**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**COMMONWEALTH OF MASSACHUSETTS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

# In Re: Ulrike[[1]](#footnote-1)

# BSEA #12-5819

## RULING ON SCHOOL’S MOTION TO JOIN THE DEPARTMENT OF DEVELOPMENTAL SERVICES

This matter comes before the Hearing Officer pursuant to the Parent’s February 28, 2012 request for a hearing to resolve a disagreement with the Silver Lake Regional School District concerning the appropriate level of and placement for special education services for Ulrike. On March 21, 2012 Silver Lake filed a Response and a Motion to Join the Department of Developmental Services (hereinafter “DDS”). During a conference call held on May 2, 2012 the Parent, through her attorneys, indicated her agreement with the School’s Motion to Join. Counsel for DDS opposed the Motion and submitted a Memorandum in support of that position on May 3, 2012. A Hearing is scheduled to take place on June 13, 19 & 21, 2012.

FACTUAL BACKGROUND

Though not fully developed the administrative record discloses the following undisputed pertinent facts:

1. Ulrike is an eleven year old resident of the Silver Lake Regional School District. Her eligibility to receive special education services is not in dispute.

2. Under an IEP covering the period March, 2011-March, 2012 which was developed by Silver Lake and accepted by the Parent, Ulrike attended a substantially separate program focused on developing her functional academic skills. The parties disagree about whether Ulrike made effective progress in that placement.

3. On February 28, 2012 the Parent requested a hearing asserting that Ulrike required a therapeutic residential placement in order to receive a free, appropriate public education.

4. On March 13, 2012 Silver Lake proposed an IEP in which Ulrike would continue in the day program and public school placement she had attended during the 2001-2012 school year.

5. Ulrike has experienced several prolonged hospitalizations, attended at least one step-down program, and had other out-of-home placements during the 2011-2012 school year. Ulrike did not attend the Silver Lake special education class room while she was in out-of-home placements. She has had multiple medical and psychological evaluations associated with these out-of-home placements. Silver Lake is currently conducting a comprehensive evaluation, including functional behavioral and home assessments.

6. During all times pertinent to this dispute the Department of Developmental Services has been providing “family support” and case coordination services to Ulrike and her family.

LEGAL FRAMEWORK

BSEA Hearing Rule IJ provides for involuntary joinder of a party to a BSEA proceeding when complete relief cannot be granted among the existing parties, or when the proposed party has an interest in the matter and is so situated that the dispute cannot be disposed of in its absence. Factors to be considered in determining whether to join a party are:

(1) the risk of prejudice to the present parties in the absence of the

proposed party;

(2) the range of alternatives for fashioning relief;

(3) the inadequacy of a judgment entered in the proposed parties’

absence; and

(4) the existence of an alternative forum to resolve the issues

When the proposed party is a state agency, the Hearing Officer must also consider whether an exercise of jurisdiction over the agency is, in the language of the applicable statute, “in accordance with” that agency’s own legislative mission and administrative regulations. M.G.L.c71B §3. Further the Hearing Officer must determine whether the services, program, personnel or expertise unique to that agency are a necessary “addition” to the special education program proposed for a student by the school district such that without them the student cannot receive a free appropriate public education. See also: 20 U.S.C.§1412(12); 603 CMR 28.08 (3), Nashoba Regional School District, 14 MSER 208 (2008); Fall River Public Schools, 15 MSER 152 (2009). Every joinder determination is unique and highly fact dependent.

DISCUSSION

The Parent initially requested a hearing to determine whether placement in a therapeutic residential school was necessary in order for Ulrike to receive a free appropriate public education. The School asserted that Ulrike had been making effective progress in the substantially separate classroom she had been attending during the 2011-2012 school year. The School further argued that the implementation of intensive in-home services, such as parent training and respite, that were uniquely within the expertise and control of the DDS could ensure that Ulrike would continue to derive a meaningful educational benefit from a public school placement that is substantially less restrictive than any residential alternative. In opposing joinder to this action the DDS posited that Ulrike had been found eligible for family supports rather than generally eligible for DDS services, implying a somehow different or lesser category of eligibility or a diminished entitlement to services. The DDS regulations do not, however, distinguish between general eligibility and eligibility for family supports for individuals under the age of 18. 115 CMR 6.06. The DDS contended that it is not permitted, by its own regulations, to provide support for the out-of-home placement requested by the Parent. The DDS also noted that the “family support services” it does provide to Ulrike are not guaranteed as they are subject to availability and funding unlike the necessary special education services a school district must provide regardless of fiscal and logistical barriers.[[2]](#footnote-2) The DDS maintained that since the BSEA cannot order the remedy the Parent seeks, ie. residential placement, joinder is not warranted.

After careful consideration of the unique posture of this matter I disagree with the position of the DDS. It is the School, not the Parent, seeking to ensure the participation of DDS in the planning and service delivery process for Ulrike. Neither the Parent nor the School has suggested that the DDS should arrange or fund a therapeutic residential placement for Ulrike. On the contrary the School argues that with appropriate implementation of the intensive home/family supports available to Ulrike only through the DDS Ulrike can continue to benefit from an effective day school program and avoid out-of-home placement. Unless the DDS is required to provide the type and level of family support Ulrike needs to safely remain at home, the School contends, she will not be able to access the least restrictive, appropriate public education that would otherwise be available to her. On the undisputed facts developed thus far and presented in these Motions I find the School’s arguments to have substantial merit.

In particular I note that the School has identified a set of services to which Ulrike is entitled, which are uniquely in the control of the DDS and which can be reasonably expected to contribute to the proper implementation of an appropriate special education program for her. Without delivery of those DDS services Ulrike may not have access to, or be able to derive a meaningful educational benefit from, the special education program available to her through the Silver Lake Public Schools[[3]](#footnote-3) Without the participation of the DDS in this Hearing process the School may not be able to show how its day placement can effectively address Ulrike’s educational needs. Without asserting jurisdiction over DDS the BSEA might not be able to craft appropriate relief under the IDEA and M.G.L.c71B. No other forum exists in Massachusetts which has jurisdiction to determine, in the first instance pursuant to 20 U.S.C.§1415, the nature and extent of Ulrike’s special education needs and entitlements as well as the obligations of state and local service providers to meet them. The set of facts present in this matter amply supports findings that Ulrike is eligible for DDS services, that the DDS services she is eligible for are congruent with the mission and legislative mandate of the DDS, and that the DDS services sought by the parties here would be “in addition” to the special education program proposed by the responsible school district. Therefore I find that joinder of DDS in this matter is proper under the applicable rules and regulations and warranted by the facts.

The Motion of the Silver Lake Public Schools to Join the Massachusetts Department of Developmental Services is GRANTED.

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Lindsay Byrne, Hearing Officer Dated: May 14, 2012

1. “Ulrike” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public. [↑](#footnote-ref-1)
2. Interested Readers may refer to the DDS Family Support Guidelines accessible at www.mass.gov/eohhs/consumer/disability-services/family-support-guidelines-.pdf [↑](#footnote-ref-2)
3. See: New Family Support Guidelines and Procedures, Commonwealth of Massachusetts Department of Mental Retardation (July 2002). Sections IV, V, VI. [↑](#footnote-ref-3)