***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**Memorandum**

To: CAFL Appellate Panel Support Unit

From: [Law Student Intern]

Date: July 18, 2016

Re: Recusal of Judge Who Previously Represented DCF

QUESTION PRESENTED

The judge in a care and protection case was a Department of Children and Families (DCF) supervising attorney when the case started. Is he required to recuse himself?

BRIEF ANSWER

A judge who was previously a DCF supervising attorney for the same case is not necessarily required to recuse himself. However, if the judge had earlier significant, personal involvement in a “prosecutorial-like role” in a critical decision regarding the case now before him, he must recuse himself. *See* *Williams v. Pennsylvania*, No. 15-5040, 2016 U.S. WL 3189529, at \*5 (June 9, 2016). Although there is no child welfare case on point, one can reasonably extend the holding in *Williams* to child welfare cases.

FACTS

We represent a mother (“M”) in a termination case. Judge Jones, who is assigned to the case, was the deputy regional counsel three years ago in the Southeast Regional DCF legal office when M’s case was originally filed in Brockton Juvenile Court. It does not appear that Judge Jones, in his former capacity, signed any paperwork regarding M’s case, but he oversaw the trial attorney who worked on the case for DCF. We want to file a motion to recuse Judge Jones from the case, because we do not believe he will be fair in M’s case.

DISCUSSION

“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). A person’s due process rights are protected by judges recusing themselves when they have either an objective or subjective bias. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876-77 (2009).

A. Objective Standard

The courts apply an objective standard to avoid having to determine whether a judge has actual bias: “whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.” *See* *Williams v. Pennsylvania*, No. 15-5040, 2016 U.S. WL 3189529, at \*5 (June 9, 2016) (internal quotations omitted) (quoting *Caperton*, 556 U.S., at 881).

A judge must recuse himself when he has a personal, direct benefit from the case’s outcome. *E.g.*, *Caperton*, 556 U.S. at 884-90 (holding that recusal is required as a matter of due process where a litigant now before the judge gave significant contributions to the judge’s election campaign); *Tumey v. Ohio*, 273 U.S. 510, 531-32 (1927) (holding that the mayor who sentenced the defendant, which was authorized by a state statute, violated the defendant’s due process rights because the mayor had a pecuniary interest in the outcome of the litigation).

Recusal is also necessary where the judge has an interest in the case. *See In re Murchison*, 349 U.S. 133, 134-39 (1955) (determining that a judge who sentenced the defendants, who at the same time was the complainant, indicter and prosecutor, violated the defendants’ due process rights, reasoning that no man can be a judge in his own case).

*Williams* applies the objective recusal standard to when a judge worked on the case earlier as a prosecutor. The Court determined that the defendant’s due process rights were violated when an appellate judge, who previously was a district attorney who gave his official approval to seek the death penalty in the defendant’s case, did not recuse himself from defendant’s appeal twenty-six years later. *Williams*,at \*3. The Court held, “under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.” *Id.* at \*5.

The United States District Court for the District of Massachusetts has addressed a related due process issue—whether an attorney who worked on both the defense and prosecution side within the same case violated the defendant’s rights. *See* *Pisa v. Streeter*, 491 F.Supp. 530, 531-34 (D. Mass. 1980). In *Pisa*,the defense attorney’s student intern worked as a research assistant and prepared a memorandum in support of the defendant’s motion for new trial. *Id.* After graduating, the former intern became an assistant district attorney and proof-read the Commonwealth’s brief regarding the defendant’s case. *Id.* The District Court held that no due process violation occurred when this happened because of the minimal participation by the lawyer. *Id*.

The most factually similar case to our current situation is *People v. Julien*. 47 P.3d 1194 (Colo. 2002). The judge was previously a supervising attorney and team leader at the district attorney’s office when the office filed the charges against the defendant. *Id*. at 1196. The defendant’s trial occurred five weeks after the judge took the bench, and another supervising attorney of the district attorney’s office, employed at the same time as the judge, appeared before the judge to prosecute the defendant. *Id*. at 1195-96. The Colorado Supreme Court held that the judge was not required to recuse himself because he did not work on the defendant’s case, had no recollection of the case, and did not supervise anyone involved in the case. *Id*. at 1196-200.

Regarding M’s case, Judge Jones is probably not required to recuse himself under the objective standard following *Williams*, *Julien* and *Pisa*. As in *Julien*,where the judge was a former team leader, and in *Pisa*, where the former intern became an ADA who proof-read the Commonwealth’s brief, here Judge Jones was only the deputy regional counsel for DCF at the time M’s case was first introduced and had no, or minimal, connection with the case. Judge Jones does not appear to have had a “significant, personal involvement” regarding a “critical decision” in client M’s case. This differs from *William*s,where the judge was a former supervising DA who authorized the prosecutor to seek the death penalty in the defendant’s case by signing the prosecutor’s memorandum. In his former capacity as DCF deputy regional counsel, Judge Jones did not sign any paperwork regarding M’s case, nor did he have any significant personal involvement in a critical decision of the case. Judge Jones did, however supervise the trial attorney who worked on the case, which was a factor suggesting recusal in *Julien*. Clearly, if Judge Jones decided, or helped the trial attorney decide, any critical aspects of the case, then the objective standard would require him to recuse himself. We therefore need more information about the nature of Judge Jones’ decision-making in M’s case when it was first filed, as well as the nature of his supervision of the DCF trial attorney.

B. Subjective Standard

Under the subjective standard of recusal, a judge should recuse himself in any proceeding in which his impartiality might be questioned. *Litkey v. U.S.*, 510 U.S. 540, 547 (1994). A judge’s personal bias, prejudice, or matters of kinship fall into this standard. *See Tumey*, 273 U.S. at 522; *In re U.S.*, 441 F.3d 44 (1st Cir. 2006) (holding the judge should have recused himself under the subjective standard because there existed a reasonable basis for questioning his impartiality in the case before him, when he was investigating the prosecutor’s office for government misconduct at the same time). The subjective standard of recusal is determined by the judge’s discretion, which usually will be upheld on appeal. *See* *Litkey*,510 U.S. at 550-51 (determining that a judge does not have to recuse himself based on knowledge that was learned through the proceedings that made him biased towards the defendant, nor does the judge need to recuse himself if he has biased or prejudiced opinions based upon what he learned from earlier proceedings). *See also In re* *Care and Protection Summons*, 437 Mass. 224, 239 (2002) (holding that a judge who had prior history with the parents in other care and protection cases was not required to recuse himself); *Care and Protection of Martha*, 407 Mass. 319, 329-30 (1990) (concluding that a judge who had presided over the initial petition to obtain emergency custody was not required to recuse himself); *Com. v. Gogan*, 389 Mass. 255, 259-60 (1983) (holding that a trial judge who as a practicing attorney recently represented one of the Commonwealth’s principal witness, and had represented a party in a civil suit against the defendant’s sister, was not required to recuse himself).

Regarding M’s case, Judge Jones *should* recuse himself under the subjective standard. Since Judge Jones was a supervising attorney at DCF when DCF first filed its case against M and directly supervised the attorney “prosecuting” M’s case, Judge Jones’ impartiality as a judge during the same case could be questioned. This differs from *Litkey*, *Care and Protection Summons*, and *Care and Protection of Martha*, where the judges’ bias and knowledge about the litigants stemmed from his or her prior history with the litigants as a judge. Here, on the other hand, Judge Jones’ potential bias arises from his role as a supervising attorney for DCF and a judge on the same case. Because Judge Jones’ impartiality can be questioned, recusal is appropriate under the subjective standard.

C. Recusal in Child Welfare Cases

There is no child welfare case law, in Massachusetts or nationally, regarding mandatory recusal because a judge previously worked as a DCF attorney or supervisor on a parent’s current case. A judge must recuse himself whenever he was a prosecutor and had a “significant, personal involvement . . . in a critical decision regarding the defendant’s case.” *Williams v. Pennsylvania*, No. 15-5040, 2016 U.S. WL 3189529, at \*5 (June 9, 2016). This holding could reasonably be applied to judges in child welfare cases who previously worked for DCF in a “prosecutorial-like role,” had actual involvement in the case while working at DCF, and now have the same case before them as a judge.

CONCLUSION

*Williams v. Pennsylvania* suggests that Judge Jones must recuse himself if, in his prior role as DCF supervising attorney, he had a significant, personal involvement in a critical decision of the case. Judge Jones does not appear to have had significant, personal involvement in a critical decision in M’s case, but further inquiry might reveal otherwise. Moreover, his level of supervision of the DCF trial attorney might suggest that recusal is necessary. But even if recusal is not required, Judge Jones *should* recuse himself under the subjective standard because his impartiality in the case could be questioned.