

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

In re: Maurice¹

BSEA #1600002

RULING ON TAUNTON PUBLIC SCHOOLS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Hearing Officer on the Motion of the Taunton Public Schools ("Taunton" or "the District") for Summary Judgment and Request for Order of Dismissal with Prejudice ("Motion for Summary Judgment"), filed on July 24, 2015. The Parent filed his Opposition to the District's Motion on July 27, 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)*.² For the reasons set forth below, Taunton's Motion for Summary Judgment is hereby ALLOWED. To the extent the District seeks an Order of Dismissal with Prejudice, its Request is 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.³ In his request, Parent enumerated multiple ways in which he believed the defendants had violated Maurice's educational rights and his own parental rights. The 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.

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

² A Conference Call was held in this matter on July 21, 2015 at which time the parties discussed the status of the case and of legal custody of Maurice.

³ Although his Hearing Request included allegations against the Department of Children and Families ("DCF") and the May Institute, Parent has not included these defendants in most of his subsequent correspondence with the Bureau of Special Education Appeals ("BSEA"). Neither DCF nor the May Institute has filed an Answer to the Hearing Request.

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 (“Response” or “Motion to Dismiss”). In its Response, the District asserted that the BSEA lacked jurisdiction over Parent’s Hearing Request because Maurice was in the custody of DCF at the time Parent filed his Hearing Request and Parent had neither custodial nor educational decision making rights regarding Maurice at that time. In his Opposition to the District’s Response, 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 in support of its Response. He argued that these records were not reliable, that Maurice had been returned home, and that the individual identified by the District as Maurice’s Special Education Surrogate Parent (SESP) did not have the authority to make educational decisions concerning his son.⁴ By Orders dated July 16 and July 23, 2015, this Hearing Officer overruled the District’s Objection and denied its Motion to Dismiss, respectively.

Following a Conference Call held in this matter on July 21, 2015, the District filed the present Motion for Summary Judgment, supported by five exhibits, as follows: (1) Juvenile Court Orders dated July 23, 2014 and May 28, 2015 committing Maurice to the custody of DCF;⁵ (2) 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 SESP for Maurice;⁶ (3) Maurice’s current IEP, which lists Ms. Coulombe, SESP, and Patrick Fitzgerald, DCF social worker, in the spaces reserved for Parent/Guardian Information;⁷ (4) an affidavit submitted by Ms. Coulombe stating that her appointment as SESP for Maurice began on August 6, 2014 and continued without interruption through July 15, 2015;⁸ and (5) a DCF Guidance on Appointment of Special Education Surrogate Parents (“DCF Guidance”).⁹ During the Conference Call on July 21, 2015, the parties informed this Hearing Officer that on July 15, 2015 the Care and Protection Petition

⁴ 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 Taunton Public Schools (“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 here and they therefore are not discussed further.

⁵ Motion for Summary Judgment and Request for Order of Dismissal with Prejudice (“Motion for Summary Judgment”) Ex. 1. This exhibit had been submitted previously in support of the District’s Motion to Dismiss.

⁶ Motion for Summary Judgment Ex. 2. This exhibit had been submitted previously in support of the District’s Motion to Dismiss.

⁷ Motion for Summary Judgment Ex. 3. The Individualized Education Program (IEP) is dated 11/21/14 to 11/20/15 and signed by Ms. Coulombe.

⁸ Motion for Summary Judgment Ex. 4. This affidavit was signed on July 22, 2015.

⁹ Motion for Summary Judgment Ex. 5, 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”].

under which DCF was awarded custody of Maurice had been dismissed and custody of Maurice returned to his parents.¹⁰

In his Opposition to the District's Motion to Dismiss, filed on July 27, 2015, Parent argued that the IEP under which Maurice was placed at the May Institute was fraudulent and in violation of special education laws because neither he nor his wife had consented to it, and that Maurice should be attending public school in Taunton rather than the May Institute in Randolph. In support of his Opposition, Parent submitted a May Institute document entitled "Emergency Contact Card" signed on June 27, 2015 listing Maurice's home address and his Father as Parent/Guardian,¹¹ and a document that appears to be a letter from the Massachusetts Department of Elementary and Secondary Education ("DESE") addressed to Parent regarding an incident report received by DESE from the South Coast Educational Collaborative for an incident that took place on August 7, 2013 involving Maurice.¹²

DISCUSSION

A. Legal Standard for Summary Judgment¹³

Pursuant to 801 CMR 1.01(7)(h), Summary Decision may be granted when there is "no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law." This rule of administrative practice is modeled after Rule 56 –

¹⁰ To date, neither party has provided written confirmation of this dismissal or transfer of custody, but the District noted in its Motion for Summary Judgment that for purposes of the Motion it does not dispute this fact. Moreover this issue is not determinative of the outcome of the present Motion for Summary Judgment, because although Parent argues that the Department of Children and Families ("DCF") should not have had custody of Maurice, he has not asserted that the Care and Protection petition had been dismissed or that Maurice was legally in his custody at the time he filed the Hearing Request on July 1, 2015.

¹¹ The document appears to be signed by Maurice's mother/Parent's wife, as she has the same last name as Parent and Maurice, and lists both her and Parent as Parents/Guardians. Opposition to Motion for Summary Judgment Ex. 1.

¹² Opposition to Motion for Summary Judgment Ex. 2.

¹³ Counsel for the District captioned her motion a Motion for Summary Judgment, but she cited the legal standards that govern a motion to dismiss and requested relief in the form of dismissal with prejudice. As the District submitted with its Motion evidence in the form of Individualized Education Programs (IEPs), court documents, and an affidavit and asked that I consider its evidence in my ruling, I have interpreted the District's Motion as a Motion for Summary Judgment and will apply the relevant legal standards. Compare FRCP 12(b)(6) (fact finder relies solely on pleadings to determine the facts for purposes of deciding a motion to dismiss) with FRCP 56 (fact finder looks beyond pleadings to consider material such as affidavits and other documents to decide a motion for summary judgment).

Summary Judgment – of both the Massachusetts and Federal Rules of Civil Procedure.¹⁴ The party seeking summary judgment begins by demonstrating, with the support of its documents, that there is no genuine issue relating to the claim or defense. This party bears the burden of proof, and all evidence and inferences must be viewed in the light most favorable to the party opposing summary judgment.¹⁵

In response to a Motion for Summary Judgment, the adverse party “must set forth specific facts showing that there is a genuine issue for trial.”¹⁶ To survive this Motion and proceed to hearing, the adverse party must show that there is “sufficient evidence” in his favor that the fact finder could decide for him.¹⁷ “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”¹⁸

B. Standing and BSEA Jurisdiction

i. “Parent” for Purposes of Special Education Decision-Making Under Massachusetts Law

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. . . .”¹⁹

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

¹⁴ Federal Rule of Civil Procedure 56 authorizes the entry of summary judgment whenever it appears that “there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”

¹⁵ *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252 (1986).

¹⁶ *Id.* at 250.

¹⁷ *Id.* at 249.

¹⁸ *Id.* at 249-50.

¹⁹ 603 CMR 28.08(3)(a).

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.”²⁰

ii. Educational Decision Making for Children in DCF Custody

DCF regulations regarding advocacy on behalf of children with special needs in DCF 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;²¹ or the child’s parent or legal guardian.²² As explained in DCF’s Guidance, when DCF determines that the parent or guardian of a child in its custody should not continue in the role of educational decision maker and the child is not placed with a foster parent willing and able to assume that role, DCF may request that the DESE, which administers the Massachusetts Special Education Surrogate Parent Program, appoint a SESP for that child.²³

When a SESP has been appointed, she has “all the rights and responsibilities of a parent in making decisions regarding eligibility and services for special education of the assigned student.”²⁴ The appointment of a SESP “does not preclude a parent or parents from participating

²⁰ 603 CMR 28.02(15).

²¹ See 110 CMR 7.402(1), as clarified by the 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 (DESE).

²² See DCF Guidance at II(A), 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.”

²³ See *id.*

²⁴ 603 CMR 28.07(7)(a). In its Motion for Summary Judgment, the District cites to 34 CFR §300.30(b) in support of its position. According to this provision when the biological or adoptive parent is attempting to act as the parent within the special education process and more than one party is qualified to act as a “parent” for purposes of the regulation (i.e. a biological or adoptive parent and a surrogate parent, foster parent, or grandparent) the biological or adoptive parent is presumed to be the parent except if he “does not have legal authority to make educational decisions for the child.” *Id.* at §300.30(b)(1). The subsection provides for one way in which a party might demonstrate that the parent does not have this legal authority: “[i]f a judicial decree or order identifies a specific person or persons . . . to act as the ‘parent’ of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the ‘parent’ for purposes of this section.” *Id.* at §300.30(b)(2). No such judicial decree or order has been submitted to the BSEA by either party.

in their child's education," but the SESP is empowered to override parental preferences in the event of a conflict.²⁵

A SESP's appointment ends upon notification by the SESP program. "[W]here an SESP has been appointed for a child in DCF custody, and the child then leaves DCF custody, DCF will notify the SESP Program that the child has left DCF custody," and the SESP program, in turn, ends the SESP's appointment."²⁶

C. Application of Legal Standards and Regulations to Parent's Hearing Request Demonstrates that Parent Lacks Standing to Proceed

The District has submitted documents in the form of Juvenile Court Orders demonstrating that Maurice was in DCF custody as of July 1, 2015, the date Parent filed his Hearing Request.²⁷ Parent has produced no evidence to dispute this fact. As explained in my previous Order on the District's Motion to Dismiss, however, this is not sufficient for me to conclude that Parent did not have the authority to make educational decisions for Maurice at that time.

Although the District has not produced a judicial decree or order regarding the status of Parent's legal authority to make educational decisions for Maurice, it has submitted documentation that this authority lay with a SESP between August 6, 2014, when she was appointed by the DESE,²⁸ and July 15, 2015.²⁹ The IEP challenged by Parent was effective November 21, 2014 and was accepted by Ms. Coulombe during her appointment as Maurice's SESP.³⁰

²⁵ DCF Guidance at II(E) ("The appointment of an SESP does not preclude a parent or parents from participating in their child's education . . . The SESP should consider the concerns and wishes of the parent in special education decision-making, but is not bound by parental preferences.")

²⁶ DCF Guidance at II(B).

²⁷ See Motion for Summary Judgment Ex. 1, Juvenile Court Orders dated July 23, 2014 and May 28, 2015 committing Maurice to the custody of DCF.

²⁸ See Motion for Summary Judgment Ex. 2, Letter from DESE to Ms. Margaret Coulombe dated August 6, 2014, appointing her as SESP for Maurice, informing her (in accordance with 603 CMR 28.07(7)(a)) that she has "all the rights and responsibilities of a parent in matters relating to the special education process, including signatory rights."

²⁹ See Motion for Summary Judgment Ex. 4, Affidavit of Ms. Coulombe stating that her appointment "continued with interruption" from August 6, 2014 through July 15, 2015, in accordance with policies set forth in the DCF Guidance to the effect that a SESP's appointment terminates when the subject child leaves DCF custody, and DCF Guidance at II(B).

³⁰ See Motion for Summary Judgment Ex. 3, IEP for Maurice dated November 21, 2014 to November 20, 2015, signed by Ms. Coulombe, placing him at the May Institute.

Through the documents it submitted in support of its Motion for Summary Judgment, the District has demonstrated that Maurice was in the custody of DCF when Parent filed his Hearing Request at the BSEA on July 1, 2015 and that a SESP had the authority to make educational decisions for him at that time. Based on the evidence before me I have determined that the SESP, therefore, was the “parent” for purposes of educational decision-making at the time Maurice’s November 21, 2014 IEP placing him at the May Institute was developed, and continued as the “parent” for these purposes through the date on which the Hearing Request was filed. Parent has not shown that there is any evidence, much less “sufficient evidence” for me to find otherwise.³¹ Viewing all evidence and inferences in the light most favorable to the Parent, I conclude that the District has met its burden of proof:³² Parent did not have standing on July 1, 2015 to file a Hearing Request on Maurice’s behalf, because he did not have the authority to make educational decisions for Maurice at that time.

CONCLUSION

Upon consideration of Taunton Public Schools’ Motion for Summary Judgment and Request for Order of Dismissal with Prejudice and Parent’s Opposition thereto, as well as the relevant documents submitted by the parties, I find that there is no genuine issue of material fact that would preclude the entry of Summary Judgment for the District.

ORDER

Taunton Public Schools’ Motion for Summary Judgment is hereby ALLOWED.

To the extent the District seeks an Order of Dismissal with Prejudice, its Request is DENIED. The grant of summary judgment in its favor constitutes the agency’s final decision in this matter.

In light of my determination that no issues remain for hearing, I need not address Parent’s renewed request, filed on July 31, 2015, that the Hearing be held in Taunton rather than in Boston. The Hearing scheduled for August 5, 2015 is CANCELLED.

By the Hearing Officer:

³¹ See *Anderson v. Liberty Lobby, Inc.* 477 U.S. at 249.

³² See *id.* at 252.

Amy M. Reichbach
Dated: August 3, 2015