

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

**In Re: Agawam Public Schools and
Mass. Dept. of Children and Families**

BSEA # 1403554

RULING ON MOTION TO DISMISS DCF AS A PARTY

Parents filed a hearing request against Agawam Public Schools (Agawam) and the Massachusetts Department of Children and Families (DCF) in the above referenced matter. DCF then filed a motion to dismiss DCF as a party to this dispute. Agawam filed an opposition, and a telephonic motion hearing occurred on December 2, 2013.¹

INTRODUCTION

Student, an eleven-year-old boy, is currently residing at the Hampstead Hospital in New Hampshire, where he has been since October 28, 2013. Parents take the position that immediately prior to the admission, Student had been demonstrating continuing and unabated self-injurious behaviors, including scratching himself, and slapping and punching his head. Student had been previously hospitalized at Hampstead Hospital from September 5 to 18, 2013 as a result of what Parents have characterized as unsafe self-injurious and aggressive behaviors.

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. Agawam takes the position that Student does not require residential services to meet her educational needs and that DCF may be the appropriate agency to provide any needed residential services.

DISCUSSION

The issue before me is whether DCF is a necessary party. Statutory language regarding the jurisdiction of a BSEA Hearing Officer over state agencies (for example, DCF) includes the following:

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.²

¹ Parents are represented by attorney Matthew Engel. Agawam is represented by attorney Peter Smith. DCF is represented by attorney Brian Pariser.

² MGL c. 71B, s. 3. See also 603 CMR 28.08(3) (regulatory language similar to above-quoted statutory language).

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.³

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.⁴

Agawam seeks to maintain DCF as a party so that it may be ordered to provide additional services (most likely in the form of residential services) in addition to those special education and related services that are the responsibility of Agawam.

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 Parents and DCF must agree to a voluntary placement.⁵

Neither of these has occurred to date. It is not disputed that Parents sought DCF voluntary services, and DCF has denied this request after determining that Student did not qualify for services. Currently, DCF has no formal relationship with Parents or Student. Apparently, Parents and DCF have had further informal discussions and it may nevertheless be possible that DCF would be willing to assist with services, perhaps through a voluntary placement agreement, but neither Parents 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.

Under similar circumstances, I have concluded that I have no basis for ordering that DCF be a party to a BSEA proceeding.⁶

Agawam takes the position that notwithstanding the above analysis, DCF should continue to be a party because of an Executive Office of Health and Human Services Policy 93-1, entitled “Interim Policy for Voluntary Out-of—Home Placements for Children with Disabilities” (hereinafter “Interim Policy”). The Interim Policy indicates that when DCF (formerly Department of Social Services, for purposes of the Interim Policy) receives a request for out-of-home services for children with disabilities “where there are no protective concerns and no parenting issues unrelated to the child’s special needs,” DCF is to refer the request to the human services agency responsible for the child. In the instant dispute, Student is currently receiving services from the Massachusetts Department of Developmental

³ 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*.

⁴ 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*.

⁵ 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.”

⁶ See *In Re: Arlington Public Schools*, BSEA # 1309210 (ruling 7/2/13).

Services (DDS). Under the Interim Policy, DDS may seek funding from DCF for out-of-home services in the event that DDS were to determine that Student needs such services “beyond the respite level” in order to prevent an out-of-home placement. I understand from DCF’s attorney that the legislature has typically appropriated funding specifically for this purpose. The Interim Policy allows for accessing this funding “as available.”

For the following reasons, I am not persuaded that the Interim Policy is sufficient to support DCF’s continuing to be a party in the instant dispute.

The BSEA’s authority to order DCF to provide services to Student is found in the above-quoted statute (MGL c. 71B, s. 3), which provides in relevant part that the BSEA may determine that DCF must provide services to Student “in accordance with the [DCF] rules, regulations and policies.” As explained above, the DCF statutory and regulatory standards provide no foundation that would support a determination that DCF must provide services to Student because he has no legal relationship with DCF—that is, there is neither a court custody order nor a voluntary placement agreement between Parents and DCF, and therefore Student is not within the care or custody of DCF.

The Interim Policy may be understood as providing for a fiscal arrangement between human services agencies, pursuant to which the agencies have significant discretion to allocate funds appropriated by the legislature for this specific purpose. The Interim Policy may be considered a potential vehicle for DDS to access DCF funding to pay for services for Student. However, in so doing, the Interim Policy does not create a legal obligation on DCF to provide services to Student. Rather, under the Interim Policy, any legal responsibility to Student remains that of DDS—that is, DCF’s role is only to provide funding to DDS so that DDS may, in turn, provide services to Student that DDS believes to be appropriate.

As a result, the Interim Policy provides no basis upon which one could determine that DCF has a legal responsibility to provide residential (or other) services to Student; and therefore the authority of the BSEA to determine that DCF must provide services to Student (pursuant to the above-quoted MGL c. 71B, s. 3 and accompanying regulations) is lacking.

For these reasons, I find that DCF is not a necessary party at this time.

ORDER

DCF’s motion to dismiss is ALLOWED.

By the Hearing Officer,

William Crane

Dated: December 3, 2013