**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In re: Student v. Mendon-Upton Regional School District BSEA # 2313527**

**RULING ONPARENT’S MOTION FOR COUNSEL’S RECUSAL**

This matter comes before the July 5, 2023[[1]](#footnote-1) Hearing Officer on *Parent’s Motion for Counsel’s Recusal* requesting that counsel for Mendon-Upton Regional School District (Mendon-Upton or the District) be disqualified or recused from the instant due process hearing (*Motion*). On the same date, the District responded opposing Parent’s Motion.

Neither party has requested a hearing on either motion. Because neither testimony nor oral argument would advance the Hearing Officer’s understanding of the issues involved, this Ruling is issued without a hearing, pursuant to Bureau of Special Education Appeals Hearing Rule VII(D).

For the reasons set forth below, Parent’s *Motion* is hereby **DENIED.**

**RELEVANT FACTS AND PROCEDURAL HISTORY:**

Student is a rising first grade student attending the Mendon-Upton Regional School District. Student had an active 504 Plan until February 2023, when she was found ineligible. Due to new concerns regarding Student’s learning, including her ability to read and write, on June 20, 2023, Parents requested a full evaluation.

On June 23, 2023, Parents filed a Request for Hearing seeking an Independent Educational Evaluation, paid for by the District. Parents also ask that “a written 504 plan to be developed and executed fully for when [Student] starts first grade. This should include services and accommodations that were outlined in her previous evaluation, as well recommendations from her developmental pediatrician, [], and the district's BCBA.” Parents also asserted, in part, that if “the district continue[d] to be unwilling or incapable of providing and implementing a 504 plan fully, [they] request that the district place [Student] in an independent or out-of-district (school choice) school and cover costs for all tuition and transportation.”

Via email at 6:52PM on July 3, 2023, Parent submitted the instant *Motion*, requesting that District’s Counsel “be removed as counsel for the district. [District’s Counsel] represented the district in a previous hearing regarding my child, and, on two separate occasions, sent emails to the incorrect parties - one was to the personal email of the previous hearing officer, and one was including me on another district’s communication. I have serious concerns with [District Counsel’s] ability to maintain confidentiality.”

On the same day, the District’s Counsel responded that “the district is my client, and they have asked me to represent them in this matter. I do not believe the BSEA has jurisdiction to tell a district which attorney they can choose to represent them.”

**LEGAL STANDARDS:**

1. Legal Standard for Ruling on Motion for Counsel’s Recusal

Motions to recuse counsel by their nature are intensely fact specific.[[2]](#footnote-2) In deciding whether recusal of counsel is warranted, a judge must “reconcil[e] the right of a person to counsel of his choice on the one hand, and the obligation of ‘maintaining the highest standards of professional conduct and the scrupulous administration of justice,’ on the other.”[[3]](#footnote-3) While “the right of a litigant to counsel of his choosing is not absolute and cannot always predominate,” motions to disqualify “must be considered in light of the principle that courts ‘should not lightly interrupt the relationship between a lawyer and [a] client.’”[[4]](#footnote-4) Because granting a motion for counsel’s recusal has “immediate, severe, and often irreparable … consequences” for the party and disqualified attorney, courts have exercised extreme caution in allowing counsel recusal or disqualification.[[5]](#footnote-5) As stated in Borman v. Borman, 378 Mass. 775, 787–88, 393 N.E.2d 847, 855–56 (1979):

“When disqualification occurs after employment has begun, it temporarily (and possibly permanently) disables the litigant in his effort to prosecute a claim or mount a defense. It is not surprising therefore that the code has been used increasingly as a catalog of pretrial tactics. When needless disqualification occurs as a result of these tactics, the very rules intended to prevent public disrespect for the legal profession foster a more dangerous disrespect for the legal process…. When a lawyer, exercising his best judgment, determines that his employment will not bring him into conflict with the code, disqualification may occur only if the trial court determines that his continued participation as counsel taints the legal system or the trial of the cause before it.”[[6]](#footnote-6)

Hence, disqualification should not be ordered “except when absolutely necessary.”[[7]](#footnote-7) Because there are “severe consequences of stripping a party of chosen counsel[,]” judges are advised to proceed with “deliberate caution” when considering requests for disqualification.[[8]](#footnote-8) They are also advised to “be alert that the Canons of Ethics are not brandished for tactical advantage,” especially when claims of unethical behavior are offered as grounds for disqualification.[[9]](#footnote-9)

Nevertheless, pursuant to the Massachusetts Rules of Professional Conduct, there are circumstances that require disqualification of counsel. These include specific personal conflicts of interest (Rule 1.8); if counsel is likely to be a necessary witness in the matter (Rule 3.7); and if counsel’s representation of a client will be directly adverse to another client or may be materially limited by counsel’s self-interests, responsibilities to another client, a third person (Rule 1.7).

**APPLICATION OF LEGAL STANDARDS:**

Because the attorney-client relationship “should not lightly”[[10]](#footnote-10) be disrupted, I exercise “extreme caution”[[11]](#footnote-11) in assessing the merits of Parent’s *Motion*. The District enjoys the right to the counsel of its choice, and, as such, the burden rests with Parent to establish the need to interfere with this relationship.[[12]](#footnote-12) After analyzing the particular facts of the case at hand,[[13]](#footnote-13) I find that Parent has not met her burden. My reasoning follows.

Here, Parent moves to have District’s legal counsel removed because of Counsel’s prior representation of the District in a previous hearing regarding Student. In addition, Parent asserts that “on two separate occasions, [District’s Counsel] sent emails to the incorrect parties - one was to the personal email of the previous hearing officer, and one was including me on another district’s communication.” As such, Parents notes that she has “serious concerns with [District Counsel’s] ability to maintain confidentiality.”

Parent’s argument for removal of District’s Counsel is unpersuasive. That the District’s Counsel worked on “a previous hearing regarding Student” does not in any way preclude her current involvement in this matter. Nor can I find any Rule in the Massachusetts Rules of Professional Conduct that would support removal of Counsel on the basis of alleged prior breaches of confidentiality.[[14]](#footnote-14) Because I cannot find that the “continued participation [of the District’s Counsel] as counsel taints the legal system or the trial of the cause before it,”[[15]](#footnote-15) Parent’s *Motion* must be denied.

**ORDER:**

Parent’s *Motion* is hereby **DENIED**.

By the Hearing Officer:

/s/ Alina Kantor Nir

Alina Kantor Nir
Dated: July 5, 2023

1. Parent submitted her request via email at 6:52PM on Monday, July 3, 2023. Because of the time of the submission and the holiday on July 4, 2023, the Parent’s Motion is deemed submitted on July 5, 2023. [↑](#footnote-ref-1)
2. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981); *Coke v. Equity Residential Properties Trust*, 440 Mass. 511, 516, 800 N.E.2d 280 (2003); *Slade v. Ormsby,* 69 Mass. App. Ct. 542, 546, 872 N.E.2d 223, 226 (2007). [↑](#footnote-ref-2)
3. *Slade*, 69 Mass. App. Ct. at 545–46 (internal citations omitted). [↑](#footnote-ref-3)
4. *G.D. Mathews & Sons Corp. v. MSN Corp*., 54 Mass.App.Ct. 18, 20, 763 N.E.2d 93 (2002), quoting from *Adoption of Erica*, 426 Mass. 55, 58, 686 N.E.2d 967 (1997); see also *Slade*, 69 Mass. App. Ct. at 546. [↑](#footnote-ref-4)
5. See, e.g., *Freeman v. Chicago Musical Instrument Co.,* 689 F.2d 715, 719 (1982); *Borman v. Borman*, 378 Mass. 775, 787–88, 393 N.E.2d 847, 855–56 (1979). [↑](#footnote-ref-5)
6. *Borman*, 378 Mass. at 787–88 (internal citations omitted). [↑](#footnote-ref-6)
7. *Slade*, 69 Mass. App. Ct. at 546; *Masiello v. Perini Corp*., 394 Mass. 842, 850 (1985). [↑](#footnote-ref-7)
8. *Smaland Beach Ass’n, Inc. v. Genova*, 461 Mass. 214, 220, 959 N.E.2d 955, 962-63 (2012). [↑](#footnote-ref-8)
9. See *Serody v. Serody,* 19 Mass. App. Ct. 411, 414 (1985). [↑](#footnote-ref-9)
10. *G.D. Mathews & Sons Corp*., 54 Mass.App.Ct. at 20. [↑](#footnote-ref-10)
11. See, e.g., *Freeman v. Chicago Musical Instrument Co.,* 689 F.2d 715, 719 (1982); *Borman*, 378 Mass. at 787–88. [↑](#footnote-ref-11)
12. *Byrnes*, 29 Mass. App. Ct. at 110. [↑](#footnote-ref-12)
13. See *Firestone Tire*, 449 U.S. at 377. [↑](#footnote-ref-13)
14. See *Massachusetts Rules of Professional Conduct*, Rules 1.7 and 1.8. [↑](#footnote-ref-14)
15. *Borman*, 378 Mass. at 787–88 (internal citations omitted). [↑](#footnote-ref-15)