

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

In re: Trina¹

BSEA #1601943

RULING ON PARENT'S MOTION TO SEQUESTER WITNESSES

This matter comes before the Hearing Officer on the Motion of the Parent of Trina to Sequester all non-party witnesses in a hearing scheduled to begin on March 22, 2016. Parent filed the instant Motion on March 8, 2016 and on March 14, 2016, Barnstable Public Schools (Barnstable or the District) filed an Opposition to Parent's Motion to Sequester. The District requested a conference call to address the issue and a telephonic Motion Session was held on March 17, 2016. For the reasons explained below, Parent's Motion is hereby DENIED.

Although the Federal Rules of Evidence provide for the sequestration of witnesses in federal court upon request, with certain exceptions,² these Rules do not apply to Bureau of Special Education Appeals (BSEA) proceedings.³ Massachusetts state courts leave the decision whether to sequester witnesses within the discretion of the trial court judge.⁴ Neither the BSEA Hearing Rules nor state regulations governing administrative hearings address the issue, though BSEA Hearing Officers have held that Hearing Officers have the discretion to sequester witnesses upon a determination that it is necessary to do so in order to "conduct a fair hearing."⁵ In the context of deciding a Motion to Sequester, in *In Re Stoneham Public Schools* Hearing Officer William Crane examined six factors set forth by the Court of Appeals for the Second Circuit in *U.S. v. Jackson* to be used in determining whether to grant or deny an exemption from a witnesses sequestration order under Federal Rule of Evidence 615.⁶ I hereby incorporate his analysis in the matter now before me.

¹ "Trina" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

² Federal Rule of Evidence 615.

³ Bureau of Special Education Appeals (BSEA) *Hearing Rule X(C)* ("Hearing Officer shall not be bound by the rules of evidence applicable to courts").

⁴ Mass. Guide to Evidence § 615; Mass. R. Crim. P. 21.

⁵ 603 CMR 28.08(5)(c); see *In Re CBDE Public Schools*, BSEA #106854 (Crane 2011) (allowing Parent's motion to require that witnesses be sequestered in a case described by the Hearing Officer as "unusual in that a hearing is being held solely for the purpose of making findings to assist a federal court to resolve the parties' damages dispute" and as such, explicitly looking to Federal Rules of Evidence for guidance); *In Re Stoneham Public Schools*, BSEA #1300160 (Crane 2012) (denying Parents' request for sequestration of witnesses in the absence of a specific basis for concern that prejudicial tailoring would occur).

⁶ 60 F.3d 128, 135 (2d Cir. 1995)(identifying the following factors for consideration when determining whether to grant or deny an exception from a witness sequestration order under Rule 615: how critical the testimony in question is; whether the information is ordinarily subject to tailoring such that cross-examination or other evidence could not bring to light any deficiencies; to what extent the testimony of the witness in question is likely to encompass the same issues as that of other witnesses; the order in which the witnesses will testify; any potential for bias that might motivate the witness to tailor his testimony; whether the witness's presence is "essential" rather than simply desirable).

Parent's argument in the instant dispute focused on the second *Jackson* factor, whether the information is ordinarily subject to tailoring such that cross-examination or other evidence could not bring to light any deficiencies, and the fifth, any potential for bias that might motivate witnesses to tailor their testimony.

Parent, through her attorney, emphasizes that Hearing Officers have discretion to sequester witnesses. She contends that where the District's witnesses will be testifying about similar kinds of issues, it is possible for them to learn from each other and to attempt to match their testimony, and that she has a reasonable basis to believe that the witnesses would tailor their testimony in this case due to its "highly political nature." Parent asserts that sequestration would serve the interests of justice without prejudicing the District significantly.

The District, through its attorney, argues that this case is about whether a particular Individualized Education Program provides a particular student with a free, appropriate public education and as such, there is nothing unusual about it in terms of any possibility of bias or tailoring of testimony. It also asserts that sequestering witnesses would be prejudicial because the practice, if applied in this case, would prevent Barnstable's witnesses from hearing and responding to Parent's witnesses' concerns about Trina's proposed program. Moreover it contends that sequestering witnesses might impair the Hearing Officer's ability to determine whether Trina's proposed educational program is appropriate, or can be made appropriate, to meet her needs.

My ruling today is guided by former Hearing Officer Crane's well-reasoned decision in *In Re Stoneham*. Upon consideration of the Parent's Motion to Sequester, as well as the relevant documents submitted by the parties and the arguments made, I find that although Parent has implied, through her attorney, that she has reason to believe that the witnesses might be biased against her and particularly inclined to tailor and match their testimony, she has not disclosed the basis of any such belief. As such, I do not have a reasonable basis to believe that prejudicial tailoring – essentially, that "certain witnesses may be motivated to tailor their testimony with the result that controverted and material testimony may be tailored (and the tailoring would not likely be brought to light)" – would occur if the witnesses were not sequestered.⁷ Moreover I find the interests of justice would be best served by allowing the District's witnesses to hear and respond to the concerns raised by Parent and by other witnesses, as this will likely assist my determination of the appropriate programming for Trina.

Parent's Motion to Sequester is hereby DENIED.

By the Hearing Officer:

Amy M. Reichbach
Dated: March 21, 2016

⁷ *In Re Stoneham Public Schools, supra.*

