

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals
Bureau of Special Education Appeals

In Re: Student v.
Brookline Public Schools

BSEA # 2303670

RULING ON DESE’S MOTION TO DISMISS AND PARENT’S OBJECTION TO THE HEARING OFFICER’S FORCING THE PARENT TO SUBMIT HER MOTION TO OPPOSE AND OBJECT TO THE SEA’S MOTION TO DISMISS IN HARD COPY, IN A BINDER, TABBED AND NUMBERED AND MOTION TO RECUSE

On October 26, 2022, Mother¹ (hereinafter, “Mother” or “Parent”) filed a Hearing Request in the above-referenced matter, claiming that the Department of Elementary and Secondary Education (“DESE” or “Department”)/ Problem Resolution System (“PRS”) and Brookline Public Schools (“Brookline” or “District”)² denied Student a FAPE and also deprived Mother of her right to meaningful participation during the 2019-2020, 2020-2021, 2021-2022 and 2022-2023 school years.³ Mother requests that DESE withhold Part B funds to the District pursuant to 34 CFR 300.600(b)(1), a finding that Student is entitled to compensatory education and monetary damages for the District’s violations, and a finding that DESE’s/PRS’ actions deprived Student of a FAPE and Mother of her procedural due process rights.

On November 17, 2022, Mother requested a postponement of the Hearing through April 11, 12 and 13, 2023, on the basis that she would be out of the country from January through March of 2023. This request was granted via Order issued on November 22, 2022.⁴

¹ According to Brookline, Mother and Father are divorced and they share full legal and physical custody of Student (inclusive of educational decision-making). Father is not at present a Party in this proceeding, but Brookline reserved its right to join Father at a later time.

² Regarding Brookline, Mother seeks a three-year re-evaluation of Student in all areas of suspected disability, monthly District oversight of fully remote implementation of Student’s IEP for the next two years, and revision of the amount of compensatory education services ordered per PRS’ Compensatory Service Plan. Brookline denies Mother’s allegations, contending that the proposed IEPs offered Student a FAPE in the least restrictive environment and noting that any imperfection in the delivery of services on its part did not result in a denial of FAPE to Student, thus, Student is not entitled to compensatory education. Moreover, Brookline notes additional mitigating factors, including Student’s extended visits out of the country during the school year, and her refusal to accept increased services and new goals in IEPs proposed for Student, including an offer for Student to participate in a special education day school program and placement.

³ Mother alleges that Brookline and DESE/PRS:

- a) Impeded the student’s right to FAPE
- b) Significantly impeded the Parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the student and,
- c) Caused a serious deprivation of education benefit to the student. (Mother’s Hearing Request).

⁴ The following day Mother requested that the Hearing be open to the public.

DESE’S Motion to Dismiss

On December 2, 2022, DESE filed a Motion to Dismiss all claims against it on the basis that

... “findings and orders issued by the Department on complaints and the Department’s processing of a complaint are not reviewable by the Bureau of Special Education Appeals.”⁵ 603 CMR 28.08(2) (*emphasis added*).

Mother challenges the Department’s findings regarding a complaint she filed on March 22, 2022, on behalf of her then 10-year-old, third grade son. The PRS complaint (PRS 6924) alleged the District’s failure to implement Student’s last accepted IEP (the IEP covering the period from October 29, 2019 to May 19, 2020). Specifically, Mother alleged that PRS’ June 6, 2022, calculation of compensatory services owed to Student was erroneous in certain areas. (Said PRS Letter of Finding determined that Brookline was out of compliance during 18 weeks from September 2021 to December 2021 and requested that the Parties submit a mutually agreed upon Compensatory Service Plan (Plan); when unable to agree on a Plan, DESE/PRS issued a Plan of Compensatory Services for the District to implement during the 2022-2023 school year.)

In addition to challenging the number of compensatory hours awarded by DESE, Mother’s Hearing Request challenges PRS’ general findings/conclusions. She seeks review and correction of PRS’ Compensatory Service Plan by the Bureau of Special Education Appeals.⁶ Mother challenges PRS’ investigatory processes, alleging failure to comply with its own internal procedures, seeking an order that PRS employees including Russell Johnston, State Special Education Director, Barry Barnett, PRS Director, Mathew Nixon, PRS Specialist, and Jane Ewing, PRS Specialist, receive training.

DESE asserted that the claims raised by Mother fall outside the jurisdiction of the BSEA, as Mother seeks review of the investigative procedures and substantive determination made by PRS following its review of a complaint that raised issues identical to those raised by Mother in the instant Hearing Request. Moreover, Mother seeks a *de novo* review of the findings made by PRS, which review DESE argues can occur in its absence.

According to DESE, reviewing a closed PRS complaint or its’ determinations, such as Mother requests with regard to PRS 6924 and the amount of compensatory services awarded, is strictly prohibited under the Massachusetts Special Education Regulations, specifically 603 CMR 28.08(2). DESE conceded the BSEA has authority to enter findings relative to allegations involving a denial of FAPE and to grant any relief to which Student may be entitled relative to Brookline, however, it argues that DESE’s participation in the Hearing is unnecessary for such a review to occur. DESE thus sought to have all claims against it dismissed and also to be dismissed as a Party.

⁵ Hereinafter “BSEA”.

⁶ Mother further alleges that PRS attempted “to prevent [her] from filing additional complaints...”.

On December 7, 2022, Mother sought and was granted an extension of time through January 20, 2023, to file her response/objection to DESE's Motion to Dismiss. On January 20, 2023, she filed, via email, an unnumbered 106 page Motion to Oppose and Object to the SEA's Motion to Dismiss and exhibits (Opposition). As explained in greater detail below, Parent did not file a hard copy nor did she fax her Opposition to the BSEA until February 8, 2023, under protest, and only after being required to do so by the Hearing Officer.

Mother's Opposition argued that pursuant to Massachusetts General Laws chapter 71B and accompanying regulations, the BSEA has jurisdiction to resolve disputes among parents, school districts and state agencies, including DESE, in matters regarding the provision of a free and appropriate public education.⁷ Mother relies on 34 CFR 300.507(a) and OSEP policy letters. Parent invokes the supremacy clause asserting generally that federal law takes precedence over state law, and asserts that DESE and the BSEA "have no standing in their position that the SEA cannot be a party in a due process hearing... or that the Hearing Officer does not have jurisdiction to hear matters related to denial of FAPE that the Parent has alleged were committed by the SEA against the student via a state complaint filed by Parent".

According to Parent's submission, the Massachusetts regulation limiting the BSEA's oversight of the SEA's complaint process is "ridiculous" and "invented" by the SEA to "deliberately restrict, limit and condition" the parent's right to a fair and impartial hearing. She thus concludes that the pertinent Massachusetts regulation is inconsistent with the IDEA and "violates the 11th Amendment to the Constitution of the United States." Mother argues that 603 CMR 28.08(2), which was specifically crafted by the SEA to ensure sovereign immunity (but was waived when the MA SEA accepted federal funds for special education) encroaches on the hearing officer's authority to exert jurisdiction over the SEA.

In making her arguments, Mother relies on an OSEP letter of February 15, 2012, Letter to Santa Fe, New Mexico, and on a "*Chavez*" case out of New Mexico, for which she offers no citation in the body of her argument. Parent further relies on OSEP's Letter to Leanne Hayes to argue that "the hearing officer has the authority to determine, based on the individual facts and circumstances in the case, whether the SEA is a proper party to the due process hearing...".

Mother threatens that DESE has "opened a can of worms" with serious repercussions for the state as it relates to its receipt of federal special education funding. She asserts that DESE/ PRS made a determination in its Plan of Compensatory Services that significantly reduced the number of compensatory services hours owed to Student, thus denying Student a FAPE because it failed to provide reasons for its determination and as such failed to properly exercise its general supervisory authority under Part B of the IDEA. As such, Mother's claims against DESE may not be dismissed. Dismissal, according to Mother, would

⁷ I note that the Massachusetts grant of authority over state agencies is an extension of the authority granted to states through the IDEA.

constitute “an error of law and Parent is confident that the decision will be overturned through an appeal in federal court and remanded to the BSEA.”

Brookline takes no position regarding the Department’s Motion to Dismiss.

Parent’s Objection to the Hearing Officer Forcing the Parent to Submit her Motion to Oppose and Object to the SEA’s Motion to Dismiss in Hard Copy, in a Binder, Tabbed and Numbered and Motion to Recuse.⁸

On January 31, 2023, the Hearing Officer informed Mother’s Advocate that a hard copy of her unnumbered, 106 page submission, inclusive of exhibits, had not been received as she had filed only an email version. The Advocate responded that she had never been told that she had to submit motions or evidence in writing and requested a copy of the order where she was instructed to do so. This Hearing Officer informed her that when lengthy submissions inclusive of exhibits are submitted, they are also to be forwarded in hard copy or via fax, with the exhibits numbered and tabbed (if hard copy was submitted).⁹ She claimed not to be aware of this practice, and noted that no order requiring the same had been issued. Mother’s Advocate went on to assert that she had not secured funds from her client (who was out of the country) to mail any documents, adding that the requirement to mail documents imposed a financial burden on families. Mother’s Advocate challenged the authority of the hearing officer to require mailing/faxing of documents and indicated she would seek guidance from DALA. Meanwhile, she noted her willingness to obtain funds from Parent to mail the documents sometime in the future.

On February 1, 2023, this Hearing Officer communicated with the Advocate indicating that pursuant to Rule IVC of the *Hearing Rules for Special Education Appeals*, all motions required a statement indicating method of service: fax, mail or hand-delivery; Rule VIII required that exhibits for hearing be numbered, divided by tabs and include an index; and Standing Order 21-1B, provided that written communications should be sent to the Hearing Officer’s email in addition to being mailed, faxed or hand delivered to the BSEA.

The Advocate responded on February 3, 2023, noting that nothing in the *Rules* and Standing Order stated that Motions could not be emailed, and arguing that the five-day rule (addressing submission of exhibits for hearing) applied only to exhibits for hearing. She indicated that over the past 30 years, she has only emailed motions to hearing officers and that the only reason for what she understood to be a different protocol in the instant matter was that DESE was involved.¹⁰

⁸ In addition to the Parties in this matter, the advocate forwarded the instant Motion to Jeffrey Riley (Massachusetts DESE Commissioner), Russell Johnston (State Special Education Director), Jim Rooney (First Administrative Magistrate for the Division of Administrative Law Appeals), Valery Williams (OSEP Director) and Laura Duos (OSEP) individual.

⁹ I take administrative notice of the fact that this Advocate has faxed documents to the BSEA in other cases throughout the years.

¹⁰ The Advocate also stated that the hearing officer’s “response” was due eight days prior to February 3, 2023, but pointed to no rule or regulation noting this requirement.

On February 6, 2023, Mother's Advocate filed Parent's Objection to the Hearing Officer Forcing the Parent to Submit her Motion to Oppose and Object to the SEA's Motion to Dismiss in Hard Copy, in a Binder, Tabbed and Numbered and Motion to Recuse.¹¹

The aforementioned Motion challenged the Hearing Officer's continuing involvement with this matter as well as the procedures that the Advocate had to follow to file the Parent's Opposition. First, Parent's Objection to the Hearing Officer Forcing the Parent to Submit her Motion to Oppose and Object to the SEA's Motion to Dismiss in Hard Copy, in a Binder, Tabbed and Numbered and Motion to Recuse argued that the Hearing Officer should be recused because of "several violations of state and federal laws regarding the parent's right to a fair and impartial hearing", and went on to note that the Advocate had informed the parties and the Hearing Officer that Parent and her family would be out of the country due to a family emergency for several months, but that this information was not included in the November 2022 Order.¹²

This Motion further asserted that

... the SEA has created a law, 603 CMR 28.08(2) that justifies the Hearing Officers at the BSEA to dismiss the SEA findings of a state complaint from being part of a due process hearing.

The Parent¹³ through her Motion... included numerous U.S. Federal laws and OSEP letters and guidance that specifically stipulate that the SEA's findings can be disputed in a due process hearing as a separate action, which is what the Parent has submitted to the BSEA.

This Motion went on to state that between January 20 and January 31, 2023, the Advocate was not informed that motions with evidence must be submitted in a binder, tabbed, numbered and mailed in hard copy. It further asserted that no regulation had been cited by the Hearing Officer in her January 31, 2023, email inquiring about the hard copy.¹⁴ She again noted lack of knowledge regarding filing methods other than email and restated that the Hearing Officer was aware that Mother was out of the country noting that the Advocate did not have access to unlimited funds and that she was not privy to Parent's bank account balances or financial status.

According to the Advocate, Standing Order 21-1(b) is not the law of the state of Massachusetts and is further inconsistent with 34 CFR 300.512, which provides that a copy of the hearing findings of fact and decision must be forwarded to parents at no cost to them.

¹¹ This Motion is analyzed in two parts.

¹² The Order referenced by the advocate dated November 22, 2022, granting her request for postponement, states in pertinent part that "... the Parties in the above-referenced matter jointly requested a postponement of the Hearing through April of 2023, on the basis that Mother will be out of the country through March of 2023."

¹³ Parent in this Ruling refers to Mother.

¹⁴ The Hearing Officer's January 31, 2023, email did not require that motions be submitted in a binder.

She reasoned that since motions and emails are part of the administrative record, these too must be at no cost to the parent and noted her intention to challenge the BSEA Standing Order with OSEP.

Mother's Advocate asserted that the Hearing Officer's Order violated Parent's right to a fair and impartial hearing by forcing Parent to incur costs for a binder for motions with evidence, which had never been requested prior to January 31, 2023. She concluded that the BSEA was retaliating against Parent for obtaining information from OSEP that contradicts 603 CMR 28.08(2)¹⁵ and was stalling her Ruling on the motions by ordering that papers must be filed by methods other than email. In addition, it is asserted that the Hearing Officer's failure to act on the motion created a delay that seriously injured a party by creating an "untimely, unexpected, expense while [Mother] is in another country".

As a result of the alleged multiple state and federal regulations and procedural violations "through her actions or lack thereof and her behavior is, pursuant to the facts, law and evidence among other issues related to this matter is bias and prejudicial as it relates to the Parent's right to file against the SEA to Dispute the SEA's state complaint findings... the parent asserts that the only beneficiary of the Hearing Officer's Action is the SEA", warning that Parent is creating an effective administrative record should she choose to appeal and "reserved her right to submit additional evidence regarding this issue to the proper authorities."

On February 8, 2023, Mother's advocate faxed to the BSEA her Motion to Object and Oppose the SEA's Motion to Dismiss.

Legal Standard and Analysis:

I. Motion to Dismiss:

It is well established that the BSEA may grant a Motion to Dismiss for failure to state a claim upon which relief can be granted, consistent with 801 C.M.R. 1.01(7)(g)(3) and Rule XVI of the *Hearing Rules for Special Education Appeals*. In the context of a Motion to Dismiss, the hearing officer must take as true any allegation made by the party against whom the motion is filed and must also take as true any inference that may be reasonably drawn from those allegations. See *Golchin v. Liberty Mutual Ins. Co.*, 451 Mass 222, 223 (2001). To survive a Motion to Dismiss, the opponent (Mother) must assert "factual allegations plausibly suggesting an entitlement to relief." *Iannochino v. Ford Motor Co.*, 451. Mass 623, 636 (2008).

¹⁵ The Advocate noted that on January 31, 2023, OSEP sent Mother an email stating that she had the right to dispute the SEA's findings and that OSEP would be investigating 603 CMR 28.08(2) to ascertain compliance with federal law.

Parent is correct that certain circumstances call for the SEA to be a party in the context of a BSEA hearing, and that a hearing officer has jurisdiction to ascertain whether the SEA should be a party to an action before the BSEA. The propriety of the SEA's (DESE) party status is precisely what I am called upon to determine in this ruling.

DESE is persuasive that the language in Massachusetts Special Education Regulation 603 CMR 28.08(2)¹⁶ is clear and unambiguous that findings and orders by DESE's PRS are not reviewable by the BSEA and that DESE is not a necessary party on related issues pending before the BSEA.¹⁷ DESE's Department's Complaint Procedures Guide, parallels the regulation, noting that "PRS findings are final and may not be appealed". The language in the regulation in effect limits the BSEA's jurisdiction, prohibiting the BSEA from entertaining claims against DESE on matters that PRS has already issued a finding and order on as well as claims that seek review of a PRS determination or challenge the process PRS follows in issuing a finding and order.¹⁸ Neither regulation 603 CMR 28.08(2) or DESE's internal procedures document regarding PRS complaints is inconsistent with federal law. See also, *In re: Student v. Medford Public Schools*, BSEA #20-02451 (2020) (finding that the PRS complaint process and BSEA hearings are separate and distinct processes and that the determinations of one are not reviewable by the other).

DESE is further correct that said limitation does not prevent Mother from moving forward with a *de novo* request for a hearing on the same allegations she raised with PRS against Brookline at the BSEA, that is, move forward with the allegations she has raised in the instant matter against Brookline. Moreover, were Mother to present sufficient facts to support a finding that Brookline failed to offer Student a FAPE for any period of time within the IDEA two-year statute of limitations, the BSEA may award any relief deemed appropriate without the need for DESE's participation in said proceeding. (I note that the PRS finding may be considered as one piece of evidence in support of Parent's claim. I

¹⁶ "Findings and orders issued by the Department on complaints and the Department's processing of a complaint are not reviewable by the Bureau of Special Education Appeals." 603 CMR 28.08(2).

¹⁷ "**Department Procedures.** The Department maintains a Problem Resolution System that provides for the investigation of complaints and the enforcement of compliance with 603 CMR 28.00, as well as with other statutes and regulations relating to the provision of publicly funded education. The Department can make findings on procedural issues and issues related to implementation of requirements. Any party wishing to file a complaint may do so through the Department. Use of the Department Problem Resolution procedures shall not prevent a party from requesting alternative administrative remedies of mediation or hearing on any matter, at any time. Copies of the Problem Resolution System Guidelines and Procedures are available from the Department upon request. Findings and orders issued by the Department on complaints and the Department's processing of a complaint are not reviewable by the Bureau of Special Education Appeals. Additionally, the pendency of a complaint before the Department does not make the Department a necessary party to actions on related issues pending before the Bureau of Special Education Appeals." 603 CMR 28.08(2).

¹⁸ See PRS letters of finding and closeout letters including PRS letter to Parent dated August 22, 2022, stating that, For matters related to special education or Section 504, the parties may seek mediation and/or a hearing through the Bureau of Special Education Appeals (BSEA) on the same issues addressed in this letter. Such a hearing, however, is a new proceeding and is not for the purposes of reviewing the Department's decision in this matter. Any order or decision issued by the BSA on the issues raised in this complaint would be binding.

further note that the courts are clear that successful claims for compensatory services are not a cookie-cutter, *quid pro quo*. Rather, said claims require a more subjective and qualitative analysis of what the student was entitled to receive to derive sufficient educational benefit to make him/her whole. See *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

Thus, DESE is not a necessary party and may be excused from the instant case.¹⁹

Mother's claims against DESE are DISMISSED and DESE is DISMISSED as a Party.

II. Analysis on Parent's Objection to the Hearing Officer Forcing the Parent to Submit her Motion to Oppose and Object to the SEA's Motion to Dismiss in Hard Copy, in a Binder, Tabbed and Numbered and Motion to Recuse:

To facilitate analysis of the above Motion, the same has been divided into two sections. The first addresses Parent's objection to the Hearing Officer's filing requirements and the second part addresses the request for recusal.

A. Objection to the Hearing Officer Order to Submit her Motion to Oppose and Object to the SEA's Motion to Dismiss in Hard Copy, in a Binder, Tabbed and Numbered:

Mother is correct that prior to January of 2023, no order had been issued by the Hearing Officer specifically requiring any individual to file lengthy submissions via fax or in hard copy; common sense, best practice, BSEA Standing Orders and a basic understanding of the workings of the BSEA would appear to have made it unnecessary. While temporary changes in BSEA protocol were made during the pandemic with respect to use of electronic communication in order to facilitate participation at the BSEA, at this time, that need no longer exists. It is not the hearing officer's responsibility to print, number, organize and label 106 pages for a party. Moreover, once it was clarified for the Advocate that she was expected to file via fax or in hard copy, the Advocate, like any other party ordered to do something by a hearing officer, was expected to do so. The BSEA is not in receipt of any document indicating Mother's indigency or the Advocate's inability to use a fax or send documents the mail. Rather, the Advocate asserts that she does not know Mother's financial circumstances. Mailing or faxing lengthy pleadings, which are numbered and organized is not unduly burdensome to parties, but instead should be expected practices and costs in the course of any litigation. I note that on February 8, 2023, the Advocate did fax her submission to the BSEA, thereby complying with the Hearing Officer's instructions. As such, to the extent that Mother faxed her Opposition and Objection to the SEA's Motion to Dismiss on February 8, 2023, she is deemed to have complied with the Hearing Officer's instructions, Mother's Objection to the Hearing Officer Order to Submit her Motion to Oppose and Object to the SEA's Motion to Dismiss in Hard Copy, in a Binder, Tabbed and Numbered rendering her motion in this regard moot.

¹⁹ See Hearing Rule I.J of the *BSEA Hearing Rules for Special Education Appeals* describing joinder and necessary parties.

However, to be clear about the practices I expect from all parties in this matter, moving forward, all parties in this matter are ordered to file a hard copy of any submission exceeding 25 pages, inclusive of exhibits. If exhibits are included, these must be labeled/ tabbed, and a list of the exhibits must be added.²⁰

As noted above with respect to the Advocate's claim that a binder was required, I note that no binder has been required at any time.

Moving forward, all parties in this matter are ordered to file a hard copy of any submission exceeding 25 pages, inclusive of exhibits. If exhibits are included, these must be labeled/ tabbed, all pages numbered and a list of the exhibits must be added.²¹

B. Request for Recusal:

Mother's Motion on February 6, 2023, also included a request for recusal of the Hearing Officer. When recusal is requested, a Hearing Officer must weigh several factors in deciding whether to grant such request. The decision-maker must engage in self-examination and consider the request seriously in order to protect the trust and confidence of the participants in this quasi-judicial proceeding. First, she must establish that she possesses the qualifications and expertise to conduct the proceeding. She must also ensure that she is capable of conducting the proceeding in a fair and impartial manner. Lastly, due process hearings must be efficient and responsive to the interests of all parties involved.

As such, the recusal process requires that the Hearing Officer being challenged: 1) examine her own professional qualifications to hear the controversies before her; 2) examine her own conscience regarding any subjective biases she may have about the parties or the subject matter; 3) be aware of any objective bars in the case before her, such as potential relationship-based bias, or financial interest in the outcome of the case or residence within the school district; and, 4) anticipate how her conduct may "appear" to the parties and the public in general. See *In Re: Ludlow Public Schools, Ruling on Motion for Recusal*, BSEA #1509319, 21 MSER 135 (Scannell, June 30, 2015) quoting *In Re: Brockton Public Schools*, 16 MSER 367 (2010); *In Re: Duxbury Public Schools*, 14 MSER 363 (2008); *In Re: Marblehead Public Schools*, 8 MSER 84 (2002).

Professional Qualifications:

This Hearing Officer is a member of the Massachusetts Bar in good standing²², who practiced as an attorney in the Commonwealth of Massachusetts for five years before accepting a position as a hearing officer at the BSEA in 1993. Given the Hearing Officer's professional qualifications, which are not challenged in Mother's Motion, recusal on this

²⁰ I note that the Advocate's submission contained a list of exhibits.

²¹ I note that the Advocate's submission contained a list of exhibits.

²² The Parent does not challenge the Hearing Officer's professional qualifications and concedes that she is a member of the Massachusetts bar.

basis is not warranted. See *In Re: Ludlow Public Schools, Ruling on Motion for Recusal*, BSEA #1509319, 21 MSER 135 (Scannell, June 30, 2015).

Subjective Biases:

The recusal request, when interpreted in the light most favorable to Mother, appears to suggest a pre-judgment bias on the part of the specific Hearing Officer. In examining my own conscience to determine whether I am truly capable of conducting an unbiased, impartial due process proceeding, I find that I do not have any previously acquired or extra-administrative knowledge of the matter, nor impermissible biases or pre-judgments in this case. I find that I am capable of fairly presiding over this matter without prejudice to either party and that I can render a decision based solely on the evidence presented at hearing and the applicable law.

Objective Biases:

Objective factors that may warrant recusal include: 1) any financial interest the hearing officer may have in the outcome of the matter that might reasonably compromise her ability to render a fair decision; or, 2) any personal or professional connection the hearing officer may have with a party. Here, Mother indirectly suggests an improper broad, professional connection between the BSEA and DESE, but does not make a specific challenge regarding this Hearing Officer having a financial, personal or professional connection to any DESE party/staff. She similarly makes no specific challenge regarding the Hearing Officer having a financial, personal or professional connection to Brookline. To my knowledge, no such current or previous familial, personal, financial or professional relationship between this Hearing Officer and DESE exists beyond the professional, common courtesy offered to any and all parties appearing before me. My only previous interaction with DESE personnel has occurred in my capacity as a Hearing Officer at the BSEA. Regarding Brookline, I note that Brookline's attorney served as a legal intern at the BSEA while she was in law school as so many other members of the Massachusetts bar on both the parent's and school's sides. There has never been any previous or current familial, personal or financial relationship with Brookline or Brookline's attorney and the professional interactions were limited to her internship at the BSEA over seven years ago, while she was being supervised by a different Hearing Officer. Therefore, I find no objective bar to continuing as a Hearing Officer in this matter.

Appearance Factors:

A hearing officer must also examine whether her impartiality might reasonably be questioned by the participants or the general public. To grant recusal, the alleged hearing officer's bias, prejudice, conduct or ties must arise from some extrajudicial source. In this context, objections to prior rulings, orders or instructions in the current matter that may be unsatisfactory to the party seeking recusal do not constitute a proper foundation for

disqualification.²³ 28 U.S.C. § 455; *Boston's Children First*, 244 F.3d164 (1st Cir. 2001); *DeMoulas v. Demoulas Super Markets*, 424 Mass. 501 (1997); *Commonwealth v. Gogan*, 389 Mass. 255 (1983).

Mother's Advocate's bias allegations are disorganized, difficult to follow and hard to place into a specific recusal analysis category. Her allegations however, seem to stem from her dissatisfaction with this Hearing Officer's instructions.

Mother's Advocate alleges that this Hearing Officer has violated several state and federal laws involving Mother's right to a fair and impartial hearing. The basis for this allegation is that the Hearing Officer required that the Advocate's 106 page response/objection to DESE's Motion to Dismiss be made available via hard copy or fax.

A large part of Mother's opposition to making the submission via a method other than email is intertwined with her substantive argument involving her opposition to DESE's Motion to Dismiss, and her conclusion that if the Hearing Officer disagrees with Mother's position, then she should recuse herself.²⁴

The recusal submission notes that a BSEA Standing Order is not the law in the Commonwealth of Massachusetts and is inconsistent with 34 CFR 300.512. Citing this regulation, which provides that "a copy of the hearing and the findings of fact and decisions are to be provided at no cost to the parents", the Advocate somehow extrapolates that all litigation must be at no cost to parents under Massachusetts and federal law. The Advocate, however, provides nothing to support her assertion that *a law* has been broken when the Hearing Officer instructed her to submit a lengthy, unnumbered filing in a manner other than email. Rather, the Advocate specifically stated that,

...the Hearing Officer is violating the Parent's right to a fair and impartial hearing by attempting to force the parent to incur costs for a binder for Motions with evidence that has never been requested prior to January 31, 2023,

and

...additional cost 8 days after 801 CMR 1.07(2) timeline for [the Hearing Officer] to answer the Motions, on the Parent without informing the Parent... detrimentally impacted the Parent and has placed an undue and unexpected financial hardship...The Parent asserts that the undue delay by the Hearing Officer's failure to act on the Motions presented to her by the SEA Motion to Dismiss and the Parent's Motion to Oppose and Object

²³ I note that this is not the first time that this Advocate has filed a request for recusal in the context of a BSEA hearing against this (and other) hearing officer when she disagrees with a hearing officer's instructions, orders or rulings.

²⁴ I note that a determination regarding the dismissal had not been entered at the time the advocate filed the recusal motion.

to the SEA's Motion to Dismiss has injured Parent and has created an untimely, unexpected, expense while they are in another country.

The Advocate further alleges that the BSEA is "retaliating against Parent for obtaining information from OSEP that contradicts 603 CMR 28.08(2)", accusing the Hearing Officer of therefore being motivated to stall her Ruling on the motion to dismiss by instructing her to fax or mail her Opposition to the Motion to Dismiss (when no previous order indicating that this was required had been issued).

The regulation cited by Mother's Advocate in regard to the timeliness of the ruling, 801 CMR 1.07(2), is a section of the Standard Adjudicatory Rules of Practice and Procedure applicable in Massachusetts to BSEA proceedings, addressing Action on Motions. This regulation states:

The Agency or Presiding Officer shall, unless the Parties otherwise agree, give at least three days' notice of the time and place for the hearing when the Agency or Presiding Officer determines that a hearing on the motion is warranted. The Agency or Presiding Officer may grant requests for continuances for good cause shown or may, in the event of unexcused absence of a Party who received notice, permit the hearing to proceed. The unexcused Party's written motion or objections, if any, are to be regarded as submitted on the written papers. The Agency or Presiding Officer may rule on a motion without holding a hearing if delay would seriously injure a Party, or if presentation of testimony or oral argument would not advance the Agency or Presiding Officer's understanding of the issues involved, or if disposition without a hearing would best serve the public interest. The Agency or Presiding Officer may otherwise act on a motion when all Parties have responded or the deadline for response has expired, whichever occurs first. If the Agency or Presiding Officer acts on the motion before all Parties have responded and the time has not expired, the ruling may be subject to modification or rescission upon the filing of one or more subsequent but timely responses.

The Advocate's reliance on this regulation is misplaced. Nothing in the aforementioned requires a hearing officer to issue a ruling within 3 days. It only requires the hearing officer to notify the parties of the time and place to hear a motion, *if* a hearing on the motions is needed or requested.²⁵

Regarding a delay in issuance of this ruling, the Advocate implies in her submission that this ruling should have been issued 8 days before January 31, 2023, and/or that by February 6, 2023, it was already late, and thus concludes that the Hearing Officer somehow violated a

²⁵ Nothing in the Parties' submissions warranted a hearing on the Motion to Dismiss.

rule or regulation. However, she points to no rule or regulation imposing a specific timeline for issuance of BSEA rulings, and there are none. This ruling is being issued prior to the hearing, and furthermore, given that Mother has been out of the country, there is no harm to her.

To the extent that issuance of this ruling has taken longer than usual, I apologize. Extraneous circumstances, totally beyond my control rendered me unavailable. Moreover, the Ruling on the Motion to Dismiss does not expand, but rather narrows, the issues for hearing, and furthermore it is being issued prior to the scheduled Hearing date. The Parties have been on notice of the Hearing dates since November 22, 2023, when the scheduling Order granting their request for postponement was issued. Contrary to the Advocate's assertion that the only beneficiary of the Hearing Officer's actions is the SEA, it is precisely the SEA who could stand to be injured by any delay in this ruling, and the SEA has made no such allegation.

It is clear that Mother's Advocate does not challenge the appearance of this specific Hearing Officer's impartiality arising from extrajudicial sources, but rather from her dissatisfaction with the Hearing Officer's instruction to make a lengthy submission available for review via hard copy or fax, and to present it in an organized fashion. This does not constitute a proper foundation for disqualification. Likewise, no reasonable member of the public could point to a factor or circumstance to doubt the Hearing Officer's impartiality in this case for the reasons raised by the Advocate.

Lacking any valid allegation against this particular Hearing Officer's professional qualifications, subjective bias, objective bars, or appearance of impartiality, there is no reasonable basis for granting Parent's request for recusal. Thus, to the extent that Parent's Objection to the Hearing Officer Forcing the Parent to Submit her Motion to Oppose and Object to the SEA's Motion to Dismiss in Hard Copy, in a Binder, Tabbed and Numbered and Motion to Recuse seeks recusal of this Hearing Officer, her request is **DENIED**.

Lastly, although not a part of any of the Motions before me, as it pertains to the potential inclusion of another party in this matter (who has yet to be joined), I take this opportunity to address the potential joinder of Father. Assuming that Parents share legal and physical custody of Student, as represented by Brookline, the need for joinder of Father should come as no surprise to the Parties. This issue was raised by Brookline's counsel in her Response to the Hearing Request. In said Response, Brookline noted that Mother and Father shared equal legal and physical custody of Student. If this is so, Father would have a vested interest in the outcome of this proceeding, rendering him a necessary party. Given that Brookline has been aware of this issue since the onset of the case, and that Mother's Advocate (who advised that she has 30 years of experience appearing before the BSEA and handling special education matters) received the Response to the Hearing Request, the need for Father's participation should have been apparent to all. Brookline and/or Mother may proceed with filing of a

Motion for Joinder of Father forthwith inclusive of supporting attachments (e.g., the custody decree).

ORDERS:

1. DESE's Motion to Dismiss is GRANTED and Mother's claims against DESE are DISMISSED.
2. DESE is DISMISSED as a Party.
3. To the extent that Parent's Objection to the Hearing Officer Forcing the Parent to Submit her Motion to Oppose and Object to the SEA's Motion to Dismiss in Hard Copy, in a Binder, Tabbed and Numbered and Motion to Recuse seeks recusal, Parent's Motion is DENIED.
4. If Parents share joint physical and legal custody of Student, Brookline and/or Mother shall file a Motion for Joinder of Father forthwith.
5. The Parties in this matter are ordered to file a hard copy of any submission exceeding 25 pages, inclusive of exhibits. If exhibits are included, these must be labeled/ tabbed, all pages numbered and a list of the exhibits must be added.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: April 3, 2023