

# COMMONWEALTH OF MASSACHUSETTS

## Division of Administrative Law Appeals

### Bureau of Special Education Appeals

In re: Student v. Danvers Public Schools

BSEA #: 1701031

#### **RULING ON PARENT'S MOTION FOR RECUSAL OF HEARING OFFICER**

#### **PROCEDURAL BACKGROUND**

Parent, through her advocate, submitted a hearing request to the BSEA on August 19, 2016. As is customary, the matter was assigned a sequential case number by date and a Hearing Officer by random rotation.

By chance the Hearing Officer assigned to the instant case had also been assigned to a previous dispute between the same parties. That case, BSEA # 1600350 was settled/withdrawn in July 2015 before proceeding to a BSEA hearing.

The instant appeal proceeded with a conference call followed by a pre-hearing conference that took place on October 18, 2016, in which possible settlement was explored. A subsequent conference call took place, followed by status reports on November 23, 2016. Another conference call was scheduled for December 8, 2016.

On December 1, 2016 Parent (not through her advocate) filed a letter with the Director of the BSEA requesting assignment of a new hearing officer based upon her experience at the October 16, 2016 pre-hearing conference. In her recusal letter Parent stated that she became uncomfortable with the Hearing Officer's objectivity because he stated that he had worked with the school's attorney for many years. She interpreted his informal, relaxed demeanor as friendly rather than a professional relationship and concluded that the Hearing Officer was biased in favor of the school's attorney. She stated that the Hearing Officer scolded her for interrupting the school's attorney during the school's presentation (after Parent's Advocate and Parent had already made their presentation); that thereafter the Hearing Officer looked at her sister rather than her; and that she felt dismissed by the Hearing Officer. She perceived that her advocate's presentation of the recommendations of two neuropsychological evaluations "appeared to make no impression" on the Hearing Officer.

On December 15, 2016, Danvers Public Schools (DPS) filed an Opposition To Parent's Motion For Recusal of Hearing Officer (Opposition)<sup>1</sup>. On December 17, 2016 the scheduled

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<sup>1</sup>I note that a different attorney in the same law firm filed this Opposition rather than the attorney in question in Parent's Recusal Motion.

conference call took place and the Hearing Officer continued with the case because there was still some possibility of settlement. The Hearing Officer requested status reports as well as a position statement from Parent's Advocate on Parent's Recusal Motion to be filed by December 23, 2016. Based upon the status reports it now appears that this appeal will proceed to a hearing. In her position statement, Parent's Advocate noted:

I am concerned that the tone of the pre-hearing was felt as negative at times by my client...

I want to insure that her concerns will be addressed appropriately as we move into the next steps of this process. I have advised [Parent] to trust the process and those who represent the BSEA.

I respect your decision. Thank you for your time and consideration.<sup>2</sup>

## LEGAL FRAMEWORK

Motions for Recusal must be considered seriously by the challenged decision-maker. It is of grave importance to the administration of justice that all participants in a judicial or quasi-judicial proceeding have trust and confidence in the impartiality and the expertise of the person conducting the proceeding. It is also important that the administrative functions of a due process entity be efficient, fair, and responsive to all interested participants. Rules have been established to guide parties and decision makers considering recusal options. There are a number of statutory requirements, judicial opinions and ethical codes that either apply directly to, or provide useful guidance on, the issue of recusal by a BSEA Hearing Officer.<sup>3</sup>

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<sup>2</sup>I note that nowhere in her position statement did Parent's Advocate indicate that she shared the position of her client regarding recusal. I further note that Parent's Advocate has also appeared before this Hearing Officer numerous times in the past.

<sup>3</sup>See in particular: Notes accompanying 28 U.S.C. §455(a); 20 U.S.C. §1415 (f) (3); 34 CFR 511 (c); 603 CMR 28.08 (3); Discussion at: *Judicial Disqualification: An Analysis of Federal Law*, Federal Judicial Center (2010), *Recusal: Analysis of Case Law Under 28 U.S.C. 455 & 144*, Federal Judicial Center (2002) ; and treatment of recusal requests at the BSEA at *In Re: Concord Public Schools*, 17 MSER 183 (Crane,2011); *In Re: Brockton Public Schools*, 16 MSER 367 (Byrne, 2010); *In Re: Duxbury Public Schools*, 14 MSER 363 (Byrne 2008); *In Re: Wachusett Regional Schools*, 14 MSER 365 (Oliver 2008); *In Re: Marblehead Public Schools*, 8 MSER 84 (Crane 2002); *In Re: Norton Public Schools* 19 MSER 134 (Byrne 2013).

Additional resources addressing ethical expectations for Judges, Hearing Officers and other lawyers functioning in a quasi-judicial role have recently been made available to the public. See: Massachusetts Code of Judicial Conduct, Supreme Judicial Court of Massachusetts(2003); U.S. Judicial Conference, [www.uscourts.gov/guide/vol12/ch1.html](http://www.uscourts.gov/guide/vol12/ch1.html); American Judicature Society (2008a), [www.qjs.org/ethics](http://www.qjs.org/ethics); ABA Model Judicial , [www.abanet.org/judicial](http://www.abanet.org/judicial) ethics/approved\_MCJCh.html; Massachusetts Committee on Judicial Ethics, [www.mass.gov/courts/rule 309](http://www.mass.gov/courts/rule_309), see in particular Canon 3, Section E concerning disqualification.

At a minimum, federal and state special education rules require that an IDEA Hearing Officer have the specialized knowledge and the necessary objectivity to act on and decide impartially each particular matter presented.<sup>4</sup>

When considering a request to recuse, a hearing officer must weigh his own professional qualifications to hear the type of appeal presented; must be alert to any objective bars that arise in the particular matter before him; must consider any subjective biases or prejudgments he may have about the parties or the subject matter; and must anticipate how his conduct of the matter might “appear” to the parties and the public. Considerations of “impartiality” in the context of a motion to disqualify a hearing officer have both a purely factual component and an objective “reasonable person” component. While it is the responsibility of the moving party to set out the facts underlying the request for recusal, it is the duty of the hearing officer when evaluating such a request to fairly examine the facts alleged and his own conscience, as well as to attempt to view his actions from the perspective of the litigants and the public. While it is clear that a personal or professional interest in the outcome of a matter would be grounds for recusal, it is more difficult to assess the impact of litigant “perception” and thwarted expectations on the potential fairness of a due process proceeding. And that is the bottom line. As lawyers and as a part of the “administration of justice,” hearing officers must ensure not only that the hearings they conduct are actually fair, but that they are perceived to be fair. Furthermore, arguments in opposition to recusal such as prevention of “judge shopping”, promotion of efficiency in case management and conservation of scarce administrative resources, while legitimate and in some instances compelling, do not override the need for close and thoughtful examination of possible factors supporting recusal. This is particularly true when the motion is advanced by a person unfamiliar with, or disadvantaged by, a complicated administrative due process system. I will therefore discuss each consideration in turn.

## **DISCUSSION**

### *A. Professional Qualifications*

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<sup>4</sup>20. U.S.C. § 1415 (f) (3) provides: A hearing officer conducting a hearing pursuant to paragraph (I)(A) shall, at a minimum- (i) not be-

I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person’s objectivity in the hearing:

(ii) possess knowledge of, and the ability to understand, the provisions of this title [20 USCS §§1400 et seq.] , and legal interpretations of this title [20 USCS §§1400 et seq.] by Federal and State courts:

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

Similarly, 603 CMR 28.08 (3) of the Massachusetts special education regulations provide:

Mediations and hearings shall be conducted by impartial mediators and hearing officers who do not have personal or professional interests that would conflict with their objectivity in the hearing or mediation and who are employed to conduct those proceedings.

Having served as a special education hearing officer for more than 36 years I believe I have the training and experience contemplated by the framers of the IDEA's dispute resolution system. Therefore, disqualification on the basis of lack of required professional qualifications is not warranted.

#### *B. Objective Bars to Service as a Hearing Officer*

Hearing Officers routinely recuse themselves from any matter in which they have a personal or professional interest which might reasonably compromise their ability to impartially conduct a hearing or to render a fair decision. These factors include but are not limited to: potential relationship-based bias due to a familial tie with a participant, residence within the school district, a financial interest in the outcome of the matter, or a prior association with counsel. In this matter the moving party has not alleged, nor is there any reasonable support for finding, the existence of any objective factor that would require recusal. I have no current or historical familial, professional or financial connections to any part, potential witness, public entity or counsel in this matter. Therefore I find that recusal is not warranted on the basis of objective factors.

#### *C. Subjective Factors*

Hearing Officers must also examine their own emotions and conscience to determine whether they are truly capable of conducting an unbiased, impartial due process proceeding.<sup>5</sup> I have made this examination. Indeed, I make this examination at every juncture in all matters before me. I conclude that I do not have any impermissible bias in or prejudgment of this matter based upon the pre-hearing conference; that I am capable of fairly presiding over this matter without prejudice to either party; and that I can and will render a judgment based solely on the evidence presented at the hearing and the applicable law.

#### *D. Appearance*

The final level of inquiry is whether the hearing officer's impartiality might reasonably be questioned. Here, recusal standards seek to uphold the "appearance of impartiality," not actual impartiality, in order to promote public confidence in the justice system. When considering whether recusal is appropriate the hearing officer must consider the perspective of the public outside of the actual controversy, as well as the views of the litigants. A Hearing Officer's impartiality might reasonably be questioned by the public due to circumstances occurring outside the hearing room, such as public comments about the matter or related issues, or hearing officer actions inconsistent with neutrality. *In Re: Boston's Children First*, 244 F.3d 164 (1<sup>st</sup> Cir. 2001). A hearing officer's impartiality might also reasonably be questioned by the litigants if there is a pattern of hostile or abusive behavior targeting one party. The facts offered to support recusal must show "what an objective knowledgeable member of the public would find to be a reasonable basis." 28 USC §455.

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<sup>5</sup>*Lena v. Commonwealth*, 369 Mass. 575 (1976)

The Parent offers no objective facts to support her request for recusal pursuant to the “appearance of partiality” standard. I have made no public or private comments about this matter, about potential participants in the hearings(s), or about the issues in dispute. While it is expected that lawyers and lay people reasonably familiar with the adversarial system will understand that adverse legal rulings do not reflect bias or partiality on the part of the decision-maker, the ability to dispassionately accept undesired outcomes is not universal.

Here, Parent’s argument in support of recusal in this hearing rests solely upon her own, subjective perceptions at the October 18, 2016 pre-hearing conference. In order to maintain confidence in the legal system, lawyers routinely educate and advise their clients that due process decisions are impartially considered and rooted in the credible evidence and applicable law. In this case, Parent’s dissatisfaction with the randomly made assignment of this Hearing Officer is apparently based upon her own impression at the pre-hearing conference and not upon any legal advice and/or legal basis for recusal. As stated above, I have been assigned to a matter (which did not result in a hearing) involving the instant parties on one prior occasion. In this situation, I do not perceive Parent’s recusal request to be an attempt to forum shop for a hearing officer but perhaps, rather a misunderstanding or misperception of the legal process, the BSEA process, and the role of Hearing Officer. Having been a Hearing Officer for 36 years working with a relatively small bar of attorneys practicing in special education law before me, I have worked with many of the same parent attorneys and parent advocates (including Parent’s Advocate in this appeal) representing different parents, as well as many of the same school attorneys often representing many different school districts. That I have a professional relationship with them all and, hopefully, a cordial/friendly relationship as well clearly does not mean that I am biased towards them or their positions in any given case. As an experienced Hearing Officer I am professionally required to maintain a neutral, impartial countenance upon the presentation of evidence or diagnostic evaluations and not to react to same. Therefore, I take Parent’s perception that her advocate’s presentation of neuropsychological recommendations made no impression upon me to reflect that I responded appropriately. Finally, I would stop any party, witness, or attorney from interrupting during another person’s testimony or presentation. I cannot find on the record presented here that a reasonable member of the public could point to any factor or circumstance causing doubt as to my impartiality. Therefore, I find that recusal is not warranted on the basis of appearance of partiality.

## **CONCLUSION**

The Parent has failed to demonstrate any reasonable basis for her Motion for Recusal in this matter. A dispassionate examination of this Hearing Officer’s training, experience, potential connections to the parties and history with the Parent’s Advocate or School’s Attorney provides no objective or subjective support for the Parent’s claims of unfitness. Therefore, I find the Motion for Recusal to be wholly without merit.

## **ORDER**

After careful consideration of the Parents’ Motion for Recusal and the School’s Opposition thereto it is my determination that the Parents’ Motion should be, and is DENIED.

By the Hearing Officer,

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Dated: January 17, 2017