

# COMMONWEALTH OF MASSACHUSETTS

## Division of Administrative Law Appeals

### Bureau of Special Education Appeals

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

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BSEA#2102164

Springfield Public Schools

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#### RULING ON PARTIES' REQUESTS TO ADMIT AUDIOTAPES

This matter comes before the Hearing Officer on the Parties' Motions to Admit Audio recordings of the Team meeting held on August 17, 2020 and the Resolution Meeting held on October 1, 2020.<sup>2</sup> Each Party argues that the audio recordings would provide the best evidence to support their version of the conversations, behavior and actions that occurred during those events, a rare instance of agreement. It is important to note at the outset that the BSEA action immediately preceding this one, BSEA #20-07894, resolved most of the issues currently in dispute between the parties. In that matter the BSEA found, in pertinent part, that the 2020-2021 IEP proposed by Springfield was reasonably calculated to provide Ollie with a free appropriate public education and that no procedural violations of the Parent's or the Student's IDEA rights occurred during multiple meetings and communications relevant to the development of that IEP or during its implementation. Thus, the issues presented by the Parent for decision in this matter are limited in time and scope. The 2020-2021 IEP approved by the BSEA is currently being implemented and constitutes the "placement pending" while the instant appeal proceeds to hearing and decision.

In her original Hearing Request of 9/16/20, and the Amended Request filed on 12/2/20, the Parent centers her objections to the Student's IEP on the composition, tone and language of the Team meetings she participated in between August 2020 and December 2020. In particular, she alleges that she and Ollie were mistreated by the other attendees and thus denied a

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<sup>1</sup> "Ollie" is a pseudonym assigned by the BSEA to protect the privacy of the Student and family in documents available to the public) and the Springfield Public Schools.

<sup>2</sup>The Parties participated in another Team meeting on September 10, 2020. It is unclear from conflicting information in the pleadings whether that meeting was recorded. If an audio recording of that meeting exists this Ruling applies to that recording as well.

meaningful opportunity to participate in the development and/or revision of Ollie's 2020-2021 IEP. Springfield disputes the Parent's assertions about the meetings, her characterizations of participants' behavior and language, her claims about required Team composition and actions, and her conclusion that she and Ollie were not permitted substantive engagement in the meetings. Both parties believe that the audio recordings of the meetings constitute the "best evidence" of their claims and will support their version of the events. They argue that the Hearing Officer can best discern tone, nuance, pace, and participation by listening to the actual event rather than to witness recollection or by reading an uninflected transcript.

## LEGAL FRAMEWORK

Neither the BSEA Rules nor the Standard Rules of Adjudicatory Practice and Procedure directly address the admissibility of audio recordings. They do, however, provide general guidance for the admission of evidence. For example, BSEA Rule IX C states: The Hearing Officer shall not be bound by the rules of evidence applicable to courts . . . Evidence shall be admitted only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs." It is a noteworthy and timely reminder that audio recordings made with a variety of technologies and of a variety of events, including presidential communications, are used daily by government officials, lawyers, and other serious individuals while conducting serious affairs with serious consequences.

While the BSEA is not required to follow formal rules of evidence, some are particularly instructive. The "best evidence" rule, for example, provides that where the contents of a document are to be proved, the party must produce the original. This rule is aimed at securing the best obtainable evidence. That is the goal for evaluating the admissibility and weight of all evidence offered in a BSEA Hearing. In Massachusetts, the best evidence rule does not explicitly apply to audio recordings simply because they are not "writings." *Commonwealth v. Duhamel*, 391 Mass. 841, 844 (1984). Nevertheless, when a tape recording represents the best available evidence of an event, its admission is within the discretion of the trial judge provided that the recording is accurate, relevant, helpful to the trier of fact, and has probative value that outweighs any potential prejudice to a party. *Renzi v. Paredes*, 452 Mass. 38, 52 (2008). Furthermore, while the admission of an audio recording does not automatically bar a witness from testifying about the event covered in the recording, the judge may limit repetitive, argumentative or irrelevant testimony. *Duhamel, supra*.

## DISCUSSION

One of the most important duties of the BSEA Hearing Officer is securing the necessary evidence for a reasonable, informed and fair decision. To this end Hearing Officers are accustomed to soliciting, organizing and evaluating live testimony. The skill critical to accomplish this is the ability to truly listen. That same skill is crucial when evaluating a recording. The factors used to determine the relevance, the weight, the credibility, the reliability, and the relative and/or "legal" importance of words on tape are no different than those used to judge live testimony. The first question to be answered here is whether the proffered audiotapes are likely to have probative value that cannot be gleaned from transcripts, or from testimony months removed from the events. The Parties agree that they do. They both argue that the audio

recordings offer a chance for the Hearing Officer to more fully and completely assess the language and tenor of the conversations and meetings the Parent complains of, and to more accurately evaluate the credibility of the Parent's claims of mistreatment and malfeasance. The language and tenor of those Meetings is the core of the Parent's appeal, the essence of 15 of her 19 claims. There is no better evidence for either the Parent or the District than a recording of those events. Neither a transcript<sup>3</sup> nor the testimony of witnesses many months removed from the events complained of, offers as accurate an account as a contemporaneous recording would. The U.S. District Court in Massachusetts agreed, finding some value in considering a recording of a Team meeting. *Nickerson-Reti v. Lexington Pub. Sch.*, 893 F. Supp. 276, 287 (D. Mass 2012). Here, as the dispute centers on the intonation, pace and participation of the people attending each meeting, the probative value of the audio recordings significantly outweighs any potential prejudice to either Party.

The second question to be answered is whether there is any rule, evidentiary or otherwise, that would bar admission of a relevant audio recording in a BSEA Hearing? The BSEA Rules require that claims of privilege be observed. Those claims may operate to bar the introduction of certain evidence not relevant here. Other than that a Hearing Officer has broad discretion to admit evidence so long as it is relevant, not repetitive, not misleading and not offensive. BSEA Rule IX C and D. None of these apply here. No other barrier to the admission of the proffered audio recordings has been brought forward.

The final question is whether the admission of the audio recordings is consistent with the interests of administrative decision-making and efficiency? Listening to the audio recordings is likely to be less time consuming for the Hearing Officer and the Parties, and less repetitive, than listening to the live testimony of the Meetings' various participants. The audiotapes present a unique opportunity to excuse from the Hearing those Meeting participants who have no

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<sup>3</sup> The use of transcripts to show the events and language of the Meetings at the heart of this matter would be the least desirable evidentiary option. In its Motion in support of the admission of the audiotapes of the Team meetings, rather than transcripts of the Meetings, Springfield's counsel writes, persuasively:

The Parent alleges in her Amended Request that she was treated unfairly, called names, was laughed at, and the District ended the meeting when she attempted to speak up. Critical evidence regarding these allegations is available only through the audio recording which effectively captures the tenor, tone and sequencing of events. Stenographic transcripts of the Meetings fail to convey the tenor and tone of the Meetings as transcripts are merely a linear account, devoid of voice tone, overspeaking, decibel level, and nonverbal utterances, if any. Meeting stenographic transcripts would not serve to advance the Parent's allegations of the laughter and her assertions regarding the tone of the Meetings, nor provide the District with an effective way to defend against the Parent's allegations of a hostile environment created by tone and tenor. Admitting a transcript does not provide the Hearing Officer with the opportunity to evaluate non-verbal communication and demeanor critical to a credibility determination. See e.g., *James F. McCarthy, M.B.T.A.*, 8 Mass Worker's Comp Rep 74, 75 (Mass. Dept. Ind. Acc. Mar. 1, 1994) (when a decision depends on credibility assessments, the judge deciding the case needs more than just the cold record"); and Cf. *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1356 (1st Cir. 1992) (live testimony preferable to transcript because "deposition testimony and letters rogatory, even if available to the American court, would be less than satisfactory substitutes..."); *Covell v. Dep't of Soc. Sercs.*, 439 Mass. 766, 787, 791 N.E. 2d 877, 893 (2003) (live testimony, rather than a transcript, "provides the optimal opportunity for the assessment of credibility....")

connection to the matter other than their attendance at a recorded Meeting That represents increased efficiency and reduced expense for both Parties. Moreover, as the Hearing Officer retains the discretion to limit repetitive or duplicative testimony, the audio recordings may substitute for much of the otherwise anticipated live testimony resulting in a swifter Hearing and ultimate resolution, a potential win for all.

Therefore, based on the undisputed facts, the arguments and agreements of the Parties, and the relevant evidentiary guidance, I find that the audio recordings of the Meetings between the Parties held between August, 2020 and December 2020 should be admitted in the evidentiary record at Hearing. Their admission is not barred by any relevant evidentiary rule or principle. Their probative value, in the unique circumstances presented in this matter, outweighs any potential prejudice to either Party. Finally, the admission of the audio recordings will advance the interests of the Parties and the BSEA in efficient administration of the Hearing process.

### ORDER

The Motions of the Parent and the Springfield Public Schools for Admission of Audio Recordings of Team Meetings are GRANTED.

By the Hearing Officer

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Lindsay Byrne  
Dated: January 8, 2021