**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re**: **Student & Springfield Public Schools BSEA #2309351**

**RULING ON SPRINGFIELD PUBLIC SCHOOLS’ RENEWED**

**MOTION TO STRIKE PARENT’S OPENING STATEMENT, AND**

**RENEWED OBJECTION TO HEARING OFFICER MUTING COUNSEL**

This matter comes before the Hearing Officer on the District’s *Renewed Motion to Strike Parent’s Opening Statement and Renewed Objection to Hearing Officer Muting Counsel[[1]](#footnote-1)* (*Motion*)filed on November 22, 2023, renewing its request for an Order striking Parent’s Opening Statement and Parent’s subsequent argument in defense of it, or portions thereof[[2]](#footnote-2), from the record. The District asserts that such Opening Statement and subsequent defense thereof, are “offensive and beyond the bounds of decency”, not appropriate to be in the hearing record and “untruthful” “personal attacks” that “do not pertain to the two issues for hearing”. Additionally, the District objected to the Hearing Officer’s muting of its Counsel and requested that “the muting function should not be further used to interfere with Springfield’s right to legal representation”. On November 28, 2023[[3]](#footnote-3), Parent filed an *Opposition to Springfield’s Motion* (*Opposition*) addressing only the request to strike Parent’s Opening Statement and related argument[[4]](#footnote-4). Parent contended[[5]](#footnote-5) that the District’s requests “encroach[] on my Constitutionally Protected (sic) First Amendment rights”, that what she stated was the “truth”, and that “this Motion summed up is a legal temper tantrum and attempt to intimidate a hearing officer…”[[6]](#footnote-6).

Further, Parent argued that she has,

a legal right to preserve the record and even though several issues raised in my complaint were dismissed with prejudice the two that were not dismissed are still intertwined and presented to the federal court to do a substantial evidence review to determine if the BSEA’s decisions are reasonable in light of the evidence on the record, this include (sic) dismissed issues[[7]](#footnote-7).

Finally, Parent renewed her request for an evidentiary hearing on the District’s *Motion*. The District has not ever requested an evidentiary hearing. As I advised on the record on November 28, 2023, since neither testimony nor oral argument advances my understanding of the issues involved, I issue this *Ruling* without an evidentiary hearing, pursuant to *Hearing Rule VII(D)*.

**RELEVANT PROCEDURAL HISTORY**

On November 14, 2023, the Hearing commenced in this matter. At the request of Parent and Student, the Hearing was open to the public. At the outset of the Hearing, I set forth the procedural rules I expected all participants to abide by during the Hearing, including that no one is to interrupt another speaker and that all objections must be made after a question/answer is completed. Both Parties acknowledged their understanding of these procedures.

As Parent began to present her oral Opening Statement, prior to completing her second sentence, the District interrupted Parent to object. I reminded the District of the procedural rules with regard to interrupting speakers and explained that at the conclusion of the Opening Statement it could note its objection for the record. The District complied with this instruction. At the completion of Parent’s Opening Statement, the District renewed its objection and requested that the entire Opening Statement be struck from the record. The District alleged it contained “inaccurate” “defamatory” information that “prejudices this entire hearing”[[8]](#footnote-8). The District’s Counsel also requested a break to speak with its client about its options. The District’s request to strike the Opening Statement was overruled given that it was not evidence, not made under oath, and not a document submitted into the record. Its request for a break was granted.

After the break, the District renewed its objections and request for the “entire statement” to be struck from the record. It also requested a reprimand of Parent for her conduct. The District also argued that the public hearing aspect of this proceeding meant there were people participating who heard Parent’s Opening Statement who “interface with the Springfield Public Schools”.

Prior to Parent responding to the request to strike the Opening Statement I advised her that any argument she was to make must address the issues for this Hearing only, should not include opinions of another person’s character, nor involve other actions outside this Hearing. I also noted that a significant amount of information was contained in the Opening Statement relating to issues that have been previously dismissed with prejudice and that those statements will not be considered by me in this matter. Parent was further advised to proceed in accordance with appropriate decorum rules for this matter, as her role in this matter was that of an advocate.

Parent’s response initially asserted that everything stated in the Opening Statement was “intertwined with the issues here”, was “true” and that the purpose of the proceeding was for the Hearing Officer to make “findings of facts, laws and conclusions about the situation before it goes to the federal court”. However, Parent then began to reference an outside investigatory proceeding allegedly involving one of the attorneys for the District (“Investigatory Proceeding Statement”). Upon hearing the Investigatory Proceeding Statement, I interrupted Parent to let her know I was stopping her from speaking further as this Statement was not acceptable or consistent with the decorum rules I had just instructed her on.

In response both Parent, and the District’s Attorney against whom the allegations had been raised, began to speak simultaneously in argument. They were then informed that they would be muted if they could not adhere to the decorum and procedural rules of this proceeding, but they continued to speak simultaneously in argument. Thus, I requested the stenographer mute both Parties. Once muted, I again reiterated my instructions to both Parties about the decorum and procedural rules of focusing solely on the two issues in this matter, refraining from personal attacks on each other even in argument, not referring to proceedings in other forums at this hearing, and not interrupting or speaking over each other as it prohibited the creation of a record of this proceeding. I then reaffirmed my ruling not to strike the entire Opening Statement but advised that in making my decision I would not consider any allegations in that Statement that do not pertain to the issues in this hearing. I also advised that I will not make any judgments nor form any opinions from the irrelevant portions of the Opening Statement about the evidence that I will be hearing relating to the two issues in this matter.

Both Parties were then asked to unmute, and the matter proceeded with the start of testimony of the first witness. At no other time during the hearing did the need to mute either party arise.

On November 22, 2023, the District filed the underlying *Motion*, discussed above. On November 28, 2023, Parent filed the underlying *Opposition*, discussed above.

The second day of Hearing commenced on November 28, 2023. At the outset of this Hearing day, the Parties were informed that I would be taking the *Motion* and *Opposition*, received earlier that morning, under advisement and would issue a written *Ruling* with the *Decision*. I also informed the Parties that I would not allow an evidentiary hearing on the *Motion*, that I was striking a portion of the *Opposition* from the Administrative record, and that the record in this matter was limited to the issues for Hearing, as noted above. I further advised Parent that I would not tolerate any more claims or allegations outside the scope of this Hearing or any references to court proceedings or other legal proceedings that she may be engaged in with the Parties or anyone else associated with this matter. Continued behavior in this way would result in sanctions being imposed, including striking statements that may be made orally or in writing. I concluded by advising all Parties that I expected each of them to move forward giving the entire adjudicatory proceeding the respect it was due.

**LEGAL STANDARD**

*Rule IX* of the *Hearing Rules* establishes the power and duty of Hearing Officers of the BSEA. As a preliminary matter, Hearing Officers are mandated to,

conduct a fair hearing; administer the oath or affirmation to witnesses testifying at the hearing; to ensure that the rights of all parties are protected; to define issues; to receive and consider all relevant and reliable evidence; to ensure an orderly presentation of the evidence and issues; to ensure a record is made of the proceedings; and to reach a fair, independent, and impartial decision based on the issues and evidence presented at the hearing and in accordance with the law.

*Rule IX* sets forth additional powers a Hearing Officers may have “in furtherance of these duties” including but not limited to “regulat[ing] the presentation of evidence and the participation of the parties for the purpose of ensuring an adequate and comprehensible record of the proceedings”, and to “censure, reprimand, or otherwise ensure that all participants conduct themselves in an appropriate manner”.

While not explicitly addressed in the *Hearing Rules,* 801 CMR 1.01(7)(c) authorizes motions to strike “… from any *pleading* … any insufficient allegation or defense, or any redundant, immaterial, impertinent or scandalous matter.” (emphasis added). As noted in the “Scope of Rules” section of the *Hearing Rules*, “unless modified explicitly by these Rules, hearings are conducted under … 801 CMR 1.01 *et seq.*”. Although an opening statement is not a pleading, in criminal matters, the First Circuit has considered whether or not comments made during opening statements are sufficient to warrant a mistrial in that they have the “type of pervasive prejudicial effect necessary to sustain a claim of due process deprivation”[[9]](#footnote-9). The *Salemme* Court declined to grant the Plaintiff a mistrial based upon the prosecutor’s statement in his opening statement that involved an “ambiguous exchange” between the Plaintiff and an FBI agent that may have related to the crimes at issue in that matter or to “unrelated criminal activity”[[10]](#footnote-10). The Court noted that the trial judge properly cautioned the jury to not take the remarks as evidence and reasoned that this “isolated comment … viewed through the lens of the trial court’s corrective instruction does not implicate denial of Salemme’s due process rights”[[11]](#footnote-11).

**APPLICATION OF LEGAL STANDARDS**

After considering the arguments of the Parties, the challenged statements and actions, and the applicable law, I **ALLOW in limited part**the District’s *Motion* and strike from the record the Investigatory Proceeding Statement, only. With regard to any other statements made by Parent during her Opening Statement and her subsequent argument in defense thereof, the District’s *Motion* is **DENIED**. The District’s objection to the Hearing Officer’s muting of its Counsel is also **DENIED**. My reasoning follows:

1. The Request to Strike the Opening Statement and Subsequent Argument in Defense Thereof.

As noted in my oral *Rulings* on the record, the Opening Statement, and subsequent argument in its defense, are not evidence. While I agree with the District that much of it involved allegations unrelated to the two issues at hearing in this matter, I stand by my oral *Rulings* and will only consider the challenged statements to the extent that they relate to the two issues involved in this Hearing in the *Decision* I issue. Any such relevant statements will also be taken for what they are – argument not evidence.

Further, with one exception, the challenged statements by Parent, while admittedly frequently involving irrelevant, unsubstantiated and grandiose allegations, are similar if not identical to much of the wording and claims raised in the *Hearing Request* and *Amended Hearing Request*. The District never sought to strike those statements from the record originally, and they were not so struck, rather they were substantively dismissed and are not relevant to the two remaining issues at hearing in this matter. Striking them now, especially as they are not evidence, is unnecessary, particularly as they continue to be deemed irrelevant[[12]](#footnote-12). I also find that the statements did not have the “type of pervasive prejudicial effect necessary to sustain a claim of due process deprivation”[[13]](#footnote-13).

The one exception is the Investigatory Proceeding Statement. The allegations contained in that statement were never previously raised by Parent in any pleading she filed in this matter. Moreover, they were made after Parent was specifically instructed that she was not to make any further references of other actions outside this matter. As the Investigatory Proceeding Statement was made in direct contravention of these instructions, I **ALLOW in part** the District’s *Motion* on that limited basis. Volume 1, page 63, lines 18-21 of the transcript of this Hearing is hereby struck from the record. The *Motion* is **DENIED** in all other respects.

1. The Muting Objection.

The District objects to its Counsel having been muted on the grounds that this “left Springfield without legal representation” in contravention of the duty of the Hearing Officer to ensure the participation of the parties. It sought to prohibit the use of the muting function further in the proceedings. While arguably moot, as the need to mute did not ever again arise in the proceedings, I disagree with the District’s argument, and its objection is **DENIED**.

Muting the District’s Counsel did not have any impact on its ability to be represented. Both Parties were muted simultaneously for the same amount of minimal time. They also simultaneously unmuted themselves. There was never any moment during the proceedings where Parent and Student actively and verbally proceeded but the District’s Counsel could not. Further, although muted, they remained present and able to observe and listen to my instructions and oral *Rulings*.

I agree that it was “extraordinary” to mute the Parties. However, my duties include ensuring an “orderly presentation of the evidence and issues” that a “record is made of the proceedings”, that there is an “adequate and comprehensive record of the proceedings”, and that “all participants conduct themselves in an appropriate manner”. Given the virtual platform for the Hearing[[14]](#footnote-14), and the simultaneous arguing by both Parties, despite being warned they may be muted, the decision to simultaneously mute both Parties for a minimal time was both appropriate and necessary[[15]](#footnote-15). Moreover, once the Parties unmuted themselves, they proceeded with the Hearing in an orderly and professional way without the need to be muted again.

**ORDER**

The District’s *Motion* is **ALLOWED in limited part**as to the Investigatory Proceeding Statement, only, and this is struck from the record as noted. The remainder of the District’s *Motion* is **DENIED**.

By the Hearing Officer,

/s/ Marguerite M. Mitchell
Marguerite M. Mitchell

Date: January 25, 2024

1. No objection was noted on the record after the Parties were muted, thus I consider this to be an initial objection not a “renewed” one. [↑](#footnote-ref-1)
2. The *Motion* was the first time the District requested something other than striking the entire Opening Statement. [↑](#footnote-ref-2)
3. Although this *Opposition* is dated November 27, 2023, it was filed after the close of business hours on that day and is deemed filed on November 28, 2023. [↑](#footnote-ref-3)
4. Parent did not address the request objecting to the Hearing Officer muting counsel in its *Opposition* or at any other time. As the time to submit a responsive pleading to the *Motion* has long passed, and the record in this matter has closed, I issue this *Ruling* on that aspect of the *Motion* based upon the District’s argument, only. [↑](#footnote-ref-4)
5. Some of the *Opposition* addresses claims that have been dismissed with prejudice – including claims pertaining to Student’s “SIMS data” information, and, thus, is not considered for purposes of this *Ruling*. Reference is made to the published *Ruling on Defendants’ Motions to Dismiss, Part II*, 29 MSER 154 (2023). [↑](#footnote-ref-5)
6. As I advised on the record on November 28, 2023, a portion of the last paragraph in the *Opposition* on the second page beginning with the phrase “I certainly did not spew …” is struck from the Administrative Record. This was solely focused on allegations and proceedings that are beyond the scope of this hearing and involve persons who are not parties to this matter. The Parties had been repeatedly Ordered, verbally, on November 14, 2023, that any further allegations made relating to other legal or adjudicatory proceedings outside this matter or involving persons who are not parties to this matter will be struck from the record. Parent did not comply with this Order for this portion of her *Opposition*. See *Hearing Rules for Special Education IX(B)* (“*Hearing Rules”*); 801 CMR 1.01(7)(c). [↑](#footnote-ref-6)
7. In response to this claim I informed Parent verbally on the record on November 28, 2023, that her right is to the creation of a record of information material only to the issues for hearing in this matter. She has no right to create a record on issues not before me or for proceedings outside this one. [↑](#footnote-ref-7)
8. So as not to continue to perpetuate the dissemination of the objectionable information Parent offered in her Opening Statement, I refer to the transcript, and incorporate it herein by reference, as to the specific statements sought to be struck. [↑](#footnote-ref-8)
9. *Salemme v. Ristaino*, 587 F.2d 81, 88-89, ftnt. 2 (1st Cir. 1978) (comparing *Krulewitch v. United States*, 336 U.S. 440, (1949); *Bruton v. United States*, 391 U.S. 123 (1968) both involving statements made by a co-conspirator that were admissible against a defendant as being the type of inappropriate statements to justify a mistrial, but not supporting the argument that a “… fair trial has been rendered impossible [here] due to prejudicial comments by the prosecutor in an opening statement”). [↑](#footnote-ref-9)
10. *Id.* at 88. [↑](#footnote-ref-10)
11. *Id.*; see *Therrien v. Vose*, 782 F.2d 1, \*5 (1st Cir. 1986) (refusing to grant a mistrial due to a closing argument by a prosecutor that was alleged to have consisted of improper commentary by a prosecutor on the evidence and his personal view of the case, as it was found not to “exceed the permissible bounds of advocacy for the state”); *United States v. Dickey,* 736 F.2d 571, 596 (10th Cir. 1984) (“the holding that no prejudice resulted from the prosecutor's closing statement was bolstered by the fact that the trial court sustained defense counsels' objection and adequately instructed the jury that arguments by the attorney were not evidence”). [↑](#footnote-ref-11)
12. See *Vose*, 782 at \*5; *Dickey,* 736 at 596; *Salemme*, 587 at 88-89, ftnt. 2. [↑](#footnote-ref-12)
13. *Salemme*, 587 F.2d 88-89, ftnt 2; see *Therrien*, 782 at \*5; *Dickey,* 736 F.2d at 596. [↑](#footnote-ref-13)
14. As noted on the record at the outset of the Hearing, the matter proceeded virtually at the request of and with the agreement of both Parties. [↑](#footnote-ref-14)
15. While I also have an obligation to ensure that “each party has a *full* opportunity to present its case orally …”, simultaneously muting them prior to the start of any testimony did not impact this right. See *Hearing Rule IX(B)(6)*. [↑](#footnote-ref-15)