

**THE COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**Bureau of Special Education Appeals**

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In Re: Student

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BSEA # 1306264

Norton Public Schools

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**RULING ON PARENTS' MOTION FOR RECUSAL**

This matter comes before the Hearing Officer on the Motion of the Parents for Recusal of the Hearing Officer, and the School's Opposition thereto. The Parents in two BSEA matters involving the same school district and two different students and families are represented by the same Advocate and submitted identical Motions. The Motions will be addressed separately.

**Procedural Background**

The Parents, through their advocate, submitted a Hearing Request to the BSEA on April 10, 2013. As is customary the matter was assigned a sequential case number by date, and a supervising Hearing Officer in random rotation. By chance, the Hearing Officer assigned to the instant matter had been assigned to an earlier filed Hearing Request by the same Advocate also involving the Norton Public Schools. (BSEA#13-06761)

On April 17, 2013, the Parents submitted a Motion to Recuse. As sole grounds therefore the Advocate posits that the Parents had been made aware by the Advocate of a previous Decision(s) by the Hearing Officer in an unrelated matter to which the Advocate objected and, based on the Advocate's explanations, did not believe the currently assigned Hearing Officer could be fair and impartial in this matter.<sup>1</sup> That challenged Decision involved a different student, different family, different school district, different school counsel and different substantive issues. The only elements

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<sup>1</sup> That case history can be viewed at: In Re: *Taunton Public Schools*, 16 MSER 288 (2010); 17 MSER 51 (2011); 17 MSER 267 (2011); 17 MSER 286 (2011). The Parent's appeal of the final BSEA Decision to federal court was recently dismissed with prejudice. *Torrey v. Department of Elementary and Secondary Education*. CA 1:12cv-11788JLT (D. Ma. April 7, 2013).

common to BSEA 10-8142, the “offending” Decision, and BSEA 13-06264, the current matter, are the identities of the Parents’ Advocate and the BSEA Hearing Officer.

On April 18, 2013, the School submitted an Opposition to the Parents’ Recusal Motion, arguing that the Parents failed to demonstrate any objective or subjective grounds for recusal or reassignment of the instant matter. The School contends that the Motion is an impermissible attempt to manipulate the random Hearing Officer assignment process as it is interposed solely to obtain a different hearing officer who might be more favorable to the Parents’ claims. See: *In Re Concord Public Schools*, 17 MSER 183 (Crane, 2011)

### Legal Framework

Motions for Recusal must be considered seriously by the challenged decision-maker. It is of grave importance to the administration of justice that all participants in a judicial or quasi-judicial proceeding have trust and confidence in the impartiality and the expertise of the person conducting the proceeding. It is also important that the administrative functions of a due process entity be efficient, fair, and responsive to all interested participants, and not subject to disruption or delay by a very small minority of individuals. Rules have been established to guide parties and decision makers considering recusal options. There are a number of statutory requirements, judicial opinions and ethical codes that either apply directly to, or provide useful guidance on, the issue of recusal by a BSEA Hearing Officer.<sup>2</sup>

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<sup>2</sup> See in particular: Notes accompanying 28 U.S.C. §455(a); 20 U.S.C. §1415 (f) (3); 34 CFR 511 (c); 603 CMR 28.08 (3); Discussion at: *Judicial Disqualification: An Analysis of Federal Law*, Federal Judicial Center (2010), *Recusal: Analysis of Case Law Under 28 U.S.C. 455 & 144*, Federal Judicial Center (2002) ; and treatment of recusal requests at the BSEA at *In Re: Concord Public Schools*, 17 MSER 183 (Crane,2011); *In Re: Brockton Public Schools*, 16 MSER 367 (Byrne, 2010); *In Re: Duxbury Public Schools*, 14 MSER 363 (Byrne 2008); *In Re: Wachusett Regional Schools*, 14 MSER 365 (Oliver 2008); *In Re: Marblehead Public Schools*, 8 MSER 84 (Crane 2002).

Additional resources addressing ethical expectations for Judges, Hearing Officers and other lawyers functioning in a quasi-judicial role have recently been made available to the public. See: Massachusetts Code of Judicial Conduct, Supreme Judicial Court of Massachusetts(2003); U.S. Judicial Conference, [www.uscourts.gov/guide/vol12/ch1.html](http://www.uscourts.gov/guide/vol12/ch1.html); American Judicature Society (2008a), [www.ajs.org/ethics](http://www.ajs.org/ethics); ABA Model Judicial , [www.abanet.org/judicial](http://www.abanet.org/judicial) ethics/approved\_MCJChhtml; Massachusetts Committee on Judicial Ethics, [www.mass.gov/courts/rule 309](http://www.mass.gov/courts/rule_309), see in particular Canon 3, Section E concerning disqualification.

<sup>2</sup> 20. U.S.C. § 1415 (f) (3) provides: A hearing officer conducting a hearing pursuant to paragraph (l)(A) shall, at a minimum- (i) not be-

- I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or
- (II) a person having a personal or professional interest that conflicts with the person’s objectivity in the hearing;

At a minimum federal and state special education rules require that an IDEA Hearing Officer have the specialized knowledge and the necessary objectivity to act on and decide impartially each particular matter presented.<sup>3</sup>

When considering a request to recuse a hearing officer must weigh her own professional qualifications to hear the type of appeal presented; must be alert to any objective bars that arise in the particular matter before her; must consider any subjective biases or prejudgments she may have about the parties or the subject matter; and must anticipate how her conduct of the matter might “appear” to the parties and the public. Considerations of “impartiality” in the context of a motion to disqualify a hearing officer have both a purely factual component and an objective “reasonable person” component. While it is the responsibility of the moving party to set out the facts underlying the request for recusal, it is the duty of the hearing officer when evaluating such a request to fairly examine the facts alleged and her own conscience, as well as to attempt to view her actions from the perspective of the litigants and the public. While it is clear that a personal or professional interest in the outcome of a matter would be grounds for recusal, it is more difficult to assess the impact of litigant “perception” and thwarted expectations on the potential fairness of a due process proceeding. And that is the bottom line. As lawyers and as a part of the “administration of justice,” hearing officers must ensure not only that the hearings they conduct are actually fair, but that they are perceived to be fair. Furthermore, arguments in opposition to recusal such as prevention of “judge shopping”, promotion of efficiency in case management and conservation of scarce administrative resources, while legitimate and in some instances compelling, do not override the need for close and thoughtful examination of possible factors supporting recusal. This is particularly true when the motion is advanced by a person unfamiliar with, or disadvantaged by, a complicated administrative due process system. Therefore I will discuss each consideration in turn.

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(ii) possess knowledge of, and the ability to understand, the provisions of this title [20 USCS §§1400 et seq.] , and legal interpretations of this title [20 USCS §§1400 et seq.] by Federal and State courts:

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

Similarly, 603 CMR 28.08 (3) of the Massachusetts special education regulations provide:

Mediations and hearings shall be conducted by impartial mediators and hearing officers who do not have personal or professional interests that would conflict with their objectivity in the hearing or mediation and who are employed to conduct those proceedings.

## Discussion

### *A. Professional Qualifications*

The Parents' Advocate makes a broad claim that in prior proceedings in which she has appeared before me I have demonstrated a persistent lack of particularized knowledge of IDEA substantive law and procedure. The Advocate offers no objective support for her claim and there is none that I am aware of or could uncover. Having served as a special education hearing officer for more than 28 years I believe I have the training and experience contemplated by the framers of the IDEA's dispute resolution system. Therefore, disqualification on the basis of lack of required professional qualifications is not warranted.

### *B. Objective Bars to Service as a Hearing Officer*

Hearing Officers routinely recuse themselves from any matter in which they have a personal or professional interest which might reasonably compromise their ability to impartially conduct a hearing or to render a fair decision. These factors include but are not limited to: potential relationship-based bias due to a familial tie with a participant, residence within the school district, a financial interest in the outcome of the matter, or a prior association with counsel. In this matter the moving party has not alleged, nor is there any reasonable support for finding, the existence of any objective factor that would require recusal. I have no current or historical familial, professional or financial connections to any part, potential witness, public entity or counsel in this matter. Therefore I find that recusal is not warranted on the basis of objective factors.

### *C. Subjective Factors*

Hearing Officers must also examine their own emotions and conscience to determine whether they are truly capable of conducting an unbiased, impartial due process proceeding.<sup>4</sup> I have made this examination. Indeed I make this examination with each ruling or event in all matters before me. The Advocate for the Parents in this matter claims that I have a continuing bias in favor of school districts in BSEA hearings. I do not. I believe any reasonable examination of decisional history over the course of nearly three decades will not support the Advocate's claim. The Advocate for the Parent also asserts that I hold an irrational bias against her in particular. I do not. All matters in which this Advocate has appeared receive the same attention and response from me as matters in which she has not entered an appearance. Decisions and Rulings issued in matters in which this Advocate has participated are based on the evidence proven in, and the law applicable to, the unique circumstances of each appeal. I conclude that I do not have any impermissible bias in or prejudgment of this matter based on the participation of the Parents' Advocate or any other identifiable factor, that I am capable

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<sup>4</sup> *Lena v. Commonwealth*, 369 Mass. 575 (1976)

of fairly presiding over this matter without prejudice to either party, and that I can render a decision based solely on the evidence presented and the applicable law.

#### D. *Appearance*

The final level of inquiry is whether the hearing officer's impartiality might reasonably be questioned. Here, recusal standards seek to uphold the "appearance of impartiality," not actual impartiality, in order to promote public confidence in the justice system. When considering whether recusal is appropriate the hearing officer must consider the perspective of the public outside of the actual controversy, as well as the views of the litigants. A Hearing Officer's impartiality might reasonably be questioned by the public due to circumstances occurring outside the hearing room, such as public comments about the matter or related issues, or hearing officer actions inconsistent with neutrality. *In Re: Boston's Children First*, 244 F.3d 164 (1<sup>st</sup> Cir. 2001). A hearing officer's impartiality might also reasonably be questioned by the litigants if there is a pattern of hostile or abusive behavior targeting one party. The facts offered to support recusal must show "what an objective knowledgeable member of the public would find to be a reasonable basis." 28 USC §455.

The Advocate offers no objective facts to support her request for recusal pursuant to the "appearance of partiality" standard. I have made no public or private comments about this matter, about potential participants in the hearings(s), or about the issues in dispute. While it is expected that lawyers and lay people reasonably familiar with the adversarial system will understand that adverse legal rulings do not reflect bias or partiality on the part of the decision-maker, the ability to dispassionately accept undesired outcomes is not universal.

Here, the Advocate's argument in support of disqualification in this hearing rests primarily on her dissatisfaction with her experience in a prior hearing. Unsatisfactory experiences, unfavorable rulings, and misperceptions, even a series of them, do not in themselves indicate partiality or bias on the part of the hearing officer and do not, without more, provide sufficient support for recusal. An "objective, knowledgeable member of the public" understands that a decision based on facts established in an adversarial hearing and consistent with applicable laws does not indicate bias. While reasonable people may disagree on the substantive merits of any decision, reasonable people do not usually leap to the conclusion that the decision-maker is impermissibly partial to the "winning" party. In order to maintain public confidence in the legal system lawyers routinely educate and advise their clients, particularly unhappy ones, that due process decisions are impartially considered and rooted in the credible evidence and legal precedent. In this matter the Parents' dissatisfaction with their random Hearing Officer assignment is apparently based on different advice.

I cannot find on the record presented here that a reasonable member of the public could point to any factor or circumstance causing doubt as to my impartiality. Therefore I find that recusal is not warranted on the basis of appearance of partiality.

## Conclusion

The Parents have failed to demonstrate any reasonable basis for their Motion for Recusal in this matter. A dispassionate examination of this Hearing Officer's training, experience, potential connections to the parties and history with the Parents' Advocate provides no objective or subjective support for the Parents' claims of unfitness. Therefore I find the Motion for Recusal to be wholly without merit.

## Reassignment

The lack of support for the Parents' Recusal Motion lends a degree of credence to the School's argument that the Motion is an impermissible attempt to obtain a decision-maker whom the Parents and their Advocate may perceive as more likely to favor their position. Decision-makers must resist efforts by litigants to manipulate the dispute resolution process. Rewarding such efforts would reduce public confidence in the neutrality, transparency and predictability of the BSEA, and create unwieldy administrative inefficiencies. There is a significant public interest in maintaining the long-established BSEA process for the assignment of hearing officers.<sup>5</sup> Nevertheless, in unusual situations, a request for a change in hearing officer not warranted under the customary recusal analysis may merit an administrative reassignment.

Here, the Advocate points out that the two contemporaneous Norton cases in which she represents the Parents involve students with similar, though not identical, educational needs, programs, placements and requests for relief as well as similar, though not identical, school proposals. Her argument that each set of Parents deserves a fresh ear, uncontaminated by arguments made or facts found in the other matter, is well placed. I find the Parties' interest in presenting their claims and positions to unconnected Hearing Officers outweighs the limited potential inconvenience posed in

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<sup>5</sup> For riveting discussions of recusal standards please refer to : *Obert v. Republic Western Ins. Co.*, 398 F.3d 138 (1<sup>st</sup> Cir.2005) (absent unusual circumstances a judge is not recused for views formed on the basis of what is learned in court: *United States v. Snyder* 235 F.3d 42,45 (1<sup>st</sup> Cir. 2000) ("the unnecessary transfer of a case from one judge to another is inherently inefficient and delays the administration of justice"; "judges are not to recuse themselves lightly under §455 (a)"); *In Re United States*, 158 F 3d. 26 (1<sup>st</sup> Cir. 1998) ("recusal on demand would put too large a club in the hands of litigants and lawyers, enabling them to veto the assignment of judges for not good reason"); *In Re: United States*, 158 F. 3d 26 (1<sup>st</sup> Cir. 1998) ("Typically cases implicating Section 455 (a) are fact specific and thus *sui generis*")' *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482,491 (1<sup>st</sup> Cir. 1989) (noting that the judicial system would be "paralyzed" were standards for recusal too low); *Police Commissioner v. Boston*, 368 Mass. 501,508 (1975) ('judge or hearing officer in some circumstances unquestionably has a duty to resist a challenge to his impartiality which is tenuous, baseless or frivolous"); *Blizard v. Frechette*, 601 F. 2d 1217 (1<sup>st</sup> Cir. 1979).

this matter to the BSEA and the Parties from swift reassignment. I will therefore recommend this matter for reassignment to a different Hearing Officer. The matter will be reassigned to the next Hearing Officer in rotation at the time this Ruling is issued.

## ORDER

After careful consideration of the Parents' Motion for Recusal and the School's Opposition thereto it is my determination that the Parents' Motion should be, and is DENIED. Further, for the reasons set out above, Parent's Request for Administrative Reassignment is GRANTED.

By the Hearing Officer

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Lindsay Byrne

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Dated: May 7, 2013