

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

In re: Victoria¹

BSEA #1606853

**RULING ON PARENT'S MOTION TO DISMISS AND MOTION TO DISQUALIFY
LEGAL COUNSEL**

These matters come before the Hearing Officer on the Motion of the Parent to Dismiss with Prejudice the Hearing Request (“Motion to Dismiss”) filed by the District², and the Motion of the Parent to Disqualify Legal Counsel representing the District (“Motion to Disqualify”). The District filed its request for hearing on February 29, 2016. The Motion to Dismiss was filed by Parent over the course of several communications on March 24, April 13, April 19, and April 22, 2016. The District filed its first Opposition to the Parent’s Motion to Dismiss on March 22, 2016 and a second Opposition to Parent’s Motion to Dismiss and/or Motion for Summary Judgment on May 6, 2016. The Parent filed her Motion to Disqualify, also, over the course of several communications on March 28, March 30, and May 9, 2016. The District filed its Opposition to the Parent’s Motion to Disqualify on March 31, 2016. Neither party has requested a hearing on either Motion, and as testimony or oral argument would not 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)*.³ For the reasons set forth below, Parent’s Motions to Dismiss and to Disqualify are hereby DENIED.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On February 29, 2016, the District filed a Hearing Request with the Bureau of Special Education Appeals (“BSEA”) against the Parent. In it, the District provided relevant factual background and history, and requested that the Hearing Officer issue an Order affirming that the District had complied with the substantive and procedural provisions of the IDEA. More specifically, the District requested an Order affirming that its proposed Individualized Education Programs (IEP)s⁴ were reasonably calculated to provide Victoria with a free, appropriate public

¹ “Victoria” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in the documents available to the public.

² The District is referred to only as “the District” to preserve the anonymity of its Counsel.

³ A conference call was held in this matter on April 1, 2016, during which the parties agreed to meet to discuss the Motions and other matters at a Pre-Hearing Conference (PHC) on April 9, 2016. Parent subsequently contacted the BSEA to indicate that she could not attend the Pre-Hearing Conference due to her health. She continues to file letters requesting that the matter be dismissed and/or that the District’s attorney be recused, but she did not request a hearing on her Motions, and she continues to assert that she is unable to participate in a Pre-Hearing Conference or a conference call. The District has never requested a hearing on either Motion.

⁴ The District proposed an IEP for the period of January 8, 2015 through January 7, 2016 (2015-16 IEP), and for the period of January 7, 2016 through June 4, 2016 (2016 IEP).

education in the least restrictive environment (FAPE).⁵ Parent then filed a Motion to Dismiss,⁶ in which she argued first, that the District's Hearing Request was fraudulent and made in bad faith,⁷ and second, that the BSEA does not have jurisdiction over the case,⁸ as Victoria is not a student of the District, nor is she receiving special education services.⁹ In its Oppositions to Parent's Motion to Dismiss, the District refuted Parent's allegation that its Hearing Request was made in bad faith.¹⁰ The District also argued that Parent failed to state grounds for dismissal pursuant to Rule 17B of the BSEA *Hearing Rules for Special Education Appeals*, and that its request asserts claims that are fully within the jurisdiction of the BSEA. Furthermore, the District acknowledged that Victoria has not attended District High School since December 1, 2014,¹¹ but asserts that Parent did not withdraw consent for special education eligibility and decline special education and related services until March 10, 2016.

Parent also filed a Motion to Disqualify,¹² in which she alleged that the District's attorney had engaged in unethical behavior.¹³ Parent states that because of this conduct, she fears being in the same room as the District's attorney. In its Opposition to Parent's Motion to Disqualify, the District asserted that the law recognizes the right of a party to select counsel of its choosing, and

⁵ The District also requested an Order requiring Parent to provide consent to either an extended evaluation of Victoria in a public therapeutic day program or a comprehensive and appropriate reevaluation of Victoria to be performed by District evaluators. On March 18, 2016, the District moved to amend its Hearing Request to remove the claim regarding evaluation of Victoria, as Parent had revoked consent for special education eligibility and declined special education services and supports by way of electronic correspondence dated March 10, 2016.

⁶ One of the communications that comprised Parent's Motion to Dismiss, dated April 22, 2016, included the phrase, "Summary Judgment requested," but it did not set forth an argument or any grounds for Summary Judgment. Pursuant to 801 CMR 1.01(7)(h), Summary Decision may be granted when there is "no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law." This rule of administrative practice is modeled after Rule 56 – Summary Judgment – of both the Massachusetts and Federal Rules of Civil Procedure. Here, Parent's allegations actually demonstrate that many facts are in dispute between the parties. A hearing is the appropriate vehicle for resolution of these disputes.

⁷ Parent argues that the District's request was made in bad faith for several reasons, including that the evidence used by the District is taken out of context (3/24 communication), the District proposed an IEP in bad faith (4/19 communication), the District was trying to force Parent into signing agreements that would "sign all her rights away," and that the District's request was retaliatory.

⁸ Parent argues this case does not belong at BSEA because its issues fall under the jurisdiction of another court, and because Victoria is not a special education student.

⁹ Parent relies on a letter she received from the District's legal counsel, dated April 13, 2016, in response to an Electronic Bullying Report filed by Parent on April 8, 2016. The District's letter states that Victoria "is **not** a student of the . . . School District, and therefore the definition of a 'victim' of bullying as set forth in M.G.L. c. 71 §37O does not apply to her. . . as a 'victim' of bullying is defined as 'a **student** against whom bullying or retaliation has been perpetrated.'" Furthermore, Parent asserts that Victoria is not a student of the District because she had not been receiving any special education services pursuant to an IEP, and instead, had been taking classes at community colleges in the dual enrollment program as part of a "safety plan." Parent contends that such "safety plan" was put in place to address Victoria's emotional problems regarding several traumatic incidents.

¹⁰ The District recognizes that Parent argues that its Request for Hearing is fraudulent, but District "maintains that its request was made in good faith and asserts claims/seek relief fully within the jurisdiction of the BSEA."

¹¹ Parent asserts that Victoria has not attended District High School since December 2014 because of Parent's unilateral decision to enroll her in courses at Bristol Community College.

¹² Parent filed her Motion to Disqualify Legal Counsel over the course of several communications on March 28, March 30, and May 9, 2016.

¹³ Parent states that Attorney "defamed" her, bullied Victoria, and withheld documents. Parent also asserts that it would be unethical for Attorney to represent the District when she might also serve as a primary witness.

that the reasons Parent relies on in her Motion to Disqualify are without merit.¹⁴ The District contends that its attorney did not act unethically and, furthermore, that Parent lacks standing to move to disqualify the District’s attorney.

DISCUSSION

A. Motion to Dismiss

The outcome of Parent’s Motion to Dismiss is governed by the application of the legal standard by which a Motion to Dismiss is evaluated, as well as regulations concerning BSEA jurisdiction.

i. Legal Standard for Ruling on Motion to Dismiss

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule 17B of the BSEA *Hearing Rules for Special Education Appeals*, a hearing officer may allow a motion to dismiss if the party requesting the appeal fails to state a claim on which relief can be granted. This rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure and as such hearing officers have generally used the same standard as the courts in deciding motions to dismiss for failure to state a claim. Specifically, what is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”¹⁵ In evaluating the complaint, the hearing officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor.”¹⁶ These “[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . .”¹⁷

The BSEA has jurisdiction over requests for hearing filed by a “parent or school district . . . on any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state¹⁸ and federal law,¹⁹ or procedural protections of state and federal law for students with disabilities. A parent of a student with a disability may also request

¹⁴ In its Opposition to Parent’s Motion to Disqualify, the District characterizes Parent’s reasons for disqualification as “essentially complaints as to the legal strategies . . . or . . . highly offensive and defamatory statements.” Furthermore, the District asserts that “nothing in Parent’s allegations against [Attorney] support even the faintest notion that her conduct violated any ethical obligation of the legal profession, much less conduct which would support disqualification.”

¹⁵ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

¹⁶ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

¹⁷ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

¹⁸ See M.G.L. c. 71B; 603 CMR 28.00.

¹⁹ See 20 U.S.C. 1401; 34 CFR 300.

a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973. . . .”²⁰

ii. Application of Legal Standard

To survive a motion to dismiss, the District need only assert “factual allegations plausibly suggesting . . . an entitlement to relief.”²¹ In determining whether it has met this burden I must take the District’s allegations as true, as well as any inferences that may be drawn from them, even if the allegations are doubtful in fact.²² The District requests a finding that its proposed IEPs for 2015-16 and 2016²³ are reasonably calculated to provide Victoria with FAPE. To support its request, the District alleges that it attempted to reevaluate Victoria, proposed new IEPs, and offered tutoring to Victoria when Parent did not consent to or accept any of the District’s efforts or proposals. The District also contends that it made agreements with Parent to pay for a portion of the cost of Victoria’s dual enrollment program at Bristol Community College, which demonstrates that it made efforts to provide Victoria with FAPE, even after Parent unilaterally removed Victoria from school. Although Parent asserts that the District’s request for hearing was fraudulent, at this stage I must take the District’s allegations as true.²⁴ As such, I find that the District’s factual allegations do plausibly suggest an entitlement to the relief it seeks.

The Parent asserts that the BSEA does not have jurisdiction over this case because Victoria is not a student at District High School, nor is she a special education student.²⁵ However, the BSEA does have jurisdiction over this matter, as the District filed a request for a hearing regarding a matter concerning the adequacy of Victoria’s proposed IEPs. I cannot determine at this time whether Victoria was a student at District High School for purposes of BSEA jurisdiction, as further information is needed regarding the circumstances of her withdrawal. This is a factual issue to be determined based on the evidence offered at Hearing.

B. Motion to Disqualify Legal Counsel

i. Legal Standard for Ruling on Motion to Disqualify

The decision whether to disqualify an attorney “ordinarily turns on the peculiar factual situation of the case.”²⁶ “A party generally enjoys the right to the counsel of his or her choice,”²⁷

²⁰ See 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 34 CFR 104.

²¹ See *Iannocchino*, 451 Mass. at 636 (internal citation and quotation marks omitted).

²² See *Golchin*, 460 Mass. at 223; *Blank*, 420 Mass. at 407.

²³ See Note 3, *supra*.

²⁴ Whether the District’s request for hearing was fraudulent is an issue that may be addressed at Hearing.

²⁵ Victoria has not attended District High School since December, 2014 because of Parent’s unilateral decision to enroll Victoria in courses at Bristol Community College. The District acknowledges that Parent withdrew her from school at this time, but asserts that parent did not withdraw consent for special education eligibility and decline special education and related services until March 10, 2016.

²⁶ *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981).

and the courts have made it clear that the relationship between a lawyer and client is one that should not be lightly interrupted.²⁸ Therefore, the burden rests on the party seeking disqualification to establish the need to interfere with this relationship.²⁹

Although circumstances exist where it may be an appropriate measure, the authority to disqualify legal counsel “should be exercised sparingly and only in the most exceptional circumstances.”³⁰ Courts have recognized that a party may have standing to move for disqualification of opposing counsel where a fiduciary duty ran from that counsel to the moving party (i.e. a current or former client),³¹ as, for example, confidences may exist from the first representation that would be relevant to the second. However, even in these circumstances, “disqualification is a drastic measure which courts should hesitate to impose except when absolutely necessary.”³² Furthermore, courts are reluctant to disqualify an attorney for alleged ethical violations when the moving party is using disqualification as a tactical weapon.³³

Legal counsel may also be disqualified where counsel is likely to participate as a witness, “and could give testimony on behalf of his client on other than formal or uncontested matters.”³⁴ In such a case, the court is instructed to look to whether the attorney is likely to “withhold crucial testimony from his client because he prefers to continue as counsel,” to determine whether “continued participation as counsel taints the legal system or the trial of the cause before it.”³⁵

ii. Application of Legal Standard

The Parent moves to disqualify the District’s legal counsel based on allegations of unethical behavior and the possibility of District’s attorney being called as a witness in the matter. In determining whether it is necessary to disqualify legal counsel, I must analyze the particular facts of the case at hand.³⁶ The District enjoys the right to the counsel of its choice, so the burden rests on Parent to establish the need to interfere with this relationship.³⁷ Parent

²⁷ *Steinert v. Steinert*, 73 Mass. App. Ct. 287, 288 (2008).

²⁸ *Adoption of Erica*, 426 Mass. 55, 58 (1997); see *Mailer v. Mailer*, 390 Mass. 371, 373 (1983).

²⁹ See *Steinert v. Steinert*, 73 Mass. App. Ct. 287, 288 (2008).

³⁰ *Masiello v. Perini Corp.*, 394 Mass. 842, 850 (1985).

³¹ See, e.g., *Great Lakes Const., Inc. v. Burman*, 114 Cal. Rptr. 3d 301, 307-08 (2010), (“A ‘standing’ requirement is implicit in disqualification motions. Generally, before the disqualification of an attorney is proper, the complaining party must have or must have had an attorney-client relationship with that attorney”); *Strasbourg Pearson Tulcin Wolff Inc. v. Wiz Tech., Inc.*, 82 Ca. Rptr. 2d 326, 329 (1999). Cf. Mass. R. Prof. C. 1.9(a) (“[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that persons’ interests are materially adverse to the interests of the former client unless the former client consents after consultation”).

³² *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir.1982).

³³ See *Serody v. Serody*, 19 Mass. App. Ct. 411, 414 (1985).

³⁴ *Brynes v. Jamitkowski*, 29 Mass. App. Ct. 107, 109 (1990).

³⁵ *Borman v. Borman*, 378 Mass. 775, 787 (1979); see *Jamitkowski*, 29 Mass. App. Ct. at 110 (*Borman* “sounds a cautionary note about judicial disqualification of counsel”).

³⁶ See *Risjord*, 449 U.S. at 377.

³⁷ See *Serody*, 19 Mass. App. Ct. at 414.

contends that the District's attorney has engaged in unethical behavior. Parent does not, however, establish any grounds for such an allegation, as the attorney's behavior described in Parent's motion either lacks factual proof or is classified as legal strategy. Furthermore, courts are reluctant to grant motions to disqualify based on assertions of ethical violations, as such motions may be tactically motivated.³⁸

There are some instances where a former client has grounds to disqualify opposing party's legal counsel, but Parent has not given any reason for me to believe that she is a former client of the District's attorney or a former client of any member of the District's attorney's firm. Parent also asserts that the District's attorney should be disqualified because she is likely to be called as a witness in the case. However, because the disqualification of legal counsel is such a drastic measure, taking such action is only warranted if "the continued participation as counsel taints the legal system or the trial of the cause before it."³⁹ I find that I do not need to determine whether the continued participation of the District's attorney would taint the legal system because the legal matter in which Parent contends the District's attorney would be called as a witness is different from this legal matter, and if it were to be heard, it would not be heard at BSEA. Parent has not met her burden to establish that disqualification of the District's legal counsel is necessary or appropriate.

CONCLUSION

Upon consideration of Parent's Motion to Dismiss the District's Hearing Request and the District's Opposition thereto, I find that District's request for hearing is properly before me. Parent's Motion to Dismiss is DENIED. Should this case proceed to Hearing, the District will have the burden of establishing that it acted in accordance with the law and offered FAPE to Victoria through its proposed IEPs.

With respect to Parent's Motion to Disqualify and the District's Opposition thereto, I find that it is not necessary to disqualify the District's attorney. Parent's Motion to Disqualify Legal Counsel is DENIED.

ORDER

Parent's Motions to Dismiss the District's Hearing Request and to Disqualify the District's Legal Counsel are hereby DENIED.

³⁸ See *id.* ("Where the opposing party seeks disqualification, courts must be alert that the Canons of Ethics are not brandished for tactical advantage").

³⁹ *Borman*, 378 Mass. at 787.

Parent is hereby directed to either cooperate with the scheduling of a conference call to discuss the status of the case, or produce a letter from a doctor stating that she is currently unable to participate in these proceedings and stating when she is expected to be able to do so.

By the Hearing Officer:⁴⁰

Amy M. Reichbach
Dated: June 27, 2016

⁴⁰ The Hearing Officer gratefully acknowledges the assistance of legal intern Danielle Lubin in the preparation of this Ruling.