

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

In Re: Student

&

BSEA No. 1904777

Montachusett R.V.T.S.
("Monty Tech.")

**RULING ON MOTION OF PARENT FOR
RECUSAL OF HEARING OFFICER**

On December 4, 2018, Parent filed the above-entitled Hearing Request with the Bureau of Special Education Appeals (BSEA). On December 5, 2018 the BSEA processed the hearing request according to its usual practice and assigned the case to the undersigned Hearing Officer.

On January 14, 2019, Parent filed a Motion seeking recusal of this Hearing Officer stating that "[t]here apparently is an unfair advantage that the hearing officer is allowing against the *pro se* party," and that the "hearing officer is making unfair rulings against a *pro se* party. Parent provided three examples of the allegedly unfair treatment,

- (1) "allowing courtesy extensions of evidence to the opposing party to allow for unfair postponements in a highly sensitive timed case due to student is a senior and mother is not being allowed her rights to due process";
- (2) "allowing the opposing party to present motions directly to her office and by fax before my motions can be obtained and heard;"
- (3) "making unfair rulings against a *pro se* party.

I will first set forth the relevant legal framework for analyzing a request for recusal, and then examine each of these asserted bases for the request in turn.

Guidelines for determining whether or not a BSEA hearing officer should grant a motion for recusal are grounded in numerous sources of law including federal and state special education law, rules governing judicial and administrative hearing officer conduct, and court decisions, and have been developed by the BSEA over the course of numerous rulings on recusal motions. See e.g., 20 USC §1415(F)(13); 34 CFR §300.511(c); MGL c. 71B Sec. 3; 603 CMR 28.08(3); SJC Rule 3:09, Canon 3A. See also *In Re: Marblehead Public Schools*, 8 MSER 84 (Crane, 2002); *In Re Wachusett Regional School District*, 14 MSER 365 (Oliver, 11/6/08). *In Re: Ishmael and the Duxbury Public Schools*, 14 MSER 363 (Byrne, 11/4/08) *In Re: Xylon and the Brockton Public Schools*, BSEA No. 11-0374 (Byrne, 9/23/10) and cases cited within these rulings.

The BSEA guidelines are designed to balance two general principles. On one hand, the parties in a due process proceeding must have confidence in the expertise and impartiality of the presiding decision-maker. On the other hand, “it is important that the administrative functions of a due process entity be efficient, fair and responsive to all interested participants, and not subject to disruption or delay” by parties who may be unhappy with a particular hearing officer. See *In Re: Xylon, and Wachusett, supra*, at p. 367-368, and cases cited in those decisions. Based on the foregoing principles, recusal is required only when there is a showing of actual prejudice or partiality by the hearing officer or the appearance of such prejudice.

Applying these principles, a BSEA hearing officer must examine both objective and subjective factors that might compromise his or her impartiality, as well as factors that might create an appearance of partiality or prejudice with the general public. *Xylon, supra*. These factors are discussed below with respect to the instant case.

Professional Qualifications: Parent has not challenged my professional qualifications.

Other Objective Factors: Parent has not alleged, and I do not have, any present or prior professional, familial, financial or personal ties with any of the parties, witnesses, counsel, or any other person or entity associated with this matter. I do not reside in the school district served by Monty Tech. I have no personal, financial or other property interest in the outcome of this case. Recusal on the basis of these objective factors is neither sought nor warranted. See 34 CFR Sec. 300.511(c)(i)(B); *U.S. v. Snyder*, 235 F.3d 42, 45 (1st Cir. 2000); *Wachusett, supra*, at pp. 366-367.

Subjective factors: After a thorough examination of my emotions and conscience in this matter, I conclude that I have no “personal bias or prejudice concerning a party” their counsel, or any other participant in the case and no “personal knowledge of disputed evidentiary facts” in this matter that would in any way interfere with my ability to examine the evidence fairly and issue a decision in an

impartial manner, consistent with applicable law. See *Xylon, supra, Wachusett, supra* at p. 367, citing SJC Rule 3:09, Canon 3A and *DeMoulas v. DeMoulas Super Markets, Inc.*, 428 Mass. 543, 546, n. 6 (1998).

Appearance of Impartiality: If a hearing officer determines that he or she is impartial, then he or she in addition must determine whether there is “the appearance of impartiality as opposed to actual impartiality, so as to promote the confidence of the public regarding the proceedings.” *In Re: Attleboro Public Schools*, 15 MSER 348, 351 (Figueroa, 2009). The hearing officer must “objectively evaluate whether this was a proceeding in which [his or her] impartiality might reasonably be questioned.” *Wachusett, supra*, at p. 367 quoting *Haddad v. Gonzalez*, 410 Mass. 571, 575, 862 (1975) The facts presented in support of recusal for this reason must show “what an objective, knowledgeable member of the public would find to be a reasonable basis” to question the hearing officer’s impartiality. *Attleboro, supra*, at p.351.

Further, the alleged lack of appearance of impartiality must stem from extrajudicial sources such as public or private comments made by the hearing officer about the case, the parties, or the issues in dispute¹ and not from “something learned from participation in the case” or from rulings with which a party disagrees. *Wachusett, supra*, at 367; *Attleboro, supra*, at p. 351. Neither adverse rulings nor unsatisfactory experiences alone are enough to support recusal. *Nelson and the Taunton Public Schools*, BSEA No. 10-8142 (Byrne, 2011).

In the instant case, Parent questions my impartiality primarily based on pre-hearing rulings which, she alleges, have placed her at a disadvantage in the pending case. I will examine each of her examples of alleged impartiality in turn, in the context of the procedural evolution of this case.

(1) “allowing courtesy extensions of evidence to the opposing party to allow for unfair postponements in a highly sensitive timed case due to student is a senior and mother is not being allowed her rights to due process”;

As stated above, Parent filed her hearing request on December 4, 2018. Pursuant to standard BSEA procedure, on the following day, December 5, 2018, the BSEA issued and mailed to the parties a standard Notice of Hearing which, in pertinent part, provided for a conference call on December 24, 2018 and a hearing date of January 8, 2018.

On December 17, 2018, Monty Tech, through its counsel, filed a responsive pleading in the form of a *Motion to Dismiss* Parent’s claim. On December 21, 2018, this Hearing Officer issued an Order (1) granting Parent’s previous request to reschedule the conference call of December 24, 2018 in light of the holiday;

¹ I have made no such comments in this case.

(2) notifying the parties that the School's *Motion to Dismiss* would be construed as a *Motion for Summary Judgment*; (3) directing Parent to file her *Response* thereto by December 27, 2018 "unless she requests and is granted an extension of time to do so" and (4) advising the *pro se* Parent that BSEA staff other than this Hearing Officer could provide her with technical assistance if needed.

On or about December 27, 2018 Parent filed an *Opposition* to the School's *Motion*. On January 2, 2018, the School filed a request to postpone the original hearing date of January 8, 2019 because counsel was scheduled to appear in an expedited hearing in another matter on that date, because a ruling was pending on the *Motion for Summary Judgment*, and because Student would be turning 18 on January 11, 2019 and the School believed the Student should be a party to the matter. Parent filed an objection to the postponement request.

The rescheduled conference call was held on January 3, 2019. During the call the Hearing Officer considered the School's postponement request as well as the Parent's opposition thereto and informed the parties that the postponement request would be granted for good cause, noting Parent's objection. The parties agreed on new hearing dates of January 16 and 17, 2019. On January 10, 2019, the Hearing Officer issued a *Notice of Hearing* memorializing the foregoing. In this Order, the parties were given a deadline of January 15, 2019 to exchange and file proposed exhibits and witness lists.

Rule IX.A. of the BSEA *Hearing Rules* which states that "[c]opies of all documents to be introduced (exhibits) and a list of witnesses to be called at the hearing must be received by the opposing party(ies) and the Hearing Officer at least five (5) business days prior to the hearing *unless otherwise allowed by the Hearing Officer*. (Emphasis supplied). Clearly, in appropriate circumstances, a Hearing Officer may extend the deadline for the exchange and filing of documents and witness lists. Such extension, if granted, would apply to *all* parties.

In this case, the "five day" deadline would have fallen on January 9, 2019. In light of the still-pending ruling on the *Motion for Summary Judgment*, it was entirely reasonable and well within the discretion of the Hearing Officer to extend the deadline so that the parties would not expend additional time or resources preparing exhibits if the School's *Motion* had been granted, which it was not. The extension applied equally to both parties. Although Parent had filed proposed exhibits and witness lists on January 7, 2019, the extension afforded her an opportunity to supplement her exhibits and witness list and did not prejudice her in any way.

(2) "allowing the opposing party to present motions directly to her office and by fax before my motions can be obtained and heard;"

The School has filed documents with the BSEA by fax and regular mail, and, in one instance, by courier delivery. Additionally, the School has filed documents electronically, as has Parent.² Each and every filing has contained a certificate of service noting the date and matter of service upon the Parent. All such filings have complied with the relevant portions of the BSEA *Hearing Rules*. I have issued no rulings on motions and requests made by either party before awaiting and considering the other party's response. The Parent's assertion that she was somehow at a disadvantage in this regard is unfounded.

(3) "making unfair rulings against a *pro se* party."

I note that the only substantive ruling in this matter, which denied the School's *Motion for Summary Judgment*, was favorable to the Parent. Parent's dissatisfaction with other rulings pertaining primarily to scheduling does not constitute grounds for recusal under the standards articulated above.

For the foregoing reasons, the Motion for Recusal is DENIED.

By the Hearing Officer,

Sara Berman
Dated: January 17, 2019

² Ordinarily, the BSEA's practice is not to accept electronic filings by any party but, rather, to require that all filings be done via fax, U.S. mail, or hand-delivery. During the period from approximately January 7 through January 14, 2019 the BSEA was in the process of relocating its offices from Boston to Malden and had limited or no faxing, mailing, and printing capacity for some or all of that period. For this reason, electronic filing was allowed for both parties.