

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

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In Re: Student	)	
	)	
v.	)	BSEA #2201162
	)	
Northborough-Southborough Regional	)	
School District	)	

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**RULING ON THE PARENT’S MOTION FOR RECUSAL (HEARING OFFICER REASSIGNMENT REQUEST)**

This matter comes before the Hearing Officer on the Parent’s August 30, 2021 Hearing Officer Reassignment Request. As grounds thereof, Parent asserts that during Parent’s “brief interactions with this hearing officer via email, [she] found [the Hearing Officer] to be very condescending and unprofessional.” Therefore, the Parent believes that she should be assigned a new Hearing Officer to “avoid any biases, partiality or confrontational judgments [that] this hearing officer may have in the future.” As “examples,” the Parent cited the following:

1. The Parent did not receive “the proper notification in a timely fashion about the next steps of the process” once the appeal was filed;
2. The Parent requested that the Hearing Officer not include opposing party in her communications, and the Hearing Officer “ignored” the request and continued “to do so”;
3. The Hearing Officer “attempt[ed] to try and force a scheduled phone conference on 8.30.21, despite [Parent’s] multiple responses stating [that she] was not available due to this being the date [her] children [return] to school”;
4. The Hearing Officer stated “very unprofessionally in an email to [Parent] that it was a ‘courtesy only’ to allow [her] to reschedule”; and
5. The Hearing Officer “us[ed] email as a means to be hostile and overly assertive – *and including the other parties in these types of emails* demonstrating subliminal hostility toward the other party” which “may also ‘conflict with ... objectivity in the hearing.’”

The Parent is *pro se*. I construe her request as a Motion for Recusal (Motion).<sup>1</sup>

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<sup>1</sup> See BSEA Rule VI A (Motion Defined) (“A party may request that a Hearing Officer issue an order or take any action consistent with relevant statutes or regulations. Such a request shall be called a motion”).

On September 2, 2021, the District submitted the *Northborough Public Schools' Opposition to Motion to Recuse Hearing Officer*. In it, the District argues that Parent failed to provide any credible evidence to support her Motion and that the email correspondence proffered as evidence do not provide a reasonable basis for the Parent's concerns regarding the Hearing Officer's ability to be fair and impartial.

Neither party has requested a hearing on the Motion, and I find that a hearing is not needed because it would not likely advance my understanding of the issues.<sup>2</sup>

### **RELEVANT FACTS<sup>3</sup> AND PROCEDURAL HISTORY:**

1. The Parent filed the instant appeal on August 9, 2021 alleging, in part, that the District had "halted" Student's special education services beginning March 2021 and through June 2021 without prior notice.
2. On August 10, 2021, the BSEA<sup>4</sup> issued a Notice to the parties indicating a conference call date and time of August 30, 2021, 4:00PM, and an initial hearing date and time of September 13, 2021, 10:00AM.
3. On August 19, 2021, the Parent informed the BSEA that she had yet to receive the BSEA Notice regarding her appeal.
4. On August 19, 2021, the Hearing Officer emailed both the Parent and opposing counsel, apologized for the Parent's non-receipt of the Notice, and provided it as an attachment to the email. The Hearing Officer asked the parties whether an earlier time on August 30 or a different mutually agreeable date and time might work better for a conference call.
5. On August 22, 2021, Parent responded to the Hearing Officer only that her children were returning to school on August 30 and that she was unavailable that day nor could she be available "the week of the 30th or September 3rd."
6. On August 23, 2021, the Hearing Officer responded to both parties informing them that that since the hearing was scheduled for September 13, it was important to have the call soon, and asked the Parent to propose a date and time.

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<sup>2</sup> See BSEA Hearing Rule VI D.

<sup>2</sup> The facts in this section are drawn from the parties' pleadings and exhibits and are subject to revision in further proceedings.

<sup>4</sup> BSEA Notices are issued and sent to the parties by the administrative support staff at the BSEA. See *BSEA Reference Manual: A Resource for Parents and School Representatives Who Appear Before the BSEA (BSEA Reference Manual)*, p. 3 ("Within five business days of receiving the Hearing Request, the BSEA will process it and issue you a Notice of Hearing, which includes the name of your assigned Hearing Officer, the time and date of any initial conference call with the Hearing Officer, the date and location of your hearing, and important information on other procedural deadlines"). The *BSEA Reference Manual* may be found at <https://www.mass.gov > pro-se-guide > download>.

7. On August 24, 2021, the Parent responded to the Hearing Officer that she could only speak in the afternoon on September 13. The Hearing Officer responded to both parties, stating that the 13th was the date of the hearing. The Hearing Officer asked to schedule the conference call for the week of August 30, 2021, and asked the Parent to propose a date and time.
8. On the same day, the Parent responded to the Hearing Officer inquiring what the conference call was regarding. She indicated that she could “speak 9/10 at 11am.”
9. On August 25, 2021, the Hearing Officer wrote to the parties:

*I would like to schedule the conference call for 8/30 as originally planned. I can be flexible on the time that day. How is 9AM? Unfortunately, 9/10 is late for a conference call with a hearing scheduled for September 13. During the call, we will discuss logistics for hearing. If the parties plan to proceed on 9/13, exhibit books and witness lists will be due 5 days prior. I will also need a request for a stenographer in writing.*
10. On August 25, 2021, the Parent wrote to the Hearing Officer asking her to “stop including [her] on messages sent to the other party,” adding, “Send 2 separate messages if you need to.” The Parent sent a subsequent email to the Hearing Officer as follows:

*I am NOT available on 8/30. As I already told you my kids return to school that day. You will have to make other arrangements or forward the matter on to your supervisor.*

*I filed this request weeks ago and had to wait to hear from you. I had no choice but to wait until I received a response. You will not now force me to attend a last minute conference call. You will wait until I am available.*

*The earliest I can do a phone conference would be 9/3. Please do not email me again asking me to conference on the 30th. Because the answer is no I will not.*
11. On August 25, 2021, the Hearing Officer responded to both parties explaining that while the conference call was originally scheduled for August 30, the Hearing Officer had the authority to order a call at her convenience, but she solicited the Parent’s availability as a “courtesy.” The Hearing Officer agreed to schedule the call for September 3, adding, “For additional guidance, you are always welcome to reach out to the Director of the BSEA, Reece Erlichman.”
12. On the same day, the Parent responded to the Hearing Officer as follows:

*Please do not email me [anymore]. Send any additional correspondence by mail only.*

*You will not use email as a means to bully or harass me.*

*I have contacted your supervisor[.]*

13. On August 25, 2021, the Hearing Officer issued an Order indicating that the conference call will take place with the parties and the Hearing Officer on September 3, 2021 at 11:00AM and providing log-in information. The Order also indicated that exhibits and witness lists were due at by the close of business day on September 6, 2021 in preparation for a hearing on September 13, 2021.

14. On August 30, 2021, the Parent filed the instant Motion.

## LEGAL STANDARDS:

The BSEA has the authority to resolve educational disputes pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1401 *et seq.*, and Massachusetts state law M.G.L. c. 71B, and the regulations promulgated thereunder, 34 C.F.R. Part 300 and 603 CMR 28.00, respectively. The *BSEA Hearing Rules* are governed by 603 CMR 28.00, federal due process procedures and the Massachusetts Administrative Procedure Act, M.G.L. c. 30A. Unless modified explicitly by the *BSEA Hearing Rules*, hearings are conducted under the Formal Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 *et seq.*<sup>5</sup>

### 1. *Recusal*

The standards for qualification as a BSEA Hearing Officer are set out in the federal special education regulations implementing the IDEA 2004 (20 U.S.C. 7400 *et seq.*) and the state regulations implementing the state special education statute (MGL c. 71B). Specifically, 20 U.S.C. §1415(f)(3) states:

A hearing officer conducting a hearing pursuant to paragraph (1)(A) 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 USCS §§ 1400 *et seq.*], and legal interpretations of this title [20 USCS §§ 1400 *et seq.*] by Federal and State courts;

(iii) possess the 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.<sup>6</sup>

Similarly, Massachusetts special education regulations provide that hearings shall be conducted by impartial hearing officers who do not have personal or professional interests that would

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<sup>5</sup> See 603 CMR 28.08(5)(b).

<sup>6</sup> See also 34 CFR 300.511(c).

conflict with their objectivity in the hearing and who are employed to conduct those proceedings.<sup>7</sup>

Either party may file a motion for recusal.<sup>8</sup> As explained below, the determination whether to recuse herself must be made by the subject hearing officer. Faced with such a motion, 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.<sup>9</sup> 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.<sup>10</sup> In the absence of either of these circumstances, a Hearing Officer should not recuse herself.

Underlying these standards are "twin" policy 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."<sup>11</sup> However, when a litigant is *pro se* or "when the motion is advanced by a person unfamiliar with, or traditionally disadvantaged by, a complicated administrative due process system," arguments in opposition to recusal "such as prevention of 'judge shopping', promotion of efficiency in case management and conservation of scarce administrative resources while legitimate, and in some instances compelling, do not override the need for close and thoughtful examination of possible factors supporting recusal."<sup>12</sup>

## 2. *Ex Parte Communications*

801 CMR 1.03(6)(a)(1) sets out that a Presiding Officer (i.e., Hearing Officer) shall not make or receive an *ex parte* communication to or from any interested person relevant to the merits of the adjudicatory proceeding. The prohibitions of 801 CMR 1.03(6) apply beginning at the time at which an adjudicatory proceeding is initiated.<sup>13</sup>

## 3. *BSEA Conference Calls*

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<sup>7</sup> 603 CMR 28.08(3).

<sup>8</sup> See BSEA Hearing Rule VI A; see also *BSEA Reference Manual*, p. 27 ("Motion for recusal if you believe that your Hearing Officer has a conflict of interest or is so biased that he or she cannot make a fair and impartial decision in your case and therefore should remove him/herself from the case") and p. 48 ("Prior to the Hearing, you can file a motion requesting that the Hearing Officer recuse (i.e., remove) him/herself if you believe that the Hearing Officer would not be able to decide your case fairly and objectively").

<sup>9</sup> See *Lena v. Commonwealth*, 369 Mass. 571, 575 (1976).

<sup>10</sup> See *Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991); *Lena*, 369 Mass. at 575 (internal citations omitted).

<sup>11</sup> *In Re United States*, 666 F.2d 690, 694 (1st Cir. 1981).

<sup>12</sup> *In Re: Duxbury Public School and Ishmael (Ruling on Parent Motion to Recuse)*, BSEA #09-1986, 14 MSER 363 (Byrne, 2008); see also *Marblehead Public Schools*, BSEA# 02-2828 (Crane, 2002); *Malden Public Schools*, BSEA# 05-4355 (Beron, 2005).

<sup>13</sup> 801 CMR 1.03(6)(a)(4). See also *BSEA Reference Manual*, p. 53 (defining *ex parte* communications and stressing their impermissibility)

Pursuant to BSEA Hearing Rule II E, in all non-expedited cases, the BSEA will schedule a telephone conference call to occur nineteen (19) calendar days after a hearing request has been received by the opposing party. In general, the call should last no more than ten (10) minutes and will address scheduling of future events, timelines for exchange of information (discovery), and any other scheduling issues. The Hearing Officer may entertain discussion of substantive matters if no further resolution meetings are anticipated during the thirty (30) day resolution session period.<sup>14</sup>

#### **APPLICATION OF LEGAL STANDARD:**

I begin this analysis by making an objective, fact-based inquiry as to whether there exists a reasonable basis for the moving party's concerns regarding my ability to be fair and impartial.<sup>15</sup> I will then examine my conscience and emotions to determine whether I could preside over the matter free from prejudice.<sup>16</sup> I will conclude by assessing whether there may be, in this matter, an appearance of impartiality.<sup>17</sup>

##### *1. There are No Objective Bars to My Service as a Hearing Officer in This Matter.*

There is no allegation by the Parent that I do not possess the minimum qualifications necessary for employment as a specialized Hearing Officer pursuant to 20 U.S.C. §1415(f)(3). In fact, my personal qualifications amply meet the minimum requirements of BSEA Hearing Officer. Therefore, disqualification on the basis of professional qualifications is not warranted.

In addition, the Parent has not alleged, nor is there any reasonable support for finding, the existence of any objective factor that would require recusal. I have no current or historical familial, professional or financial connection to any party, potential witness, public entity or counsel in this matter.

Therefore, I find that recusal is not warranted on the basis of objective factors.

##### *2. There are No Subjective Factors Impeding My Service as a Hearing Officer in This Matter.*

To determine whether she is truly capable of conducting an unbiased, impartial due process proceeding, the Hearing Officer must examine her own emotions and conscience. I have made this examination. I approach every appeal, including the one at issue, with compassionate neutrality. Here, I do not have any impermissible bias or prejudgment, and I am capable of fairly presiding over this matter without prejudice to either party and of rendering a decision based solely on the evidence presented and the applicable law.

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<sup>14</sup> See also, *BSEA Reference Manual*, p. 3 (explaining the purpose of the 19-Day Conference Call) and p. 23 (directing a parent who is unavailable on the day of the conference call to seek a postponement thereof in writing).

<sup>15</sup> See *Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991); *Lena*, 369 Mass. at 575 (internal citations omitted).

<sup>16</sup> See *Lena v. Commonwealth*, 369 Mass. 571, 575 (1976).

<sup>17</sup> See *In Re: Danvers Public Schools (Ruling on Parent's Motion for recusal of Hearing Officer)*, BSEA #1701031, 23 MSER 5 (Oliver, 2017).

Therefore, I find that recusal is not warranted on the basis of subjective factors.

3. *There is No Reasonable Basis to Support an Appearance of Impartiality on My Part in the Present Matter.*

Because recusal standards seek to uphold the "appearance of impartiality" in addition to actual impartiality, I must also consider the perspective of the public outside of the actual controversy, as well as the views of the litigants. A Hearing Officer's impartiality might reasonably be questioned by the public if there is a pattern of hostile or abusive behavior targeting one party. However, the facts offered to support recusal must show "what an objective knowledgeable member of the public would find to be a reasonable basis."<sup>18</sup> In other words, "[c]onsiderations of 'impartiality' in the context of a motion to disqualify a hearing officer have both a purely factual component and an objective 'reasonable person' component."<sup>19</sup>

Here, the Parent offers no objective facts to support her request for recusal. As grounds for her request, Parent asserts that during Parent's "brief interactions with this hearing officer via email, [she] found [the hearing officer] to be very condescending and unprofessional." Therefore, Parent believes that she should be assigned a new hearing officer to "avoid any biases, partiality or confrontational judgments [that] this hearing officer may have in the future." Hence, I assess each of the "examples" offered by the Parent to support recusal pursuant to the "reasonable person" standard described above.

Parent alleges that she did not receive "the proper notification in a timely fashion about the next steps of the process" once the appeal was filed. While this is regrettable, the Hearing Officer is not responsible for issuing and sending out BSEA Notices following the filing of a Request for Hearing; rather, this is done by administrative support staff at the BSEA. Moreover, once I became aware of the issue, I immediately forwarded Parent the BSEA Notice via email.

Parent also alleges that she requested that the Hearing Officer exclude opposing party in her communications and that the Hearing Officer "ignored" her request. In addition, she argues that the Hearing Officer used "email as a means to be hostile and overly assertive – *and including the other parties in these types of emails* demonstrating subliminal hostility toward the other party." She asserted that this "demeanor may also 'conflict with ... objectivity in the hearing.'" However, I am bound by 801 CMR 1.03(6)(a)(1) which establishes that a Hearing Officer may not make or receive an *ex parte* communication to or from any interested person relevant to the merits of the matter.<sup>20</sup> Nor can a review of my email communications with the parties be viewed by any reasonable person as "hostile" or "overly assertive"; at all times, I solicited Parent's input while attempting to secure a mutually agreeable date and time for the conference call.

Parent asserts that the Hearing Officer "attempt[ed] to try and force a scheduled phone conference on 8.30.21, despite [Parent's] multiple responses stating [that she] was not available

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<sup>18</sup> See 28 U.S.C. § 455(a).

<sup>19</sup> *In Re: Danvers Public Schools (Ruling on Parent's Motion for recusal of Hearing Officer)*, BSEA #1701031, 23 MSER 5 (Oliver, 2017).

<sup>20</sup> I note that although Parent is *pro se*, the bar on *ex parte* communications is explained in detail in the *BSEA Reference Manual*.

due to this being the date [her] children [return] to school.” However, conference calls that occur 19 days after a hearing request has been received by the opposing party are part of the normal course and process of BSEA appeals.<sup>21</sup> During such calls, the parties address scheduling of future events, timelines for exchange of information (discovery), and any other scheduling issues. Hence, it is important for the 19-day conference call to take place early enough in the hearing process.

In this matter, a conference call was scheduled by the BSEA for August 30, 2021. Due to Parent’s unavailability, I offered to reschedule the call. However, as Parent offered no date other than September 10 (three days before the scheduled hearing date), I proposed the original date established by the BSEA Notice, but offered to be flexible with time. I also explained the reasons that September 10 was not an appropriate date. Furthermore, when Parent offered September 3, I scheduled the conference call for said date at a time that was convenient for Parent. I offered to reschedule “as a courtesy” to Parent, because although Parent’s schedule alone does not dictate the course of the hearing process, I am always mindful of the many drains on the schedules of parents of children with special needs.

Therefore, I cannot find on this record that a reasonable member of the public could point to any factor or circumstance causing doubt as to my impartiality.<sup>22</sup>

**CONCLUSION:**

For the reasons described above, recusal of the undersigned Hearing Officer in the above-referenced matter is neither necessary nor appropriate.

I also acknowledge that the Parent has requested not to receive communications via email. However, at times, BSEA appeals necessitate quick dispensation of information. As such, unless Parent can provide another means of receiving important information quickly and efficiently (i.e., fax), email will continue to be utilized, as needed.

**ORDER:**

Parents' Hearing Officer Reassignment Request, interpreted and addressed as a Motion for Recusal, is hereby DENIED.

So Ordered,

By the Hearing Officer,

    /s/ Alina Kantor Nir  
Date: September 3, 2021

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<sup>21</sup> See BSEA Hearing Rule II E. The importance of said call and the reasons thereof are clearly set out in the *BSEA Reference Manual*.

<sup>22</sup> *In Re United States*, 666 F.2d at 695.



