

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

In re Ryder¹

BSEA #2100796

**RULING ON WORCESTER PUBLIC SCHOOLS' MOTION TO PERMIT
OBSERVATION**

This matter comes before the Hearing Officer on a motion filed by Worcester Public Schools (Worcester, or the District) to permit observation of Ryder at the program in which he has been unilaterally placed by Parents. On November 12, 2020, Worcester filed its *Motion to Permit Observation*, requesting that the BSEA issue an Order allowing the District to observe Ryder at the Bancroft School, as such observation is necessary for the full presentation of its case at hearing. On the same date, Parents filed an *Opposition*, asserting that Worcester had improperly served them, as neither they nor their attorney have any authority or responsibility regarding Bancroft's decision whether to allow in-person and/or virtual observation of its program, particularly during a pandemic that presents COVID-related challenges and restrictions. Parents argued that Worcester's *Motion* should have been served upon Bancroft and its counsel, and as such, the BSEA should deny it as presently filed.

Following a Conference Call that took place on November 12, 2020, during which we discussed the parties' filings and I requested further briefing, I issued a Scheduling Order. According to this Order, Worcester's brief in support of its *Motion to Permit Observation*, should it choose to submit one, was due by close of business on November 30, 2020, and Parents would have seven days to respond.

As Worcester has filed no further briefing, neither party requested a hearing on the motion, and neither testimony nor oral argument would advance the Hearing Officer's understanding of the issues involved, this Ruling is being issued without a hearing pursuant to Bureau of Special Education Appeals *Hearing Rule VII(D)*.

For the reasons set forth below, Worcester's *Motion* is hereby DENIED.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY²

¹ "Ryder" 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 drawn from the parties' pleadings and is subject to revision in further proceedings.

On August 21, 2020, Parents filed a *Hearing Request* against Worcester asserting that the District has failed to offer Ryder a free, appropriate public education (FAPE) since August 2018 and, as such, they are entitled to compensatory services and/or reimbursement of tuition and mileage expenses for that failure. Parents also contend that Bancroft, a private, special education day school for students who struggle with language-based and other complex social emotional needs, is appropriate for Ryder, and that Worcester should be ordered to fund his placement there for the 2020-2021 school year. The Hearing was scheduled for September 25, 2020.

The undersigned Hearing Officer granted two assented-to *Motions for Extension of Time to File Response*, as Worcester was unable to access Ryder's records due to a malfunction of the District's student records system. On September 14, 2020, the District filed its *Response*, arguing that Ryder has never been enrolled in Worcester Public Schools and Parents have not allowed him to participate in any of the special education services or supports proposed by the District; that the Individualized Education Programs (IEPs) and full inclusion placements proposed by Worcester for Ryder during the relevant time period have been reasonably calculated to provide him with a FAPE; and that Ryder does not require an out-of-district day placement at the Bancroft School. As such, Worcester asserts, Parents are not entitled to the relief they seek.

In the meantime, on September 9, 2020, Worcester filed a *Motion to Continue* the hearing, as counsel and several key witnesses were unavailable. During the Conference Call the same day, Parents assented, and the matter was scheduled for Hearing December 15, 16, and 17, 2020, with a Pre-Hearing Conference on November 12, 2020. The parties each filed motions for protective orders and, after conferring, jointly proposed a *Protective Order*, which I signed and issued on October 15, 2020. On November 23, 2020, the parties jointly requested that the Hearing be postponed an additional six weeks to permit them to continue working together toward resolution. I allowed this request, and the Hearing was scheduled for January 25, 26, and 27, 2021.

II. DISCUSSION

In its *Motion to Permit Observation*, Worcester contends that when District staff contacted Bancroft School to schedule an observation, their request was refused, and they have not received a response to their subsequent request to conduct the observation virtually. Although the District asserts that an observation of Ryder at Bancroft is essential to the preparation of its case, Worcester offers no legal basis for me to issue an order requiring a non-party private school to permit one. Given the opportunity to supplement its argument with legal authority, Worcester declined to do so. As such, I review relevant law, rules, and regulations to determine whether such authority exists.

A. Massachusetts General Law Chapter 71B, § 3 and 603 CMR 28.07(1)(a)(3)

Massachusetts law regarding observation of programs for students identified as eligible for special education services aims to increase parents' ability to "participate fully and effectively with school personnel in the consideration and development of education programs"

for their children, and to provide informed consent for their children’s placement.³ Consistent with this purpose, “a school committee shall, upon request by parents, provide timely access to parents and parent-designated independent evaluators and educational consultants, for... any proposed program for the child, including both academic and non-academic components of any such program.”⁴ The law is silent as to any right of school districts to observe programs where students have been unilaterally placed by their parents. Moreover, such observations are not consistent with the purpose served by the provisions that have been enacted. As such, neither M.G.L. c. 71B, §3 nor 603 CMR 28.07(1)(a)(3) provides a basis under which I may grant Worcester’s *Motion*.

B. Discovery Rules

Hearing Officers are not bound by the rules of evidence or civil procedure applicable to Massachusetts courts, but at times we turn to them for guidance. The Massachusetts Rules of Civil Procedure allow for the issuance of a subpoena by a clerk of court, a notary public, or a justice of the peace on a nonparty to permit a party to enter on land to inspect the premises.⁵ Hearing Officers are bound, however, by the BSEA *Hearing Rules for Special Education Appeals* (Hearing Rules) and the Standard Rules of Adjudicatory Practice and Procedure, 801 Code Mass Regs 1.01.⁶ Hearing Rule V governs discovery, or the informal and formal exchange of information, in BSEA proceedings, and Hearing Rule VII(B) allows the BSEA to issue subpoenas, including those directed at nonparties. Nothing in the BSEA Rules or the Standard Rules of Adjudicatory Practice and Procedure allows a Hearing Officer to issue a subpoena requiring a nonparty to permit a party to enter its premises for any reason. To the extent Worcester chooses to pursue this course of action, it would not be before the BSEA.

CONCLUSION

Upon consideration of Worcester’s *Motion to Permit Observation* and Parents’ *Opposition* thereto, I find no legal authority for the Order the District seeks.

ORDER

Worcester Public Schools *Motion to Permit Observation* is hereby DENIED.
The matter will proceed to hearing on January 25, 26, and 27, 2021 via Zoom.

By the Hearing Officer,

 /s/ Amy Reichbach

December 3, 2020

³ M.G.L. c. 71B, § 3; see 603 CMR 28.07(a)(3) (As part of a school district’s responsibility to obtain informed parental consent, parents “have the right to observe any program(s) proposed for their child if the child is identified as eligible for special education services”).

⁴ M.G.L. c. 71B, § 3.

⁵ Mass. R.C.P. 34(c), 45(a).

⁶ See 801 CMR 1.01(8) (administrative rules governing discovery before the BSEA and other Massachusetts agencies); 801 CMR 1.01(10)(g) (regarding issuance of subpoenas).