RULING ON MOTION FOR RECUSAL OF HEARING OFFICER

Through a letter to the Bureau of Special Education Appeals (BSEA) Director dated June 13, 2011, Parents requested a change in Hearing Officer through reassignment. The BSEA Director referred this letter to me, and I advised the parties that I would consider Parents’ letter as a *Motion for Recusal of the Hearing Officer (Motion for Recusal)*. Concord Public Schools (Concord) filed an opposition. After considering Parents’ and Concord’s arguments, I have determined that oral argument would not advance my understanding of the issues (see BSEA Hearing Rule VIID).

As explained within their letter of June 13, 2011, the basis of Parents’ *Motion for Recusal* is that I have presided over two previous disputes between the same parties as in the instant dispute, and I did not find in favor of Parents in either dispute. Parents further explain that in one of the previous disputes, I discounted the testimony of one of their witnesses solely based on the fact that the witness was Parents’ educational advocate (the advocate sought to testify as an expert) and that I “took testimony of another witness out-of-context in [my] finding, again showing bias against [Parents’] witnesses.” Parents further stated: “This bias to dismiss our witness on such grounds is not in our favor as we may have this same witness testify in this current hearing.” Parents further argue that in the previous disputes, I gave “great deference” to Concord’s witnesses even when their testimony included “inconsistencies and professional mistakes”. In addition, Parents take the position that “Officer Crane has also established that testimony from Parents is not given weight unless corroborated by third parties” thereby further indicating bias. Parents also filed an addendum to their *Motion for Recusal*, taking the position that I issued an order in the instant dispute improperly requesting the parties to proceed to summary judgment. For these reasons, Parents take the position that they will not obtain a fair and impartial hearing in the present dispute unless this matter is assigned to another Hearing Officer.

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1 My Order actually stated: “The issues, as identified by Concord in its hearing request, possibly may lend themselves to my resolution of this dispute through a motion for summary judgment. Either party may file a motion for summary judgment ….” Each party has indicated that it will not be filing a motion for summary judgment because each party believes that an evidentiary hearing will be necessary to resolve disputed facts.
I begin with a brief discussion of the legal standards relevant to Parents’ *Motion for Recusal*.

When faced with a recusal motion, the decision-maker (whether judge or hearing officer) is required 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.

I have made this examination by carefully considering Parents’ arguments and reflecting on whether Parents are correct that I would not be able to provide a fair and impartial hearing for the parties. I have concluded that I will be able to preside over this matter without prejudice to either party and that I therefore should not recuse myself on this basis.

The second part of the recusal analysis requires that I make an objective, fact-based inquiry as to whether there is a reasonable basis for Parents’ concerns regarding my ability to be fair and impartial. The First Circuit Court of Appeals has explained this objective inquiry as follows:

> 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.

As discussed above, Parents take the position that my decisions in two previous disputes (involving the same parties as the instant dispute) demonstrate bias and make it unlikely that Parents can receive a fair and impartial hearing unless there is a different Hearing Officer. In sum, they seek to establish that my previous rulings were so flawed and prejudicial as to require recusal.

It is entirely understandable that Parents disagree with the findings and conclusions in my two previous decisions, and that they also disagree with my analysis of the evidence, including my view of the persuasiveness of the testimony of several witnesses. When Parents (or any other party) disagree with my (or any other Hearing Officer’s) decision, then Parents have the option of filing an appeal in state or federal court. Through such an appeal,

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2 For a more complete discussion of the legal standards that either apply directly or provide useful guidance to the issue of recusal by a BSEA Hearing Officer, see *In Re: Marblehead Public Schools*, BSEA # 02-2828, 8 MSER 84 (SEA MA 2002).

3 See *Demoulas v. Demoulas Super Markets, Inc.*, 428 Mass. 543, 546 n. 6 (1998); *Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991); *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).

4 *In Re: United States*, 666 F.2d 690, 695 (1st Cir. 1981) (emphasis in original) (internal quotations omitted), quoted with approval in *In re United States*, 158 F.3d 26 (1st Cir. 1998). See also *Cigna Fire Underwriters v. MacDonald & Johnson*, 86 F.3d 1260 (1st Cir. 1996), and the Massachusetts cases cited in footnote 2.
Parents could have raised all of the arguments that they now make within the context of their Motion for Recusal and obtained a judicial determination regarding their claims.

A recusal motion is not the appropriate forum to dispute the correctness of my previous decisions, including my evidentiary analysis that formed the basis of these decisions. As the First Circuit and Supreme Court have made clear, “Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion .... Almost invariably, they are proper grounds for appeal, not for recusal.” Further, opinions “formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.”

“[N]either lawyers nor litigants are entitled to tabula rasa judges.” “It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.”

The Supreme Court provided the following example to illustrate what it meant by a judge (or hearing officer) having displayed such a “deep-seated favoritism or antagonism that would make fair judgment impossible”:

An example … is the statement that was alleged to have been made by the District Judge in Berger v. United States, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921), a World War I espionage case against German-American defendants: “One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans” because their “hearts are reeking with disloyalty.”

I find that Parents’ concerns do not rise to the level of objectively indicating partiality. Rather, Parents disagree with the analysis and conclusions in my two previous decisions and now seek another Hearing Officer who, they hope, will be more favorable to their witnesses and claims in the instant dispute. Seeking a new Hearing Officer for this purpose is contrary to the principles of recusal, as explained by the First Circuit:

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.

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5 In re Boston's Children First, 244 F.3d 164, 167 n. 7 (1st Cir. 2001) (quoting Liteky v. United States, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994)).
6 Liteky, 510 U.S. at 555, 114 S.Ct. at 1157.
9 Liteky, 510 U.S. at 555, 114 S.Ct. at 1157.
10 In Re Allied-Signal, Inc., 891 F.2d 967, 970 (1st Cir. 1989) (internal citations omitted) (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
I conclude that Parents’ arguments do not support recusal and to yield to Parents’ request would impermissibly allow Parents to manipulate the system established by the BSEA for random assignment of Hearing Officers.

For these reasons, Parents’ Motion for Recusal is DENIED.

By the Hearing Officer,

William Crane
Date: July 7, 2011