February 27, 2020 be converted to a Pre-Hearing Conference to permit them to clarify the issues for hearing and continue working together toward resolution, and the Hearing was postponed to May 6, 2020. On February 11, 2020, the District informed the BSEA that it still had not received the relevant paperwork.

On February 26, 2020, Parents requested that the Pre-Hearing Conference scheduled for the next day be postponed due to time constraints related to transportation of Rand's sibling. They also requested that both the Pre-Hearing Conference and the Hearing in the instant matter be postponed until after the issues regarding Rand's sibling had been resolved. By Order dated February 26, 2020, the Pre-Hearing Conference was cancelled. The Hearing remained scheduled for May 6, 2020, and I specified the following, in bold print: "Should Parents wish to reschedule the Hearing for another date between May 6 and June 19, 2020, they may make that request in writing after conferring with Counsel for Sharon regarding the District's availability. No postponements will be allowed beyond that date."

Following the Conference Call that took place April 22, 2020, Parents requested postponement of the Hearing scheduled for May 6, 2020 to May 28 and June 11, 2020, stating that they needed additional time to attempt to reach agreement with Sharon for reimbursement, and if not, to prepare for hearing due to the impact of coronavirus and emergency orders of school shutdown and state closures. On April 25, 2020, the District agreed to this request, so long as no further postponements were allowed. On April 27, 2020, I issued an Order scheduling the virtual Hearing² for May 28 and June 11, 2020. I specified, "as explained previously, because this case was initially filed in June 2019 and involves events that occurred in or about the summer of 2017, no further postponement requests will be granted in the absence of exigent

² Parents requested that the Hearing occur via WebEx rather than Zoom. They also requested a recording of the Hearing in addition to a written transcript. I explained that the court reporter could produce a recording if we proceeded via Zoom, but I could not guarantee the same if we proceeded via WebEx. Parents chose WebEx.

circumstances **and the agreement of the District** (emphasis in the original).” The Order established May 20, 2020 as the due date for exhibits and witness lists.

Sharon timely submitted these documents. At 3:56 PM on May 20, 2020, Rand’s mother sent an email to the BSEA and the District explaining that she would miss the end of business day deadline for delivery of exhibits because she had “been struggling with a crashed computer trying to recover files that still need printing with a jammed broken printer/copier and recreating the exhibits list.” She promised to, and did, deliver them the following day to the BSEA and the District. Parents did not, however, provide a hard copy of the exhibits to the court reporter, as they had been instructed to do.

Over Sharon’s objection, filed on May 21, 2020 and heard on May 27, 2020, I accepted Parents’ late-filed witness list and exhibits. That same day, approximately 24 hours before the Hearing was to begin, Parents filed a document entitled *Motion to Request Information to Prepare for Cross Examination of SPS District Witness*. As I explained that day, this was neither the appropriate time nor the appropriate vehicle for a discovery request.

On May 28, 2020, the first day of the Hearing ended early, because Parent became ill. The night before the second day of Hearing, Parent informed the parties by electronic mail that she might be unable to speak due to respiratory illness, and the second day ended early on June 11, 2020 for that reason. A third and final day was scheduled for July 2, 2020.

On June 18, 2020, the District requested permission for an additional witness, who had not been on its witness list, to testify, and requested that a subpoena issue. In its request, the District stated that this witness had attended a particular Team meeting and could provide information regarding Rand’s IEPs, programming, and presentation during the relevant time period.

On June 19, 2020, Parents requested a subpoena *duces tecum* for documents it described as having “been previously requested of parties and never produced,” including “education records specifically milieu, clinical, emails, correspondence, notes on telephone calls, correspondence and emails and any records that identify [Rand] or his parents that may include medical services billing, notes, documents or files that directly reference [Rand] or his parents.” They also requested education documentation related to an event that allegedly occurred in November 2018 from LABBB and requested that subpoenas *duces tecum* be issued to both the District and LABBB for these documents. On June 19, 2020, the District filed an *Opposition* to Parents’ request for subpoena *duces tecum*, noting that at no time since the matter was filed have parents sought discovery in this case.

On June 22, 2020, Parents requested that a Conference Call to “request clarification regarding Hearing procedures and exhibits” be scheduled prior to 6:00 PM on June 23, 2020. The same day, I issued an Order denying their request. In my Order I noted the following:

At this point, we are two days into the Hearing in a matter filed over a year ago. One day remains. At no point before the Hearing began did Parents request clarification regarding Hearing procedures and exhibits, and despite being informed that we would discuss the Hearing during the Pre-Hearing Conference

they later requested be postponed indefinitely, they never asked to reschedule the Pre-Hearing Conference.

II. DISCUSSION

The BSEA *Hearing Rules* establish timelines to enable parties to prepare for, and Hearing Officers to preside over, a hearing that is “conducted in a fair and orderly manner.”³ Pursuant to the Five Day Rule, “copies of all documents to be introduced (exhibits) and a list of the witnesses to be called at the hearing must be received by the opposing party (ies) and the Hearing Officer at least five (5) business days prior to the hearing unless otherwise allowed by the Hearing Officer.”⁴

The BSEA *Hearing Rules* also instruct the parties regarding the issuance of subpoenas. Specifically, a request for a subpoena or a subpoena *duces tecum* must be received by the Hearing Officer and the opposing party at least 10 calendar days prior to the Hearing.⁵ A subpoena *duces tecum* is appropriately directed toward a non-party; to the extent Parents seek documents from the District itself, these documents should have been sought through discovery. Where discovery is served by one party upon the other, BSEA *Hearing Rule* V(B) provides for 30 days to respond, unless the Hearing Officer establishes a different period of time.

The *Hearing Request* in this matter was filed over a year ago. The parties have had sufficient time to obtain discovery, select witnesses, and obtain both subpoenas and subpoenas *duces tecum*. Neither party has offered a persuasive argument as to why a mid-hearing request justifies departure from the timelines established by the BSEA *Hearing Rules*.

CONCLUSION

Upon consideration of Sharon’s mid-hearing request that a subpoena be issued (and implicitly that it be permitted to amend its witness list), and Parents’ mid-hearing request that subpoenas *duces tecum* be issued (and implicitly that they be permitted to submit evidence not contained in their exhibits), I find that neither request is timely or persuasive. As such, they are both DENIED.

ORDER

The Hearing in this matter remains continued to 9:30 AM on July 2, 2020 for the third and final day. It will be limited to witnesses and exhibits provided before the Hearing commenced on May 28, 2020.

³ BSEA *Hearing Rule* IX(A).

⁴ BSE *Hearing Rule* VIII(A).

⁵ BSEA *Hearing Rule* VII(B).

By the Hearing Officer:

/s/

Amy M. Reichbach

Dated: June 23, 2020