

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In Re: Rafael

&

BSEA #1609348

Norton Public Schools

RULING ON PARENTS' MOTION FOR RECUSAL

This matter comes before the Hearing Officer on the Parents' September 23, 2106 Motion for Recusal. The School opposed the Motion at the September 27, 2016 Prehearing Conference which the Parents and their advocate declined to attend. The Parents offer two reasons for recusal. First they argue that, in the instant matter, this Hearing Officer has failed to respond to multiple Parent requests and to properly manage the case. Second, the Parents allege that the Hearing Officer's mismanagement of a previous unrelated BSEA matter involving the Parents' advocate, Tami Joia, has compromised her ability to conduct this administrative process fairly. The School disagrees with both premises. The Parents have not alleged, much less demonstrated, any factor which would traditionally support recusal: a lack of professional qualifications; an objective bar such as a personal, professional or financial interest in the outcome of the matter; an impermissible bias or prejudgment about the substantive claims or the individuals/entities making them; or a public appearance of partiality. See discussion at *Taunton and Nelson*, 17 MSER 51 (2011); *Brockton Public Schools*, 14 MSER 367 (2010); *Duxbury Public Schools*, 14 MSER 363 (2008).

Turning directly to the complaints outlined in the Parents' Recusal Motion I find that neither proffered basis is supported by any evidence in the administrative record. On the contrary the correspondence, formal filings and joint exhibits reflect persistent misunderstandings, mischaracterizations and misjudgments on the part of the Parents' advocate that have posed an undue burden on the time, effort and purse of School personnel, School's counsel and BSEA staff without corresponding benefit to the Student.¹

¹ The School's Motion for Costs and Sanctions is under advisement.

Ms. Joia alleges that 22 Parent Motions have not been addressed by this Hearing Officer. That is inaccurate. One of the “Motions” complained of was a July 22, 2016 status report submitted by Ms. Joia providing her perspective on the Student’s summer program. The status report did not require Hearing Officer action. To the extent the status report raised procedural questions they were resolved by the Ruling on the Motion for Clarification of ‘Stay Put’ services issued on August 30, 2016.

Another of the “Motions” Ms. Joia claims was not addressed by the Hearing Officer was an August 24, 2016 letter from Ms. Joia to the BSEA complaining that the School’s attorney was “picking a fight.” No response to this letter was necessary or warranted.

Nine of the purportedly neglected “Motions” identified by Ms. Joia are the Parties’ formal Discovery requests.² Typically, prehearing exchange of information does not require Hearing Officer intervention in the absence of a specific request for assistance. BSEA Rule VI. Here the Parents made two specific requests, on August 25 and on August 26, 2016, for Hearing Officer assistance. Both requests were addressed and resolved in a conference call held on September 8, 2016 and memorialized in an Order issued on September 13, 2016.

The remaining 11 “Motions” allegedly unaddressed by the Hearing Officer are:³

- 1) The Parents’ Motion to Amend and Opposition to Norton’s Motion to Dismiss, submitted on June 10, 2016. The substance of this Motion had previously been addressed during the initial conference call on May 31, 2016 and discussed at the Prehearing Conference held on August 2, 2016. An Order entered on August 5, 2016 reflects the Parents’ Amended Hearing Request. The Ruling on the School’s Motion to Dismiss, issued on August 30, 2016, addresses both components.
- 2) The Parents’ Motion for Home-Based Services, an improper request for an Interim Placement Order, was discussed at the Prehearing Conference held on August 2, 2016 and was resolved by the Ruling on Motion for Clarification of ‘Stay Put’ Services issued on August 30, 2016.
- 3) The School’s Motion to Dismiss, dated June 24, 2016, was the subject of the August 30, 2016 Ruling on the School’s Motion to Dismiss.
- 4) The School’s June 27, 2016 Motion to Dismiss, Response to Hearing Request and Response to Motion for Home Based Services was discussed at the Prehearing Conference held on August 2, 2016 and was addressed by the Ruling on the School’s Motion to Dismiss, the

² School Request for Production of Documents (6/23/16); Parent Request for Production of Documents And Answers to Interrogatories (6/30/16); “Respondent’s” Objection to Discovery (7/8/16); Parents’ Motion for 2nd Set of Production of Documents (7/17/16); Parents’ Objections to Discovery (7/21/16); “Respondent’s” Objections to Discovery (7/22/16); Parents’ Motion for 1st set of Discovery and 1st Set of Interrogatories (8/22/16); Parents’ Motion to Compel Production (8/25/16); Parents’ Motion to Compel Production (8/26/16). Note that the titles of some documents have been paraphrased for clarity and brevity

³ Some of the titular language has been altered to better identify the document to which Ms. Joia refers in the Motion to Recuse.

Ruling on Motion for Clarification of ‘Stay Put’ Services and the Amended Issue List all issued on August 30, 2016.

- 5) The Parents’ July 6, 2016 Motion to Oppose the School’s Motion to Dismiss was addressed by the August 30, 2016 Ruling on the School’s Motion to Dismiss.
- 6) The Parents’ July 21, 2016 Motion to Compel was addressed and resolved during the Prehearing Conference held on August 2, 2016 and the conference call held on September 7, 2016. The discussions are reflected in Orders issued on August 5, 2016 and on September 13, 2016.
- 7) The Parents’ August 18, 2016 Motion for Subpoenae was discussed during the conference call held on September 7, 2016. As a result the BSEA sent 16 subpoenae on September 9, 2016 and again on September 19, 2016.
- 8) The Parents’ August 22, 2016 and September 9, 2016 Requests for a Court Reporter were confirmed and acknowledged by the Court Reporting Service on September 9, 2016. The Court Reporter was present at the September 27, 2016 Prehearing Conference.
- 9) The Parents’ September 9, 2016 Request for a Written Transcript of the September 7, 2016 conference call was addressed by letter of September 15, 2016 and discussed at the September 27, 2016 Prehearing Conference. The Prehearing Order issued on October 6, 2016 contains a formal Ruling on the Parents’ Request.
- 10) The Parents’ September 14, 2016 Motion for an additional 7 subpoenae resulted in the issuance of the requested subpoenae on September 15, 2015 and again on September 19, 2016.
- 11) The Parents’ Motion to ‘Object’ to the Denial of a publicly funded written transcript of the September 7, 2016 conference call does not require a Hearing Officer response. Nevertheless it was addressed in the October 6, 2016 Prehearing Order.⁴

As none of her complaints is supported in the administrative record, Ms. Joia’s unfounded assertions of Hearing Officer mishandling reflect significant inattention to case management, and/or serious misunderstanding of the discovery, motion and other procedural rules governing administrative hearings, and/or deliberate misconstruction of the language and intent of the pertinent statutes, regulations and communications from the opposing party, its representatives and the BSEA.

This finding provides a natural segue to the second prong of the Parents’ Motion for Recusal. Ms. Joia remains disgruntled about the proceedings and the outcome of a 2010-2011 BSEA matter in which I was the Hearing Officer. (*Nelson and Taunton*, 17 MSER 286 (2011).) She correctly points out that there are similarities between the Taunton matter and this one. The

⁴ I note that there are an additional 4 pre-Recusal Motion Rulings in the record about which the Parents did not complain. The Prehearing Order of October 6, 2016 addressed 6 post-Recusal Motions and took 2, including the Recusal Motion, under advisement. Since that Order the Parents have submitted one Motion which is being addressed separately.

pertinent similarity lies in Parent advocate conduct. See: *Nelson and Taunton*, 17 MSER 51 (2011).⁵ In the intervening five years Ms. Joia has taken many opportunities to complain to supervisors and oversight agencies about the Taunton matter, apparently without satisfaction. She contends that lingering tensions about the Taunton matter make it impossible for her to receive a fair hearing. I reject that premise. This Hearing, as all BSEA hearings, is about the student, not the advocate. Adverse rulings, even a series of them, do not indicate partiality or bias on the part of the Hearing Officer. *Duxbury and Ishmael*, 14 MSER 363 (2008). Nor would a reasonable person viewing the Hearing Officer's conduct during this proceeding or examining the administrative record find any reason to doubt the impartiality of the Hearing Officer. *Boston's Children First*, 244 F.3d 164 (1st Cir. 2001). I have examined my conscience and emotions and have found no impermissible bias or prejudice that would render me incapable of fairly presiding over this matter and rendering a decision based solely on the evidence presented and the applicable law.

Thus I find that there is no objective or subjective basis on which to grant the Parents' Motion for Recusal. Indeed the equities and the rules of procedure militate against it. Recusal should occur only when there is demonstrable potential for bias that could affect the validity of the Hearing Officer's decision. Otherwise litigants could "shop" for a decisionmaker whose "style" they prefer or whose "record" they believe is more favorable to their position, supporting perceptions of "rigging" or favoritism and leading to diminishing public confidence and increasing administrative inefficiency. *Wachusett R.S.D.*, 14 MSER 367 (2008).

Nevertheless one could reasonably expect Ms. Joia to have forcefully communicated her antipathy to the Parents. So long as they retain Ms. Joia to represent them at the BSEA they are unlikely to feel comfortable proceeding to a Hearing with me. While "comfort" is not a determinative factor for anyone's participation in a BSEA Hearing, the BSEA is obliged to assist inadequately represented parties to present their claims as effectively as possible. I find that the potential harm and inconvenience that a Hearing Officer reassignment might cause to the School and to the BSEA is outweighed by the potential harm to the Parents' confidence in the integrity of the BSEA's administrative process that retention could prompt. This matter is ready to proceed to Hearing. It is not complex, factually or legally. It is time limited. The issues have been formulated. The bulk of the documentary evidence, 354 exhibits, has been reviewed and admitted. The Hearing dates have been secured. Witnesses have been scheduled. At this time there is only one outstanding Motion and no further Motions are anticipated. It will not be unduly difficult for another Hearing Officer to step in at this time. I will therefore request the administrative reassignment of this matter to another Hearing Officer. Reassignment of active matters is an administrative decision made by the Director of the BSEA based on multiple factors extrinsic to the case including Hearing Officer availability, workflow management, conflicts, etc. There is no guarantee that reassignment will be possible.

⁵ As in *Taunton* I must presume that the Parents are not aware that their advocate's behavior may have serious, even fatal, repercussions for their substantive and procedural claims at the BSEA. I take this opportunity to warn them that failure to follow BSEA Orders, failure to be scrupulously truthful to the BSEA, and failure to conduct oneself with civility in all dealings with the opposing party, witnesses and the Hearing Officer may result in the imposition of sanctions up to and including dismissal. 801 CMR 1.01(7); BSEA Rule X.

ORDER

Having demonstrated no substantive basis for Recusal the Parents' Motion is therefore DENIED. This matter is, however, referred for administrative reassignment.

By the Hearing Officer

Lindsay Byrne
Dated: October 21, 2016