

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

In re: Ollie<sup>1</sup>

BSEA #2007894

**RULING ON PARENT’S MOTION FOR SEQUESTRATION OF WITNESSES**

This matter comes before the Hearing Officer on the Motion filed by Parent on July 9, 2020 to sequester all Springfield Public Schools’ (Springfield, or the District) witnesses during the Hearing scheduled to begin on July 13, 2020. In her *Motion for Sequestration of Witnesses*, Parent stated, “Off the record Springfield Public School employees have informed me they fear retaliation if they tell the truth in IEP [Individualized Education Program] meetings regarding student’s (*sic*) real needs including my son.” On July 10, 2020, Springfield filed a *Motion in Opposition to Parent’s Motion to Sequester Witnesses*, in which it contended that Parent’s unfounded false allegations lacked any basis in fact or evidence and were intended to influence the Hearing Officer. Citing to *In Re Stoneham Public Schools*,<sup>2</sup> the District argued that the general possibility that testimony will be tailored is not a sufficient basis for a sequestration order. That same day, Parent filed a *Response* to the District’s *Opposition*. She made several specific allegations related to administrators investigating or retaliating against her or other people for hiring her as an advocate and stated that she had documentation and witnesses to support her contention that sequestration is necessary.

After investigating these allegations fully, I issued an oral ruling on this matter at the beginning of the second day of hearing, before any of the District’s witnesses testified. For the reasons explained then, and in more detail below, Parent’s *Motion for Sequestration of Witnesses* is hereby DENIED.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The factual background and procedural history of this matter has been described in detail in my previous published Rulings, including my *Ruling on Springfield Public Schools’ Motion to Postpone*, issued April 10, 2020, my *Ruling on Multiple Motions*, issued May 28, 2020, my *Ruling on Springfield Public Schools’ Second Motion to Postpone*, issued June 11, 2020, my *Second Ruling on Multiple Motions*, issued June 11, 2020, and my *Ruling on Parent’s Motion for District to Produce Teachers and Them Pay (sic) Per Diem Rate for Hearing and Parent’s Urgent Matter of Discovery/Request for Sanctions*, issued July 2, 2020. I need not repeat it here.

Despite filing numerous motions and participating in multiple Pre-Hearing Conferences, Parent did not mention her concern about witnesses testifying in front of each other until the final

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<sup>1</sup> “Ollie” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

<sup>2</sup> BSEA # 13-00160 (Crane 2012).

Pre-Hearing Conference, held via Zoom on July 8, 2020. She filed the instant *Motion* on the Thursday before the Hearing was scheduled to begin on Monday; the District responded, and Parent filed a further response, on Friday. I took the unusual step of issuing a *Final Pre-Hearing Order* to address this matter on Saturday July 11, 2020. In that Order, I wrote, in pertinent part:

As BSEA Hearing Officers have made clear in previous Rulings, sequestration is an unusual step to take in BSEA Hearings. Parent must go beyond general allegations to establish a specific basis for concern that prejudicial tailoring by particular witnesses in this case would occur in the absence of sequestration. As such, I will accept sworn affidavits from these specific witnesses, to be submitted at 9:00 AM on July 13, 2020, as the basis for a sequestration Order. I will also hear arguments from both parties at the beginning of the Hearing, focused on specific evidence regarding specific witnesses in this case.

Although Parent submitted statements from individuals in a timely manner, they were not sworn, nor did they contain information relevant to Parent's contention that the District employees scheduled to testify in the instant matter would be unable to do so truthfully. The statements were authored primarily by individuals who had hired Parent as an advocate. They addressed other Parents' frustrations with the District, beliefs about administrators' treatment of Parent in that context, and – in one case – a generalized statement that some unnamed staff were afraid to speak up at meetings due to fear of retaliation by an administrator completely unconnected to the case before me.

At the beginning of the first day of Hearing, July 13, 2020, I met with Parent and the attorneys for the District off the record, in a separate virtual breakout room, to hear arguments regarding Parent's *Motion*.<sup>3</sup> I indicated that as Parent's submissions that morning had not substantiated her allegations regarding particular witnesses in this matter, I was prepared to deny her *Motion for Sequestration of Witnesses*. Parent insisted that she could produce additional evidence, which she had withheld due to her desire to protect Springfield staff from retaliation. Due to the serious nature of her allegations and the fact that all witnesses were waiting for us to begin, I suggested that the Hearing commence, as none of the contested witnesses were scheduled to testify on the first day, and that we reconvene as a group once the Hearing had ended for that day.

In the post-hearing virtual breakout room meeting, also off the record, Parent argued that sequestration of District employees was necessary. She asserted that several individuals scheduled to testify had stated that they had been afraid, and were presently afraid, to speak honestly about Ollie due to fear of retaliation from the administration. The District contested these allegations vigorously. I proposed, and the parties agreed to, a process for investigating Parent's allegations. We scheduled a further confidential, off-the-record breakout session to take place at the beginning of the second day of Hearing

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<sup>3</sup> BSEA legal intern Alison Sexson was also present.

On July 15, 2020, I met again with Parent and the District's attorneys before ruling on Parent's *Motion*.<sup>4</sup>

## II. DISCUSSION

### A. Standard for Ruling on Motion to Sequester Witnesses

Although the Federal Rules of Evidence provide for the sequestration of witnesses in federal court upon request, with certain exceptions,<sup>5</sup> these Rules do not apply to Bureau of Special Education Appeals (BSEA) proceedings.<sup>6</sup> Massachusetts state courts leave the decision whether to sequester witnesses within the discretion of the trial court judge.<sup>7</sup> Neither the BSEA Hearing Rules nor state regulations governing administrative hearings address the issue, though BSEA Hearing Officers have held that Hearing Officers have the discretion to sequester witnesses upon a determination that it is necessary to do so in order to “conduct a fair hearing.”<sup>8</sup> In the context of a motion to sequester, the Hearing Officer in *In Re Stoneham Public Schools* (Crane 2012) examined six factors set forth by the Court of Appeals for the Second Circuit in *U.S. v. Jackson* to be used in determining whether to grant or deny an exemption from a witnesses sequestration order under Federal Rule of Evidence 615.<sup>9</sup> I hereby incorporate his well-reasoned analysis in the matter now before me.

### B. Application of the Standard Demonstrates Sequestration is not Appropriate

Parent's initial *Motion* indicated that employees had informed her that they feared retaliation if they were to tell the truth during IEP meetings, implying that they might not be truthful in their testimony at hearing for the same reason. These allegations align most closely with the fifth *Jackson* factor for consideration, which focuses on any potential for bias that might motivate witnesses to tailor their testimony. Given the opportunity to substantiate these allegations through affidavits from and/or regarding particular witnesses in this proceeding, Parent was unable to do so. When she raised new allegations during the breakout session, I inquired as to their basis, and we agreed on a process for investigating them. Following further

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<sup>4</sup> BSEA legal intern Alison Sexson was also present.

<sup>5</sup> See Federal Rule of Evidence 615.

<sup>6</sup> Bureau of Special Education Appeals (BSEA) *Hearing Rule X(C)* (“Hearing Officer shall not be bound by the rules of evidence applicable to courts”).

<sup>7</sup> Mass. Guide to Evidence § 615; Mass. R. Crim. P. 21.

<sup>8</sup> See 603 CMR 28.08(5)(c); *In Re CBDE Public Schools*, BSEA #106854 (Crane 2011) (allowing Parent's motion sequester in a case described by the Hearing Officer as “unusual in that a hearing is being held solely for the purpose of making findings to assist a federal court to resolve the parties' damages dispute” and as such, explicitly looking to Federal Rules of Evidence for guidance). See also *In Re Stoneham Public Schools*, *supra* (denying Parents' request for sequestration of witnesses in the absence of a specific basis for concern that prejudicial tailoring would occur).

<sup>9</sup> 60 F.3d 128, 135 (2d Cir. 1995) (identifying the following factors for consideration when determining whether to grant or deny an exception from a witness sequestration order under Rule 615: how critical the testimony in question is; whether the information is ordinarily subject to tailoring such that cross-examination or other evidence could not bring to light any deficiencies; to what extent the testimony of the witness in question is likely to encompass the same issues as that of other witnesses; the order in which the witnesses will testify; any potential for bias that might motivate the witness to tailor his testimony; whether the witness' presence is “essential” rather than simply desirable).

discussion, I did not find sufficient evidence to conclude that sequestration was necessary to obtain truthful testimony from witnesses. As such, I do not have a reasonable basis to believe that prejudicial tailoring – essentially, that “certain witnesses may be motivated to tailor their testimony with the result that controverted and material testimony may be tailored (and the tailoring would not likely be brought to light)” – would occur if the witnesses were not sequestered.<sup>10</sup>

## CONCLUSION

Upon consideration of Parent’s *Motion for Sequestration of Witnesses*, the District’s *Opposition*, the relevant documents, and the parties’ arguments, I found no credible support for Parent’s contention that sequestering witnesses would be necessary for me to conduct a fair hearing.<sup>11</sup> As such, Parent’s *Motion for Sequestration of Witnesses* is hereby DENIED.

## ORDER

The matter will proceed to Hearing as scheduled.

By the Hearing Officer:<sup>12</sup>

/s/

Amy M. Reichbach

Dated: July 24, 2020

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<sup>10</sup> *In Re Stoneham Public Schools, supra.*

<sup>11</sup> See 603 CMR 28.08(5)(c); see also *In Re Stoneham Public Schools, supra.*

<sup>12</sup> The Hearing Officer acknowledges the diligent assistance of legal intern Alison Sexson in the preparation of this Ruling.