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

In re: Zeke[1] BSEA # 2300305

***SUA SPONTE* DISMISSAL OF BUREAU OF SPECIAL EDUCATION APPEALS DIRECTOR AS A PARTY**

On July 8, 2022, Parent filed a *Hearing Request* against multiple parties regarding events that took place during the summer of 2022, in connection with Zeke's twenty-second birthday and his transition from special education to adult services. Specifically, Parent named as respondents Pembroke Public Schools, the Department of Elementary and Secondary Education, the Director of the Bureau of Special Education Appeals (BSEA), the Department of Developmental Services, the Department of Early Education and Care, and the Evergreen Center.

Because a Hearing Officer of the BSEA cannot, consistent with BSEA jurisdiction and legal precedent, hear and decide claims against the BSEA Director, and because this is not the appropriate forum for Parent's allegations regarding the BSEA Director's conduct in a separate case, I hereby dismiss the BSEA Director as a party in this matter *sua sponte*. As I have concluded that I cannot exercise jurisdiction over the BSEA or its Director and that any amendment Parent might make to her *Hearing Request* in this regard would be futile for the reasons below, I have not given the parties the opportunity to offer arguments on the issue. As such, the parties may note their objections to be preserved in the record, as provided in the Order below.

I. RELEVANT FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In her *Hearing Request*, Parent sets forth her allegations regarding each party under a separate section naming that party – with the exception of the BSEA Director. Allegations regarding the BSEA Director appear in the section entitled "Department of Elementary and Secondary Education" (DESE) and generally assert that she has a "close" or "comfortable" relationship with the law firm that represents Pembroke Public Schools, constituting a "violation" by DESE of "conflict of interest regulations." The only reference in the *Hearing Request* to the BSEA Director specific to these parties relates to a previous case involving Parent, Zeke, and the Pembroke Public Schools, wherein Parent alleges that in the previous matter, the BSEA Director improperly discussed scheduling with Pembroke Public Schools' Attorney.[2]

[1] Zeke is a pseudonym chosen by the Hearing Officer to protect the student's identity in public documents.
[2] Although Parent refers to texts she attached to her *Hearing Request*, those texts appear unrelated to the previous matter involving Parent. To the extent the BSEA Director may have been involved in scheduling of that case, I take judicial notice of my service on a grand jury between April 7 and July 7, 2022, which necessitated the involvement of my colleagues in the scheduling of matters that remained before me.

Regarding the BSEA more generally, Parent states that the undersigned Hearing Officer, who presided over the previous case, improperly permitted a representative of Evergreen, which was not a named party, to participate in a Conference Call regarding that case. In that case, this issue was brought to the Hearing Officer's attention shortly before the Hearing. It was addressed then, and the decision in that case is pending.

II. DISCUSSION

Although the BSEA has not encountered a matter in which the agency, or one of its employees, has been named as a party in a *Hearing Request*, I am guided by the legal standards below. Moreover, for the purposes of this analysis, as with the evaluation of a motion to dismiss, I take as true "the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor."[3]

A. *Legal Standards*

1. *Sua Sponte* Dismissals

It is well-established that judges possess inherent authority to dismiss claims *sua sponte* in certain circumstances, such as the absence of certain aspects of subject matter jurisdiction (i.e. standing) or the inability of the plaintiff to produce evidence to support the necessary findings to prevail.[4] Such powers are "a necessary incident to the right and duty to keep the judicial system in efficient operation."[5] Generally, parties should be provided notice that the judge is considering dismissal, except where "it is crystal clear that the plaintiff cannot prevail and that amending the complaint would be futile."[6]

2. BSEA Jurisdiction

Under 20 U.S.C. § 1415(b)(6), the BSEA has jurisdiction over timely complaints filed by a parent/guardian or school district "with respect to any matter relating to the identification, evaluation, or educational placement of [a] child, or the provision of a free appropriate public education to such child."[7] In Massachusetts, parents may request hearings on any matter

[3] *Cf. Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

[4] See, e.g., *Abate v. Freemont Inv. & Loan*, 470 Mass. 821, 828 (2015) (recognizing that a judge may consider, *sua sponte*, certain aspects of subject matter jurisdiction at any time and dismiss a claim on this basis); *Commonwealth v. Dube*, 59 Mass. App. Ct. 478, 488-89 (1992) (recognizing judge's inherent authority to dismiss a case *sua sponte* where evidence was insufficient to support the necessary finding, specifically, probable cause); *State Realty Co. of Boston v. MacNeil Bros. Co*., 358 Mass. 374, 379 (1970) (noting that courts have inherent, discretionary powers to dismiss cases in certain circumstances, such as failure to prosecute, even in the absence of any motion by parties to dismiss).

[5] See *State Realty Co*., 358 Mass. at 379.

[6] *Chute v. Walker*, 281 F.3rd 314, 319 (2002) (noting that *sua sponte* dismissals of complaints for failure to state a claim may be appropriate where parties "have been afforded notice and the opportunity to amend the complaint or otherwise respond," but that prior notice is not necessary where plaintiff cannot prevail); see *Davis v. Kvalheim*, 261 Fed. Appx. 231, 234-35 (11th Cir. 2008) (unpublished) (affirming judge's *sua sponte* dismissal of complaint without notice where complaint was frivolous).

[7] See 34 CFR § 300.507(a)(1).

concerning the "eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities."[8]

3. Recusal

The Supreme Court has recognized that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."[9] To "promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible,"[10] judges are expected to recuse themselves in any proceeding in which their "impartiality might reasonably be questioned,"[11] or where specific circumstances exist that might show partiality.[12] Such circumstances include those in which a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," and when the judge is named a party to the proceedings.[13] Any doubts must be resolved in favor of recusal, particularly in these circumstances, as "the potential for conflicts of interest [is] readily apparent."[14] Generally, when a judge is a named defendant, recusal is mandatory.[15] There is an "exception to this rule, however, in cases where 'the case cannot be heard otherwise.'"[16] "Under this 'rule of necessity,' a judge is not disqualified due to a personal interest if there is no other judge available to hear the case," because, for example, they all share that same interest.[17]

B. *Application of Legal Standards*

In this matter, I believe there exists a potential ground for recusal – namely, that my supervisor has been named a defendant, which might lead to the appearance of impropriety.[18] All other BSEA Hearing Officers, however, share this same personal interest, such that under the

[8] 603 CMR 28.08(3)(a); see M.G.L. c. 71B § 2B (under its governing statue, the BSEA has the authority to provide "adjudicatory hearings, mediation and other forms of alternative dispute resolution . . . for resolution of disputes between and among parents, school districts, private schools and state agencies concerning: (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child arising under this chapter and regulations").
[9] *In Re Murchison*, 349 U.S 133, 136 (1955).
[10] *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003) (internal citation omitted).
[11] 28 USC § 455(a).
[12] See 28 USC § 455(b).
[13] 28 USC § 455(b)(1), (5)(i), (e); see *Patti*, 337 F.3d at 1321.
[14] *Murray v. Scott*, 253 F.3d 1308, 1310, 1312 (11th Cir. 2001); see *Patti*, 337 F.3d at 1321.
[15] See 28 USC § 455(b)(5)(i); *Akers v. Weinshienk*, 350 Fed. Appx. 292, 2009 WL 3403183 (10th Cir. 2009) (unpublished) (judge's refusal to recuse herself where she was one of the defendants in an action, and no exceptions applied, constituted a violation of section 455(b)(5)(i)). To guard against judge-shopping, however, courts have properly "refused to disqualify themselves under Section 455(b)(5)(i) unless there is a legitimate basis for suing the judge." *Tamburro v. East Providence*, 981 F.2d 1245, at *1 (1st Cir. 1992) (unpublished); see *United States v. Pryor*, 960 F.2d 1, 3 (1st Cir. 1992) ("It cannot be that an automatic recusal can be obtained by the simple act, of suing the judge"; question of recusal is "purely for the court's own decision").
[16] *Bolin v. Story*, 225 F.3d 1234, 1238 (11th Cir. 2000) (quoting *United States v. Will*, 449 U.S. 200, 213 (1980)).
[17] *Id*. (internal citations omitted). See *Davis*, 261 Fed. Appx. at 234 (judge named as defendant in lawsuit "was relieved of [his] obligation to recuse [himself] under the rule of necessity" where plaintiff indicated his intention to name all judges of that court, such that each judge would have shared the same interest).
[18] See 28 USC § 455.

rule of necessity, I need not disqualify myself from hearing the case. As such, I continue my analysis.

Pursuant to my discussion of *sua sponte* dismissals, above, I have the authority to dismiss so much of the *Hearing Request* as alleges claims against the BSEA Director, should I find that the BSEA lacks subject matter jurisdiction as to these claims.[19] I may do so without a hearing only if it is evident that Parent cannot prevail in her claims, and amending the *Hearing Request* would not cure the deficits.[20]

In this case, Parent asserts that the BSEA Director has a conflict of interest, and/or that she was involved improperly in a case pending before this Hearing Officer that involves some of the same parties. These allegations do not concern the eligibility, evaluation, or placement of a child, the provision of a free appropriate education to such child, or procedural protections for students with disabilities.[21] As such, even taking as true Parent's claims against the BSEA Director and any inferences that may be drawn therefrom,[22] these claims are not within the jurisdiction of the BSEA. As the BSEA cannot hear these claims, Parent cannot possibly prevail on them before the BSEA, and amending her *Hearing Request* would be futile.[23] For this reason, I need not provide notice and an opportunity to be heard before dismissing the BSEA Director as a party to the instant, *sua sponte*.[24]

CONCLUSION

For the reasons above, the BSEA Director is hereby DISMISSED as a party.

ORDER

The matter will proceed as follows.

1) All remaining parties shall file any additional responses and/or motions in response to the *Hearing Request* by close of business on August 31, 2022. Any party that wishes to file a written objection to this *Ruling*, to preserve such objections for the record, may also do so on or before that date.

2) Oral arguments on all motions will take place via a virtual platform on October 21, 2022 at 9:30 AM.

---

[19] *Cf.,* e.g., *Abate*, 470 Mass. at 828; *State Realty Co.*, 358 Mass. at 379.
[20] See *Chute*, 281 F.3rd at 319.
[21] See 34 CFR § 300.507(a)(1); M.G.L. c. 71B § 2B; 603 CMR 28.08(3)(a).
[22] See *Blank*, 420 Mass. at 407.
[23] See *Chute*, 281 F.3d at 319; *Davis*, 261 Fed. Appx. at 234-35. In so finding, I make no conclusion regarding the factual basis or underlying merit of Parent's claims; I simply find that pursuing them in this forum, as part of the instant *Hearing Request*, would be futile given the BSEA's lack of jurisdiction over these claims. To the extent Parent believes the actions of the BSEA Director in connection with the previous case may have impacted the outcome of that case, she may opt to challenge those actions in court should she choose to appeal that case.
[24] See *Chute*, 281 F.3d at 319; *Davis*, 261 Fed. Appx. at 234-35.

3) The Hearing will take place via a virtual platform on November 14, 15, and 16, 2022, beginning at 9:30 AM each day.

4) Exhibits and witness lists are due by close of business on November 7, 2022.

By the Hearing Officer:

/s/ *Amy M. Reichbach*
Dated: August 18, 2022

COMMONWEALTH OF MASSACHUSETTS

BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL

Effect of BSEA Decision, Dismissal with Prejudice and Allowance of Motion for Summary Judgment

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Similarly, a Ruling Dismissing a Matter with Prejudice and a Ruling Allowing a Motion for Summary Judgment are final agency actions. If a ruling orders Dismissal with Prejudice of some, but not all claims in the hearing request, or if a ruling orders Summary Judgment with respect to some but not all claims, the ruling of Dismissal with Prejudice or Summary Judgment is final with respect to those claims only.

Accordingly, the Bureau cannot permit motions to reconsider or to re-open either a Bureau decision or the Rulings set forth above once they have issued. They are final subject only to judicial (court) review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. This means that the decision must be implemented immediately even if the other party files an appeal in court, and implementation cannot be delayed while the appeal is being decided. Rather, a party seeking to stay–that is, delay implementation of–the decision of the Bureau must request and obtain such stay from the court having jurisdiction over the party's appeal.

Under the provisions of 20 U.S.C. s. 1415(j), "unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement," while a judicial appeal of the Bureau decision is pending, unless the child is seeking initial admission to a public school, in which case "with the consent of the parents, the child shall be placed in the public school program."

Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child's placement while judicial proceedings are pending must ask the court having jurisdiction over the appeal to grant a preliminary injunction ordering such a change in placement. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

Compliance

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau of Special Education Appeals contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

Rights of Appeal

Any party aggrieved by a final agency action by the Bureau of Special Education Appeals may file a complaint for review in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th. Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.