

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

**In re: Student v. Boston Public Schools**

**BSEA #2303331**

**RULING ON MASSACHUSETTS DEPARTMENT OF CHILDREN AND FAMILIES'  
MULTIPLE MOTIONS**

This matter comes before the Hearing Officer on the *Massachusetts Department of Children and Families' Motion to Reconsider Denial of Motion to Dismiss Department as a Party* (Motion to Reconsider), *Department of Children and Families' Request to Postpone Hearing* (Motion to Postpone), and *Department of Children and Families' Motion to Vacate Subpoena Duces Tecum* (Motion to Vacate) filed on November 8, 2022 (together, *Multiple Motions*). Also on November 8, Parent filed an opposition to the Motion to Postpone.<sup>1</sup> Via email dated same, the District noted its opposition to the Motion to Quash for the record.

None of the parties requested a hearing on the *Multiple Motions*, and, because a hearing would not advance the Hearing Officer's understanding of the issues, this Ruling is issued in accordance with BSEA Hearing Rule VII(D).

For the reasons set forth below, the Department of Children and Families' (DCF or the Department) *Multiple Motions* are hereby DENIED.

**RELEVANT FACTUAL BACKGROUND**

The following facts are not in dispute and are taken as true for the purposes of this *Ruling*. These facts may be subject to revision in subsequent proceedings.

Student is a 13-year-old, 8<sup>th</sup> grade student enrolled in Boston Public Schools. She has been diagnosed with Post-Traumatic Stress Disorder (PTSD), Attention-Deficit/ Hyperactivity

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<sup>1</sup> In said opposition Parent asserts that

“The significant concerns that warranted accelerated status at the time of filing on October 14, 2022, are still prevalent today. Since transitioning out of the around-the-clock residential program in July 2022 and attending St. Ann's as only a day student, [Student's] behavioral and emotional dysregulation has dramatically impacted her ability to engage in and access instruction and therapeutic supports at St. Ann's. She has been hospitalized three times, spending more than 40 days in hospital-based programs, receiving little to no academic instruction during those 40 days. At the present moment, [Student] continues to board at Boston Children's Hospital (BCH) where she meets criteria for inpatient level of care. [Student] has been unable to access any academic instruction since she began boarding on October 27, 2022. In addition to [Student's] inability to access her academics, the safety of [Student] and those around her is at significant risk. Prior to boarding at BCH, [Student] ran away from home earlier in the week, putting herself in danger. Furthermore, Parent received a notice, dated October 7, 2022, of Boston's Domestic Violence Unit bringing charges for assault and battery against [Student] for the severe level of physical aggression against the family. A clerk magistrate's hearing originally scheduled for November 3, 2022 has been postponed due to [Student's] current hospitalization.”

Disorder (ADHD), Oppositional Defiant Disorder (ODD), Generalized Anxiety Disorder (GAD), Major Depressive Disorder (MDD), Disruptive Mood Dysregulation Disorder (DMDD), a Communication Disability, a Specific Learning Disability, and Schizophreniform. Since July 2022, Student has been attending St. Ann's School as a day student. Student's history is significant for inpatient hospitalizations resulting from safety concerns identified by her community-based providers and Parent. Most of Student's unsafe and aggressive behaviors occur in the home, although there are also reports of Student acting out at school. Student's "triggers" include conflict with siblings and Parent. Student struggles to take her medication regularly at home but does so when attending CBATs as well as when she attended the residential setting during her extended evaluation.

Between January and July 2022, Student resided at St. Ann's, where she was placed by the Department of Children and Families (DCF) pursuant to a settlement agreement among Parent, DCF, and Boston. Parent also had prior involvement with DCF after filing Child Requiring Assistance (CRA) petitions in the Juvenile Court in 2017 and 2021. On July 22, 2022, Student transitioned home from St. Ann's residential placement and began attending St. Ann's therapeutic day school. Student has also attended CBATs at St. Ann's in August 2022 and the Wetzell Center in October 2022, respectively. On October 15, 2021, following a referral for more intensive in-home services made through DCF, the family began working with Youth Villages.

DCF is providing services through Youth Villages three hours per week. In addition, Parent utilizes approximately three additional hours per week in crisis support from Youth Villages. Parent has also had to contact mobile crisis weekly and to reach out to 911 in response to Student's unsafe behaviors in the home.

On October 14, Parent filed a Request for Hearing seeking accelerated status, which was granted on the same day. In her Request for Hearing, Parent asserts, in part, that "the current level of intensive home supports and placement at a therapeutic day school are not adequate to support [Student], and the inadequate level of services coupled with [Student's] current behaviors pose a significant safety risk to [Student], her immediate family, and school members." On November 1, 2022, following a hearing on the motion, the Hearing Officer allowed Boston Public Schools' *Motion to Join the Massachusetts Department of Children and Families*. On November 2, 2022, the Hearing Officer provided the parties with a statement of the issues for hearing and requested that the parties articulate their objections thereto by November 4, 2022. The issues were stated as follows:

1. Whether the current IEP for Student denies Student a free and appropriate public education (FAPE)?
2. If the answer to (1) is 'yes,' can the IEP be modified in such a way as to offer Student a FAPE in the least restrictive environment (LRE) at a therapeutic day program?
  - a. If the answer to (2) is 'yes,' are there any services which must be provided by the Department of Children and Families in addition to the program and related services to be provided by Boston?

3. If the answer to (2) is ‘no,’ does Student require a therapeutic residential school placement and corresponding Individualized Education Program (IEP) that can meet her unique needs as a child with a long history of significant mental health challenges and learning disabilities?

The November 1, 2022 Ruling allowing joinder of the Department of Children and Families was reiterated on November 3, 2022 via *Ruling on Massachusetts Department of Children and Families Objection to Statement of Issues and Motion to Dismiss Department as a Party*.

## LEGAL STANDARDS

### 1. Joinder

The BSEA has jurisdiction to resolve “differences of opinion among school districts, private schools, parents, and state agencies.”<sup>2</sup> Joinder is governed by the BSEA Hearing rules and Mass. Gen. Laws ch. 71B, §2A and § 3. Pursuant to BSEA *Hearing Rule I(J)*:

“Upon written request of a party, a Hearing Officer may allow for the joinder of a party in cases where complete relief cannot be granted among those who are already parties, or if the party being joined has an interest relating to the subject matter of the case and is so situated that the case cannot be disposed of in its absence. Factors considered in determination of joinder are: the risk of prejudice to the present parties in the absence of the proposed party; the range of alternatives for fashioning relief; the inadequacy of a judgment entered in the proposed party’s absence; and the existence of an alternative forum to resolve the issues.”

Parties often use this rule to join state agencies (such as DCF) that the BSEA may determine are responsible for providing services to a student in a matter before it, if such services are necessary for the student to access or benefit from a FAPE in the least restrictive environment.<sup>3</sup> In order to join a party, the Hearing Officer must determine whether “additional services from the state agency (over and above those services that are the responsibility of the school district) may be necessary to ensure that the student will be able to access or benefit from the school district’s special education program.”<sup>4</sup> Specifically,

“ [A 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 mental retardation [now the department of developmental services], the department of mental health, the department of public health, or any other state agency or program,

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<sup>2</sup> M.G.L. c 71B, § 2A; see 603 CMR 28.08(3).

<sup>3</sup> See M.G.L. c 71B, §§ 2A, 3; 603 CMR 28.08(3).

<sup>4</sup> See *Lowell Public Schools*, BSEA # 072412 (Crane 2007).

in addition to the program and related services to be provided by the school committee.”<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

## 2. *Postponement*

Pursuant to BSEA Hearing Rule I (D), a hearing to be assigned accelerated status in the following situations:

- a. When the health or safety of the student or others would be endangered by the delay; or
- b. When the special education services the student is currently receiving are sufficiently inadequate such that harm to the student is likely; or
- c. When the student is currently without an available educational program or the student’s program will be terminated or interrupted immediately.

Pursuant to BSEA Hearing Rule III (4) (a), for matters assigned accelerated status, no postponements will be granted

## 3. *Subpoenas*

Pursuant to BSEA Hearing Rule VII (C), a person receiving a subpoena may request that a Hearing Officer vacate or modify the subpoena. A Hearing Officer may so do upon a finding that the testimony or documents sought are not relevant to any matter in question or that the time or place specified for compliance or the breadth of the material sought imposes an undue burden on the person subpoenaed.

## **APPLICATION OF LEGAL STANDARDS:**

1. Massachusetts Department of Children and Families Motion to Reconsider Denial of Motion to Dismiss Department as a Party is DENIED.

DCF’s Motion to Reconsider asserts that

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<sup>5</sup> M.G.L. c 71B, § 3; see 603 CMR 28.08(3).

<sup>6</sup> See *In Re: Agawam Public Schools and Mass. Dept. of Children and Families (Ruling on Motion to Dismiss DCF as a Party)*, BSEA # 1403554 (Crane, 2013).

<sup>7</sup> See *In Re: Arlington Public Schools (Amended Ruling to Join DCF and DDS)*, BSEA # 1309210 (Crane, 2013).

“1. There is no pending 51A against Parent, as alleged on page three of the hearing officer’s ruling, dated November 3, 2022.

2. DCF has no obligation to provide services to a child who is not in its care or custody and the provision of voluntary services requires the agreement of both the Parent and DCF. See 110 CMR 4.01, et. seq ; 110 CMR 4.10, et. seq. ; 110 CMR 4.34 and G.L. c. 119 § 21; As the Department does not have care or custody of Student, an order to provide specific services, e.g., to ‘provide additional wrap-around services to enable Student to access her education’ would have the effect of requiring her engagement in DCF services in violation of DCF regulations and, perhaps more problematically, compel the Student’s (and Student’s family) involvement in a ‘voluntary’ process with DCF in which the student and parent may have no desire to participate.

3. Any argument that DCF might bear some responsibility for some services in the future can only be characterized as speculation, and therefore insufficient to require participation as a party at this time. The Department’s involvement is limited to providing an in-home therapy team from Youth Villages, the purpose of which is to serve as a temporary bridge to longer-term insurance-funded services. Parent has offered no indication that she will be seeking further services from the Department.”<sup>8</sup>

My rulings issued on November 1 and 2, 2022 explain my reasoning for joining DCF as a necessary party in this matter. My reasoning still holds. To reiterate, even in the absence of an active 51A on the family, and despite the fact that DCF has neither care or custody of Student, DCF has had and continues to have an open clinical case with Student and Mother and is currently “providing an in-home therapy team from Youth Villages.” Therefore, there is an existing legally cognizable relationship between DCF and Student.<sup>9</sup> Whereas in the instant case the BSEA may not order DCF to place Student in residential care, as discussed below, a potential order to expand the clinical services that the Department currently offers would not be inconsistent with DCF’s rules, regulations, and policies.

Here, DCF relies on “110 CMR 4.01, et. seq.; 110 CMR 4.10, et. seq.; 110 CMR 4.34, and G.L. c. 119 § 21” in its assertion that “DCF has no obligation to provide services to a child who is not in its care or custody and the provision of voluntary services requires the agreement of both the Parent and DCF.”

110 CMR 4.10, 110 CMR 4.34, and G.L. c. 119 § 21 are immaterial to the present matter. 110 CMR 4.10 addresses voluntary placement agreements and states that upon  
“the request of one or both parent(s) or parent substitute(s) and when supported by an assessment of the needs of the child which has been conducted by the Department, the Department may agree to provide substitute care for a child.

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<sup>8</sup> Internal citations omitted.

<sup>9</sup> See *In Re: Chicopee Public Schools and Abelard*, BSEA #063912 (Byrne, 2006); see also *In Re: Lynn Public Schools and Yakov (Ruling on Parent’s Motion to Join the Department of Children and Families)*, BSEA # 2205881 (Reichbach, 2022).

Every voluntary placement into substitute care shall be accomplished by completion of the Department's standard form of Voluntary Placement Agreement, between the parent(s) or parent substitute and the Department.”

110 CMR 4.34 addresses the Department’s custodial powers. G.L. c. 119 § 21 defines "custody" as “the power to: (1) determine a child's place of abode, medical care and education; (2) control visits to a child; and (3) consent to enlistments, marriages and other contracts otherwise requiring parental consent.” Neither the cited regulations nor the referenced statute is applicable in the present matter, because, as asserted by DCF, Student is neither in the custody or care of the Department.

110 CMR 4.01 addresses requests for services, stating that

“any person located within the Commonwealth may request social services from the Department. Persons requesting social services must complete a written application form. Persons needing assistance in completing the written application form shall be furnished with assistance by the Department.”

Here, Parent and Student are currently receiving services from DCF through Youth Villages. Thus, at some point, Parent sought, and the Department approved, services for Student. The only issue relative to DCF in the present matter whether Student requires “additional” services. The regulation cited by DCF is silent relative to securing additional services making this regulation inapposite.

DCF’s Motion to Reconsider is therefore DENIED.

2. Department of Children and Families’ Request to Postpone Hearing is DENIED.

Because this Hearing has been assigned accelerated status, it may not be postponed.<sup>10</sup> Moreover, as Student continues to board at Boston Medical Center due to unsafe and aggressive behaviors in the home, “the significant concerns that warranted accelerated status at the time of filing on October 14, 2022, are still prevalent today.” Therefore, DCF’s Motion to Postpone is DENIED.

3. Department of Children and Families’ Motion to Vacate Subpoena Duces Tecum is DENIED.

On November 2, 2022, a subpoena duces tecum was issued at the request of the Boston Public Schools, seeking that the Department to produce “a wide range of records regarding Student no later than November 9, 2022. DCF argues that the Department’s records are “the subject of statutory impoundments and privileges held by the student and her family members, and potentially third parties as well, and the Department is bound to hold this information as confidential.” Without the “data subject’s” consent, the material that is sought by way of the subpoena here is presumptively privileged and beyond the subpoena power of the BSEA. DCF cites to the following regulations to support its position: 110 CMR 12; M.G.L. c. 66A; M.G.L. c. 112, §§ 135A, 135B; M.G.L. c. 119, § 51E; M.G.L. c. 210, § 5D. Moreover, DCF contends that any release of such privileged records would have to be ordered by the Superior Court pursuant to M.G.L. 30A, § 12(5); 110 CMR 12. Last, DCF argues that the subpoena is overly broad, seeking discovery of “copies of all documents in the possession, custody, and/or control of the

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<sup>10</sup> BSEA Hearing Rule III (4) (a).

Department of Children and Families” concerning the student, including “complete copies of any and all records, reports, evaluations, assessments, whether formal or informal, investigation findings, correspondence, electronic mail messages, telephone records, tape recordings, video recordings, photographs, notes, minutes, letters, and memoranda.” DCF asserts, “Undoubtedly, portions of the department’s case record sought by the subpoena include significant documentation concerning matters that bear no relevance to the BSEA proceedings.”

Here, I find no basis for vacating the Subpoena in its entirety.<sup>11</sup> DCF records are not completely immune from subpoenas. 110 CMR 12.07 only instructs that “[w]henver any Department records, documents or information are sought by compulsory legal process (subpoena, etc.) in any civil proceeding (for criminal proceedings, see 110 CMR 4.53) the Department shall not release such records until the Department has made reasonable efforts to notify each data subject identified in the records, so that he/she has reasonable time to seek to have the process quashed, in accordance with M.G.L. c. 66A, § 2(k).”<sup>12</sup>

In addition, whereas DCF asserts the confidentiality of records pursuant to M.G.L. c. 210, § 5D, said statute only applies to adoption records. Similarly, M.G.L. c. 112, §§ 135A and 135 B, applies to communications between a social worker and a client only. Pursuant to M.G.L. c. 119, § 51E and 110 CMR 12.08, copies of 51A reports and 51B investigations shall be made available only if one of the following is obtained:

“(a) The written consent of the child's parent(s) ("parent" shall mean the child's mother, or the child's father as "father" is defined by M.G.L. c. 209C, § 6) or guardian(s) or counsel. Regardless of whether parental or guardian consent is obtained, the Commissioner or his/her designee shall have the discretionary authority to grant or deny the request in order to promote and protect the best interests of the child.

(b) The written approval of the Commissioner or his/her designee.

(c) An order of a court of competent jurisdiction. A ‘court of competent jurisdiction; may include an out-of-state (non-Massachusetts) court, or a military court, so long as that court has some form of jurisdiction over the subject matter or the party(s).”

Hence, “it plainly is within the department's power to obtain the necessary approval” in order to comply with the issued subpoena.<sup>13</sup>

While the BSEA has no power to enforce a subpoena, BSEA Hearing Rule VIII(D) instructs that if “any person fails to comply with a properly issued subpoena, the party requesting the issuance of the subpoena may petition the Superior Court for an order requiring compliance with the

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<sup>11</sup> See BSEA Hearing Rule VII (C).

<sup>12</sup> Emphasis added.

<sup>13</sup> *Rhea R. v. Dep't of Child. & Fams.*, 98 Mass. App. Ct. 901, 902, 154 N.E.3d 969, 971 (2020), review denied, 486 Mass. 1113, 163 N.E.3d 394 (2021).

terms of the subpoena.” Therefore, while I am unable to enforce the Subpoena *Duces Tecum*, I find no reason to vacate it, and Boson may petition the Superior Court for a compliance order.

DCF’s argument that the subpoena is overly broad is similarly unpersuasive. With respect to the scope of discovery, the BSEA looks to Rules 26(b)(1) of both the Massachusetts and Federal Rules of Civil Procedure for guidance. Specifically, Massachusetts Rule 26(b)(1) provides that

“[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...It is not ground for objection that the information sought will be inadmissible at the trial if...[it]...appears reasonably calculated to lead to the discovery of admissible evidence.”

Federal Rule of Civil Procedure Rule 26(b)(1) allows discovery of

“...any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues..., the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information...need not be admissible in evidence to be discoverable.”

The BSEA has interpreted the applicable discovery provisions liberally, to enable parties to thoroughly prepare for hearing or otherwise resolve the dispute.<sup>14</sup>

The Hearing Officer is not in possession of the Subpoena *Duces Tecum* at issue. Therefore, I am unable to limit it at this point.<sup>15</sup> In light of the short timeline for Hearing, I instruct the parties to work together to limit the requested documents to those relevant to the present matter based on the issues delineated for Hearing. If the parties are unsuccessful, DCF is instructed to file a motion to limit the subpoena indicating which portions of the record are irrelevant.

**ORDER:**

*Massachusetts Department of Children and Families’ Motion to Reconsider Denial of Motion to Dismiss Department as a Party* is hereby DENIED. *Department of Children and Families’ Request to Postpone Hearing* is hereby DENIED. *Department of Children and Families’ Motion to Vacate Subpoena Duces Tecum* is also DENIED.

By the Hearing Officer,

/s/ Alina Kantor Nir

Alina Kantor Nir

Dated: November 9, 2022

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<sup>14</sup> See *In Re: Student v. Andover Public Schools*, BSEA # 17-06174 (Figueroa, 2017).

<sup>15</sup> See BSEA Hearing Rule VII (C); see also (g) in accordance with the provisions of M.G.L. c. 30A, § 12.