

**COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS**

In Re: Bridgewater-Raynham Regional School District v.
Student

BSEA # 09-8323

**Ruling on Parent's/Student's Motion for Re-Assignment of the Hearing
Officer/Recusal and Bridgewater-Raynham Public Schools' Request for Issuance
of Subpoena to Dr. Steven Auster and Motion to Leave Open the Record for the
Testimony of Dr. Auster**

On June 24, 2009 Bridgewater-Raynham Public Schools (BR) filed a request for hearing in the above-referenced matter. The BSEA issued a notice of hearing setting the matter for July 14, 2009. Thereafter, Parent's/Student's attorney filed several motions to postpone citing numerous different reasons why he was unavailable. Parent's/Student's attorney also filed a Motion to Dismiss on July 8, 2009. These motions were all denied by July 9, 2009. A second Motion to Dismiss was filed by Parent's/Student's attorney on July 13, 2009. This Motion was denied but the time of the hearing was changed during a telephone conference call on July 13, 2009, to accommodate Parent's/Student's attorney's court schedule.

During the call, Parent's/Student's attorney was asked to confirm, by 6:00 p.m. that day (July 13, 2009), his availability to start the proceedings at 12:30 p.m.; otherwise, the hearing would commence at 10:00 a.m. as previously scheduled. The Parties were informed that a prior ruling on Parent's/Student's July 13, 2009 Motion to Dismiss would be issued prior to commencing the hearing, and that if a ruling was entered denying Parent's/Student's motion, the hearing on the merits would proceed immediately thereafter.

In a subsequent telephone call, Parent's/Student's attorney confirmed his preference for commencing at 12:30 p.m. on July 14, 2009 and indicated that if he did not make it, he would rely on the Motion to Dismiss filed on July 13, 2009.

On July 14, 2009, neither the Parents, Student, nor their attorney appeared at the BSEA. No communication explaining their absence was received. The hearing officer waited until 1:05 p.m. to commence the proceeding and at that time went on the record, issued a ruling denying Parent's/Student's Motion to Dismiss and proceeded with the taking of the testimony of BR's witnesses. The hearing officer admitted the exhibits submitted by Parent: the Response to the Hearing Request, the July 8, 2009 Motion to Dismiss (three attached exhibits), and the July 10, 2009 letter submitted by Dr. Steven Auster.

On July 15, 2009, the Hearing Officer sent a copy of the Hearing tape to Parent's/Student's attorney by certified mail. The Hearing Officer also issued an

order on that date informing Parent's/Student's attorney that the record in the case would remain open until the close of business on July 30, 2009 in order to afford Parent/Student an opportunity to submit a written response/closing argument. Parent's/Student's attorney submitted a response to BR's arguments on July 16, 2009, which alleged due process violations.

On July 21, 2009, BR filed a Request for Issuance of a Subpoena to Dr. Steven Auster and a Motion to Leave Open the Record for the testimony of Dr. Auster. BR sought this additional testimony in response to Dr. Auster re-submission of his May 20, 2009 Physician's Statement, which contains additional writing not present when the form was originally submitted. As this writing could be considered new information after the July 14, 2009 hearing, BR wishes to hear Dr. Auster's testimony as to the basis for his recommendations. Ruling on BR's Motion is addressed in Part II of this Ruling, however, the rest of the relevant facts are discussed herein.

In the interest of being able to issue a subpoena for a precise date, the Hearing Officer requested the Assistant Director of the BSEA contact counsel for BR regarding availability for hearing in response to the motion. Counsel for BR was unavailable, and the Assistant Director left a message. It was the Assistant Director, not the Hearing Officer, who made this call in order to avoid ex-parte communication, and the sole purpose of the call was scheduling. On July 22, 2009, the Assistant Director was out of the office, so the Hearing Officer requested that fellow Hearing Officer William Crane contact BR's counsel to follow-up on the previous day's call. Hearing Officer Crane became involved solely to avoid ex-parte communication and his involvement was limited to scheduling. Hearing officer Crane asked counsel for BR to ascertain and submit the dates of Dr. Auster's availability in written form to the BSEA, and to also send a copy to Parent's/Student's attorney. Counsel for BR acceded to this request, and the information on Dr. Auster's availability was forwarded to both the BSEA and Parent's/Student's attorney later that same day.

On July 23, 2009, taking into consideration Dr. Auster's availability, and consistent with BSEA internal process, the hearing officer provided available dates for hearing to Mr. Paul O'Brien, the BSEA scheduling officer. The scheduling officer attempted to contact s attorney and Parent's/Student's attorney in order to find a mutually convenient date to convene and take Dr. Auster's testimony. Mr. O'Brien succeeded in contacting BR's attorney, who gave him a selection of available dates. He attempted to contact Parent's/Student's attorney on July 23 and July 24, 2009, but was unable to speak with Parent's/Student's attorney and instead left messages. Parent's/Student's attorney confirmed his availability with Mr. O'Brien on July 27, 2009.

On July 24, 2009, Parent's/Student's attorney submitted an objection to BR's request for subpoena and motion to keep the record open addressed in Part II of this Ruling. BR responded to Parent's/Student's objection on July 24, 2009, titled BR's Reply To Respondent's Opposition To Request for Issuance of Subpoena to Dr. Steven Auster

and Motion to Leave Open the Record For The Testimony of Dr. Auster and Partial Withdrawal of Motion. In it, BR states its position regarding Parent's/Student's allegations, discussed in Parts I, II and III of this Ruling and stated its willingness to withdraw its request for issuance of a subpoena and to keep the record open provided that the Hearing Officer ordered Respondent to refrain from submitting any further physician's statements for temporary home education.

Parent's/Student's attorney also submitted a Request for Re-assignment of Hearing Officer to the Director of the BSEA on July 24, 2009. The BSEA sent a response that the request would be construed as a Motion for Recusal and forwarded to the Hearing Officer.

On July 28, 2009, BR filed an Opposition to Respondent's Request for Reassignment of Hearing Officer/Motion for Recusal and Motion for Sanctions Pursuant to Rule X.B.16¹ of the *Hearing Rules for Special Education Appeals*. BR states that the claims against it and the Hearing Officer are frivolous. As part of its opposition, BR attached two Affidavits from Attorney Mary Ellen Sowyrda and Attorney Doris R. MacKenzie Ehrens referencing the allegations of ex-parte communication and the telephone conference call of July 13, 2009. Lastly, BR seeks for the Hearing Officer to "censure, reprimand, or other sanction against respondent and counsel pursuant to BSEA Hearing Rule X.B.15 to stop abuse and protect the District from further undue burden, expense and delay", claiming that Respondent's counsel's tactics are attempts to avoid a decision.

I Recusal of the Hearing Officer:

The IDEA statute and regulations² set out the minimum standards for qualification of BSEA hearing officers. Similar considerations alluding to the objectivity and professional competence of hearing officers appear in the Massachusetts special

¹ Rule X.B.16 does not exist. Instead, BR is obviously referring to Rule X.B.15, as can be inferred from the language in its motion which is copied almost verbatim. Clearly BR made a typographical error. Therefore, for the remainder of this decision BR's request is addressed correctly as Rule X.B.15.

² A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum-

- (i) not be-
 - (I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or
 - (II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;
- (ii) possess knowledge of, and the ability to understand, the provisions of this title [20 U.S.C. §§ 1400 et seq.], and legal interpretations of this title [20 U.S.C. §§ 1400 et seq.] by Federal and State courts;
- (iii) possess knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
- (iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice. 20 U.S.C. 1415 (f)(3); see also, 34 CFR 300.511 (c).

education statute and regulations³. The standards embodied in the aforementioned statutes and regulations seek to assure that the matters presented before the BSEA will be decided impartially and fairly.

When a party in the context of a BSEA matter makes a motion for recusal of a hearing officer, that party must set out the facts to support said request and the hearing officer is then responsible to evaluate the facts alleged, search his/her own conscience regarding his/her ability to remain impartial, and also examine his/her actions from the perspective of the litigants as well as the general public. *Ishmael & Duxbury Public Schools*, BSEA # 09-1986 (11/04/08, Byrne), citing *Litkey v. U.S.*, 510 U.S. 540 (1994); *Comfort v. Lynn School Committee*, 418 F3d 1 (1st Cir. 2005); *In Re: Boston's Children First*, 244 F.3d 164 (1st Cir. 2001); *U.S. v. Snyder*, 235 F.3d 42 (1st Cir. 2000). See also, *Marblehead Public Schools*, 8 MSER 84 (3/19/02, Crane), for a detailed discussion and guidance on ethical considerations, and judicial opinions regarding recusals.

In the case at bar, Parent's/Student's attorney does not challenge the professional qualifications of this Hearing Officer, who is a licensed attorney in the Commonwealth of Massachusetts with over twelve years experience as a special education hearing officer in this state. Rather, Parent's/Student's attorney expresses concern over "the appearance of prejudice against the Respondent" in the matter relating to: 1) ex-parte communication, 2) denying discovery to Parent/Student and allowing it to BR, and 3) denying Parent/Student a postponement. Parent/Student's concerns call for both objective and subjective consideration.

Turning first to Parent's/Student's attorney's concerns regarding ex-parte communication, I refer to the above chronology of events on July 21 and 22, 2009. As previously stated, the Assistant Director of the BSEA, and later Hearing Officer Crane, were asked to contact BR's attorney precisely in order to avoid ex-parte communication. Administrators at the BSEA regularly contact counsel concerning scheduling issues, which is presumably why Parent's/Student's attorney does not object to the involvement of the Assistant Director. On July 22, 2009, the Assistant Director was not available, and so another neutral BSEA staff person was sought to assist in obtaining the necessary information regarding scheduling. Hearing Officer Crane is in no way associated with BSEA case #09-8323 nor was his involvement substantive in any manner; he has not read the hearing request or any of the documents; he was not present at the hearing on July 14, 2009; he is not familiar with Parents, Student, BR's personnel involved, or the issues in dispute; he was not, in point of fact, acting in his capacity as a hearing officer. Hearing Officer Crane was simply assisting with scheduling. Parent's/Student's attorney further argues that the July 22, 2009 telephone call occurred "before [Parent's/Student's attorney's] office

³ 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 and who are employed to conduct those proceedings. 603 CMR 28.08(3).

[sic] any ability to respond” to BR’s Motion. BR’s motion was served on the BSEA and Parent’s/Student’s attorney simultaneously, as required by BSEA Rule VII(C). Whether Parent’s/Student’s attorney had “actual knowledge” or “ability to respond” is irrelevant as BR’s Motion was properly served and no communication between the Hearing Officer assigned to this matter and BR’s attorney took place. The initial administrative work, which amounts to nothing more than clerical work, occurred prior to receipt of Parent’s/Student’s Objection. The attempt to obtain availability of all those potentially involved in the hearing was done in light of the difficulties that scheduling hearings presents over the summer when people have scheduled vacations and/or may be otherwise unavailable. Parent’s/Student’s allegation that what is clearly clerical work constitutes ex-parte communication is without merit. No ex-parte communication took place in this matter.

I now turn to Parent/Student’s attorney’s second concern, alleging denial of Parent/Student’s rights to discovery and contention that BR’s subpoena of Dr. Auster constitutes discovery. Regarding denial of Parent’s/ Student’s discovery request, the Parties in this matter were previously involved in a hearing request initiated by BR regarding some of the same issues raised by BR in the current matter. Administrative notice of said case, BSEA #08-2356, reveals that BR originally filed its request for hearing on October 17, 2007, and later amended its complaint on December 9, 2008. Parent/Student filed a counterclaim on December 15, 2008, and the case was scheduled for hearing. Given that the case was open for a year and eight months before the Parties were prepared to proceed to hearing in March 2009, the Parties had ample opportunity to conduct discovery as argued by BR. Also, in BSEA #08-2356, exhibits and witness lists were received from Parents on February 20, 2009 and from BR on February 15, 2009 further showing that exchanges of information had occurred. BSEA #08-2356 was closed on March 17, 2009 when BR withdrew its Hearing Request on the first day of Hearing.⁴ In the instant matter BR submitted the same exhibits and added only Exhibit #23, the request for hearing filed by BR on June 24, 2009. BR’s exhibits and witness list were received by Parent/Student and the BSEA more than five business days before the hearing consistent with Rule IX of the *Hearing Rules for Special Education Appeals* and the IDEA. The only new exhibits were submitted by Parent/Student. Therefore, Parent’s/Student’s assertion that the denial to conduct further discovery was arbitrary is without merit.

Parent’s/Student’s attorney further allege that BR’s subpoena of Dr. Auster constitutes discovery, and that I am allowing BR to improperly discover privileged documents or information protected by the doctor/therapist patient privilege. I note that there has not yet been a ruling on BR’s Request for Subpoena and Parent/Student’s Objection, which is addressed later in this Ruling.

⁴ In that matter, Parent/Student’s attorney also filed a Motion for Recusal of the hearing officer on March 16, 2009, which was denied via Ruling issued the same day by the hearing officer then assigned to that matter. The following date, the first day of a two day hearing, BR withdrew its request for hearing when a settlement was reached between the Parties. Presumably Parent/Student also withdrew their counterclaim.

Thirdly, Parent's/Student's attorney infers prejudice from this hearing officer's denial of his motion for postponement.⁵ The July 14, 2009 hearing date was the administrative initial date assigned upon receipt of BR's Request for Hearing, as discussed during the telephone conference call on July 13, 2009.⁶ The notice of hearing was issued on June 25, 2009, and received by the Parties shortly thereafter. Taking into account the moving party's strong opposition to any delay, and given the past history of the case at the BSEA, Parent's/Student's Motions for postponement submitted on July 8 and July 13, 2009 were denied. In consideration of the totality of the circumstances, there is no support for Parent's/Student's assertion of prejudice. Such rulings do not necessitate recusal. Furthermore, Parent's/Student's attorney implies that the firm representing BR "always requests a postponement... and it is always granted." There is no foundation for this statement as Murphy, Hesse, Toomey & Lehane has not requested any postponement in the case at bar. If counsel for Parent/Student refers to actions taken by the previous hearing officer in BSEA #08-2356, these assertions are irrelevant to the case at bar and ultimately unsupported by the procedural history in that matter as indicated in the two Rulings issued by the previous hearing officer in BSEA #08-2356 on March 13, 2009. Motions to postpone may be granted for good cause, and are decided on the merit of the totality of the circumstances, including consideration of whether the party making said Motion is the moving party.

Parent's/Student's allegations that BR's attorney stated during the conference call with Parent's/Student's attorney that what was happening to him was punishment is simply untrue. The interpretation that a partial denial for postponement "constituted punishment" came from Parent's/ Student's attorney, when he called at approximately 5:50 p.m.⁷ to confirm his availability to begin the Hearing at 12:30 p.m. the next day, to which there was no reply from the Hearing Officer other than to state that the purpose of the call was confirmation of the time and that no further discussion would be had. Parent's/Student's attorney asked this Hearing Officer whether the telephone conference call had been taped and was told it had not. BR's counsel was aware that Parent's/Student's attorney would call to confirm the time and assented to the call.

⁵ Parent/Student submitted Motions for postponement on July 8 and July 13, 2009. Parent's/Student's attorney does not specify whether he is referring to one or the other Motion for postponement in his Motion for Recusal.

⁶ See the Order issued on July 15, 2009 in the instant case.

⁷ During the conference call on July 13th, Parent's/Student's attorney was given close to one hour to confer with his clients and confirm availability to begin the Hearing at 12:30 p.m. His response was due by 6:00 p.m., a time at which the BSEA support staff was unavailable as was some of the support staff at BR's attorneys' firm. BR also had to communicate with its witnesses to inform them of any changes regarding the time of the Hearing. It was agreed that Parent's/Student's attorney would confirm the time with the Hearing Officer who would then pass the information to BR's attorney. After Parent's/Student's attorney communicated his availability as stated above, said information was communicated to BR's attorneys. Other than the communication related above, no other statements were made by any of the Parties or the Hearing Officer. I note that neither Parent's/ Student's attorney or BR's attorneys allude to the aforementioned communications in any of their Motions or Responses.

The Hearing Officer was engaged in no further conversation with Parent's/Student's attorney, and only communicated with BR's attorneys to confirm the time of the Hearing. During the telephone conference call with the Parties, great frustration was expressed by BR's attorneys regarding the district's inability to finalize an issue which has remained unresolved for BR for over two years, especially where the IDEA clearly favors and stresses prompt resolution of these matters and calls for cases to be resolved within 45 days of the date on which the opposing party receives the request for hearing. 20 USCS § 1415.

Upon examining my own conscience regarding any actual bias in favor of BR or its legal counsel, I can, without a shadow of a doubt, conclude that I have none, and that I am capable of rendering a decision in this matter which is fair and impartial, that is, solely based on the evidence presented at hearing and the applicable law. I am convinced that the results of this matter will not be dependent on my professional or personal opinion of either Party, but rather the merits of the case and relevant law alone.

The last thing to be considered regarding a Motion for Recusal of a hearing Officer is the appearance of impartiality as opposed to actual impartiality so as to promote the confidence of the public regarding the proceedings. In this sense, the facts presented by Parent's/Student's attorney in support of the recusal must show "what an objective knowledgeable member of the public would find to be a reasonable basis." 28 U.S.C. § 455. As with every other case over which I have presided, the interests of both Parties have been considered at all times prior to rendering any determination. The record here shows that I have made decisions allowing Parent's/Student's attorney the benefit of the doubt, notably in agreeing to commence the Hearing at 12:30 p.m. over BR's objection (as one of its witnesses was unavailable after 1:30 p.m. on the date of hearing), and accepting into evidence the exhibits submitted in Parent's/Student's Response and Motions in spite of the fact that no one appeared on behalf of Parent/Student at hearing. Taking the aforementioned into consideration, one can only conclude that a reasonable member of the public looking at the record and the totality of the circumstances would not doubt the impartiality of my determinations. Therefore, I find that there is no reasonable basis to grant Parent's/Student's attorney's Motion for Recusal and as such, this Motion is **DENIED**.

II. Bridgewater-Raynham Public Schools' Request for Issuance of Subpoena to Dr. Steven Auster and Motion to Leave Open the Record for the Testimony of Dr. Auster:

On July 21, 2009, BR filed a Request for Issuance of Subpoena to Dr. Steven Auster and Motion to Leave Open the Record for the Testimony of Dr. Auster. Parent's/Student's attorney submitted an objection to BR's Request for Subpoena and Motion to Keep the Record Open, on July 24, 2009. Parent/Student argues that the subpoena of Dr. Auster attempts to bring in issues not included in BR's original hearing request, and that an amendment to the hearing request is now improper. Parent/Student

further contends that BR's Motion to leave open the record is in fact an improper attempt to reopen a closed case. BR submitted a response to this objection, in which the school offered to withdraw its Request for Subpoena and Motion to Leave Open the Record so long as Parent/Student and Dr. Auster refrain from submitting or re-submitting further demands for temporary home tutoring.

First, BR is persuasive that the Motion was not an attempt to amend the hearing request to add some new issue. Dr. Auster's notes for home tutoring are at the center of the dispute between the Parties. These notes were offered by Parent/Student as attachments to their submissions. These notes are at the core of Parent/Student's position and defense, and were admitted at hearing as an exhibit, in Parent/Student's absence, without objection.

Second, Parent/ Student allege that BR's Request for Issuance of Subpoena to Dr. Auster is an attempt to conduct discovery regarding privileged documents and/or information regarding treatment and communication between a patient and his doctor/therapist. In their objection to re-opening the case and to issuance of a subpoena to Dr. Auster, Parent/Student now invoke the privilege, in an attempt to prevent BR from gaining access to Student's medical and therapeutic records. Parent/Student's argument is not totally without merit, regarding the timing of BR's request, although it overlooks a central point: Student's case rests on the notes of Dr. Auster and the recommendations of Linda L. D'Ambly that Student be tutored at home *because of Student's mental/emotional health*. In doing so, Parent/Student opened the door to accessing documents and information regarding Student's mental/emotional health. To this extent, all of the information submitted by the Parties and admitted in evidence as exhibits and testimony including the numerous notes, are relevant and admissible. The problem here is that BR's request seeking testimony and access to Dr. Auster's records came *after* BR rested its case; a hurdle that BR cannot now overcome given Parents'/ Student's objection. This brings us to Parent/Student's third allegation, that is, that BR should have called Dr. Auster as a witness.

Rule X.B.14 of *The Hearing Rules for Special Education Appeals* allow a Hearing Officer to reconvene the hearing "at any time prior to the issuance of a decision for any purpose or pursuant to a post-hearing motion." It is therefore clear that a Hearing Officer at the BSEA has the authority to reconvene a hearing prior to issuance of a decision. Since a decision has not been issued in this matter, BR's Motion to Re-convene the Hearing is considered.

In the case at bar, BR, the moving party, requested to proceed to hearing on the date originally assigned by the BSEA. This request was granted over Parent/Student's objection. The list of proposed witnesses submitted by BR did not include Dr. Auster. BR is correct that Dr. Auster, (who later communicated his availability to testify on Tuesday and Thursday mornings), should have been called to testify by Parent/Student but neither, their attorney nor any witness appeared at hearing on

Parent/Student's behalf. Given the information available to BR in this case BR was remiss in not calling Dr. Auster as part of its case. Nothing prevented BR from including Dr. Auster in its list of witnesses, or requesting that the BSEA issue a subpoena to assure Dr. Auster's presence at the Hearing. The hearing took place on Tuesday July 14, 2009 and BR rested at the conclusion of the taking of the testimony and made an oral closing argument. The record remained open until July 30, 2009 to afford Parent/Student an opportunity to respond. Parent/Student's Response was received on July 16, 2009. At that time the record would have been considered closed except that BR filed the Motion addressed here on July 21, 2009. While I may have been inclined to grant BR's request, had it not been opposed, the situation changed once Parent/Student filed their objection. BR's request arrived too late in the process, and as such must be **DENIED**.

III. BR's Motion to Order Respondent to refrain from Submitting Further Physician's Statements for Temporary Home Education Motion for Sanctions Pursuant to Rule X.B.15:

As Part of BR's Response to Parent's/Student's Opposition, BR requested that Respondent be ordered to refrain from submitting any further Physician's Statements for Temporary Home Education. Given that the Physician's statements and notes are at the core of BR's request for hearing, it would be premature to issue any order regarding this issue without an opportunity to scrutinize and evaluate the totality of the evidence presented at hearing. Furthermore, a Hearing Officer may lack the power to issue such an order. As such, BR's request is **DENIED**.

Regarding BR's Motion for Sanctions Pursuant to Rule X.B.15, ruling on this issue is deferred until all of the evidence is reviewed and the decision is reached. Parent/Student are deemed to have been placed on notice regarding this issue.

As of the date of issuance of this Ruling, the record in this matter is considered closed. Consistent with the IDEA, a decision will be issued within twenty five days as per Rule X. E. of the *Hearing Ruled for Special Education Appeals*.

So Ordered by the Hearing Officer,

Rosa I. Figueroa
Dated: July 29, 2009