

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

In re: Maurice¹

BSEA #1600002

RULING ON TAUNTON PUBLIC SCHOOLS' MOTION TO DISMISS

This matter comes before the Hearing Officer on the Motion of the Taunton Public Schools ("Taunton" or "the District") to Dismiss with Prejudice the Hearing Request ("Motion to Dismiss") filed by the Parent on behalf of the Student. The Motion to Dismiss was filed on July 9, 2015.² The Parent filed his Opposition to the District's Motion to Dismiss on July 13, 2015, with further responses on July 16 and July 20, 2015. Neither party has requested a hearing on the Motion, and as testimony or oral argument would not advance the Hearing Officer's understanding of the issues involved, this Ruling is being issued without a hearing pursuant to *Bureau of Special Education Appeals Hearing Rule VII(D)*.³ For the reasons set forth below, Taunton's Motion to Dismiss is hereby DENIED.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On July 1, 2015 the Parent of Maurice filed a Hearing Request with the Bureau of Special Education Appeals ("BSEA") against the District, the Department of Children and Families ("DCF"), and the May Institute.⁴ In his request, the Parent enumerated multiple ways in which he believed the defendants had violated Maurice's educational rights and his parental rights. The

¹ "Maurice" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

² Taunton Public Schools ("Taunton" or "the District") captioned its Motion a Motion to Dismiss with Prejudice and Objection to Sufficiency of the Hearing Request and noted that it also constituted the District's Response to the Parent's Hearing Request. This Hearing Officer overruled the District's Objection to the Sufficiency of the Hearing Request by Order on July 16, 2015.

³ A Conference Call was held in this matter on July 21, 2015. Although the parties both represented that to their knowledge, the Juvenile Court dismissed the Care and Protection case involving Maurice and his family last week, neither party has provided written confirmation to this effect at this time. This issue is not determinative of the outcome of the present Motion.

⁴ Although his Hearing Request included allegations against the Department of Children and Families ("DCF") and the May Institute, the Parent has not included these defendants in subsequent correspondence with the Bureau of Special Education Appeals ("BSEA"). Neither DCF nor the May Institute has filed an Answer to the Hearing Request.

allegations pertinent to these proceedings are, essentially, that the District's placement of Maurice at the May Institute resulted from an Individualized Education Program ("IEP") that was not reasonably calculated to provide Maurice with a free, appropriate public education, and that Parent had been denied the opportunity to participate fully in the special education process regarding his son.

On July 9, 2015, the District filed its Response to the Hearing Request, which also constituted its Motion to Dismiss and an Objection to the Sufficiency of the Hearing Request. In essence, the District argued that Maurice was in the custody of DCF; that Parent had neither custodial nor education decision making rights regarding Maurice; and that consequently the BSEA lacked jurisdiction over Parent's Hearing Request. In support of its Motion, the District submitted Juvenile Court Orders dated July 23, 2014 and May 28, 2015 committing Maurice to the custody of DCF.⁵ It also submitted a letter from the Massachusetts Department of Elementary and Secondary Education Special Education Surrogate Parent Program addressed to an individual named Margaret Coulombe, dated August 6, 2014, appointing her as the Special Education Surrogate Parent ("SESP") for Maurice.⁶

In his Opposition to the District's Motion, filed on July 13, 2015, Parent asserted that his son was without a signed IEP and objected to the District's submission of juvenile court records. He argued that these records were not reliable, that Maurice had been returned home, and that Ms. Coulombe did not have the authority to make educational decisions concerning his son.⁷

DISCUSSION

A. Legal Standards

The outcome of the District's Motion is governed by the application of three legal standards: the standard by which a Motion to Dismiss is evaluated; regulations concerning BSEA jurisdiction; and regulations and policies governing educational decision-making authority for children involved with DCF.

i. Standard for Ruling on Motion to Dismiss

⁵ Motion to Dismiss, Ex. 2.

⁶ Motion to Dismiss, Ex. 1.

⁷ Parent made additional arguments regarding the Care and Protection case involving his family, his parental rights, the failure of DCF and the May Institute to respond to his Hearing Request, and his treatment by the District. As those allegations are not within the jurisdiction of the BSEA I do not address them. Parent has submitted several additional letters to the BSEA, none of which is relevant to the Motion and they therefore are not discussed further.

Pursuant to the *Standard Adjudicatory Rules of Practice and Procedure*, 801 CMR 1.01(7)(g) (3) and Rule 17B of the BSEA *Hearing Rules for Special Education Appeals*, a hearing officer may allow a motion to dismiss if the party requesting the appeal fails to state a claim on which relief can be granted. This rule is analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure and as such hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. Specifically, what is required to survive a motion to dismiss “are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”⁸ In evaluating the complaint, the hearing officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor.”⁹ These “[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . .”¹⁰

ii. BSEA Jurisdiction

The BSEA has jurisdiction over requests for hearing filed by a “parent or school district . . . on any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities. A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973. . . .”¹¹

iii. Authority to Make Educational Decisions

Massachusetts regulations recognize that the term “Parent” refers to a child’s mother or father, but further define the term “for purposes of special educational decision-making,” in pertinent part, as “father, mother, legal guardian, person acting as a parent of the child, foster parent, or an educational surrogate parent appointed in accordance with federal law.”¹²

Because Parent’s Hearing Request alludes to the involvement of DCF in his child’s education, I turn to DCF regulations and policies. DCF regulations regarding advocacy on behalf

⁸ *Iannocchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁹ *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995).

¹⁰ *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted).

¹¹ 603 CMR 28.08(3)(a).

¹² 603 CMR 28.02(15).

of children with special needs in DCF care or custody allow for educational decision-making authority to lie with one of several classes of individuals. These include an educational advocate appointed by an authorized educational advocacy program (a SESP); a foster parent;¹³ or the child's parent or legal guardian.¹⁴

B. Application of Legal Standards

To survive a motion to dismiss, Parent need only make “factual allegations plausibly suggesting . . . an entitlement to relief.”¹⁵ In determining whether he has met this burden I must take his allegations as true, as well as any inferences that may be drawn from them, even if the allegations are doubtful in fact.¹⁶

Parent's Hearing Request alleges that due to the involvement of DCF in his family's life, he has been deprived of the opportunity to make educational decisions for Maurice. Parent also contends that he has custody of his son and that the authority to make these decisions rests with him.

¹³ See 110 CMR 7.402(1), as clarified by DCF Policy # 97-002, *Education Policy for Children Birth through 22*, Appendix B, *Guidance on Appointment of Special Education Surrogate Parents* (rev. Jan. 2013) [hereinafter “DCF Guidance”] (providing that for a child in DCF custody, the educational advocate may be a foster parent or “an educational advocate appointed by an authorized educational advocacy program established by the Department of Education pursuant to 20 U.S.C. § 1401”). In conjunction with 20 U.S.C. § 1401, as explained in the DCF Guidance, Massachusetts provides for the appointment of a Special Education Surrogate Parent (“SESP”) by the Department of Elementary and Secondary Education. See also 110 CMR 7.402(2) (For children in its care, DCF “shall not exercise special education parental rights” unless specific language in the Voluntary Placement Agreement delegates that authority to DCF and/or DCF has requested such delegation because “an assessment has determined that exercise of those parental rights is essential to the provision of social services to the family”).

¹⁴ See DCF Guidance, which provides for the appointment of a SESP or a foster parent as educational decision maker for a child in DCF custody in circumstances where “DCF determines that the child's parent should not continue in the role of educational decision maker.”

¹⁵ *Iannocchino v. Ford Motor Co.*, 451 Mass. at 636 (internal citation and quotation marks omitted).

¹⁶ See *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. at 223; *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. at 407.

The family's involvement with DCF does not necessarily indicate that Parent lacks the authority to make educational decisions for Maurice.¹⁷ As such, taking his allegations as true, I cannot determine at this time that Parent is not a "Parent" for purposes of BSEA jurisdiction over his Hearing Request.

CONCLUSION

Upon consideration of Taunton Public Schools' Motion to Dismiss Parent's Hearing Request and Parent's Opposition thereto, as well as the relevant documents submitted by the parties, I cannot find that the BSEA lacks jurisdiction over this matter. The District's Motion to Dismiss is DENIED. Should this case proceed to Hearing, Parent will have the burden of establishing that he had the authority to make educational decisions on behalf of Maurice at the time he filed his Hearing Request on July 1, 2015, notwithstanding the District's assertions otherwise.

ORDER

The District's Motion to Dismiss Parent's Hearing Request is hereby DENIED.

Parent has requested that the Hearing be held in Taunton.¹⁸ If the District agrees to this request and timely expresses that agreement in writing, the Hearing will be held in Taunton. In the absence of such agreement, the default location is the Office of the BSEA in Boston. Should Parent timely submit documentation of a disability that precludes him from attending a Hearing in Boston, an alternate location may be selected over the objection of the District.

The case is scheduled for Hearing on August 5, 2015 at the BSEA, 1 Congress St, 11th floor, in Boston. It will begin at 10:00 AM.

Exhibits and witness lists are due July 29, 2015.

¹⁷ See DCF Guidance. Even if I were to consider Exhibits 1 and 2 submitted by the District on this point, they establish only that Maurice was in DCF custody between July 23, 2014 and May 28, 2015 (pending a hearing on July 15, 2015), and that on August 6, 2014, a SESP was appointed to make educational decisions on behalf of Maurice. The District has provided no information as to where the authority to make educational decisions on behalf of Maurice lay as of July 1, 2015; had it done so, its evidence could have been considered on a Motion for Summary Judgment.

¹⁸ Parent also requested, by letter dated July 16, 2015, that the Hearing be held in Raynham, but withdrew that request by letter dated July 23, 2015.

By the Hearing Officer:

Amy M. Reichbach
Dated: July 23, 2015