COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Arlington Public Schools **BSEA # 1309210**

AMENDED RULING ON MOTION TO JOIN DCF AND DDS

Arlington Public Schools (Arlington) filed a Motion to Join the Department of Developmental Services (DDS) and the Department of Children and Families (DCF) in the above referenced matter. DDS and DCF filed oppositions. Parent did not file any document and took the position at hearing that she neither supported nor opposed joinder of either agency. A Motion Hearing was held by telephone on July 1, 2013. [1]

INTRODUCTION

Student, a nine-year-old girl, is currently residing at the Hampstead Hospital in New Hampshire, where she has been since November 27, 2012. On that date, she was admitted to the inpatient specialty unit for children with co-morbid psychiatric and developmental disabilities. Student is diagnosed with severe Autism as well as intellectual impairment. She has very limited communication abilities and has significant behavior concerns that have manifested themselves principally in the home.

Parent takes the position that Student requires a residential educational placement and is not safe to leave Hampstead Hospital until such a placement is obtained. Arlington takes the position that Student does not require residential services to meet her educational needs, that DCF may be the appropriate agency to provide any needed residential services, and that home-based services from DDS or DCF may make it unnecessary for Student to be placed residentially.

DISCUSSION

The issue before me is whether DDS or DCF should be joined as a necessary party pursuant to BSEA Hearing Rule 1F.[2] Statutory language regarding the jurisdiction of a BSEA Hearing Officer over state agencies (for example, DDS and DCF) includes the following:

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[1] Parent is represented by attorney Tim Sindelar. Arlington is represented by attorney Nancy Nevils. DCF is represented by attorney Brian Pariser. DDS is represented by attorney Jacquelyn Berman.

[2] Pursuant to BSEA Hearing Rule 1F (entitled "Joinder"), joinder may be ordered upon a finding that (1) complete relief cannot be granted among the existing parties, or (2) the proposed party to be joined has an interest in this matter and is so situated that the dispute cannot be disposed of in its absence.

> The [BSEA] hearing officer may determine, in accordance with the rules, regulations and policies of the respective agencies, that services shall be provided by the department of [Children and Families], the department of [Developmental Services], the department of mental health, the department of public health, or any other state agency or program, in addition to the program and related services to be provided by the school committee.[3]

The "in addition to" language within this statute means that if a student's needs can be met through the special education and related services which are the responsibility of the school district, complete relief can be granted without the need for the human service agency to become a party. This language maintains the school district as the entity with sole responsibility for all those services to which the student is entitled pursuant to state and federal special education law.[4]

Additional services from a human services agency may be considered but only if such additional services may be necessary to ensure that the student will be able to access or benefit from the school district's special education program and services.[5]

Arlington seeks joinder of DDS and DCF so that, as parties, they may be ordered to provide additional services in the form of residential services or home-based services in addition to those special education and related services that are the responsibility of Arlington.

More specifically, Arlington takes the position that the BSEA may order DCF (but not DDS[6]) to provide residential services in the instant dispute. DCF does not disagree that a primary DCF role is to provide residential services for children when appropriate, but takes the position that DCF residential placement would require that Student first be within the care or custody of DCF. For this to occur, either a court custody order is needed, or Parent and DCF must agree to a voluntary placement.[7] Neither of these has occurred to date. To be sure, Parent and DCF might enter into a voluntary placement agreement, but neither Parent nor DCF has taken the position that there is any likelihood of this in the future; and there is no reason to believe that DCF will seek a court custody order.

Arlington also seeks joinder of DCF for the purpose of allowing the Hearing Officer to order DCF to provide non-residential services—that is, home-based services that might permit Student to avoid the need for residential services. DCF agrees that these services might be

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[3] MGL c. 71B, s. 3. See also 603 CMR 28.08(3) (regulatory language similar to above-quoted statutory language).
[4] See, e.g., *In Re: Attleboro Public Schools*, BSEA # 02-4839, 8 MSER 326 (2002); *In Re: Ipswich Public Schools*, BSEA # 02-4324, 8 MSER 185 (2002) and BSEA decisions/rulings cited in footnote 2 of *Ipswich* Ruling.
[5] See *In Re: Attleboro Public Schools*, BSEA # 02-4839, 8 MSER 326 (2002); *In Re: Ipswich Public Schools*, BSEA # 02-4324, 8 MSER 185 (2002) and BSEA decisions/rulings cited in footnote 3 of *Ipswich* Ruling.
[6] DDS regulations (115 CMR 6.07(2)(b)) provide, in relevant part, that "in no case shall the Department provide residential supports to children younger than 18 years of age".
[7] The DCF statute (MGL c. 119, ss. 21, 24, 25, et seq.) provides for a court custody order before DCF may unilaterally place a child into a residential placement. DCF regulations (110 CMR 4.10) provide that any voluntary placement must "be accomplished by completion of the Department's standard form of Voluntary Placement Agreement, between the parent(s) or parent substitute and the Department."

ordered by the BSEA without the need for a judicial custody order or voluntary placement agreement.

However, there is no indication that DCF has been asked to provide home-based services to Student and Parent. If such a request were made, it is unclear what DCF home-based services would be requested, whether DCF would agree to provide these services without a BSEA order, or whether such services would offer the possibility of avoiding the need for residential services. In short, the nature and scope (and need for) such DCF services is uncertain.

DDS is a more logical source of home-based services, and Arlington seeks joinder of DDS for this purpose. Until Student's hospitalization, DDS was providing intensive in-home support to Student and her family for the purpose of maximizing the likelihood of avoiding a residential placement. DDS's attorney has represented that DDS is willing and able to continue to provide these services without the necessity of an order from the BSEA. Neither Arlington nor Parent has identified any DDS services that should be provided but have not been.

To be sure, joinder might be helpful to Arlington for purposes of having one or more additional parties who might share the responsibility of providing services to Student, and this might assist in the informal resolution of this dispute. Also, the need for joinder may become more apparent in the future. But, Arlington has put forth no compelling reason why DDS or DCF must be joined at this time as a necessary party in order for the BSEA to resolve the special education dispute between Parent and Arlington.

Arlington correctly points out that even in these situations, the BSEA has, upon occasion, joined a human services agency such as DDS or DCF. I agree that a BSEA Hearing Officer has discretion to join a human services agency (and that BSEA Hearing Officers have joined human service agencies in the past) even when it is uncertain how or whether the human service agency might be ordered to provide additional services. In exercising this discretion, I consider the following factors.

First, a BSEA Hearing Officer may believe that joinder of a human services agency is necessary to ensure that all relevant issues are fully addressed through the evidentiary hearing, perhaps because of the particular perspective or expertise of the human services agency. I take note that both Arlington and Parent are represented by highly experienced attorneys who, if need be, can subpoena human services agency staff and other experts to testify at hearing. I have no concern that joinder is necessary in order to ensure that the issues before me are fully litigated.

Second, as Arlington correctly points out, without joinder there is always the risk that it will be determined through the evidentiary hearing that complete relief cannot be provided without an order that a human services agency provide additional services, thus necessitating a second hearing to determine the responsibility of the human services agency. This risk is to be weighed against the cost in time and resources of complicating the BSEA hearing

process through additional parties without any certainty regarding the need for these additional parties. To a large extent, I rely upon Arlington and Parent to assist me in the balancing of these risks.

Although both Arlington and Parent have an interest in the balancing of these risks, I suggest that it is principally the Parent and Student who have the most at stake. Failure to join a necessary party may delay the resolution of the dispute and therefore the discharge of Student from Hampstead Hospital. It is highly relevant to my analysis that Parent, through her attorney, stated at the joinder hearing that she does not support joinder, but rather has taken a neutral position regarding this issue.

For these reasons, I find that Arlington has not sustained its burden of showing that either DCF or DDS should be joined at this time.

ORDER

Arlington's Motion to Join the Massachusetts Department of Developmental Services and the Department of Children and Families is DENIED without prejudice.

By the Hearing Officer,

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William Crane
Dated: July 2, 2013