

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

In re: Stewart¹

BSEA #2101061

RULING ON PARENT’S MOTION TO SEQUESTER WITNESSES

This matter comes before the Hearing Officer on Parent’s Motion to Sequester Witnesses during a hearing scheduled to begin on May 11, 2021.² Parent filed the instant Motion on January 28, 2021 and requested a hearing on it. To date, Acton-Boxborough Regional School District (ABRSD or the District) has not responded.³ As oral argument would not advance my understanding of the issues involved, I am ruling on Parent’s *Motion to Sequester Witnesses* without a hearing.⁴ For the reasons below, Parent’s Motion is hereby ALLOWED in part and DENIED in part.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The factual background and procedural history of this matter have been described in detail in my previous published Rulings, including my *Ruling on Parent’s Motion to Consolidate*, issued December 23, 2020, and my *Ruling on Acton-Boxborough Regional School District’s Partial Motion to Dismiss and Parent’s Motion to Join the Town of Acton*, issued March 12, 2021. I need not repeat them here.

On January 28, 2021, Parent filed a *Motion to Sequester Witnesses* claiming, in part, that sequestration is necessary to prevent witnesses who may be subject to future federal claims—regarding the alleged bullying of Stewart, his “forced hospitalization,” Parent’s arrest, the involvement of the School Resource Officer (SRO), and the allegedly retaliatory assignment of a 1:1 aide to Stewart—from tailoring their testimony in an effort to avoid liability for said claims. In her Motion, Parent referenced her intent to seek damages in federal court against the District, the Town of Acton (Town or Acton), and some of the witnesses in an individual capacity after she has exhausted administrative remedies at the Bureau of Special Education Appeals (BSEA). Parent further asserts that the media attention surrounding the January 9, 2020 incident (January

¹ “Stewart” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

² In her Motion, Parent specifically requested the sequestration of all non-party witnesses, aside from a designated District representative.

³ Pursuant to Bureau of Special Education Appeals (BSEA) *Hearing Rule* VI(C), “[a]ny party may file written objections to the allowance of the motion and may request a hearing on the motion within seven (7) calendar days after a written motion is filed with the Hearing Officer and the opposing party, unless the Hearing Officer determines that a shorter or longer time is warranted.”

⁴ BSEA *Hearing Rule* VI(D) provides in relevant part: “A Hearing Officer may rule on a motion without holding a hearing if: delay would seriously injure a party; testimony or oral argument would not advance the Hearing Officer’s understanding of the issues involved; or a ruling without a hearing would best serve the public interest.”

incident) creates an additional incentive for the District to ensure consistent testimony at hearing.

To support her allegation that in the absence of sequestration, witnesses will tailor testimony improperly, Parent adduces two new pieces of evidence: an excerpt from a police report noting a subsequent conversation between the District and the Acton Police Department (APD) about the January incident,⁵ and an excerpt from an investigative report that notes a District employee's disagreement with the APD's portrayal of the January incident.⁶

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,⁷ these Rules do not apply to BSEA proceedings.⁸ Massachusetts state courts leave the decision whether to sequester witnesses within the discretion of the trial court judge.⁹ Neither the BSEA Hearing Rules nor state regulations governing administrative hearings address the issue,¹⁰ 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 to “conduct a fair hearing.”¹¹ Because sequestration is the exception, not the rule, Parent, as the moving party, bears the burden of establishing that departure from “past practice and settled expectations permitting all interested and/or affected individuals to participate in special education due process proceedings” is necessary in the instant matter to ensure a fair hearing.¹²

⁵ See Ex. D to *Motion to Sequester Witnesses* (suggesting that if the District and APD had met once before to discuss their statements, they might do so again to make sure their testimony is aligned).

⁶ See Ex. E to *Motion to Sequester Witnesses* (suggesting that the District's employee wanted the APD to change the police report to align with her description of the January incident).

⁷ See Fed. R. Evid. 615.

⁸ BSEA *Hearing Rule* X(C) (“Hearing Officer shall not be bound by the rules of evidence applicable to courts”).

⁹ Mass. Guide to Evidence § 615; Mass. R. Crim. P. 21.

¹⁰ Cf. *In Re Stoneham Pub. Sch.*, BSEA #1300160 (Crane 2012) (noting that the “Division of Administrative Law Appeals Magistrates, who have no greater authority than BSEA Hearing Officers regarding sequestering witnesses, have a practice of more routinely allowing motions to sequester witnesses”).

¹¹ 603 CMR 28.08(5)(c). See, e.g., *In Re Quentin*, BSEA #19-07460 (Reichbach 2019) (allowing Parents' sequestration request); *In Re CBDE Pub. Sch.*, BSEA #106854 (Crane 2011) (allowing Parent's motion to 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); *In Re Student v. Bedford Pub. Sch.*, BSEA #09-5853 (Figueroa 2009) (allowing Parent's sequestration request). But see *In Re Ollie*, BSEA #2007894 (Reichbach 2020) (denying motion to sequester where Parent failed to substantiate off-the-record comments she claimed had been made by District employees who were allegedly motivated to provide false testimony in fear of retaliation by the District); *In Re Trina*, BSEA #1601943 (denying Parents' sequestration request in the absence of a specific basis for concluding prejudicial tailoring would occur); *In Re Stoneham* (same).

¹² *In Re Violet & Walpole Pub. Sch.*, BSEA #12-3645 (Byrne 2015).

To determine whether Parent has met her burden, I consider the six factors set forth by the United States Court of Appeals for the Second Circuit in *U.S. v. Jackson*,¹³ which BSEA Hearing Officer Bill Crane applied in *In Re Stoneham Public Schools*.¹⁴ The *Jackson* Court used these factors to decide whether to decline a request to sequester under Federal Rule of Evidence 615 (Rule 615):

1. how critical the testimony in question is;
2. whether the information is ordinarily subject to tailoring such that cross-examination or other evidence could not bring to light any deficiencies;
3. to what extent the testimony of the witness in question is likely to encompass the same issues as that of other witnesses;
4. the order in which the witnesses will testify;
5. any potential for bias that might motivate the witness to tailor his testimony; and
6. whether the witness' presence is "essential" rather than simply desirable.¹⁵

B. Application of the Standard Demonstrates that Limited Sequestration is Appropriate

Parent has requested sequestration of all the District's witnesses. Her argument focuses on the fifth *Jackson* factor: potential for bias that might motivate witnesses to tailor their testimony. Parent distinguishes her case from *In Re Trina and Barnstable Public Schools*,¹⁶ where this Hearing Officer denied a motion for sequestration that was based on the mere possibility of witnesses hearing and matching their testimony to that of other witnesses. She likens her case to *In Re CBDE Public Schools*,¹⁷ in which former Hearing Officer Crane determined that sequestration was warranted because the parties' pending damages dispute in federal court would have potentially biased witnesses before the BSEA and motivated them to improperly tailor their testimony.

Upon consideration of Parent's *Motion to Sequester Witnesses*, as well as the procedural record, I find that Parent has established a potential for bias that might motivate some witnesses in the instant matter to tailor their testimony. Although Parent has not yet initiated a federal lawsuit, she has made clear, through Counsel, that parties named in her federal suit will include some of the non-party witnesses called to testify during the BSEA hearing.¹⁸ According to Parent, the federal suit would arise out of the same set of underlying facts that are at issue before the BSEA.¹⁹ Parent has substantiated her allegation with new evidence demonstrating that at least one conversation about the January incident has taken place between the District and APD

¹³ 60 F.3d 128 (2d Cir. 1995).

¹⁴ BSEA #1300160 (Crane 2012).

¹⁵ *Jackson*, 60 F.3d at 135.

¹⁶ BSEA #1601943 (Reichbach 2016).

¹⁷ BSEA #106854 (Crane 2011).

¹⁸ Parents' only adverse party *In Re CBDE Public Schools* was the School District, but in their federal lawsuit, they also alleged individual liability of six District staff and the town of CBDE.

¹⁹ See *In Re CBDE* ("Many of the Court claims mirrored the claims made in the instant dispute before the BSEA").

(a subsidiary of Acton)—Parent’s prospective adverse parties in federal court.²⁰ Parent thus raises concerns not only about witnesses hearing other witnesses and making adjustments accordingly, but about inaccurate testimony and collusion—concerns that Rule 615 can address.²¹ In light of Parent’s allegations and the similarities between this matter and *In Re CBDE Public Schools*, Rule 615 guides my decision.²² Applying this Rule, I find that Parent has established a reasonable basis for concluding that prejudicial tailoring of some witnesses’ testimony might occur in the absence of sequestration.

Moreover, the evidence Parent proffered in support of her *Motion to Sequester Witnesses* is bolstered by the shifting alignment between the District and the Town of Acton with respect to this proceeding.²³ In its *Partial Motion to Dismiss* and *Opposition to Join the Town of Acton*, the District initially argued that Acton, not the District, was exclusively responsible for the involvement of the SRO in the January incident.²⁴ The District then reversed its position during oral argument on January 22, 2021 and conceded that it would be the one to “answer for” the SRO’s involvement.²⁵ The District’s concession on this issue was preceded by an email exchange in which Counsel for Acton indicated that the Town joined the District in its *Opposition*, Counsel did not represent Acton in this matter, and that Acton would not (and in fact, did not) participate in the *Motion Session* discussing joinder.²⁶ Though the District and Town of Acton’s interests with regard to the actions of the SRO are currently aligned, I cannot predict with certainty how a federal lawsuit might impact this alignment. As such, I find that sequestration of certain witnesses is the appropriate safeguard to ensure reliable testimony and a fair hearing regarding those claims that are the subject of Parent’s federal claims.

Although Parent has implied, through her attorney, that she has reason to believe that all of the District’s witnesses might be biased and particularly inclined to tailor and match their testimony, she has only met her burden as to testimony by District personnel and employees of the Town of Acton (and its subsidiaries) pertaining to her claims about the alleged bullying of Stewart, his “forced hospitalization,” her arrest, the involvement of the SRO, and the assignment of a 1:1 aide to Stewart to the extent such testimony is focused on ABRSD’s allegedly retaliatory

²⁰ See Ex. D to *Motion to Sequester Witnesses*. Cf. *In Re Ollie* (denying sequestration where Parent was unable to substantiate her allegations regarding witnesses’ motivation to provide false testimony).

²¹ See *In Re Stoneham* (“[T]he advisory committee’s notes indicate that Rule 615 was adopted because the “efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion” (citing Fed. R. Evid. 615, advisory committee note)).

²² See *In Re CBDE* (“I reasoned that the instant dispute is 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. For this reason, I found it appropriate to be guided by Rule 615 of the Federal Rules of Evidence.”)

²³ The Acton Police Department (APD) is a subsidiary of the Town of Acton, and as such, APD Officers who are called to testify as non-party witnesses before the BSEA may become party witnesses in Parent’s federal lawsuit. The School Resource Officer (SRO) is an APD employee.

²⁴ See *Ruling on Acton-Boxborough Regional School District’s Partial Motion to Dismiss and Parent’s Motion to Join the Town of Acton*, for a detailed discussion of the issues remaining for hearing regarding the SRO’s alleged involvement in Stewart’s behavioral intervention on January 7, 8, and 9, 2020.

²⁵ See Transcript of January 22, 2021 *Motion Session* (Tr.) at 42; Tr. at 44 (“The Hearing Office can make findings relative to the SRO and how Acton-Boxborough Regional School District used the SRO in relation to [Student’s] entitlement to FAPE, but not against the Town of Acton.”) (statement of Attorney Brunt, Counsel for ABRSD).

²⁶ See *id.* at 39-40.

motives.²⁷ Parent has not provided a reasonable basis to believe that prejudicial tailoring would result from having witnesses present at all other times. Moreover, I find that the interests of justice would be best served by allowing the District's witnesses to hear and respond to observations and recommendations offered by evaluators, expert witnesses, and colleagues, as this will likely assist in my determination as to whether the District provided appropriate programming for Stewart.²⁸

CONCLUSION

Upon consideration of Parent's *Motion to Sequester Witnesses*, the relevant procedural history, and exhibits, I found credible support for Parent's contention that sequestering some witnesses would be necessary for me to conduct a fair hearing.²⁹ As such, Parent's *Motion to Sequester Witnesses* is hereby ALLOWED in part and DENIED in part.³⁰

ORDER

To the extent witnesses are offering testimony regarding the alleged bullying of Stewart, his "forced hospitalization," Parent's arrest, the involvement of the SRO, and the allegedly retaliatory assignment of a 1:1 aide to Stewart, all witnesses except for the District's designated representative will be sequestered. At all other times there is no need for sequestration. The matter will proceed to Pre-Hearing Conference on April 12, 2021 and Hearing on May 11, 12, 13, and 14, 2021.

By the Hearing Officer:³¹

/s/ Amy M. Reichbach

Dated: April 6, 2021

²⁷ A designated representative from the District would also be present during the testimony of all non-party witnesses.

²⁸ See *In Re Bedford* ("It is unusual in the context of BSEA hearings for witnesses to be sequestered. When this occurs, witnesses who provide services to students are deprived of hearing information, such as insight as to particular disabilities, explanations on how a disability may impact a student, or recommendations not explicitly stated in reports. Often, this information is offered by school and independent evaluators, and the information may assist staff in the provision of services to the particular student.")

²⁹ See 603 CMR 28.08(5)(c); *In Re CBDE*.

³⁰ In her Motion, Parent requested written findings with respect to any witnesses not sequestered. As sequestration in BSEA proceedings is the exception, not the rule, I deny that request. See *In Re Violet*.

³¹ The Hearing Officer gratefully acknowledges the diligent assistance of legal intern Harper Weissburg in the preparation of this Ruling.