

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

In Re: Student v.
Boston Public Schools

BSEA # 1603783

**Ruling on Parents' Request for Recusal of the Hearing Officer and Request for an
Extension of Time to Provide Clarification of the Hearing Issues**

On November 9, 2015, Parents filed a Hearing Request in the above-referenced matter involving a sixteen year old resident of Boston, Massachusetts. Parents' narrative describes Student's educational history starting at age two and a half, and progressing through high school, including a period during which Student attended an exam school in Boston. However, Parents' Hearing Request lists only the following issues reproduced below verbatim:

- Whether O'Bryant School [sic] has developed and implemented an IEP designed to provide [Student] with a free and appropriate [public] Education in the least restrictive environment with appropriate accommodations, supports and services to enable [Student] to access the general curriculum as required under 20 USC 1401.
 1. The accommodations listed in section A of Boston's proposed IEP address organizational and executive functioning which is one of [Student's] needs, but don't provide support for accommodations that enable [Student] to complete academic work missed due to emotional impairment that results in absences and missed work. [Student] requires accommodations that will enable her to make up missed work due absences triggered by her disability.
 2. [Student's] emotional impairment interferes with her ability to negotiate directly with teachers to complete missed work or even discuss the reasons for frequent absences, which then causes more anxiety and avoidance behavior, more absences, and more missed work. If this is not addressed in her IEP and implemented, [Student] will not be able to access the general curriculum.
- Accommodations to following the Code of Conduct:
 1. In addition to missed work, [Student's] absences and avoidant behaviors put her at risk of being drawn into school discipline actions, should staff fail to understand that a significant portion of her absences from class and avoidance behaviors (extended time in bathroom, leaving school without reporting to nurse/PATH first) are a manifestation of emotional dysregulation due to her disability.

[Student] requires a specific accommodation to following the BPS Code of Conduct that addresses this specific behavior (absence/hiding/flight) as a manifestation of her disability, not to be addressed through school discipline. [Student's] avoidance behaviors result from anxiety and panic attacks, and are a manifestation of her disability, yet O'Bryant staff has proposed to discipline [Student] with an in-school suspension.

Parents' proposed resolution of the problem was:

- Order Boston to modify [Student's] IEP to include meaningful accommodations that will enable [Student] to access the general curriculum by giving her access to missed assignments and ability [to] turn in work late by excusing absences that are due to panic/anxiety.
- Order Boston to amend [Student's] IEP to include a specific exception to the Code of Conduct as it relates to [Student] leaving the school or avoiding going to class, which are manifestations of her emotional impairment.
- Order Boston to suspend all pending disciplinary procedures related to avoidance behaviors that are a manifestation of this student's disability, and remove all disciplinary marks related to behavior that is a manifestation of her disability from [Student's] student record.

Boston Public Schools (Boston) responded to the Hearing Request on November 19, 2015, raising several affirmative defenses including challenges to the statute of limitations for certain portions of the Hearing Request, failure to state a claim upon which relief could be granted and failure to state a relief as required by applicable state and federal laws.

A Pre-Hearing Conference was held on December 10, 2015 during which the Parties explained their positions regarding Student's areas of need, hospitalizations, tutoring, the IEP proposed by Boston, the program attended by Student, attendance concerns, and the time periods involved.

I take administrative notice of BSEA #1506276, involving the same Parties, which was closed on March 15, 2015, when the Parties reached a settlement agreement during a Pre-hearing/Settlement Conference with a different Hearing Officer.

Ruling on Parents' Request for Recusal

Hearing Officers must weigh several factors when considering motions for recusal so as to protect the trust and confidence of the participants in judicial or quasi-judicial proceedings. Hearing Officers must possess the expertise to conduct the proceeding and must do so in a fair and impartial manner. Due process hearings must also be efficient and responsive to the interests of all the parties involved.

The Recusal process requires the challenged Hearing Officer to: 1) examine her own professional qualifications to hear the controversies before her; 2) examine her own conscience regarding any subjective biases she may have about the parties or the subject matter; 3) be aware of any objective bars in the case before her, such as potential relationship-based bias, financial interest in the outcome of the case or residence within the school district; and, 4) anticipate how her conduct may “appear” to the parties and the public in general. See *In Re: Brockton Public Schools*, 16 MSER 367 (2010); *In Re: Duxbury Public Schools*, 14 MSER 363 (2008); *In Re: Marblehead Public Schools*, 8 MSER 84 (2002).

Professional Qualifications

Parent does not challenge this Hearing Officer’s professional qualifications and therefore, recusal is not warranted on this basis.

Subjective Biases

Parents allege lack of impartiality on the part of the Hearing Officer based on their perception during a Pre-hearing Conference held on December 10, 2015.

During the Pre-hearing Conference Parents made serious statements regarding abuse and bullying of Student by Boston which, according to them, resulted in Student being hospitalized. According to Parents, Student continues to evidence trauma as a result of her experience which has a negative impact on her education. According to Parents, the experience has been quite difficult for both Student and Parents and the family did not openly discuss the situation. This Hearing Officer inquired whether Student was involved in individual and family counseling through school or privately. Parents perceived the Hearing Officer’s inquiry as strong prejudice and reflecting a presumption that Parents were failing to provide mental health services to their daughter.

In light of Parents’ allegations, I have examined my own conscience to determine whether I hold “strong prejudice” against Parents and as to whether I am capable of conducting an unbiased, impartial due process proceeding which will result in a decision based solely on the evidence presented at Hearing.¹ Having done so, I find that I do not have any previously acquired or extra-administrative knowledge of the matter, nor impermissible prejudice, biases or pre-judgments. Consistent with my responsibilities as a Hearing Officer, my sole concern is to ascertain whether Student’s educational needs and IDEA rights entitle her to the relief sought by Parents. As such, I am confident in my capacity to preside over this matter fairly, without prejudice to either party, and of rendering a decision based solely on the evidence presented and the applicable law.

¹ I note that the questions regarding Student’s counseling stemmed from the Hearing Officer’s concern for Student and the need to clarify the issues for Hearing.

Objective Bars

Objective factors that warrant recusal include: 1) any financial interest the hearing officer may have in the outcome of the matter that might reasonably compromise my ability to render a fair decision; or, 2) any personal or professional connection I may have with a party. See *In Re: Brockton Public Schools*, 16 MSER 367 (2010). Parents do not request the Hearing Officer's recusal based on either of these objective bars. To my knowledge, I have no current or previous familial, professional or financial connection to either party, potential witness, or public entity in the matter. Additionally, I have no prior familial or financial connection with Parents or with Boston's counsel. My only previous limited interaction with counsel is through her prior appearances before me as a Hearing Officer at the BSEA. Therefore, I find no objective bar to continuing as Hearing Officer in this matter.

Appearance Factors

Lastly, I must examine whether my impartiality might reasonably be questioned by the participants or the general public. To grant recusal on this basis the alleged bias, prejudice, conduct or ties must arise from some extrajudicial source and not simply a party's dissatisfaction with prior rulings in the instant matter, as those would not constitute a proper foundation for disqualification. 28 U.S.C. § 455; *Boston's Children First*, 244 F.3d164 (1st Cir. 2001); *DeMoulas v. Demoulas Super Markets*, 424 Mass. 501 (1997); *Commonwealth v. Gogan*, 389 Mass. 255 (1983).

Here, Parents' concerns appear to stem from discussions during the Pre-Hearing Conference. Parents, who are *pro-se*, were provided with procedural guidance regarding the status of their case in view of the fact that Student is no longer enrolled in Boston. Parents were given the opportunity to go home and further evaluate their claims, concerns, and ascertain whether they wished to amend their Hearing Request. I find nothing in this conduct to show that a reasonable member of the general public or the participants should question my impartiality, or that a member of the general public should conclude that said actions show bias or prejudice against either Party.

Parents have not established grounds for Recusal. Consequently, Parents' Motion for Recusal is **DENIED**.

II Request for an Extension of Time to Provide Clarification of the Hearing Issues:

In Parents' January 19, 2016 communication, Parents stated that they did not receive the BSEA Order issued on January 11, 2016 until January 16, 2016 and therefore, had insufficient time to respond to the BSEA Order by the January 19, 2016 deadline established by the Hearing Officer. Parents further stated that January 11, 2016 was the first time they were aware of being asked to provide specificity regarding the allegations of abuse and bullying for which they hold Boston responsible noting, that they did not remember discussing the same at the Pre-hearing Conference. Parents further stated that they were

“unable to know how to proceed with the Hearing until” they received the Ruling on the recusal issue.

Parents are correct that they did not list issues involving bullying or abuse in their Hearing Request. However, during the Pre-Hearing Conference Father raised these issues and the same were noted again in Parents’ communication to the BSEA dated January 11, 2016, at paragraph five:

We have explained that [sic] to Ms. Figueroa that there are serious issues of abuse, bullying, and sexual abuse of our daughter by Boston Public Schools.

It is unclear to the Hearing Officer whether these are new issues alleged by Parents or whether it is their position that Student’s anxiety/emotional issues result from alleged instances of abuse and bullying at Boston thereby warranting the desired accommodations and modifications to Student’s IEP. Since a previous BSEA matter between the Parties resulted in a settlement agreement in early 2015, it is unclear whether the alleged incidents of bullying and abuse occurred during the spring/summer/fall of 2015, following closure of BSEA #1506276, or how those allegations relate the issues stated in Parents’ Hearing Request and the proposed resolution.

Parents are reminded that a two-year statute of limitations is applicable to IDEA claims. Additionally, they may be precluded from raising issues that were already addressed in their prior BSEA case. Parents must clarify the time period involved in their current dispute.

Also, since Student is not currently enrolled in Boston, any determination entered by the BSEA regarding Parents’ stated relief would be irrelevant. If they are seeking relief different than that stated in their Hearing Request they must so state, and amend their Hearing Request accordingly. As was explained to Parents during the Pre-hearing Conference, at this time, the BSEA’s authority may be limited to an award of compensatory education for alleged transgressions following closure of BSEA #1506276 until the date on which Student withdrew from Boston. If so, Parents must amend their Hearing Request to so reflect.

Therefore, Parents’ Request for an extension of time to respond to the Order issued on January 11, 2016 is **GRANTED**, based on their representation that the Order was not received by them until January 16, 2016.

I next address Parents’ remaining allegations in their January 19, 2016 communication. Regarding lack of knowledge on Parents’ part that they had to provide clarification by January 11, 2016, Parents are directed to the Order dated December 15, 2015, issued following the Pre-hearing Conference. Said Order stated in pertinent parts,

Pursuant to the Pre-Hearing Conference held on December 10, 2015, the Hearing in the above-referenced matter is continued to provide Parents an opportunity to amend their Hearing Request and clarify the issues.

I note that at present Student is not enrolled at Boston Public Schools, she attended a program between September and November of 2015...

January 11th 2016 is also the deadline for Parents to clarify their position regarding the present dispute, amend and their Hearing Request and/or withdraw portions of their case that may have been impacted by Student's withdrawal from school.

The language in the December 15, 2015 Order clearly established the first deadline for Parents to clarify the issues for Hearing and instructed Parents to submit their response via an Amendment to the Hearing Request by January 11, 2016. Therefore, this is the second extension granted for Parents to provide clarification.

Regarding Parents' allegation that this matter was filed as an Expedited Hearing and has not yet been heard, I note that the case was never afforded expedited status by the BSEA Director.² This matter does not meet the standards applicable to expedited cases and will therefore proceed under the regular calendar.

Lastly, the Order issued on January 11, 2016 was intended to provide Parents guidance in clarifying the issues for Hearing, consistent with 603 CMR 28.08(5)(c) charging the Hearing Officer with the power and duty "... to take such other steps as are appropriate to assure the orderly presentation of evidence and protection of the parties' rights at the hearing...".

The deadline for Parents to respond to the January 11, 2016 Order is hereby extended again through the close of business on February 5, 2016. A Hearing may proceed after the issues for Hearing have been clarified.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: January 25, 2016

² Parents alleged in the Haring Request that Student was without an educational program and that the matter should therefore be granted expedited status. Since the lack of an educational program was occasioned by Student's withdrawal from school, the expedited standard was not met.