

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

In Re: Easthampton Public Schools v.
Student

BSEA# 1904761

RULING ON PARENT’S MOTION FOR RECUSAL OF THE HEARING OFFICER

On February 11, 2019, Parent in the above-referenced matter filed a Motion for Recusal of the Hearing Officer written in Spanish. The BSEA had Parent’s request translated into English and forwarded to Easthampton Public Schools on or about February 19, 2019 via email while Easthampton’s attorney was on vacation. The attorney received the Motion via regular US postal service on February 22, 2019.

Easthampton filed its Opposition to Parent’s Motion to Recuse the Hearing Officer on February 25, 2019. The Opposition was translated into Spanish, and, immediately upon receipt, was forwarded to Parent and to this Hearing Officer on February 28, 2019.

In her Motion, Parent states that she expected the Pre-hearing conference held on February 11, 2019, to be an informal event for which she sought (and was granted) consent to bring a friend for “moral support”. (I note that Parent’s friend had previously participated in a telephone conference call between the Parties and the Hearing Officer on January 8, 2019.)

Parent’s Motion states that she was surprised to see Student’s teacher and the Director of Special Education at the Pre-hearing conference which made her feel “unprepared and marginalized as a participant” because she was not notified of their attendance. Parent further alleged that the Hearing Officer had stated that this was her first hearing, that there would be “legal implications” to this informal process, and that she would issue an order noting the Parties areas of agreement. Parent further noted the Hearing Officer’s statement that Parent’s lawyer should be present (if Parent already had a lawyer that represented her in this process). Because Parent had no attorney present, she requested that the Pre-hearing be continued. Her Motion further states that

...the interpreter stated that [Parent] needed constant clarification to interpret English and Spanish for [Parent] and the school representative. Prolonging the duration of the meeting.

For this issues and other issues, I believe that my concerns were not addressed satisfactorily.

Parent further stated that she felt disrespected by the Hearing Officer, and therefore, requested

the appointment of a new Hearing Officer to supervise my IEP meetings due to lack of communication and failure to provide appropriate accommodations for my communication needs.

Easthampton opposed the Motion on the bases that Parent's recusal motion was based on misstatements of what actually occurred during the telephone conference call on January 8, 2019 and at the February 11, 2019 Pre-hearing Conference, as well as on subjective feelings of discomfort or disrespect.

Recusal Standard:

The IDEA and accompanying regulations set the minimum standards for qualifications of a Hearing Officer in the BSEA. Pursuant to the IDEA, hearing officers 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 USC §§1400 *et seq.*], and legal interpretations of this title [20 USC §§1400 *et seq.*] by Federal and State courts;
- (iii) possess 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. 20 USC 1415(f)(3); see also, 34 CFR 300.511(c).

Similar considerations addressing the professional competence and objectivity of hearing officers are found in the Massachusetts special education regulations.¹ The standards embodied in the federal and Massachusetts Special Education laws and regulations seek to assure that matters before this forum are decided impartially and fairly, based on the facts of the case and the applicable laws.

As explained in numerous BSEA Rulings quoting decisions from both Massachusetts Supreme Judicial Court and the First Circuit Court of Appeals, recusal is only required where there is a showing of actual prejudice or appearance of prejudice, and motions for recusal of

¹ 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. 603 CMR 28.08(3).

hearing officers require a two part inquiry. See *Litkey v. U.S.*, 510 U.S. 540 (1994); *Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005); *In Re. Boston Children First*, 244 F3d 164 (1st Cir. 2001); *U.S. v. Snyder*, 235 F3d 42 (1st Cir 2000). See also, *In re: Marblehead Public Schools*, 8 MSER 84 (3/19/2002).

The first prong of this two part inquiry requires that the hearing officer evaluate the facts alleged by the requesting party in support of her motion and searches her own conscience regarding her ability to remain impartial. *In re: Attleboro Public Schools*, BSEA #09-6759 (2009). Factors that should be considered include professional qualifications, objective bars and subjective factors. *In re: Xylon & Brockton Public Schools*, BSEA # 11-0374 (2010). Possible sources of bias may “include but are not limited to: potential relationship-based bias due to a familial tie with a participant; residence within the school district or a prior association with counsel”. *In Re: Nelson and Taunton Public Schools*, BSEA #10-8142 (2011).

The second prong in the analysis involves 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*, BSEA 09-6759 (2009). Under this prong, the hearing officer must examine her own conscience regarding her ability to remain impartial and also examine her actions from the perspective of the litigants as well as the public in general. *Ishmael v. Duxbury Public Schools*, BSEA #09-1986 (11/04/08) [14 MSER 363], citing *Litkey v. U.S.*, 510 U.S. (1st Cir. 2005); *Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005); *In Re: Boston’s Children First*, 244 F.3d 164 (1st Cir. 2001); *U.S. v. Snyder*, 235 F.3d 42 (1st Cir. 2000).² The parent “must show what an objective knowledgeable member of the public would find to be a reasonable basis.” *Id.* To disqualify the hearing officer, the alleged bias and prejudice “must rise from an extrajudicial source and not from something learned from participation in the case or by prior rulings fairly made that may be unsatisfactory to one party.” *In re: Wachusett Regional School District*, BSEA #09-2526 (2009). In this context, adverse rulings are not in and of themselves indicative of bias against a party absent additional evidence to support partiality. *Id.*; see also, *In Re: Nelson and Taunton Public Schools*, BSEA #10-8142 (2011) (Unsatisfactory experiences and misperceptions, even a series of them, do not in themselves indicate partiality or bias on the part of the hearing officer and do not, without more, provide sufficient support for recusal).

Lastly, in the context of a motion for recusal of a hearing officer, the hearing officer must consider “the public interest in maintaining the integrity of the BSEA process for the assignment of Hearing Officers.” *In re: Student v. Wachusett Regional School District*, BSEA #09-2526 (2008). Parties should be discouraged from “too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.” *Id.*, quoting *In Re: Allied-Signal, Inc.*, 891 F.2d 987, 970 (1st Cir. 1989).

² See also, *Marblehead Public Schools*, 8 MSER 84 (3/19/2002), providing a detailed discussion and offering guidance on ethical considerations and judicial opinions addressing recusals.

With this guidance I proceed to the objective and subjective analysis required in the context of a recusal motion in the instant case.

Analysis:

This analysis both addresses Parent's allegations and concerns and delineates what transpired during the telephone conference call of January 2019 and the Pre-hearing Conference of February 2019, in an effort to provide clarity and in the spirit of bringing Parent's newly retained Counsel³ up to date.

In her submission, Parent does not allege that this Hearing Officer has any current, professional, historical, financial or familial connection to any party, potential witness, public entity or counsel, and indeed, the Hearing Officer has none in this regard.

During the telephone conference call of January 8, 2019, the purpose and general process of a Pre-hearing Conference was explained in Spanish and in English. This Hearing Officer noted that it was an informal opportunity for the Parties to come together before the Hearing Officer to discuss the hearing process, discovery, ascertain whether partial or total resolution might occur and answer any questions Parent may have regarding the Hearing process. Parent was further advised to consult the *Hearing Rules for Special Education Appeals* (which had been sent to her by the BSEA) regarding the description of the Pre-hearing Conference. During the call, Parent was advised that the Pre-hearing Conference typically lasted a couple of hours. Every question raised by Parent and her friend was addressed in Spanish and English. To the extent that Parent raised questions and concerns outside the purview of the hearing before me, Parent was directed to speak with the mediator, Susan Singleton, to discuss additional concerns regarding Student's education, as well as dispute resolution options. Parent stated that she was not represented by an attorney. Parent was advised to copy Easthampton's attorney on everything that she sent to the Hearing Officer, and was informed that Easthampton's attorney would have to participate in any conversation between Parent and the Hearing Officer (and *vice-versa*) to avoid ex-parte communication with the Hearing Officer. The Parties agreed that the Pre-hearing Conference would be held on February 11, 2019, in Springfield, Massachusetts.

A Scheduling Order reflecting the date of the Pre-hearing Conference scheduled during the telephone conference call was issued on January 9, 2019.⁴ A second Order was issued on February 5, 2019, ordering the Parties to appear at the February 11, 2019 Pre-hearing Conference, and a copy of the description of the Pre-hearing Conference appearing in the *Hearing Rules for Special Education Appeals* was attached in both Spanish and English.

Following the January 2019 telephone conference call, Parent contacted the mediator Susan Singleton as directed and multiple exchanges via email and at least one telephone

³ On March 11, 2019, the BSEA received Attorney Peter Hahn's Notice of Appearance on behalf of Parents. To date, Parent's counsel has not appeared or participated in any proceedings.

⁴ It does not appear that this initial Order was forwarded to Parent in Spanish. A second Order was however, forwarded in both languages.

conversation took place. On or about February 1, 2019, Ms. Singleton forwarded to this Hearing Officer email exchanges between her and Parent, noting Parent's lack of interest in participating in mediation. According to Ms. Singleton, Parent appeared to see her as a "conduit of information and questions regarding the hearing process". Ms. Singleton directed Parent to the general BSEA telephone number. Ms. Singleton also asked the Hearing Officer about forwarding future email correspondence from Parent to the Hearing Officer. Ms. Singleton was immediately directed not to forward any communications between her and Parent to the Hearing Officer as this would constitute ex-parte communication. The entire email exchange between Ms. Singleton and the Hearing Officer was immediately forwarded to Easthampton's attorney.⁵ There has been no subsequent communication whatsoever between the mediator and this Hearing Officer in the context of this case.

A Pre-hearing Conference was held on February 11, 2019 in Springfield, Massachusetts. Due to difficulties in securing an interpreter for the proceedings, there was a brief delay at the beginning of the Pre-Hearing Conference which involved waiting for the on-line /telephone interpreter service. Parent identified an attorney (who frequently appears before the BSEA) as her attorney and the Hearing Officer contacted the individual to ascertain whether he was representing Parent, in which case the Pre-hearing Conference should not proceed. The Attorney, Peter Hahn, stated via speakerphone that he was not representing Parent or Student in connection with the BSEA process and he further noted that there was no impediment to proceeding with the Pre-Hearing Conference in his absence.⁶ As such, the Pre-Hearing Conference proceeded.

In her Recusal request, Parent alleges that the Hearing Officer stated that the instant matter was her first case. This statement was never made, nor is it true.

This Hearing Officer holds a Masters degree in education, a J.D., and is a duly licensed attorney in the Commonwealth of Massachusetts. The Hearing Officer has served as a BSEA Hearing Officer since 1993 (with the exception of approximately a two and a half year hiatus to serve as special assistant to the Puerto Rico Attorney General between 1997 and 1999). During this tenure, this Hearing Officer presided over hundreds of cases, conducted over 120 hearings⁷, over 300 Pre-hearing Conferences and motion sessions, and has issued over 118 Decisions and more than 90 substantive rulings. As such, this Hearing Officer holds the necessary requirements to serve in this capacity.

The Pre-hearing Conference was initiated with a comprehensive explanation of what would happen during the Pre-hearing Conference and the description appearing on the *Hearing Rules for Special Education Appeals* was also read and explained to Parent. Parent was advised that she could present any information she wished and was encouraged to ask any questions she had regarding the Pre-hearing and the Hearing processes. In the spirit of

⁵ I note that I did not read any of the email communications other than the paragraph directly from Ms. Singleton to the Hearing Officer.

⁶ On March 11, 2019, the BSEA received a Notice of Appearance by Attorney Peter Hahn on behalf of Parents.

⁷ Some cases settled after or during the Hearing so that no decision had to be issued.

helping the Parties bridge their differences, Parent was further encouraged to raise any additional concerns she had regarding Student. The Hearing Officer has never stated that Parent required a lawyer to appear before the BSEA.

In her recusal letter, Parent notes her desire of having a Hearing Officer “supervise my IEP meetings due to lack of communication and failure to provide appropriate accommodations for my communication needs.” Hearing Officers conduct hearings, pre-hearing conferences and motion sessions. They perform other necessary functions in connection with the hearings and issue determinations via orders, rulings and decisions. Hearing Officers do not supervise IEP meetings; however, as discussed during the Pre-hearing Conference and at Easthampton’s request, Student’s IEP meetings will be facilitated by the BSEA staff responsible for facilitating IEP meetings.

To date Parent has only identified English as a second language as her sole “communication need”. Spanish/ English translation/interpretation has been offered at every proceeding/event in the context of the instant matter, and will continue to be offered in all future proceedings.⁸ Similarly, written communications/rulings/decisions from the BSEA to the Parties will be translated for Parent.⁹ Regarding the Pre-Hearing Conference, the interpreter offered clear, accurate, easy to understand translation, and this Hearing Officer checked for understanding with Parent, who noted that when the Hearing Officer explained things, she understood everything that was stated. Parent also raised no concerns regarding the translation/interpreting services offered. Parent’s command of the Spanish language is excellent. She expressed herself in Spanish with ease, accuracy and sophistication indicative of literacy and exposure to formal education. Her vocabulary is vast.

The Pre-hearing Conference was lengthy so as to enable Parent’s concerns to be addressed, the process explained, and to allow for the translation to occur, as well as to allow for checks to ensure that Parent understood what was being said. Moreover, communication was facilitated in an attempt to help the Parties identify areas of agreement so as to move forward in preparation for Hearing. A description of the areas of agreement were subsequently memorialized in an Order issued on February 19, 2019, also translated into Spanish.

Parent offers no information or detail to support her allegation that her concerns were not addressed satisfactorily, that there was any bias against her, any incompetence by the Hearing Officer or that she was in any way disrespected.¹⁰ During all proceedings before the BSEA the Hearing Officer is responsible to ensure the orderly presentation of the case and evidence ensuring that the parties “conduct themselves in a manner consistent with the standards of decorum commonly observed in any court” and “where such decorum is not observed, the Agency or Presiding Officer may take appropriate action”. 801 CMR 1.01(10)

⁸Moreover, Parent submitted at least one communication to the BSEA in Spanish, which communication has been translated into English and made available to Easthampton’s Attorney.

⁹I note that this Hearing Officer’s first language is Spanish and as such, this Hearing Officer has been in the unique position of assessing the interpreting services provided to Parent thus far, which are judged to have been excellent.

¹⁰ During the Pre-hearing Conference Parent was asked once to wait until the Hearing Officer had finished her statement and the interpreter had an opportunity to translate before Parent responded.

(d)(2). Rule X. A of the *Hearing Rules for Special Education Appeals* further charges Hearing Officers with the responsibility to “ensure that appropriate standards of conduct are observed and that the hearing [or other proceeding] is conducted in a fair and orderly manner”.

Upon examining my own conscience regarding actual or perceived bias, I have no doubt that none exists, and that I can render a fair and impartial decision in this matter based solely on the evidence presented at the Hearing and the applicable law. I am confident that my determinations will be consistent with the mandates of the IDEA and Massachusetts Special Education Laws. Taking all of the above into consideration I find that a reasonable member of the public, looking at the totality of the circumstances, would conclude that my determinations have been and will be impartial. As such, I find no reasonable basis to grant Parent’s request for recusal of the Hearing Officer.

Parent’s Motion is **DENIED**.

So Ordered by the Hearing Officer,

Rosa I. Figueroa, Esq.
Dated: March 26, 2019