

COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

**Worcester Public Schools v.
Fitchburg Public Schools
& the Department of Elementary
and Secondary Education**

BSEA # 1709036

**RULING ON THE DEPARTMENT OF CHILDREN AND FAMILIES' MOTION TO
VACATE SUBPOENA *DUCES TECUM***

This case involves an appeal by Worcester Public Schools (“Worcester”) of the Department of Elementary and Secondary Education’s (“DESE”) assignment of financial responsibility for the student (“Student”). Specifically, Worcester alleges that DESE assigned financial responsibility to Worcester and it should have assigned *joint* financial responsibility to Worcester and Fitchburg.

This Motion to Vacate was filed by the Department of Children and Families (“DCF”) after it received a subpoena *duces tecum* from Worcester requesting documents pertaining to Student¹ be produced to the offices of Worcester’s counsel. In its Motion, DCF argues that its records are the subject of statutory impoundments and privileges held by Student and her parents, and potentially other third parties, and thus, DCF is bound to hold said information as confidential. DCF cites to the following regulations to support its position: 110 CMR 12; M.G.L. c. 66A; M.G.L. c. 112, §§ 135A, 135B; M.G.L. c. 119, § 51E; M.G.L. c. 210, § 5D. DCF argues that without the authorization of the “data subject” to release the requested documents, most of the material sought through the subpoena is presumptively privileged and beyond the BSEA’s subpoena power. It avers that any release of such privileged records would have to be ordered by the Superior Court pursuant to M.G.L. 30A, § 12(5); 110 CMR 12.

Worcester filed an Opposition to DCF’S Motion to Vacate. It explained that the purpose of its subpoena to DCF is to obtain residency information regarding Student, her biological parents, and any guardian(s) which information, it believes, DCF has previously provided to DESE. Worcester states it would accept responsive documents which are redacted to remove any privileged or otherwise confidential information other than the residency information it seeks. It claims that the laws cited by DCF do not prohibit the production of responsive documents or diminish the BSEA’s authority to order the production of responsive documents pursuant to a lawfully issued private subpoena.

Worcester argues that to the extent that any records are confidential under M.G.L. c. 210, § 5D (which applies only to adoption records) or privileged under M.G.L. c. 112, §§ 135A and 135 B

¹ DCF’s Motion indicates that the subpoena was issued by the BSEA, however, it appears from the file that the subpoena was issued privately by Worcester.

(which applies only to communications between a social worker and a client) DCF may redact said records before producing them. Worcester further stated its willingness to enter into a protective order requiring all documents produced be provided only to Worcester's counsel and requiring that any copies of said documents be destroyed or returned to DCF at the conclusion of the BSEA matter.

Worcester further argues that written reports under M.G.L. c. 119 § 51E and §§ 51 through 51D can be produced in response to an order of a court of competent jurisdiction and that the BSEA is a court of competent jurisdiction under M.G.L. c. 30A, § 12(1), 801 CMR 1.01(10)(g) and Rule VIII of the Hearing Rules for Special Education Appeals.

Finally, Worcester states that M.G.L. c. 66A § 2(k) does not prohibit the production of personal data, but only requires that a "data subject has been notified of [a demand for data] in reasonable time that he may seek to have the process quashed" prior to the production of such data. Therefore, DCF's duty to notify data subject(s) prior to producing responsive documents is not grounds for vacating Worcester's subpoena *duces tecum*.

I find no basis for vacating the Subpoena in its entirety. I am unpersuaded that a Superior Court Order is required for the release of DCF's records under M.G.L. ch. 30A, § 12(5) which deals with enforceability in the context of failure to comply with a subpoena. Further, although DCF is required by law to contact the "data subject(s)" prior to producing responsive documents, that is not a bar to the release of responsive documents. It simply requires DCF to notify the data subjects for the subpoena in a reasonable time that would allow said subject to seek to have the process quashed. See M.G.L. c. 66A § 2(k). 110 CMR 12.07 provides the specific methodology for seeking said consent and documenting efforts to obtain consent prior to releasing records.

I am issuing a protective order with respect to documents specifically protected by M.G.L. 112, §§ 135A, 135B; M.G.L. c. 119, § 51E; M.G.L. c. 210, § 5D. DCF shall not be required to produce records statutorily protected by the above laws including communications between social workers and a client, adoption records, and reports of injured children. Release of some of the documents potentially held by DCF requires the informed consent of a parent or guardian, the written approval of the commissioner, or an order of a court of competent jurisdiction². (M.G.L. c. 119, § 51E) All of the aforementioned documents are likely to include highly personal and sensitive information and Worcester has not made a showing that the records are likely to include information admissible at a hearing or leading to the discovery of admissible evidence in the underlying BSEA matter.

Any documents that do not fall within the above exemptions shall be produced to Worcester in redacted form as suggested by Worcester.

ORDER

² Worcester has not shown that the BSEA is a court of competent jurisdiction with respect to ordering the release of sensitive information from DCF.

DCF's Motion to Vacate the Subpoena is DENIED in part. DCF shall comply with the subpoena, with the above protections implemented.

By the Hearing Officer

Catherine M. Putney-Yaceshyn

Dated: July 13, 2017