

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO.

MASSACHUSETTS OFFICE OF
CHILD CARE SERVICES,

Plaintiff,

v.

THE DESISTO SCHOOL, INC. and
A. MICHAEL DESISTO,

Defendants.

PETITION FOR EQUITABLE REMEDIES

Preliminary Statement and Jurisdiction

Pursuant to G. L. c. 28A, §§ 11 and 16, the Massachusetts Office of Child Care Services (“OCCS”) seeks interim and final relief against The DeSisto School, Inc. (“DeSisto”), which is operating an unlicensed group care facility in Stockbridge, Massachusetts and against its Founder, A. Michael DeSisto. Through the entry of such relief, OCCS seeks to require that Defendants provide for the safety of the students enrolled at the school and meet all legal standards for operating a group care facility. Recent visits to and inspections of DeSisto by OCCS’s licensing staff have revealed practices and conditions at the school that threaten the physical safety and welfare of the students enrolled there.

Massachusetts law mandates that all group care facilities must have a license from OCCS to operate. G.L. c. 28A, § 11. In recognition of the vulnerable nature of special

needs children, the law requires that each private residential school with 30% or more of its students having special needs is regulated as a group care facility. Defendants are operating a private residential school whose student body consists of substantially over 30% special needs students and is therefore a group care facility subject to licensure by OCCS. G.L. c. 28A, § 9; 102 C.M.R. § 3.02. To date, Defendants have not sought nor obtained a license to operate a group care facility, and are thus operating in violation of G.L. c. 28A, § 11. The Superior Court is authorized to enjoin violations of G.L. c. 28A, § 11, or take such other action as equity and justice may require: Id., § 16.

OCCS requests interim equitable relief to immediately address dangerous practices and conditions at DeSisto. Specifically, given the serious diagnoses and needs of the students, staffing levels fail to meet minimally acceptable standards of safety and protection; staff are untrained in how to safely care for and supervise the students,

including how to administer a restraint that does not present a high risk of injury or asphyxiation; the school uses discipline that is overly punitive and dangerous; and students are routinely denied their basic human rights through strip searches, denial of permission to use bathroom facilities in privacy, and denial of all means of communication with family members.

OCCS also seeks permanent relief, after a determination on the merits, to ensure the continuing safety of all students enrolled at the school.

I. The Parties

1. OCCS is an agency of the Commonwealth of Massachusetts established pursuant to G.L. c. 28A. Its central administrative office is located in Boston, Massachusetts. OCCS is the state agency empowered to regulate and promote safe,

healthy and responsible substitute care for children within the Commonwealth of Massachusetts. G.L. c. 28A, §§ 1 et seq.

2. DeSisto is a corporation doing business under the name "DeSisto School" as a private residential school located on Route 183 in Stockbridge, Massachusetts.

3. A. Michael DeSisto is a natural person whose last known place of residence and business is Route 183, Stockbridge, Massachusetts. On information and belief, he founded DeSisto, is President of its Board, and controls its affairs.

II. Relating Administrative and Judicial Review Proceedings

4. After OCCS issued an Order for DeSisto to show cause why it was not subject to licensure by OCCS, DeSisto sought a hearing before the Division of Administrative Law Appeals ("DALA").

5. In May of 2001, DALA entered discovery sanctions against DeSisto, due to its repeated failure to comply with discovery orders.

6. In June of 2001, OCCS moved for summary decision, on the ground that more than 30% of the students had special needs. DeSisto filed a response in August of 2001. On September 5, 2001, DALA granted OCCS's motion for summary decision and issued a recommended decision that DeSisto be deemed subject to OCCS's licensing authority and obliged to take all steps necessary to secure a license or else close the school. OCCS issued its final agency decision on October 11, 2001, finding that DeSisto was subject to OCCS's licensing authority. See Exh. 1.

7. On October 12, 2001, DeSisto appealed to the Superior Court from OCCS's decision, pursuant to G. L. c. 30A, § 14, seeking judicial review of OCCS' decision and in the meantime to stay any licensing activity. On October 18, 2001, the

Superior Court (Volterra, J.) denied DeSisto's motion to stay, finding that DeSisto had failed to demonstrate it was likely to succeed on the merits of its appeal; that the public interest would be harmed by delay; and that DeSisto had failed to demonstrate irreparable harm. See Exh. 2.

8. On October 19, 2001, OCCS's licensing staff notified DeSisto that staff would be at the school to commence the agency's licensing activity on October 22. When licensing staff arrived at the school, OCCS did not permit them to begin their licensing work. As a result, OCCS filed a Complaint for Civil Contempt. After conducting a hearing, this Court (Volterra, J.) ruled that DeSisto must allow OCCS to commence its licensing study in accordance with the Court's prior order.

9. OCCS licensing staff visited the school on October 24 and 25, and November 1, 6, and 20, 2001. During the course of these visits, the licensing staff

interviewed staff and students, reviewed personnel and student records and medication logs, inspected the physical facilities on the campus, and provided technical assistance to the school.

III. The Facts

10. DeSisto's students have exhibited a range of special needs, including: bulimia, anorexia nervosa, depression, paranoid schizophrenia, bi-polar disorder, self-mutilation, learning disabilities, Tourette's syndrome, and alcohol and drug abuse. Many students have histories of juvenile court involvement, psychiatric hospitalization, and/or suicide attempts. In connection with its licensing activities, OCCS works with residential programs to develop appropriate staff/student ratios to enable a program to protect and

supervise the residents. See 102 C.M.R. § 3.07(1, 2) (Exh. 3); Staffing Ratio Policy (Exh. 4).

11. By analyzing the current number of DeSisto's students at each dorm, their diagnoses and needs, and the physical layout of the campus, OCCS determined that an appropriate average staff to resident ratio for DeSisto is currently one staff member to every five students (1:5) during the day and evenings and one staff member to every ten students (1:10) during the night.

12. As a result, OCCS determined that between 52 and 57 full time equivalent staff members are required to safely supervise the approximately ninety students currently enrolled at DeSisto.

13. DeSisto presently has only 27 direct care staff, half of the number of staff necessary to adequately protect the residents. See Exh. 5. Consequently, DeSisto is

chronically understaffing its program, thus placing the residents in jeopardy.

14. There are three awake staff on the overnight shift from Monday through Thursday, leaving DeSisto six staff members short to maintain safe supervision levels. On Friday through Sunday nights, there is only one overnight awake staff, eight short of the staff necessary to adequately protect the residents.

15. This chronic lack of staffing results in dangerous practices. One of these practices, which DeSisto refers to as "shifting," involves the placement of a mattress for a student or staff member in front of the dormitory bedroom door, thereby preventing students from exiting the room. DeSisto employs this practice when it deems a student at risk for running away or acting out. DeSisto uses bars and furniture to blockade windows and also routinely places mattresses for students on the floor, to prevent runaways and as

a means of discipline, thereby placing more students in a room than it can safely accommodate. In the event of a fire, these practices would present a risk of serious injury or death. The use of adequate levels of overnight staffing is required to eliminate the use of these practices.

16. As a result of understaffing, students are used to supervise other students in an inappropriate and unsafe manner. Students are routinely used to assist staff in restraining students by holding limbs or otherwise performing restraints. The use of students to assist in restraints is an extremely dangerous practice, associated with a high risk of serious injury or death for the student being restrained and high risk of injury for an untrained student administering the restraint. This practice fails to meet OCCS standards and fails to meet nationally recognized standards for restraints. Proper staffing levels would eliminate the need to use this practice.

17. ~~Students are also used to strip search other students when students are new~~ to the school. One student reported that he is responsible for bringing medications from the nurse's office to the dormitory, counting the medication and preparing it for distribution to other students. In one recent incident, it was a student who called another student's parents to inform them their son had run away from the program. This use of students (who are paying tuition of approximately \$65,000 a year to have their own needs met by the DeSisto program) goes well beyond any peer mentoring role and jeopardizes the students' well being.

18. DeSisto uses other punitive practices, such as "hand holding," "spacing," and "grouping," when a student has acted out or tried to run away. DeSisto would not need to resort to these practices with proper staffing levels. "Spacing" and "grouping"

mean students are responsible for staying within an arm's length of each other. If they do not maintain "spacing," they may be "hand held," such that they are required to hold hands with another student when they go anywhere, including the bathroom and the showers. While under this restriction, students do not attend classes.

19. No staff member at DeSisto has the necessary qualifications under OCCS regulations to have unsupervised contact with students. Before any staff member may have sole responsibility for residents in his or her care, that person must have: an orientation to the characteristics of children served; training in symptoms and behavioral signs of emotional disturbance, drug overdoses, and alcohol intoxication; training in procedures for reporting suspected incidents of child abuse and neglect; orientation and certification in CPR and First Aid procedures; and training in universal precautions, infection control procedures, and the program's policies on medication, run away

students, and behavior management. See 102 C.M.R. § 3.04(7). DeSisto provides no orientation on most of these topics, and no staff member has current CPR and First Aid certification.

20. In addition, all staff must have a background free of any conduct that would have an adverse impact upon their ability to care for residents, including criminal convictions. See 102 C.M.R. § 1.05(2). DeSisto was not able to produce documentation to OCCS that it conducted a criminal background check for 17 of its 27 staff members. Moreover, DeSisto lacks written policies and plans that are necessary to meet the needs of its students, such as policies and plans for employing restraint of students; reporting suspected child abuse or neglect; providing psychological, social and psychiatric services; meeting students' emergency medical needs; and rules for employing behavioral

management; governing personnel, and implementing staff training. See 102 CMR § 3.03.

Untrained staff also provide “group therapy” for students. DeSisto’s lack of training, background checks, and written policy and protocol places its students at risk.

21. No staff member of DeSisto has the necessary training to assist in restraining a student. Under OCCS’s regulations, staff initially must have 16 hours of training in preventing and safely administering a restraint and must have eight hours of refresher training each year. See 102 C.M.R. § 3.04 (7).

22. Under OCCS regulations, a school may not restrain a student unless the student acts in a manner that poses a danger to self or others, and no other intervention has averted or is likely to avert the danger. 102 C.M.R. § 3.07. A restraint may not continue for over 20 minutes without the approval of the chief administrator for a program or his or her designee, and the school must constantly monitor the student’s physical condition. 102 C.M.R. § 3.07. In adopting these standards for initiating a restraint,

OCCS recognizes that, even with trained staff, restraints are potentially dangerous to perform, and that every effort should be made to de-escalate the student’s behavior and avoid the restraint. If it is not possible to avoid the restraint, it should not continue for any longer time than is necessary. In addition, under OCCS regulations, no student may be restrained for purposes of punishment or non-compliance with a program rule, staff directive, or expectation. See 102 C.M.R. § 3.07(7)(j)(2 and 3).

23. DeSisto routinely restrains students for mere disobedience and for lengthy periods of time. This practice violates OCCS regulations and national standards regarding restraint. DeSisto’s incident reports reveal the following restraints: a student who had refused to stop leaning against a wall was restrained for several hours; a student remained

in a three-person restraint for an entire day; and a student who had thrown a plate and engaged in a verbal argument was restrained for five and a half hours. DeSisto's use of untrained staff and students to restrain students for lengthy periods of time creates an extreme risk of injury and even death. DeSisto's use of restraint for mere disobedience is excessively punitive.

24. "Cornering," another behavior management technique used at DeSisto (also referred to as "time out"), is punitive and dangerous. This technique, which imposes periods of isolation and seclusion for up to months at a time, contravenes the applicable regulations. See 102 C.M.R. § 3.07(7)(k). Cornering involves the practice of having a student sit on a metal chair facing the corner; during "time outs" the student's chair faces outward. While in the corner, the student may not speak unless given permission, may not make eye contact, may not receive communication from family members, and may not attend classes.

25. DeSisto "cornered" one student, whose diagnoses included bi-polar disorder, ADHD, and impulse control disorder, for weeks on end. As a result, the student became depressed, his mood-stabilizing medication fell below therapeutic levels, and he began to defecate and urinate on himself. This student was taken from the "corner" to the hospital for treatment of pneumonia and was then returned from the emergency room to the "corner," rather than to his bed. In response to OCCS's concerns regarding "cornering," DeSisto continued to use the same technique, merely renaming it "renewal" or "reflecting."

26. DeSisto also denies students basic human rights by conducting strip searches and by having students use the toilet in the presence of staff and/or fellow

students. DeSisto also has its students routinely take group showers, denying them privacy and leading to instances of sexual abuse. DeSisto also gives students' possessions to charity if they leave the program without permission for over 24 hours. DeSisto also routinely withholds class credits and transcripts when a student withdraws from the school.

27. DeSisto also routinely deprives students of human rights when it "farms" them, by sending them to a separate dormitory (which it calls the "farm") or by "farming" the dormitory in which they live. DeSisto has "farmed" students for days, weeks, months, and even for more than one year. When DeSisto "farms" a student, he or she may not attend classes; must wear a "Dickie" style jumpsuit; must go to the bathroom as a group with other farmed students; may be deprived of food and water for up to eight hours until he or she completes chores; and may have no contact with home, for months at a time.

28. DeSisto denies students' basic human rights by depriving them of minimal communication and visitation with family members, as a form of punishment. DeSisto staff monitor all calls for new students, disconnecting calls if the student complains about a DeSisto practice. DeSisto only allows new students one ten-minute phone call per week. If a student complains about a school practice, staff routinely informs parents that their child has fabricated the event and is attempting to manipulate the parent into withdrawing the student from the school. If a parent complains about a school practice, DeSisto may "expel" the parent, thereby denying contact with their child or may even terminate the student from the program. DeSisto has also disciplined students for making statements about what they have experienced or pressured them into recanting such statements.

DeSisto routinely censors and withholds mail from students and restricts family visits. Its students frequently do not go home for holidays or other visits.

29. DeSisto regularly prevents students from attending classes when they are being disciplined and may suspend classes for weeks at a time while students pursue other activities. The cessation of formal education during disciplinary periods is against long-standing federal policy.

30. DeSisto engages in other conditions and practices that fail to meet OCCS licensing conditions and legal standards.

31. The above conditions and practice put the students enrolled at DeSisto at immediate risk of irreparable harm.

IV. Claims for Relief (Against All Defendants)

32. OCCS repeats and incorporates by reference paragraphs 1 through 31, as though fully set forth herein.

33. Massachusetts law mandates that all group care facilities must have a license from OCCS to operate. G.L. c. 28A, § 11. In recognition of the vulnerable nature of special needs children, the law requires that each private residential school with 30% or more of its students having special needs be regulated as a group care facility. 102 CMR 3.02.

34. DeSisto is operating a private residential school whose student body consists of substantially over 30% special needs students and is therefore a group care facility. G.L. c. 28A, § 9; 102 C.M.R. § 3.02.

35. To date, DeSisto and Mr. DeSisto have not sought or obtained a license to operate a group care facility, and DeSisto is thus operating in violation of G.L. c. 28A, §

11. The Superior Court is authorized to enjoin violations of G.L. c. 28A, § 11, or take such other action as equity and justice may require. Id., § 16.

V. Requests for Relief

WHEREFORE, OCCS requests that the Court issue orders for the following forms of interim and final relief:

A. Immediate Interim Relief

Issue the following preliminary orders, effective immediately, pending a decision on the merits of this petition:

1. Afford OCCS continuing access to the DeSisto campus, records, staff, students, and physical facilities; authorize OCCS to coordinate with school district and other funding sources as well as other pertinent agencies to address issues raised through this petition.

~~2. Authorize OCCS to designate a person or persons or entity or entities to assist~~
it in the review and inspection of the DeSisto campus, records, staff, students, and physical facilities and to ensure compliance with Court orders; and provide said person(s) or entity(ies) with full access thereto and with office space and telephone access on site.

3. Require the Defendants to pay for the travel expenses, lodging and meals of said person(s) or entity(ies), as reasonably incurred in the course of assisting OCCS.

4. Order that the Defendants cease and desist from the following, effective immediately:

- (a) allowing students to assist in or implement a restraint;
- (b) strip-searching students;

(c) separating a student from the group for over thirty minutes without written approval from a licensed medical or mental health professional, specifying the need to continue separation;

(d) having a staff or student sleep directly in front of or behind a dormitory bedroom door or barricading doors or windows;

(e) withholding food or liquids from students as a form of punishment; or serving students fewer than three meals a day; or serving students different meals, unless there is a medical reason documented by a medical professional in the student's records;

(f) preventing or restricting any student from the opportunity to visit with family or other persons, unless such a restriction is ordered by a court of proper jurisdiction or documented for a therapeutic reason in an individual's service plan, provided that such persons whose visitation is restricted or denied receive a written explanation from the program as to the reasons therefore.

5. Order that the Defendants do the following, effective immediately:

(a) ensure that the number of students sleeping in a room comports with the applicable fire code and OCCS regulations;

(b) provide all students with a bed and mattress to sleep on;

(c) provide all direct care staff with an orientation in CPR and First Aid, conducted by a certified trainer;

(d) allow all students to use bathroom and shower facilities in private;

(e) provide each student with three outgoing unmonitored phone calls a week to family, and with unrestricted outgoing and incoming phone calls from attorneys, clergy and rabbis, and social workers;

(f) allow each student to open and send mail unread by staff except when a restriction is necessary to achieve a documented therapeutic goal, provided that staff may open and inspect a student's mail for contraband, but only in the student's presence, and provide that in the event that any mail is opened, a copy must be returned to sender with reasons therefore;

(g) work with OCCS or its designee to adopt a safe restraint technique
refrain from using any restraint technique unless a student is acting in a manner that poses a demonstrable danger to the student or others;

(h) issue reports to OCCS of all restraints, on the OCCS incident report form, within 24 hours of administering the restraint;

(i) issue a weekly report to OCCS and the Court on the current status of DeSisto's staffing and its hiring process; and

(j) submit an application to OCCS for a license.

B. Additional Interim Relief

Order that the Defendants do the following, within 45 days from the date on which the Court enters an order for such relief:

6. Require that the Defendants hire an adequate number of qualified staff, in accordance with OCCS regulations and policy, to care for the number of students enrolled, and adopt a written schedule for direct-care staff, in a form approved by OCCS, to provide twenty-four hour coverage, seven days a week.

7. Arrange for all staff who may assist or perform a restraint to be trained for a minimum of 16 hours in the prevention and proper use of restraints by a currently certified trainer, with a minimum of two direct-care staff members certified as restraint trainers.

8. Adopt and implement a restraint policy and a policy for separating students from the group, in a manner approved by OCCS.

9. Obtain certification in First Aid and CPR for all direct-care staff who have been at DeSisto School for at least six months.

10. Perform a criminal background check for all staff who have potential for unsupervised contact with students, to be conducted in accordance with the standards set forth in OCCS's regulations, and document in personnel records the justification for hiring any such person with a criminal background.

11. Submit for review by OCCS a statement defining the school's rules, policies, and procedures for behavior management.

12. Establish a visitation and communication policy, in a form approved by OCCS, and provide copies of the approved policy to all residents, families and referral sources.

OCCS reserves the right to seek further injunctive and other equitable relief as conditions warrant.

C. Final Relief

13. If OCCS determines that the Defendants have not promptly and fully complied with the interim relief, such that they cannot provide for the safety of the students enrolled at the school and meet all legal standards for operating a group care facility, the Court should order them to close the program and order other relief pursuant to G.L. c. 28A, § 15.

RESPECTFULLY SUBMITTED,
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Dated: November ____, 2001