COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS

In Re: Marblehead Public Schools  BSEA # 02-2828

RULING ON MOTION FOR DISQUALIFICATION OR RECUSAL

Marblehead Public Schools (hereafter, Marblehead) through its attorney (Matthew MacAvoy) has filed a Motion for Recusal or Disqualification of Hearing Officer. This Ruling addresses Marblehead’s Motion.

A. ISSUE

Whether the Hearing Officer’s previous relationship with Marblehead’s attorney (including the attorney’s acting as an employment reference for the Hearing Officer with respect to his present position) should result in recusal of the Hearing Officer.

B. PROCEDURAL HISTORY

On February 4, 2002, Parents (through their advocate Robert Augustine) filed with the Bureau of Special Education Appeals (hereafter, BSEA) a Request for Hearing, alleging that Marblehead’s current education placement of their son is inappropriate and unsafe.

By Order of February 13, 2002, the Hearing Officer allowed Marblehead’s request for postponement of the automatic hearing date and scheduled a prehearing conference for March 8, 2002.

On February 26, 2002, Marblehead wrote a letter to the Hearing Officer describing the relationship between the Hearing Officer and Marblehead’s attorney (Mr. MacAvoy) and requesting a conference call to discuss and address any conflict of interest. On February 27, 2002, the Hearing Officer conducted a conference call with Marblehead’s attorney and Parents’ advocate. During the call, the issue of conflict of interest was discussed, Marblehead’s attorney indicated that he thought the Hearing Officer should recuse himself and the Parents’ advocate stated his opposition to recusal. The Hearing Officer declined to recuse himself at that time, but he advised the parties that if Marblehead sought a more formal ruling from the Hearing Officer on this issue, it should file a motion seeking recusal.

On March 5, 2002, Marblehead filed a Motion for Recusal or Disqualification of Hearing Officer (hereafter Motion), Memorandum of Law in support of its Motion, witness list (listing only the Director of the BSEA, Jackie Belf-Becker) and six proposed exhibits (including Marblehead’s letter of February 26, 2002 and an affidavit of Mr. MacAvoy). On
March 6, 2002, the Hearing Officer conducted a recorded conference call with Marblehead’s attorney and Parents’ advocate to discuss the Hearing on Marblehead’s Motion. During that conference call, Jackie Belf-Becker’s interest in this matter was discussed, and the Hearing Officer denied Marblehead’s request that she be called as a witness. Parents’ advocate reiterated Parents’ desire to oppose Marblehead’s Motion. On February 6, 2002, Marblehead filed a revised witness list (adding the Hearing Officer).

A hearing on the Motion was conducted on March 8, 2002. At the Hearing, Marblehead’s six proposed exhibits were admitted into evidence without objection (marked as Exhibit 1, etc.); Marblehead repeated its request to have Ms. Belf-Becker testify, which request was denied; and Marblehead’s request that the Hearing Officer testify was also denied. The Hearing Officer read into the record a disclosure statement regarding his relationship with Mr. MacAvoy. Marblehead’s attorney then argued its Motion, and Parents’ advocate argued their opposition. The Hearing Officer then directly asked Parents several questions to determine Parents’ understanding and voluntariness of their position regarding recusal of the Hearing Officer.

C. FACTS

The relevant facts are not in dispute.

Prior to becoming a Hearing Officer at the BSEA, I was employed by the Massachusetts Department of Mental Health (hereafter, DMH) as Special Assistant for Human Rights. My responsibilities included general oversight of the state-wide DMH human rights system.

During the time of my employment at DMH, Matthew MacAvoy represented a number of psychiatric patients at Taunton State Hospital as a Mental Health Protection and Advocacy attorney, and he was a member of the human rights committee at Westborough State Hospital. I supervised the DMH human rights officers at both of these state hospitals; and on a number of occasions, I spoke with Mr. MacAvoy regarding human rights at these two hospitals or within other parts of DMH.

In 1998 while Mr. MacAvoy was a Hearing Officer at the BSEA, I first applied for a position as a BSEA Hearing Officer. I was not offered this position. Subsequently, there were two openings for a Hearing Officer position, and in March 1999 I re-applied. I was then offered a position as a Hearing Officer, and began work at the BSEA in July 1999.

During the time when I applied for and was being considered for the positions at the BSEA, I spoke with Mr. MacAvoy (by telephone on several occasions and once over lunch after he left the BSEA) to learn about the Hearing Officer position and what it might be like to work at the BSEA. Also, I asked Mr. MacAvoy if he would be willing to be a reference with respect to my application to be a BSEA Hearing Officer; Mr. MacAvoy agreed to be a reference; and I then did use Mr. MacAvoy as a reference with respect to my application. I have not requested Mr. MacAvoy to be a reference for me on any other occasion.
Since becoming a BSEA Hearing Officer in July 1999, my only substantive discussions or contact with Mr. MacAvoy have been within my role as a Hearing Officer.

I do not preside over BSEA Hearings in any matter in which either of two other attorneys (named by Mr. MacAvoy in his affidavit) represents a party to the proceeding. These two attorneys served as a reference for me with respect to my application for my current employment with the BSEA.¹

D. ANALYSIS

1. Legal Standards.

There are a number of legal standards that either apply directly or provide useful guidance to the issue of recusal by a BSEA Hearing Officer.

The standards established specifically for a BSEA Hearing Officer are found within the federal special education regulations implementing the IDEA (20 USC 1400 et seq.) and the state regulations implementing the state special education statute (MGL c. 71B). When addressing the issue of due process and an impartial hearing officer, the federal regulations provide:

(a) A hearing may not be conducted—

(1) By a person who is an employee of the State agency or the LEA that is involved in the education or care of the child; or (2) By any person having a personal or professional interest that would conflict with his or her objectivity in the hearing.²

Similarly, the state regulations provide:

Mediations and hearings shall be conducted by impartial mediators and hearing officers who do not have personal or professional interests that would conflict with their objectivity in the hearing or mediation . . . .³

The recusal standards for federal justices, judges and magistrates are found within 28 U.S.C. § 455. Subsection (a) of § 455 provides:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

¹ For reasons explained below, the facts contained within this particular paragraph are not relevant to this Ruling, but I include them here because these facts are relied on by Marblehead and I discuss them within the Analysis section of this Ruling.
² 34 CFR 300.508(a).
³ 603 CMR 28.08(3).
The federal First Circuit Court of Appeals has explained that this statute “forbids partiality whether grounded in an ‘interest or relationship’ or a ‘bias or prejudice’; and it forbids not only the reality of partiality but its objective appearance as well.” 4 The United States Supreme Court has similarly characterized subsection (a): "Quite simply and quite universally, recusal [i]s required whenever 'impartiality might reasonably be questioned.'” 5 Although these statutory standards expressly apply only to justices, judges and magistrates, they may also be applicable to an administrative decision-maker. 6

A review of Massachusetts standards begins with Article 29 of the Massachusetts Declaration of Rights which establishes the right to judges who are “free, impartial and independent”. 7 The Massachusetts Supreme Judicial Court (SJC) has indicated that the protections contained within this constitutional mandate are generally no greater than are provided for pursuant to Massachusetts conflict of interest law, to which I now turn. 8

SJC Rule 3:09, Canon 3A, section 3(C)(1) requires a judge to recuse himself whenever “his impartiality might reasonably be questioned.” Circumstances where a judge's impartiality might reasonably be questioned include instances where the judge "has a personal bias or prejudice concerning a party. . . ." 9 A comparison of these state standards with the above-described federal recusal standards indicates that they are substantially the same. And, as with the federal standard, the state code of conduct requires an “objective appraisal” of whether the decision-maker’s impartiality might reasonably be questioned. 10

The SJC has concluded that the state judicial recusal standards are equally applicable to a “disinterested person whose function is essentially judicial” – for example, a person holding a hearing, taking evidence and making findings of fact. The SJC has also explicitly found that these standards extend to administrative hearing officers, as well as masters, auditors and all other persons authorized to decide the rights of litigants. 11 There is no doubt that these state standards apply to me as the BSEA Hearing Officer in the instant dispute; and by analogy, if not directly, the federal recusal standards also apply.

Finally, I note that in determining whether impermissible bias exists requiring recusal, the decision-maker is allotted a certain degree of discretion. Reversal on appeal occurs only

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6 See Withrow v. Larkin, 421 U.S. 35, 46 (1975) (applying due process fair trial standards to an administrative agency).
7 Article 29 provides in part: "It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."
9 SJC Rule 3:09, Canon 3A, Section 3(C)(1): "A judge should disqualified himself in a proceeding in which his impartiality might reasonably be questioned . . . including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party . . . ."; Haddad v. Gonzalez, 410 Mass. 855, 862 (1991).
upon a showing that the decision-maker abused this discretion.\footnote{Herridge v. Board of Registration in Medicine, 420 Mass. 154 (1995); Haddad v. Gonzalez, 410 Mass. 855, 862 (1991). The federal First Circuit Court of Appeals explained it as follows: [T]he analysis of allegations, the balancing of policies, and the resulting decision whether to disqualify are in the first instance committed to the district judge. And, since in many cases reasonable deciders may disagree, the district judge is allowed a range of discretion. The appellate court, therefore, must ask itself not whether it would have decided as did the trial court, but whether that decision cannot be defended as a rational conclusion supported by [a] reasonable reading of the record. In re United States, 666 F.2d 690, 695 (1st Cir. 1981).}

2. Integrity of the BSEA Process for Assignment of Hearing Officers.

Prior to applying the above legal standards to the facts of the present dispute, I address an argument of Marblehead related to one’s general understanding of these legal standards.

Marblehead argues that since there is the possibility of impermissible prejudice, however remote, there is no good reason for me not to recuse myself when, as in the present case, the parties have not introduced evidence, presented substantive arguments, exchanged discovery, participated in a prehearing conference or scheduled dates for a hearing on the merits.\footnote{Marblehead's Memorandum of Law in support of its Motion, pages 6 and 7.} Marblehead correctly points out that there are other BSEA Hearing Officers to whom this case could be assigned, and it is not uncommon within the BSEA for there to be a reassignment of a Hearing Officer for administrative reasons.

Although there is a certain appeal to Marblehead’s argument, it does not take into consideration an important part of the analysis. There is no debate that the underlying purpose of the legal standards regarding recusal are to ensure not only the reality but also the appearance of an impartial dispute resolution process. Yet, there is another important consideration, which is the integrity of the BSEA process for assignment of Hearing Officers. In the words of Judge Breyer, now Justice Breyer:

When considering disqualification, the district court is not to use the standard of Caesar’s wife, the standard of mere suspicion . . . . that is because the disqualification decision must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.\footnote{In Re Allied-Signal, Inc., 891 F.2d 967, 970 (1st Cir. 1989) (emphasis in original), quotation cited with approval in Cigna Fire Underwriters v. MacDonald & Johnson, 86 F.3d 1260 (1st Cir. 1996). See also United States v. Snyder, 235 F.3d 42, 45 (1st Cir. 2000) (“the unnecessary transfer of a case from one judge to another is inherently inefficient and delays the administration of justice”; “judges are not to recuse themselves lightly under § 455(a)’’); In re United States, 158 F.3d 26 (1st Cir. 1998) (“recusal on demand would put too large a club in the hands of litigants and lawyers, enabling them to veto the assignment of judges for no good reason’’); Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482, 491 (1st Cir. 1989) (noting that the judicial system would be "paralyzed" were standards for recusal too low); Police Commissioner v. Boston, 368 Mass. 501, 508 (1975) ("judge or hearing officer in some circumstances unquestionably has a duty to resist a challenge to his impartiality which is tenuous, baseless or frivolous").}
I now turn to an application of these legal principles to the facts of the present dispute.

3. Actual Prejudice.

In a series of decisions, the SJC has made clear the need for the decision-maker to engage in a two-part analysis of whether there is impermissible bias. The first level of inquiry is for the decision-maker to examine his conscience and emotions, and determine whether his presiding over this matter would be free from prejudice.\(^{15}\)

I have made this examination and have concluded that I will be able to preside over this matter without prejudice to either party.

4. Appearance of Prejudice.

The second level of inquiry is whether the decision-maker’s impartiality might reasonably be questioned. As discussed above in part D1 of this Ruling, the decision-maker must make an objective, fact-based inquiry as to what a “reasonable man” would likely conclude, rather than simply inquire as to what may be in his or her own mind or that of the litigants.\(^{16}\) The First Circuit Court of Appeals has explained clearly this objective inquiry:

The statute requires a judge to step down only if the charge against her is supported by a factual foundation and the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge’s impartiality.\(^{17}\)

My involvement with Mr. MacAvoy occurred at several levels. First, he and I had discussions regarding human rights concerns relevant to our professional work. Second, I inquired of him regarding the role of a Hearing Officer and working within the BSEA. This was in the context of my considering and then applying for a position as a BSEA Hearing Officer. Third, I requested, received permission and then did use Mr. MacAvoy as a reference for a position as Hearing Officer, which position I then did obtain.

Marblehead focuses only on the third level of the relationship, arguing that the employment reference in and of itself is sufficient to require my recusal or disqualification. In support of this argument, Marblehead does not cite to any case law addressing the same or comparable

\(^{15}\) \textit{Demoulas v. Demoulas Super Markets, Inc.}, 428 Mass. 543, 546 n. 6 (1998); \textit{Haddad v. Gonzalez}, 410 Mass. 855, 862 (1991); \textit{Lena v. Commonwealth}, 369 Mass. 571, 575 (1976) (when faced with a question of his capacity to rule fairly, the decision-maker must first consult his own emotions and conscience; if he concludes that he does not lack the capacity to act fairly and impartially, the decision-maker must then attempt an objective appraisal of whether this was a proceeding in which his impartiality might reasonably be questioned).

\(^{16}\) \textit{Cigna Fire Underwriters v. MacDonald & Johnson}, 86 F.3d 1260 (1st Cir. 1996). See also the Massachusetts cases cited in footnote 15 above.

\(^{17}\) \textit{In Re: United States}, 666 F.2d 690, 695 (1st Cir. 1981) (emphasis in original) (internal quotations omitted), quoted with approval in \textit{In’re United States}, 158 F.3d 26 (1st Cir. 1998).
facts, but rather relies on the general standards which I have discussed above in part D1 of this Ruling.

My review of Massachusetts and federal case law revealed only two decisions that address the issue of reference or recommendation.

In a case involving allegations of bias by an arbitrator, the trial judge found that the arbitrator had nominated the attorney for one of the parties (Coughlan Construction Company) to be general counsel to the Utility Contractors Association, of which the arbitrator was founder, treasurer, president, member of the board of directors, and life member. There were other aspects of the relationship, including the attorney’s representation of a company belonging to one of the arbitrator's brothers. The appellate court found that the “trial judge was well justified in treating the arbitrator's association with Coughlan's counsel as a professional relationship in matters unrelated to the arbitration dispute”. The appellate court concluded that there was no impermissible bias as a result of the arbitrator’s nomination of a party’s attorney to be general counsel to the Utility Contractors Association.18

Similarly, the SJC found no justification for disqualification of a trial judge as a result of his having written a letter for one of the prosecution’s witnesses, recommending that he be admitted to the Massachusetts bar. The letter was written nearly thirty-five years before the trial.19

A review of cases more generally reveals that the courts are reluctant to establish any criteria that automatically must result in recusal. Even where there may be a significant potential for impermissible bias (either actual or by appearance), the recusal determination typically turns on the facts.20

For example, when faced with the question of whether a judge should recuse himself when his son or daughter is employed by one of the parties in the dispute, a careful inquiry of the entire factual context is used to resolve the matter, rather than establishing a per se rule of recusal.21 The appearance of conflict in these cases (where a judge’s son or daughter is currently employed by a party) is more substantial than an employment reference occurring three years ago. The factual analyses in these reported cases (involving a party’s current employment of a judge’s son or daughter) have generally concluded with a finding of no recusal.22

What can be gleaned from these cases is that an employment recommendation or reference should not, by itself, result in an automatic or per se recusal – rather, the entire factual

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20 See, e.g., In re United States, 158 F.3d 26 (1st Cir. 1998) (“Typically, cases implicating section 455(a) are fact-specific, and thus sui generis.”)
21 See, e.g., Southwestern Bell Telephone, Co. v. FCC, 153 F.3d 520, 522-523 (8th Cir. 1998) (determination of whether conflict exists is factually bound rather than based on a per se rule).
22 Id. and cases cited therein.
context should be carefully considered. My relationship with Mr. MacAvoy has neither been close nor personal. The employment reference at issue in the present dispute was an isolated instance of professional courtesy which did not change our overall relationship, and the employment reference occurred approximately three years ago. Since becoming a BSEA Hearing Officer in July 1999, my only substantive discussions or contact with Mr. MacAvoy have been within my role as a Hearing Officer.

I conclude that an objective, knowledgeable member of the public would find that these facts do not provide a reasonable basis for doubting my impartiality. In the words of the First Circuit Court of Appeals in a decision dismissing a claim for recusal of the trial judge based on the appearance of impermissible prejudice:

Even, however, if one may assume the survival of some residue of gratitude [towards defendant] after such a period [of time], it is beyond contemplation that such gratitude would be of the weight necessary to cause a judge to jettison his impartiality and . . . violate his deepest professional and ethical commitments as a judge.23

In further support of this conclusion, I also note a pattern, found generally within the case law, that it is unusual for a reviewing court to require recusal when (i) the relationship in question occurred prior to the decision-maker assuming that position and (ii) the subject matter of the case brought before the decision-maker is unrelated to the relationship in question. For example, the SJC has found that it is impermissible for the relationship of attorney and client to exist concurrently with the attorney’s client appearing before the attorney as the decision-maker, but this general rule is not applicable to an attorney for a party in past litigation involving issues entirely unrelated to pending issues, and in such case there is no disqualification.24 Similarly, the federal courts have not inferred bias or prejudice when the decision-maker had a prior attorney-client relationship with one of the parties to the dispute.25

23 In Re: United States, 666 F.2d 690, 696 (1st Cir. 1981).

A lawyer for an agency who later assumes adjudicatory functions that relate to that agency's work will inevitably face matters involving issues similar to those he dealt with as a lawyer. A prosecutor or a defense attorney who becomes a judge will also often find himself in such a situation. A recusal is required only if a matter arising out of the same factual circumstances and involving the same parties later comes before the judge or an adjudicator.

25 Michael v. Intracorp, Inc., 179 F.3d 847, 860-861 (10th Cir. 1999) (judge’s representation of some of the defendants in other litigation and his working with some of the defense witnesses, all prior to becoming a judge, were not sufficient to obligate judge to recuse himself); Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1165-1166 (5th Cir. 1982) (where judge had represented one of defendants six years before, relationship was “too remote and too innocuous to warrant disqualification”); Darlington v. Studebaker-Packard Corp., 261 F.2d 903, 906 (7th Cir. 1959) (recusal not warranted where trial judge had represented defendant in unrelated matters for a four to five year period three to four years earlier); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 976 F.Supp. 84, 87 (D.Mass. 1997) (dicta).
In addressing the need for recusal when there exists a current attorney-client relationship, the SJC has noted that the attorney-client relationship is “ordinarily so close and confidential”. 26 In comparison, Mr. MacAvoy and I have never had a close or confidential relationship. I conclude that my relationship with Mr. MacAvoy (including the employment reference) is less significant, for purposes of recusal, than the typical attorney-client relationship.

For these reasons, I find that there is not an appearance of impermissible prejudice. Moreover, were I to find an appearance of impermissible prejudice, I would conclude that Parents have waived this claim, for the reasons explained immediately below.

5. Waiver of Claim.

Typically, an issue of conflict of interest is first raised through disclosure of certain facts that may raise a question as to the impartiality of the decision-maker. Once these facts are disclosed, the party which might be prejudiced has a limited period of time to raise the issue formally through a motion. Failure to do so may result in waiver of any claim of prejudice.27

The present dispute is highly unusual in that it is Marblehead (rather than Parents) that has sought my recusal even though any alleged bias would operate in Marblehead’s favor (and would prejudice Parents).28 On at least three occasions after disclosure was made to Parents, the Parents indicated that they did not intend to request my recusal and they opposed any attempt by Marblehead to obtain my recusal.

Marblehead’s only interest in pressing this matter is to avoid the possibility that Parents could successfully argue on appeal (after losing on the merits) that they did not give up their right to have the Hearing Officer disqualified.29 Marblehead has stated that it is for this reason that its Motion seeking my recusal has been filed.30


A lawyer for an agency who later assumes adjudicatory functions that relate to that agency's work will inevitably face matters involving issues similar to those he dealt with as a lawyer. A prosecutor or a defense attorney who becomes a judge will also often find himself in such a situation. A recusal is required only if a matter arising out of the same factual circumstances and involving the same parties later comes before the judge or an adjudicator.

27 United States v. DiPina, 230 F.3d 477, 486 (1st Cir. 2000) (since defendant had not moved below for judge's recusal or otherwise raised the issue of bias, appeals court considered it waived); United States v. Devin, 918 F.2d 280, 294 n. 11 (1st Cir. 1990) (failure to move to recuse a judge has been held to constitute a waiver of a bias claim arising out of facts known prior to or during trial) and cases cited therein; United States v. Murphy, 768 F.2d 1518, 1539 (7th Cir. 1985) (disqualification based on appearance of bias can only run from time motion is made or granted).

28 At the Hearing, Marblehead stated that it was not aware of a single decision in which the party who might benefit from any possible prejudice was requesting recusal, nor am I aware of any such decision.

29 The implications of Marblehead’s position are clarified when one considers Marblehead’s options in response to a denial of its Motion. The denial of its Motion does not give rise to the right to immediate judicial review; Marblehead must therefore wait until it receives a final decision on the merits. MGL c. 30A, s. 14; A. Cella, Administrative Law and Practice, Massachusetts Practice Series, p. 623 n. 11 (1997). See also In Re: United States, 158 F.3d 26 (1st Cir. 1998) (only in unusual situations would an appellate court hear an interlocutory review of a
In its Memorandum of Law (page 6), Marblehead argues that since Parents are represented by an advocate who is not an attorney, they are without benefit of legal representation, and therefore they may not effectively waive their rights regarding recusal. At the Hearing and in its Motion (paragraph 19), Marblehead pressed this point further by taking the position that Parents’ advocate was illegally practicing law by representing Parents on the issue of recusal and, more generally, representing Parents before the BSEA.31

Parents’ advocate filed a Request for Hearing with the BSEA on behalf of Parents, and he has represented Parents in all aspects of this proceeding to date. This is not unusual. Advocates, who are not lawyers, regularly appear before the BSEA, representing students and/or their parents. Representation occurs, for example, with respect to the prehearing conference, motions, discovery and formal evidentiary hearing on the merits of the claim.

The BSEA Rules 1A and 1D explicitly allow such an advocate both to file a Request for Hearing on behalf of parents or student, and to represent the parents or student before the BSEA. On the basis of the BSEA Rules, I conclude that Parents’ advocate may represent Parents regarding all aspects of the present dispute before the BSEA, including the issue of recusal of the Hearing Officer.

Moreover, even were Marblehead correct that the advocate cannot adequately represent Parents regarding the recusal issue, I am not persuaded that this should result in the Parents’ being unable to make a binding decision regarding this matter.

On the basis of my questioning Parents directly (and their responses to me) during the Hearing on Marblehead’s Motion, I have satisfied myself that Parents (completely apart from their representation by their advocate) understand their rights regarding the recusal issue and have knowingly and voluntarily made a decision to oppose the Motion and to request that the Hearing Officer not recuse himself.32 Under these circumstances, I conclude that Parents

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30 Marblehead’s Motion, paragraphs 18 and 19.
31 Marblehead points to MGL c. 221, s. 46 (prohibiting the practice of law by anyone who is not a member of the Massachusetts bar); In the Matter of: Marilyn Arons, et. al, 32 IDELR 253 (Delaware Supreme Court July 6, 2000); Lowell Bar Association v. Loeb, 315 Mass. 176 (1943) (certain practices involving advising upon a question of law relative to taxation are part of the practice of law); Massachusetts Conveyancers v. Colonial Title, No. 962746C (Mass. Superior Court June 5, 2001) (certain conveyancing practices constitute the unauthorized practice of law).

Yet, at the same time, Marblehead takes the position (with which I agree) that as a BSEA Hearing Officer, I do not have the authority to determine whether Parents’ advocate is engaged in the unauthorized practice of law.

32 At the Motion Hearing, I made it clear to Parents that if for any reason they had concerns regarding my impartiality or objectivity and therefore would like me to recuse myself, I would automatically do so if the Parents’ request was made during the Motion Hearing. I made this statement to the Parents not on the basis of the merits of the recusal issue but because there would then be a joint request from the parties for recusal prior to my addressing the merits of the special education dispute. See Police Commissioner v. Boston, 368 Mass. 501 (1975) (in making his decision whether to withdraw, the hearing officer should accord “significant weight” to the fact that both parties requested him to do so).
have made a binding decision regarding the issue of recusal, independent of their representation by a lay advocate in this matter.\footnote{33}{See \textit{W.B. v. Matula}, 67 F.3d. 484 (3rd Cir. 1995) (agreement waiving claims relevant to the IDEA, including civil rights claims, will bind parents if the court determines its execution was knowing and voluntary).}

6. Recusal Practice of this Hearing Officer with Respect to Other Attorneys.

Mr. MacAvoy’s affidavit (Exhibit 6, paragraphs 18 and 19) states that as a general rule, I do not preside over BSEA Hearings in any matter in which either of two other attorneys (named in the affidavit) represents a party to the proceeding. The affidavit further provides that both of these other two attorneys were a reference for me with respect to my application for my current employment with the BSEA. These facts are not disputed.

Marblehead argues that my recusal in all such matters with respect to one of these two attorneys is an acknowledgement by me that serving as a reference constitutes a potential for perceived bias.\footnote{34}{Marblehead’s Memorandum of Law, pages 5 and 6.} At the Hearing, Marblehead pressed this point further, arguing that my practice of recusal with the two attorneys should result in my recusal in the present dispute because of the common theme of employment reference.

Marblehead’s arguments are misplaced. Each case of recusal must be argued and justified on the basis of its own particular set of facts.\footnote{35}{See \textit{In re United States}, 158 F.3d 26 (1st Cir. 1998) (“Typically, cases implicating section 455(a) are fact-specific, and thus \textit{sui generis}. Comparison, therefore, is an inexact science.”); \\textit{Diversified Numismatics, Inc. v. City of Orlando, Fl.}, 949 F.2d 382, 383 (11th Cir. 1991) (fact that judge had previously recused himself from three cases in which counsel was involved, stating that he might be biased against counsel, did not require him to recuse himself in all further cases in which that counsel was involved). I am not aware of a single state or federal decision which indicates that a comparison of the judge’s or hearing officer’s past practice regarding recusal would have any relevance to a determination of whether the judge or hearing officer should recuse him/herself.} In addition, any comparison that is limited to the employment reference (rather than analyzing the entire factual context) is incomplete.\footnote{36}{Any useful analogy between my relationship with Mr. MacAvoy and my relationship to the other two attorneys would need to consider (i) the nature and length of my professional relationship with those attorneys, (ii) whether I have been and continue to be friends with those attorneys, and (iii) whether I have some doubt as to whether I could be entirely impartial were they to appear before me. See parts D3 and D4 of this Ruling.}

7. Other Procedural Rulings in This Matter.

During the process of addressing Marblehead’s \textit{Motion}, I made three procedural rulings which will be explained below.

- Marblehead sought to call me as a witness for purposes of the Hearing on its \textit{Motion}. Through my testimony, Marblehead would have sought to establish that, as a general rule, I do not preside over BSEA Hearings in any matter in which either of two other attorneys (named by MacAvoy in his affidavit) represents a party to the proceeding because these other two attorneys were a reference for me with respect to my application for my current employment with the BSEA.
I denied the request for me to testify for the following reasons. For reasons discussed in footnote 35 and accompanying text of this Ruling, my past practices regarding recusal are not relevant to the present dispute. For reasons discussed in footnote 36 and accompanying text of this Ruling, the facts which Marblehead sought to establish through my testimony would not be persuasive. I also note that the facts which Marblehead sought to establish through my testimony were already included in Mr. MacAvoy’s affidavit (Exhibit 6, paragraphs 18 and 19). 37

• Marblehead sought to call as a witness Jackie Belf-Becker who is the Director of the BSEA. I denied this request for the following reasons. The only issue before me is whether my past relationship with Mr. MacAvoy requires recusal. All factual evidence necessary to address this issue was admitted into evidence through Mr. MacAvoy’s affidavit or was included in my disclosure statement that I read into the record at the Hearing. Ms. Belf-Becker would, at best, have second-hand knowledge of the relationship (between Mr. MacAvoy and me) that is the subject of this dispute. So long as this information could be obtained through Mr. MacAvoy’s affidavit and my disclosure statement, there was no need to have Ms. Belf-Becker testify. 38

• During the Hearing on the Motion, Marblehead sought a disclosure of interest from Ms. Belf-Becker. I denied this request for the following reasons. Ms. Belf-Becker attended the Hearing on the Motion only as an observer. The only issue before me is whether my past relationship with Mr. MacAvoy requires recusal. Whether or not Ms. Belf-Becker may have an interest in this matter is not relevant to a resolution of this dispute. I also note that Ms. Belf-Becker’s interest in this matter had been disclosed during my previous, recorded conference call on March 6, 2002 with the Parents’ advocate and Marblehead’s attorney.

E. CONCLUSION

For these reasons, Marblehead’s Motion for Recusal or Disqualification of Hearing Officer is DENIED.

By the Hearing Officer,

William Crane
Dated: March 19, 2002

37 I also note, but do not rely on, the fact that Marblehead included my name on a revised witness list submitted after the deadline for advising the Hearing Officer and the opposing party of all proposed witnesses.

38 I also note, but do not rely on, the fact that had Ms. Belf-Becker testified, I may have had to recuse myself, and it may not have been possible to assign the case to another BSEA Hearing Officer because of the professional relationship between Ms. Belf-Becker and the BSEA Hearing Officers. Compare Herridge v. Board of Registration in Medicine, 420 Mass. 154 (1995) (hearing officer’s casual relationship with witness, which ended five years prior to the hearing, did not compromise her ability to assess the credibility and weight of the testimony, and therefore hearing officer correctly declined to recuse herself).