

**MASSACHUSETTS DEPARTMENT OF ELEMENTARY
AND SECONDARY EDUCATION**

Bureau of Special Education Appeals

In Re: Xylon¹

&

Brockton Public Schools

BSEA #09-7936

RULING

This matter comes before the Hearing Officer on the request of the appealing party, the mother, that a different Hearing Officer be assigned to hear the instant appeal. The Parent's request is construed as a Motion for Recusal. The School filed a Response on June 30, 2009. In order to properly address the Motion, a brief outline of the background is necessary.

Background

This Parent and School District have been at odds for many years about the delivery of supplemental and/or compensatory educational services in the Student's home. On November 4, 2008 the Parent requested a hearing to secure reimbursement for expenses she incurred in providing home-based educational services, and to establish the number of hours of compensatory education services owed to the Student. This appeal was assigned BSEA #09-2740. After a hearing on February 5, 2009, I found:

- 1.) that the Parent's claims for reimbursement were barred by the IDEA's two year Statute of Limitations; and
- 2.) that Brockton owed the Student 153 hours of compensatory educational services.

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

The Decision ordered Brockton to submit a Plan outlining how it proposed to deliver the necessary compensatory educational service to the Student. 15 MSER 103 (2009). The School submitted a proposed Compliance Plan on May 1, 2009. No objection was received from the Parent. An Order was issued May 20, 2009 finding:

- 1.) that delivery of educational services to the Student in his home was neither effective nor possible; and
- 2.) that the Compliance Plan submitted by Brockton was consistent with the Decision issued on March 26, 2009.
- 3.) that the School should complete all compliance actions no later than December 1, 2009.

BSEA #09-2740 remains an open matter as the Hearing Officer retains jurisdiction to ensure compliance. Neither party has appealed the Decision in BSEA #09-2740.

Instant Appeal

On June 15, 2009, the Parent requested a BSEA hearing asserting that the Student requires educational services in the home in addition to the services he receives at his private day school in order to receive a free, appropriate education. The appeal, assigned BSEA #09-7936, was randomly assigned to me. A hearing is scheduled to take place on July 17, 2009.

Motion for Recusal

In her Motion to Recuse, the Parent alleges bias and improper handling of BSEA #09-2740. She also disagrees with the outcome. She seeks a different Hearing Officer for the instant appeal because she had an unhappy experience in her first appeal. She does not assert any circumstances relating to BSEA #09-7936 or to me that might immediately warrant recusal. In its Response Brockton disputes the Parent's factual allegations but does not oppose the assignment of a different Hearing officer to this pending matter.

Legal Framework

Motions for Recusal must be considered seriously by the challenged decision-maker. It is of grave importance to the administration of justice that all participants in a judicial or quasi-judicial proceeding have trust and confidence in the impartiality and the expertise of the person conducting the proceeding. It is also important that the administrative functions of a due process entity be efficient, fair and responsive to all interested participants, and not subject to disruption or delay by a very small minority of individuals. Therefore some rules

have been established to guide both parties and decision makers considering Recusal options.² A Hearing Officer must weigh her own professional qualifications to hear the type of appeal presented; must be alert to any objective bars that arise in the particular matter before her; must consider any subjective biases or prejudgments she may have about the parties or the subject matter; and must anticipate how her conduct of the matter might “appear” to the parties and the public.³

I consider these categories of challenges in turn:

1.) Professional Qualifications:

The Parent posed no challenge on this basis and therefore disqualification is not warranted.

2.) Objective Bars:

Objective factors which usually warrant recusal include any personal or professional connection the Hearing Officer might have with a hearing participant that might reasonably compromise her ability to render a fair decision. These factors include but are not limited to: potential relationship-based bias due to a familial tie with a participant; residence within the school district, a financial interest in the outcome of the matter, or a prior association with counsel. In this matter the Parent has not alleged, nor is there any reasonable support for finding the existence of any objective factor that would require recusal. I have no current or historical familial, professional or financial connection to any party, potential witness, public entity or counsel in this matter. Therefore I find that there is no objective bar to continuing as a Hearing Office in this matter.

3.) Subjective Factors:

The Hearing Officer must also examine her own emotions and conscience to determine whether she is truly capable of conducting an unbiased, impartial due process proceeding. I have made this examination. Indeed I make this examination with each ruling or event in all matters before me. I have concluded that I do not have any impermissible bias or prejudgment, that I am capable of fairly presiding over this matter without prejudice to either party and of rendering a decision based solely on the evidence presented and the applicable law.

4.) Appearance:

The final level of inquiry is whether the Hearing Officer’s impartiality might reasonably be questioned by the participants or the general public. To be disqualifying the alleged bias, prejudice, or improper remark, conduct or ties must arise from some extrajudicial source. Facts or circumstances gleaned from participation in a current or prior appeal involving the same parties or subject

² 20 U.S.C. §1415 (F) (13); 34 CFR 300.511; 608 CR 228.09 (3)

³ See: Duxbury Public Schools, 14 MSER 363 (2008) Malden Public Schools, BSEA #05-4355, 4/5/05; and Marblehead Public Schools, 8 MSER 84 (2002) for a more thorough discussion of recusal factors.

matter, or objections to prior rulings in the current matter that may be unsatisfactory to the party seeking recusal, do not constitute a proper foundation for disqualification. 28 U.S.C. §455; Boston's Children First, 244 F.3d 164 (1st Cir.2001); Demoulas v. Demoulas Super Markets, 424 Mass 501 (1997); Commonwealth v. Gogan, 389 Mass. 255 (1983).

Here, the Parent's argument in support of disqualification in this hearing rests primarily on her dissatisfaction with the adverse ruling she obtained in a prior hearing. Unfavorable rulings, even a series of them, do not in themselves indicate partiality or bias and do not, without more, provide sufficient support for recusal. While reasonable people may disagree on the substantive merits of any decision, I cannot find on this record that a reasonable member of the public could point to any factor or circumstances causing doubt as to my impartiality. Therefore I find that recusal is not warranted on the basis of appearance of partiality.

Reassignment

While there is no reasonable basis for granting the Parent's Motion for Recusal, there remains, nonetheless, the duty to assist pro se litigants to the extent possible to present their claims.

In this matter I find that the Parent is likely to be more comfortable presenting her concerns to a Hearing Officer less familiar with her and with the history of conflict between the parties. The Parent's arguments in support of recusal relate solely to the previous Hearing and Decision (09-2740) and constitute, at best, an impermissible collateral appeal. Nevertheless her request for hearing in this matter (09-7936) sets out a new issue: whether delivery of extended day services in the home is currently necessary for the Student to receive a free, appropriate public education? While retention of this matter would certainly be more efficient for all concerned, a new Hearing Officer will have no difficulty managing the discrete issue presented by the parent and separating it from the previous BSEA matter. The potential inconvenience to the School and to the BSEA of late reassignment is outweighed here by the need to maintain confidence in the unbiased administration of justice.

I will therefore on the Mother's behalf request the administrative reassignment of this matter to another Hearing Officer. Reassignment of active matters is an administrative decision made by the Director or Assistant Director of the BSEA based on multiple factors extrinsic to the individual case, including Hearing Officer availability, work flow management, conflicts, etc. There is no guarantee that reassignment will be possible.

ORDER

The Parent's Motion for Recusal is DENIED. This appeal is, however, referred for administrative reassignment.

By the Hearing Officer,

Dated: July 8, 2009