

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

In Re: Student v.
North Middlesex Regional School District &
Department of Children and Families

BSEA # 1612096

**Ruling on the Department of Children and Families' Motion
to be Dismissed as a Party**

On June 30, 2016 Parents requested a Hearing before the Bureau of Special Education Appeals in the above-referenced matter.

The instant disputes involves Parents' request for a six month residential placement of Student to decrease Student's chronic stress. At present Student attends the Perkins day school program (a private therapeutic placement) pursuant to an IEP issued by North Middlesex Regional School District (NMR) in June 2016. Parents' Hearing Request was filed against both, DCF and NMR, and funding for Student's residential placement is sought from either or both.

On July 27, 2016, the Department of Children and Families (DCF) filed a Motion to Dismiss DCF as a party. DCF argued that its involvement with Student and Parents has been minimal and asserts that it does not have care or custody of Student, nor has it had it at any time. DCF argues that it cannot provide a placement for any child not in its care or custody as that would contravene DCF's "rules, regulations and policies". G.L. c. 71B §3; 603 CMR 28.08. Therefore, DCF's participation as a party would serve no legitimate purpose and the sole remedy sought by Parents can be provided by NMR.

NMR filed an Opposition to DCF's Motion to Dismiss on August 3, 2016, arguing that DCF is currently a provider of services to the Student and as such has an interest relating to the subject matter of this Hearing and a judgment cannot be reached in its absence. Furthermore, release of DCF would result in a risk of prejudice to the District.

According to NMR, Student has been the recipient of a DCF Treatment Plan since November 30, 2015¹ (Treatment Plan Document April 21, 2016 and June 2, 2016). On December 19, 2015, Student underwent a neuropsychological evaluation with Seth Doolin, Psy.D.,

¹ I note that all of the facts delineated in this Ruling are considered to be true solely for the purpose of this Ruling.

arranged for by DCF, in order to clarify Student's then presenting diagnosis. NMR asserts that Student is currently assigned to work with a Social Worker from the DCF Lowell Area Office. Student's Treatment Plans call for: "Family Therapy, Parent Skills Training; Case Management; and Permanency Coaching". Furthermore, while receiving services under the aforementioned service plans a report under M.G.L. c.119 §51A was filed alleging abuse of Student by a family member. This allegation resulted in an increase in the DCF supports offered to Student under the DCF Treatment Plans issued on April 21 and June 1, 2016. According to NMR, these Treatment Plans describe a chaotic home environment in which parents are being provided with support to manage the stress in the household and to facilitate a safe living environment for the family, as well as family therapy sessions for the various household members.

NMR argued that DCF is extensively involved with Student and her family, rendering DCF a necessary party and that, DCF is uniquely situated such that the case cannot be disposed of in its absence. NMR further argued that if Student is in need of a residential placement, such placement is not for educational reasons and therefore requests that DCF's Motion be denied and that DCF be maintained as a party to fund a potential residential placement or to offer Student and/or Parents additional services.

This Ruling is issued in consideration of the arguments and documents submitted by the Parties including the Hearing Request filed by Parents and addresses solely the question of whether DCF is necessary for a full disposition of the case and if not, whether it can be dismissed as a party.

Legal Standard Regarding Joinder:

The analysis involved in allowing a party to be dismissed is similar to that involving joinder and as such I turn to the legal standards involving joinder.

Under federal special education law and regulations states are charged with the responsibility to establish mechanisms for coordination of services among agencies to facilitate resolution of disputes where multiple public entities may share the responsibility for providing special education and related services to eligible students to ensure that they receive a FAPE.² 20 U.S.C. §1412(12)(A); 34 C.F.R. 300.142(a).³

² Chapter 159, section 162 of the Acts of 2000, amending M.G.L. c 71 B §3, grants the BSEA authority to order a state agency to provide services "in addition to the program and related services to be provided by the school committee." See *In Re: Lunenburg Public Schools and Department of Mental Health (ruling on Motion to Dismiss)*, 10 MSER 478 (2004); see also, ruling on motion to join DMH and DMR in *In Re: Medford Public Schools*, BSEA # 01-3941 (2002).

³ See *In re: Tantasqua Regional School District*, BSEA #1403256 (12/11/13).

In Massachusetts the authority to order a state agency to provide services consistent with 603 CMR 28.08(3) falls within the purview of the BSEA. See *In re: Tantasqua Regional School District*, BSEA #1403256 (12/11/13). In general, the BSEA may order a state agency to provide services “in accordance with the rules, regulations, and policies of the respective agenc[y]” in addition to the IEP services that the school district is responsible to provide. 603 CMR 28.08(3). A state agency, including DCF, may be ordered to provide services that are found to be necessary for the student to be able to receive a FAPE through the school district, or, provide services over and above those that are the responsibility of the school district if the services are necessary to ensure that the student is able to access or benefit from the special education program and services offered by the school district. *In re: Tantasqua Regional School District*, BSEA #1403256 (12/11/13); *Lowell Public Schools*, 107 LRP 655543 (2007).

I note that the Parties do not dispute the jurisdiction of the BSEA over state agencies pursuant to Massachusetts General Laws Chapter 159, section 162 of the Acts of 2000, amending M.G.L. c 71 B §3 and 603 CMR 28.08(3). As such, I turn to the elements that must be considered in determining whether a particular agency, here DCF, must be joined as or maintained as a party. In this regard, I seek guidance from the BSEA rule addressing joinder, the mechanism through which a party may request that another party be required to participate in a proceeding after an initial request for hearing has been filed.

In the context of a BSEA proceeding joinder of a party is governed by Rule 1J of *The Hearing Rules for Special Education Appeals*, providing that joinder of a state agency may be ordered if

- (1) complete relief cannot be granted by the originally named parties or
- (2) the third party has an interest in the matter and is so situated that the case cannot be disposed of in its absence.

In determining if joinder is warranted, Rule 1J requires consideration of the following factors:

- (1) risk of prejudice to the present parties;
- (2) the range of alternatives for fashioning relief;
- (3) the inadequacy of a judgment entered in the proposed party’s absence; and
- (4) the existence of an alternative forum to resolve the issues.

When considering the need to join or maintain a state agency as a party, there must be a preliminary showing by the party seeking joinder or maintenance of the state agency’s party status that evidence presented at Hearing may result in that agency being found responsible to offer some service to the student. See *In re: Boston Public School District*, BSEA #02-4553 (2002). If joinder is granted, the Hearing Officer may only order services consistent with the rules, regulations, and policies governing the particular state agency, and, assuming

that the student is eligible to receive said services, may order only those services that fall within the array of services offered by the particular agency. See G.L. c.71B §3.

As explained by Hearing Officer Byrne in *Auburn Public Schools*, 8 MSER 143, (5/16/2002),

In special education appeals, the joinder inquiry will necessarily focus on whether a free, appropriate public education can be developed, delivered, declared or guaranteed without the participation of the state agency sought to be joined. If it cannot, joinder will be allowed (*Id.*).

It is undisputed that in the context of special education school districts are ultimately responsible for the full spectrum of placements required by a student for educational reasons (including residential placements). Therefore, where a student requires residential placement for educational reasons, the district, not the state agency, will be found responsible for said placement even if residential placement is among the services offered by the state agency to its clients.⁴ *In Re: Student v. Boston Public Schools*, BSEA # 06-6542 (July 25, 2006). (*In re: Tantasqua Regional School District*, BSEA # 1403256 (12/11/13)).

In the case at bar, determination of DCF's party status depends on the nexus between Student and or his/her parents and DCF, and the BSEA's ability to order the particular services sought consistent with the rules and regulations governing DCF.

With this guidance, I turn to facts in the instant case.

RULING:

DCF argues that the only issue before the BSEA is Student's need for residential placement and not additional services that must be provided by DCF. Relying on *Abrahmson v. Hershman*, 701 F.2d 223, 228 (1983)⁵, DCF argues that the educational service requested by Parents is available from the school district, an already existing party. As such, DCF argues that it is not a necessary party because complete relief can be granted, absent its participation, among those who are already parties; that is, the case can be disposed of in its absence. See *In Re: Lawrence Public Schools*, BSEA #08-2804, 14 MSER 1, 2 (2007) "(denying joinder of DCF where no party 'alleged that Student needs services that only DSS⁶ can provide in addition to education services')". Lastly, DCF argues that even if the BSEA were to determine that NMR is not responsible for Student's residential placement, DCF would still not be an appropriate party because Student is neither in the care nor custody of

⁴ See *In Re: Westford Public Schools*, BSEA #05-0621, 10 MSER 541, 551 (2004, Beron.)

⁵ DCF notes that *Abrahmson v. Hershman*, 701 F.2d 223, 228 (1983) "recogniz[es the] responsibility of school districts to provide residential education where necessary for educational benefit".

⁶ In Massachusetts DCF was formerly known as the Department of Social Services.

DCF. Such care or custody is a necessary requirement for DCF to provide any out of home placement consistent with 110 CMR 4.10; G.L. c.119§21 *et seq.*⁷

NMR argued that DCF's extensive involvement with Student and her family, renders DCF a necessary party. NMR further argued that any need for a residential placement on Student's part is not for educational reasons. According to NMR, BSEA orders are not limited to the remedies sought by parents; rather, "such order may provide for the placement or services requested by the school committee, the placement or services requested by the parent, either of those placements or services with modifications, or such alternative programs or services as may be required to assure such development of such child." M.G.L. c. 71B §3. NMR argued that the scope of the Hearing therefore involves not only Student's need for residential placement but also: a) whether her current private day placement offers her a FAPE; b) whether Student requires additional in-home or residential services; (3) whether those in-home or residential services would be educational in nature; and d) if not educational in nature, whether DCF is responsible to provide them. Moreover, according to NMR, given that Student and her family are currently receiving services under a Treatment Plan Document (June 1, 2016 Treatment Plan Document) it would appear that any difficulty experienced by Student in the home is attributable to the home environment rather than unmet educational needs, therefore, a private day placement for Student would suffice to offer her a FAPE in the least restrictive environment. Since a determination of the need for residential placement and/or home wrap-around services, as well as whether such services would be for educational reasons may involve orders against NMR and DCF, the BSEA would be unable to fashion the necessary remedies in the absence of DCF. Lastly, NMR argued that administrative efficiency could only be assured by maintaining DCF as a party.

DCF is correct that BSEA jurisdiction over said agency is limited to situations where DCF has a significant relationship with the student. I find that the existence of the current Treatment Plan establishes a relationship between the parties sufficient to satisfy the threshold question, even if Student is not presently in the care or custody of DCF. While care or custody of Student may impact DCF's ability to provide residential services, or the BSEA's ability to order it to do so, the existence of an active and comprehensive Treatment

⁷ According to DCF,

"There is no indication that the parents have sought to voluntarily place the student in DCF's care. Even if there were, any such placement must be voluntary on the part of DCF as well as the parents. To the extent that it is reviewable, DCF's decision to deny a voluntary placement may be reviewable through the department's fair hearing process and then the Superior Court, but not the BSEA. 110 CMR 10.06, *et seq.*; G.L. c. 30A §14; See also *In Re: Ware Public Schools*, BSEA #05-4126, 11 MSER 140, 141 (2005) (the hearing officer should not now be 'inserted' into internal agency determinations of 'client eligibility for management determination absent extraordinary circumstances). Moreover, DCF 'will not enter into voluntary placement agreements with the child's parent(s) solely for the purpose of sharing the costs of any residential school placement with an LEA.' 110 CMR 7.402(2)".

Plan establishes enough of a relationship to allow the BSEA to order non-residential services (such as additional home-based or therapeutic services) consistent with DCF's rules and regulations, that are necessary to enable Student to receive a FAPE.

Lastly, in light of the most recent allegations, it is also possible that the relationship between Parents/Student and DCF is altered during the pendency of the BSEA appeal in which case residential placement could be among the remedies available through DCF.

As such, DCF's Motion to be Dismissed as a Party is DENIED. DCF will be maintained as a Party.

ORDER:

1. DCF's Motion to be Dismissed as a Party is **DENIED**.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: August 15, 2016