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

In Re: Stoneham Public Schools **BSEA # 1300160**

RULING ON
PARENTS' MOTION TO SEQUESTER WITNESSES

This ruling addresses Parents' motion to sequester witnesses. More specifically, the motion seeks an order excluding all witnesses from the hearing room until such time as they are called to testify in this matter. Parents' motion was heard on August 28, 2012, and the parties were orally advised of the conclusions of my ruling at that time.[1]

Neither the Bureau of Special Education Appeals (BSEA) Hearing Rules, the state Department of Elementary and Secondary (DESE) regulations governing BSEA proceedings, nor the Executive Office of Administration and Finance Adjudicatory Rules of Practice and Procedure address the question of whether (or when) witnesses must (or may) be sequestered.

However, DESE regulations provide broad authority to a BSEA Hearing Officer to take such steps as may be necessary to "conduct a fair hearing."[2] This allows a BSEA Hearing Officer to sequester witnesses were he or she to determine that sequestering witnesses is necessary to ensure a fair hearing.[3]

For further guidance, I consider the practice and rules within federal and state courts. In Massachusetts state courts, sequestration lies within the discretion of the trial judge.[4] Within the federal courts, the "sequestration of trial witnesses is a practice of long standing",[5] and since 1975, has been established as a right (with certain exceptions) through Federal Rules of Evidence Rule 615 (Rule 615).[6]

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[1] Parents were *pro se*. Stoneham was represented by Attorney Nancy Nevils. I note, with appreciation, the legal research by BSEA intern Shaina Wamsley that assisted my preparation of this ruling.

[2] 603 CMR 28.08(5)(c).

[3] On occasion, BSEA Hearing Officers have ordered that witnesses be sequestered. In contrast, the Division of Administrative Law Appeals Magistrates, who have no greater authority than BSEA Hearing Officers regarding sequestering witnesses, have a practice of more routinely allowing motions to sequester witnesses.

[4] See Mass. Gen. Laws § 615 ("At the request of a party, or sua sponte, the court may order witnesses excluded so that they cannot hear the testimony of other witnesses. The court may not exclude any parties to the action in a civil proceeding, or the defendant in a criminal proceeding."); *Com. v. Pope*, 392 Mass. 493, 506 (1984) ("Both the sequestration of witnesses and the remedy for violating sequestration lie within the sound discretion of the trial judge.").

[5] *United States. v. Magana*, 127 F.3d 1, 5 (1st Cir. 1997).

[6] Federal Rules of Evidence Rule 615 provides as follows:

The Supreme Court has noted that the purpose is twofold. "It exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid."[7] Similarly, the advisory committee's notes indicate that Rule 615 was adopted because the "efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion."[8]

In *U.S. v. Jackson*, the Court of Appeals for the Second Circuit identified the following six factors that may be considered when determining whether to grant or deny an exemption from a witness sequestration order under Rule 615:

1. how critical the testimony in question is—that is, whether the testimony will involve controverted and material facts;
2. whether the information is ordinarily subject to tailoring such that cross-examination or other evidence could not bring to light any deficiencies (testimony regarding "simple objective facts" is "ordinarily not subject to tailoring, and, if it were, it could have been exposed easily");
3. to what extent the testimony of the witness in question is likely to encompass the same issues as that of other witnesses;
4. the order in which the witnesses will testify;
5. any potential for bias that might motivate the witness to tailor his testimony—for example, where a witness has both the ability and the motive to modify testimony in favor of a party); and
6. whether the witness's presence is "essential" rather than simply desirable.[9]

As discussed above, my authority to order that witnesses be sequestered is found within a BSEA Hearing Officer's general authority to ensure that the parties receive a fair hearing. The above-referenced six factors in *Jackson* may be useful in determining whether one or more witnesses should be sequestered by a BSEA Hearing Officer in order to ensure a fair hearing.

I now consider whether Parents (as the moving party) have met their burden of persuasion that sequestering witnesses should be ordered.

> At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
> (a) a party who is a natural person;
> (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
> (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
> (d) a person authorized by statute to be present.

[7] *Geders v. United States*, 425 U.S. 80, 87 (1976).
[8] Fed.R.Evid. 615, advisory committee note.
[9] *U.S. v. Jackson*, 60 F.3d 128, 135 (2d Cir. 1995) (internal citations omitted).

In their motion to sequester witnesses, Parents take the position that "[i]t is important that people testify based on their own knowledge and expertise and ... witnesses should [not] be allowed to hear what others say before them." Parents expressed concern that if Stoneham witnesses heard the testimony of their colleagues, as well as the testimony of Parents' witnesses, this "could sway the [Stoneham] witnesses before their testimony …." Thus, Parents have focused on a principal concern to be addressed through sequestering witnesses—specifically, that testimony may be tailored (or otherwise improperly altered) if sequestering does not occur.

However, Parents did not provide any reason for me to be concerned that prejudicial tailoring would actually occur in the instant dispute—for example, that there is a reasonable basis to believe certain witnesses may be motivated to tailor their testimony with the result that controverted and material testimony may be tailored (and that the tailoring would not likely be brought to light) if the witnesses were not sequestered. Parents only took the position that tailoring was possible and therefore witnesses should be sequestered to preclude that possibility.

I find that Parents' merely raising a general possibility that testimony will be tailored is not sufficient basis for me to conclude that sequestering witnesses is necessary to ensure a fair hearing.

Because sequestering witnesses is a discretionary remedy, I also consider the benefits, if any, as a result of not sequestering all witnesses. I agree with Stoneham (and so find) that allowing Stoneham's witnesses to hear and respond to concerns of Parents' witnesses will likely assist my determination of appropriate programming for Student.

For these reasons, I conclude that Parents have not met their burden of persuasion, with the result that their motion to sequester witnesses is DENIED.

By the Hearing Officer,

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William Crane
Dated: September 5, 2012