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

In re: Mark[1] BSEA #1908079

**RULINGS ON PARENT'S MOTION TO RECUSE AND MOTION FOR PRODUCTION OF DOCUMENTS**

This matter comes before the Hearing Officer on Parent's *Motion to Recuse and Motion for Production of Documents*, filed on May 17, 2019. Whitman-Hanson Regional School District (Whitman-Hanson or "the District") initially filed its *Hearing Request* regarding Mark on March 8, 2019, seeking an order that its proposed Individualized Education Program (IEP) and placement were reasonably calculated to provide him with a free, appropriate public education (FAPE) in the least restrictive environment.[2]

On March 20, 2019, Parent filed her first *Motion to Dismiss*, asserting that because the District had not alleged a violation of the Individuals with Disabilities Education Act (IDEA), no basis for the District's *Hearing Request* remained.[3] On March 22, 2019, I denied Parent's *Motion,* concluding that Whitman-Hanson's factual allegations (in short, that Mark remained out of school without an agreed-upon placement) plausibly suggested an entitlement to the relief it seeks (a declaration that the IEP proposed for Mark for the period from April 6, 1018 to April 8, 2019,[4] and the accompanying placement at a private day school, is reasonably calculated to provide Mark with FAPE).

On April 5, 2019 Parent filed her second *Motion to Dismiss* and on May 9, 2019, she filed her third *Motion to Dismiss*. In both Motions she argued that because she had accepted the District's proposed IEP, no issues were left for hearing. Parent also asserted, in both Motions, that a hearing may not go forward absent a claim alleging a violation of the IDEA.

I denied Parent's second and third *Motions to Dismiss,* concluding that pursuant to 20 U.S.C § 1515(b)(6) and Bureau of Special Education Appeals (BSEA) *Hearing Rules for Special Education Appeals,* a party need not allege an IDEA violation for a hearing request to be properly within the jurisdiction of the BSEA. Rather, the BSEA has jurisdiction over "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education."[5] Accordingly, even in the absence of any allegations that

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1 "Mark" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in the documents available to the public.

2 Whitman-Hanson Regional School District (Whitman-Hanson or "the District") also sought an order stating that it is not required to fund an independent educational evaluation (IEE) for Mark at a rate that exceeds the state-approved rate. Parent asserts that she has rescinded her request. In my previous Rulings denying Parent's Motions to Dismiss, I noted that to the extent the District maintains this claim, it will be dismissed on a showing by Parent that she has, in fact, withdrawn her request for an IEE.

3 Parent also argued that the BSEA lacked jurisdiction over the District's *Hearing Request* because she had withdrawn her request for an IEE. See note 2, *supra*.

4 On April 24, 2019 Whitman-Hanson amended its *Hearing Request* to include its most recently proposed IEP for Mark, which is dated March 20, 2019 to March 19, 2020.

IDEA has been violated, the District may seek a declaration that its proposed IEP and placement are reasonably calculated to provide Mark with a FAPE.

On May 22, 2019, following the denial of her third *Motion to Dismiss*, Parent filed the instant *Motion to Recuse*, arguing that the Hearing Officer has demonstrated bias in favor of Whitman-Hanson. She asserts that such bias is demonstrated by the Hearing Officer's refusal to accept that "all of the issues have been resolved" and by her deliberate misinterpretation of 34 CFR 300.507,[6] which she claims requires a party to allege a violation of the IDEA in order to state a claim upon which relief can be granted by the BSEA by way of a due process hearing. Parent argues that the District has simply stated the "nature of the problem" which, she contends, is not a sufficient basis for a hearing. As such, she asserts that by allowing the hearing to go forward, the Hearing Officer is "unilaterally modifying federal and state regulations" and "setting a new standard" for what constitutes a claim. Parent argues that the purpose of the Hearing is to "intimidate and harass" her and that it is clear that the Hearing Officer has a "hidden agenda," which she suggests is to force an unnecessary hearing to accommodate the District.[7]

With her *Motion to Recuse*, Parent filed a *Motion for Production of Documents from the Department of Elementary and Secondary Education Special Education Dept and the Whitman Hanson Regional School District*, seeking "a copy of the Whitman Hanson Regional School District signed Assurances made to the SEA as a condition upon which the LEA would receive the IDEA special education funds [and] a copy of the Assurances signed by the SEA and given to OSEP as part of the condition upon which the state made to OSEP to receive approximately $642 million since 2011 in special education funding." She asserts that this information will show that because Parent did not sign any assurances, she cannot violate the IDEA under FAPE.

On May 23, 2019, the District filed an *Opposition* to Parent's *Motions*. According to Whitman-Hanson, "at no time since the filing of this Hearing Request has the Hearing Officer acted improperly or not within the boundaries of all relevant laws and regulations." Moreover Parent offered no support for her allegations other than an incorrect interpretation of said regulations. Furthermore, the District had a legal obligation to file for hearing based on its obligation to provide Mark with a FAPE. Whitman-Hanson also disagrees with Parent's assertion that "all issues have been resolved," as Mark's placement remains undetermined. Finally, the District contends that Parent's request for assurances is neither clear nor relevant to the issues in the case.

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5 The "Scope of Rules" section of the BSEA *Hearing Rules for Special Education Appeals* (*Hearing Rules*) also explains that the BSEA has jurisdiction over any matter concerning the provision of a free appropriate public education (FAPE).

6 Pursuant to 34 CFR § 300.507, a parent or a public agency may file a due process complaint on any matter relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child. 34 CFR § 300.503 defines such matters to include either proposals or refusals to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

7 The District is not seeking to force Parent to accept its proposed IEP; in fact by her own admission, Parent has accepted the most recent IEP proposed by the District. Rather, the District is seeking a declaration that it has met its obligation to propose an IEP and placement reasonably calculated to provide Mark with a FAPE.

No party requested a hearing on the instant motions. As neither testimony nor oral argument would advance my understanding of the issues involved, I am issuing the ruling on these motions without a hearing, pursuant to BSEA *Hearing Rule* VII(D). A full factual background and procedural history of the matter is set forth in detail in my *Ruling on Parent's Third Motion to Dismiss,* issued May 20, 2019; I do not repeat it here. For the reasons set forth below, Parents' *Motions* are hereby DENIED.

LEGAL STANDARDS FOR RECUSAL

Faced with a Motion to Recuse, a Hearing Officer must engage in a two-part analysis of whether impermissible bias exists. The first part of this analysis requires that the Hearing Officer examine her conscience and emotions to determine whether she could preside over the matter free from prejudice.[8] The second part requires the Hearing Officer to make an objective, fact-based inquiry as to whether there exists a reasonable basis for the moving party's concerns regarding her ability to be fair and impartial.[9] In the absence of either of these circumstances, a Hearing Officer should not recuse herself.

Underlying these standards are "twin – and sometimes competing – polic[y]" concerns: first, that courts (and administrative agencies) "must not only be, but must seem to be, free of bias or prejudice . . . [which requires that] the situation . . . be viewed through the eyes of the objective person," and second, "that a judge [or hearing officer] once having drawn a case should not recuse himself on an unsupported, irrational, or highly tenuous speculation; were he to do so, the price of maintaining the purity of appearance would be the power of litigants or third parties to exercise a negative veto over the assignment of judges."[10]

ANALYSIS

To engage in the first part of the analysis, I examine my conscience and emotions. After considering Parent's concerns, I have concluded that I will be able to preside over this matter without prejudice to any party. Acting in accordance with the relevant legal standards, I was obliged to deny Parent's several motions to dismiss this matter and allow the hearing to move forward.[11] Therefore I should not recuse myself on this basis.

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8 See *Lena v. Commonwealth*, 369 Mass. 571, 575 (1976).

9 See *Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991); *Lena*, 369 Mass. at 575 (internal citations omitted).

10 *In Re United States*, 666 F.2d 690, 694 (1st Cir. 1981).

11 Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g)(3) and Rule XVI(B)(4) of the BSEA *Hearing Rules,* a hearing officer may allow a motion to dismiss if the party requesting the appeal fails to state a claim on which relief can be granted. Here, the District may be entitled to relief in the form of an Order that the IEP dated March 20, 2019 to March 19, 2020 and corresponding placement at a private day school is reasonably calculated to provide Mark with a FAPE. Furthermore, in accordance with federal law, the BSEA has jurisdiction over a timely complaint filed by a parent/guardian or a school district "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education of such a child." 20 U.S.C § 1415(b)(6). Based on these legal standards, I was obliged to deny Parent's several motions to dismiss, as Whitman-Hanson's *Hearing Request* (initially and as amended) states a claim upon which relief may be granted.

The second part of this analysis requires that I conduct an objective, fact-based inquiry as to whether my "impartiality might reasonably be questioned."[12] The First Circuit has held that a "charge of partiality must be supported by a factual basis."[13] The facts asserted by Parent are described above: the Hearing officer refuses to acknowledge that all issues have been resolved; Parent disagrees with the Hearing Officer's interpretation of the relevant legal standards with regard to what constitutes a claim for which relief may be granted by the BSEA; and Parent believes the Hearing Officer's denial of her Motions to Dismiss were an effort to intimidate and harass her, motivated by bias in favor of Whitman-Hanson.

According to the First Circuit, disqualification would be appropriate only if these "facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the [Hearing Officer]'s impartiality."[14]

With regard to Parent's claim that all issues in this matter have been resolved, no evidence has been presented to show that Mark's placement has been determined.[15] Parent also sets forth no basis for her allegation that my decision to allow the Hearing to move forward was badly motivated or biased. Rather, she draws such conclusions based on her belief that I have misinterpreted the relevant legal standards. My position regarding the basis for a complaint rests on the plain text of the governing law: 20 U.S.C. 1415(b)(6) and BSEA *Hearing Rules for Special Education Appeals.* Likewise, my decisions to deny Parent's three motions to dismiss are supported by relevant legal standards and case law.

As such, I find that the facts asserted by Parent in her Motion do not provide what a "knowledgeable member of the public would find to be a reasonable basis for doubting the [Hearing Officer]'s impartiality."[16]

MOTION FOR PRODUCTION

To the extent Parent seeks an Order from the BSEA directing the District to provide her with documents, her *Motion for Production* appears premature as there is no indication in the record that she has requested these documents from Whitman-Hanson through discovery. To the extent she seeks an Order from the BSEA directing the Department of Elementary and Secondary Education (DESE) to provide her with records, DESE is not a party in the present matter. As such, I cannot issue such an Order unless it is in the form of a subpoena *duces tecum*, pursuant to BSEA *Hearing Rule* V(B)(i).

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12 *Lena*, 369 Mass. at 575 (quotation omitted).

13 *In Re United States*, 666 F.2d at 695.

14 *Id*.

15 Evidence provided by Whitman-Hanson indicates that on May 7, 2019, Parent was provided with a list of ten potential placements for Mark and asked to sign consent forms to allow the District to send referral packets to the proposed private day schools. On May 16, 2019, the District submitted a request to postpone the Hearing in order to give Parent additional time to respond to the District's requests. According to the District, Parent had neither returned signed consents for referral packets nor set up visits with the potential placements at that time. There is no evidence in the record indicating that Parent has provided consent or contacted any of the proposed placements.

16 *In Re United States*, 666 F.2d at 695.

CONCLUSION

For the reasons above, recusal in the above-referenced matter is neither necessary nor appropriate, and there is no basis for an order that Whitman-Hanson or the DESE produce copies of the Assurances sought by Parent.

**ORDER**

Parent's *Motion for Recusal* is hereby DENIED. Her *Motion for Production* is DENIED *without prejudice*. The matter remains scheduled for hearing June 26 and 27, 2019, with a Conference Call at 2:00 PM on June 14, 2019 to discuss the moving party's pending postponement request.

By the Hearing Officer:[17]

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Amy M. Reichbach
Dated: June 11, 2019

17 The Hearing Officer gratefully acknowledges the diligent assistance of legal intern Melanie Howland in the preparation of this Ruling.