

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

**In Re: Student v. Westfield Public Schools & DMH**

**BSEA # 2200773**

**RULING ON THE CUTCHINS PROGRAMS FOR CHILDREN & FAMILIES’  
MOTION TO VACATE AND/OR QUASH SUBPOENA a  
AND  
MOTION TO MODIFY SUBPOENA *DUCES TECUM***

This matter comes before the Hearing Officer on two motions filed by Cutchins Programs for Children & Families (Cutchins), a non-party entity, regarding subpoenas issued by the Bureau of Special Education Appeals (BSEA) at the request of Westfield Public Schools (the District or Westfield). On or about September 23, 2021, the District requested, and the BSEA issued shortly thereafter, a subpoena *duces tecum* to the Keeper of Records Cutchins for a number of documents concerning Student. On or about the same date, subpoenas were issued to LI, a Clinical Director at Cutchins – NCCF, and EM, Student’s Clinician at Cutchins, to appear and testify at the Hearing in this matter which is currently scheduled for November 16, 19, 22, and 23.<sup>1</sup> On October 4, 2021, Cutchins filed its *Motion to Vacate and/or Quash Subpoena (Motion to Vacate)* and its *Motion to Modify Subpoena Duces Tecum (Motion to Modify)* (together, the Motions), along with two affidavits in support of its Motions. Neither Parents nor the Department of Mental Health (DMH) have opposed the motions.

On October 6, 2021, I heard arguments on the issues raised by the Motions via a virtual platform.<sup>2</sup> For the reasons set forth below, Cutchins’ *Motion to Vacate and/or Quash Subpoenas* is ALLOWED, and its *Motion to Modify Subpoena Duces Tecum* is ALLOWED IN PART and DENIED IN PART.

**RELEVANT FACTS<sup>3</sup> AND PROCEDURAL HISTORY:**

1. Student is a 14-year-old boy who was adopted by Parents at a young age. Student carries many diagnoses, including PTSD, Reactive Attachment Disorder, ADHD, anxiety disorder, and mood disorder. He also suffers from learning and cognitive disabilities, and his adaptive functioning is limited.
2. Student was found eligible for services through DMH in March 2016. From September 2016 to May 2019, Student and his family received a variety of DMH-funded wrap-around services.

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<sup>1</sup> On October 8, 2021, the parties jointly requested postponement of the matter, which was scheduled for Hearing on November 2, 3, and 4, 2021. On October 12, 2021, the postponement was granted for good cause.

<sup>2</sup> Parents and DMH asked to be excused from the motion session, as they had no objections to the Motions. The Hearing Officer excused them from attending.

<sup>3</sup> The following facts are not in dispute and are taken as true for the purposes of this Ruling. These facts may be subject to revision in subsequent proceedings.

3. In March 2019, following a hospitalization, Student was placed at the Northampton Center for Children and Families (NCCF), a DMH-funded residential treatment center, part of the Cutchins Program for Children and Families, where he resides to date.
4. On July 27, 2021, Parents filed the instant appeal, alleging, in part, that the District's proposed placement at a private day program fails to offer Student a FAPE and that Student requires placement in a residential program. In response, the District asserted that DMH is responsible for addressing Student's mental health needs, which are distinct and separate from his learning needs. On September 20, 2021, the Hearing Officer joined DMH as a necessary party to this dispute.
5. On or about September 23, 2021<sup>4</sup>, in response to a request by the District, the BSEA issued a subpoena *duces tecum* to the Keeper of Records at Cutchins for a number of documents concerning Student (hereinafter, Subpoena *Duces Tecum*). On or about the same date, subpoenas were issued to LI, a Clinical Director of Cutchins – NCCF, and EM, Student's clinician at Cutchins to appear and testify at the Hearing in this matter on November 2, 3, and 4, 2021.
6. On October 4, 2021, Cutchins filed the Motions with affidavits from TC, Chief Executive Officer of Cutchins, and LI in support thereof (the Affidavits).
7. In its *Motion to Vacate*, Cutchins argued that while EM is Student's clinician and has firsthand, personal knowledge relative to Student's care and progress at Cutchins, LI is EM's supervisor; she has not worked with Student directly and could only testify to secondhand information derived from EM. Furthermore, due to the pandemic, the agency is currently overwhelmed and short-staffed, and requiring LI to prepare for and attend a multiple-day hearing would be an enormous burden on the agency financially and from a workload perspective. The Affidavits support the *Motion to Vacate*.
8. In its *Motion to Modify*, Cutchins argued that the Subpoena *Duces Tecum* is unreasonable and oppressive, overbroad, and, in part, requests both confidential documents protected by law and documents not relevant to the issue. Specifically, paragraphs 5, 6 and 7 of the Subpoena *Duces Tecum* require Cutchins to produce "any and all documentation, including but not limited to letters, emails or other correspondence of any kind" between and among staff of Cutchins or any of its affiliated programs and Student's parents, DMH, and the District, respectively. Emails are used as a frequent source of communication by Cutchins' staff for a myriad of matters, including but not limited to personnel matters, staff changes, COVID-related concerns, and scheduling. While such emails are placed in each client's file, they contain no information concerning Student's treatment, current need or level of functioning. Cutchins furthermore argued that it is a non-profit agency, and the Subpoena *Duces Tecum* essentially requires Cutchins, a non-party to this action, to produce "hundreds of pages of typewritten, handwritten, and electronic records, many of which are too old to be of any use or relevance to this proceeding" from April 18, 2019 through the present. Given its non-profit status and the pandemic, this would place an enormous burden on limited staff. Cutchins furthermore asserted that some of the documents requested in the subpoena contain confidential information. Specifically, paragraph 4 of the Subpoena *Duces Tecum* requests, in part,

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<sup>4</sup> On September 16, 2021, the District first requested that the BSEA issue the subpoenas at issue in this Ruling. However, the District improperly directed the subpoenas to Three Rivers and NEARI. On September 23, 2021, the District revised its request, and the BSEA issued the requested subpoenas on said date. Cutchins was served with the subpoenas on September 27, 2021.

psychotherapy notes, which enjoy a heightened protection under the law. Such production, Cutchins asserted, would violate Student's patient/therapist privilege. Moreover, such records are prohibited by law from disclosure.

9. Cutchins requested that the Subpoena *Duces Tecum* be modified by limiting the records to be produced to the following from January 1, 2021, through the present: (i) treatment plans (ii) safety plans, (iii) occupational therapy records, (iv) incident reports, and (v) progress reviews. It also requested three (3) weeks from the date upon which it receives the instant Ruling to respond to the Subpoena *Duces Tecum*.
10. The District did not file a written response but argued its objections to the Motions orally on October 6, 2021.
11. In response to the *Motion to Vacate*, the District argued that although EM's testimony would likely be sufficient, the District did not want to preclude the option of having LI testify, if needed.
12. In response to the *Motion to Modify*, the District argued the need for documents dating farther than the proposed January 1, 2021 date since, at Hearing, the District intended to demonstrate, in part, Student's progress throughout his time at Cutchins. The District proposed that Cutchins provide documents from September 2020 to the present, and agreed to waive documents that are administrative and not substantive in nature.

## **LEGAL STANDARDS:**

### **A. The BSEA's Authority to Issue and Quash Subpoenas**

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.<sup>5</sup> Under 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.

## **APPLICATION OF LEGAL STANDARDS AND CONCLUSION:**

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<sup>5</sup> 801 CMR 1.01(10)(g) and BSEA Hearing Rules VII B and C.

After consideration the arguments of Cutchins and the District, and noting Parents' and DMH's failure to object to the Motions, I have made the following determinations:

1. Cutchins' Motion to Vacate and/or Quash Subpoena is ALLOWED.

The subpoena of LI is quashed over the objection of the District. With the Affidavits offered in support of the Motions, Cutchins persuasively argued that LI cannot offer any information on the instant matter which cannot be elicited from the testimony of EM, who has also been subpoenaed to appear at the Hearing and will be doing so. Furthermore, in response to Cutchins' reasonable request, EM will be informed as to the days and times she will be expected to testify. Testimony will take place via a virtual platform. Should LI's testimony become necessary, a new subpoena may be issued, and a mutually agreeable time will be scheduled for direct testimony and cross-examination.

2. *Cutchins Motion to Modify Subpoena Duces Tecum* is ALLOWED IN PART and DENIED IN PART.

I am sensitive to Cutchins' struggles as a non-profit agency operating with limited staff during a lengthy pandemic. However, the District must be allowed to respond to Parents' claims and to present its case-in-chief following a diligent review of all relevant, available information.

As such, by the close of business on November 2, 2021, Cutchins will provide to the District the following records, from September 1, 2020 through the present: (i) treatment plans (ii) safety plans, (iii) occupational therapy records, (iv) incident reports, and (v) progress reviews.

In addition, in response to paragraphs 5, 6 and 7 of the Subpoena *Duces Tecum*, Cutchins shall only provide the District with documentation that is substantive in nature and is non-administrative or duplicative. Such documentation shall also be limited to the period from September 1, 2020 through the present.

Cutchins' objection to providing the District with the "psychotherapy and /or clinical notes ... and any and all clinical information obtained through individual, group and family therapy related to and referencing [Student]" raises valid concerns regarding the potential damage which such action could cause the therapeutic relationship. Cutchins' position is buttressed by the limitations on access to psychotherapy notes imposed by the Health Insurance Portability and Accountability Act (HIPAA) and 45 CFR §164.524 (a)(1)(i).<sup>6</sup> I also note that M.G.L. c. 233, §

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<sup>6</sup>45 CFR §164.524 (a)(1)(i) states that an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set for as long as the protected health information is maintained in the designated record set, **except for** psychotherapy notes. According to 45 C.F.R. § 164.501, *psychotherapy notes* means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date. These notes are often referred to as "process notes," distinguishable from "progress notes," "the medical record," or "official records." In

20B, provides, in relevant part, that “in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings, a patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient's medical or emotional condition.” Similarly, M.G.L. c. 112, Section 135B<sup>7</sup> provides, in relevant part, that in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings, a client shall have the privilege of refusing to disclose and of preventing a witness from disclosing, any communication, wherever made, between said client and a social worker licensed pursuant to the provisions of section one hundred and thirty-two of chapter one hundred and twelve, or a social worker employed in a state, county or municipal governmental agency, relative to the diagnosis or treatment of the client's mental or emotional condition. . . .”

In both Massachusetts privilege statutes, an exception exists for

... any proceeding, except one involving child custody, adoption or adoption consent, in which the client introduces his mental or emotional condition as an element of his claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between the client and [the psychotherapist or the social worker] be protected....<sup>8</sup>

Here, Parents<sup>9</sup> have not objected to the Subpoenas *Duces Tecum*. They were invited to participate in the October 6, 2021 Motion Session but waived their right to participate.<sup>10</sup> As a result, I infer their willingness to waive the privileges.<sup>11</sup> Furthermore, Parents have introduced Student’s mental and/or emotional condition as an element in their claim. There is no question that resolution of this matter turns largely on the student’s mental health, and that I must determine whether he requires a residential therapeutic placement in order to receive a free appropriate public education (FAPE) or requires residential placement for other, non-educational reasons. Hence, psychotherapy and/or clinical records, even if confidential in nature, may be relevant to the District’s presentation of its case and to my decision.

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addition, “process notes are often kept separate to limit access, even in an electronic record system, because they contain sensitive information relevant to no one other than the treating provider.” Summary information, such as the current state of the patient, symptoms, summary of the theme of the psychotherapy session, diagnoses, medications prescribed, side effects, and any other information necessary for treatment or payment, is always placed in the patient’s medical record. See 65 F.R. 82622-23.

<sup>7</sup> I am referencing the client-social worker privilege because the Subpoena *Duces Tecum* seeks “clinical notes” as well as psychotherapy notes, but does not reference the provider’s credentials.

<sup>8</sup> M.G.L. c. 233, § 20B(c) and M.G.L. c. 112, Section 135B(c).

<sup>9</sup> See M.G.L. c. 233, § 20B and M.G.L. c. 112, Section 135B (“If a patient is incompetent to exercise or waive such privilege, a guardian shall be appointed to act in his behalf under this section. A previously appointed guardian shall be authorized to so act”).

<sup>10</sup> Via email on October 5, 2021, Counsel for Parents informed the Hearing Officer that he was waiving his right to participate.

<sup>11</sup> Even if this Hearing Officer’s inference overreaches Parents’ intentions, I note that my conclusions in this Ruling remain the same.

Therefore, following a line of BSEA discovery rulings<sup>12</sup>, with regard to Paragraph 4 of the Subpoena *Duces Tecum*, Cutchins shall provide the Hearing Officer with “clinical notes ... and any and all clinical information obtained through individual, group and family therapy related to and referencing [Student]” for an in-camera review, through which I will determine which, if any, of these records should be disclosed. Such notes shall be **redacted** of references to individuals other than Student and his family and shall be limited to the time period from September 1, 2021 through the present.

With regard to Paragraph 4 of the Subpoena *Duces Tecum* seeking “psychotherapy notes” related to and referencing Student, I find that I have no authority to order Cutchins to produce them. Unlike clinical notes, HIPPA provides additional protections to psychotherapy notes, denying access even to the patient or their personal representative.<sup>13</sup> The District must therefore pursue a court order<sup>14</sup> in order to access said documents.

However, “summary information<sup>15</sup>” related to and referencing Student, to the extent that such summaries exist, is excluded from the definition of psychotherapy notes and may be relevant to the instant matter. Hence, Cutchins shall provide to the Hearing Officer for in-camera review any existing summaries of psychotherapy notes related to and referencing Student. I will then determine which, if any, of these records should be disclosed.<sup>16</sup> Such summaries shall be **redacted** of references to individuals other than Student and his family and shall be limited to the time period from September 1, 2021 through the present. 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.

## **ORDER:**

1. Cutchins’ *Motion to Vacate and/or Quash Subpoena* is ALLOWED.

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<sup>12</sup> See *In Re: Nashoba Regional School District and Preston*, BSEA #20-04002 (Reichbach, 2020); *In Re: Nashoba Regional School District*, BSEA # 03-0860, 10 MSER 98 (Crane, 2003); *In Re: Saugus Public Schools*, BSEA # 02-3886, 8 MSER 395 (Beron, 2002); *In Re: Wilmington Public Schools*, BSEA # 97-3289, 3 MSER 171 (Erlichman, 1997).

<sup>13</sup> See 45 C.F.R. § 164.524(a)(1)(i).

<sup>14</sup> I note that this *In Re: Nashoba Regional School District and Preston*, BSEA #2004002, Hearing Officer Amy Reichbach observed that “requiring a court order for production of confidential documents regarding [the student] 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.” Although the backlog of cases continues to be significant, currently, courts are open again. Despite the delay that seeking a court order may cause in this matter, I find that I cannot reach a different conclusion regarding my authority.

<sup>15</sup> Summary information is excluded from the definition of psychotherapy notes. See 65 F.R. 82733 (“Summary information, such as the current state of the patient, symptoms, summary of the theme of the psychotherapy session, diagnoses, medications prescribed, side effects, and any other information necessary for treatment or payment, is always placed in the patient’s medical record”). See also Hearing Officer Amy Reichbach’s ruling on a nearly identical issue in *In Re: Nashoba Regional School District and Preston*, BSEA #2004002, where she ordered same.

<sup>16</sup> Both Massachusetts privilege statutes require that the presiding officer balance, on a case-by-case basis, the interests of fairness and justice which would be served by the disclosure, against protection of the confidential relationship between client and psychotherapist or social worker

2. Cutchins' *Motion to Modify Subpoena Duces Tecum* is ALLOWED IN PART and DENIED IN PART. Specifically, by the close of business day on November 2, 2021:
  - a. Cutchins will provide the District (and the Hearing Officer) with the following records relative to Student and/or his family, for the period September 1, 2020 through the present:
    - i. Treatment plans;
    - ii. Safety plans;
    - iii. Occupational therapy records;
    - iv. Incident reports;
    - v. Progress reviews;
    - vi. Letters, emails or other correspondence limited to that which is substantive in nature and is non-administrative or duplicative; and
  - b. In response to the District's request for "psychotherapy and /or clinical notes ... and any and all clinical information obtained through individual, group and family therapy related to and referencing [Student]," Cutchins will submit to the Hearing Officer for in-camera review the following records for the period September 1, 2020 through the present redacted in the manner described above:
    - i. "[C]linical notes ... and any and all clinical information obtained through individual, group and family therapy related to and referencing [Student]; and
    - ii. Existing summaries of "psychotherapy notes" related to and referencing Student.

So Ordered by the Hearing Officer,

/s/ Alina Kantor Nir

Hearing Officer

Dated: October 13, 2021