**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**SPECIAL EDUCATION APPEALS**

**In Re:** Emmet K. v. **BSEA #**12-8582

Gateway Public Schools

**Ruling on Gateway’s Motion to Join the Department of Children and Families**

Parents requested a Hearing in the above-referenced matter on May 29, 2012, seeking public funding for residential placement of Student. On July 3, 2012, Gateway Public Schools (Gateway) filed a Motion to Join the Department of Children and Families (DCF) in the above-referenced matter.

DCF filed an Opposition to Gateway’s Motion to Join the Department of Children and Families on July 11, 2012. This Ruling is rendered in consideration of the arguments and documents submitted by the Parties, and seeks to address solely the question of whether joinder of DCF is necessary for a full disposition of the case, without rendering any determination as to whether it will ultimately be found responsible to provide services beyond those for which Gateway may be found responsible and consistent with the array of services offered by DCF.

Facts:

1. Student is a 14 year old resident of Blandford, Massachusetts. His eligibility for special education is not disputed by the parties. Prior to March 2012, Student received educational services in Gateway.
2. Student and his family became clients of DCF in the spring of 2009.
3. In mid May 2009, DCF attended a Team meeting for Student at which time the DCF representative stated that DCF was applying for residential placement for Student. Gateway agreed to visit the schools identified by DCF, and further agreed to fund the day portion of Student’s placement (SE-1).
4. During the 2009-2010 and the 2010-2011 school years, Student attended Eagleton School under a cost-share agreement whereby DCF funded the residential portion and Gateway the educational portion of Student’s placement (SE-2).
5. In June 2011, Student’s Tam convened and recommended that Student be moved to a less restrictive setting. Gateway proposed that Student attend a substantially separate program at the Gateway Regional Junior High School for the period from June 20, 2011 through June 19, 2012. Parents accepted the IEP in full on September 12, 2011 (SE-3).
6. In September 2011, Student began attending Gateway. At Gateway Student had good attendance and did not display the violent behaviors that Parent reported in the home.
7. On March 25, 2012 he was hospitalized at Westwood Lodge (Westwood) due to violent behavior in the home. From Westwood, Student was transferred to the Providence Hospital ART on April 5, 2012 and later transferred to the CHAD Unit in Providence Hospital on April 29, 2012.
8. Parents and the Providence Hospital staff met on April 13, 2012 and DCF joined the aforementioned at a second meeting held on April 17, 2012. Gateway was not informed of either meeting nor invited to attend.
9. On April 23, 2012, Alice Taverna, Special Education Director at Gateway, contacted Student’s clinician who informed Ms. Taverna that Parents, DCF and the Providence Hospital staff would meet on April 24, 2012. Because of the short notice and family illness, Ms. Taverna was unable to attend, but Gateway’s school adjustment counselor (SAC) was sent in her stead. Ms. Taverna further explained that the SAC would be present for informational purposes but stated that she did not have decision-making authority.
10. At the April 24, 2012 meeting, the Providence Hospital staff recommended that Student attend residential placement due to unsafe behavior in the home. Gateway disagreed that Student required residential placement for educational reasons and hence did not support residential placement. Following the April 24th meeting, Ms. Taverna received a letter from Amanda Rilla, M.Ed. (Student’s clinician) dated April 18, 2012 recommending discharge of Student to a residential placement to “stabilize and manage [Student’s] aggressive behaviors and to provide structure”.
11. Gateway convened Student’s Team on May 4, 2012. The Gateway staff opined that since the behaviors reported to be taking place at home which caused Student’s hospitalization were not observed in school, the issue of Student’s safety at home was not educational. Thus, Gateway did not support residential placement of Student.
12. DCF did not attend the May 4, 2012 Team meeting and Gateway did not issue and IEP immediately following the meeting.
13. On or about May 14, 2012, Ms. Taverna received a letter from Dr. Yamani, Student’s psychiatrist in which Dr. Yamani recommended residential placement for Student.
14. Ms. Taverna also spoke to Judith Clark of DCF in May of 2012 who informed Ms. Taverna that Student could be placed in a Behavioral Treatment Residence (BRT) or an Intensive Foster Care setting. Both options would allow Student to continue to attend Gateway.
15. On or about May 29, 2012, Student was discharged from Providence Hospital, and on May 30, 2012 he resumed his program in Gateway through the remainder of the school year. Since his release from Providence Hospital Student has not lived in a residential facility.
16. DCF continues to be involved with Student’s family and at present, provides Intensive Care Coordination (SE-1).
17. Student is neither in the care nor custody of DCF. DCF’s regulations require that Student be in its care or custody in order for the agency to provide residential placement. 110 CMR 4.10; G.L. c.119 §21, et seq.

**Legal Standard:**

Federal special education law and regulations require establishment of a mechanism for interagency coordination to resolve any disputes regarding responsibility for providing special education and related services to students where multiple public entities may share the responsibility for ensuring that students receive a FAPE. 20 U.S.C. §1412(12)(A); 34C.F.R. 300.142(a).

In Massachusetts Chapter 159, section 162 of the Acts of 2000, amending M.G.L. c 71 B §3, grants the BSEA authority to order a state agency to provide services “in addition to the program and related services to be provided by the school committee.” See *In Re: Lunenburg Public Schools and Department of Mental Health (ruling on Motion to Dismiss)*, 10 MSER 478 (2004); see also, ruling on motion to join DMH and DMR in *In Re: Medford Public Schools*, BSEA # 01-3941 (2002).

Furthermore, in order to resolve differences between parties regarding the provision of special education to eligible students, the Massachusetts Special Education Regulations specifically grant the BSEA jurisdiction over state agencies. Pursuant to 603 CMR 28.08(3) the BSEA may order a state agency to provide services “in accordance with the rules, regulations, and policies of the respective agenc[y]” in addition to the IEP services that the school district is responsible to provide. 603 CMR 28.08(3). That is, a state agency may be ordered to provide services that are found to be necessary for the student to be able to receive a FAPE through the school district, or, provide services over and above those that are the responsibility of the school district if the services are necessary to ensure that the student is able to access or benefit from the special education program and services offered by the school district. Lowell Public Schools, 107 LRP 655543 (2007).

Where participation of the particular state agency is sought after the request for hearing has been filed, the agency’s participation may be obtained through a motion for joinder of the additional party. Joinder of a party in the context of a BSEA proceeding is governed by Rule 1J of *The Hearing Rules for Special Education Appeals.* Said Rule 1J provides that upon receipt of a motion, joinder of a state agency may be ordered if

1. complete relief cannot be granted by the originally named parties or
2. the third party has an interest in the matter and is so situated that the case cannot be disposed of in its absence.

Rule 1J further provides that the following factors must be considered in determining if joinder is warranted

1. risk of prejudice to the present parties;
2. the range of alternatives for fashioning relief;
3. the inadequacy of a judgment entered in the proposed party’s absence; and
4. the existence of an alternative forum to resolve the issues.

As such, in order to join a state agency, the moving party “must be able to show, at least in a preliminary way, that it will be able to present evidence at a Hearing that may result in the entity being found responsible to offer some service…to the student.” *In re: Boston Public Schools District*, BSEA #02-4553 (2002, Figueroa.) If joinder is granted, the hearing officer may only order services consistent with the rules, regulations, and policies that govern the particular state agency, and may order only those services that fall within the array of services that the particular agency provides, assuming that the student is eligible to receive said services. See G.L. c.71B §3.

As explained by Hearing Officer Byrne in *Auburn Public Schools*, 8 MSER 143,

In special education appeals, the joinder inquiry will necessarily focus on whether a free, appropriate public education can be developed, delivered, declared or guaranteed without the participation of the state agency sought to be joined. If it cannot, joinder will be allowed.

Since school districts are ultimately responsible for all types of placements required by a student for educational reasons (including residential placements), if the student requires the residential placement for educational reasons, the state agency will not be found responsible for said placement even if residential placement is among the services offered by the state agency to its clients.[[1]](#footnote-1) *In Re: Student v. Boston Public Schools*, BSEA # 06-6542 (July 25, 2006). With this guidance, I turn to facts in the case at bar.

RULING:

Parent states that Student requires residential placement because of his unsafe behaviors. Gateway disputes that Student’s need for residential placement in the past was for educational reasons and states that this is the reason why Student’s residential placement was the result of a cost-share agreement between itself and DCF.

Gateway asserts that this matter meets the necessary criteria warranting joinder of DCF. Specifically, Gateway argues that Student and his family are currently clients of DCF. DCF is the agency that funded the residential portion of Student’s placement from 2009 to 2011. Also, Gateway argues that DCF may be found responsible to provide other services in accordance with the array of services provided by DCF (such as supplemental services in the home) beyond what Gateway is responsible to provide so as to support Student’s educational placement and enable him to access a FAPE. As such it argues that should the BSEA find that Student requires residential placement, complete relief cannot be granted in the absence of DCF.

DCF disputes its need to be joined arguing that the sole issue before the BSEA is Student’s educational need for residential placement. Furthermore, Student is neither in the care or custody of DCF and as such the BSEA lacks authority to order DCF to provide him services. DCF asserts that any order by the BSEA against it would violate DCF’s regulations thereby exceeding the statutory authority granted to the BSEA.

DCF argues that its involvement with Student is significantly limited, a fact that militates against its joinder. See *In Re: Chicopee Public Schools and Abelard*, BSEA #06-3912, 12 MSER 108, 109 (2006)(acknowledging limitations in the BSEA’s authority to join DCF where it lacks custody of the minor child). DCF further states that only a court with pertinent jurisdiction can place children in its custody. To date, no such petition has been made. Similarly, neither Student’s parents nor DCF have requested voluntary placement of Student in DCF.

While Student has been determined eligible to receive DCF services, at present he is neither in the care or custody of DCF, a fact which limits the authority of the BSEA to order DCF to provide and fund residential placement for Student. Furthermore, at this time it is unclear whether Student needs residential placement for educational reasons. Therefore, DCF is correct that the nexus between said agency and Student and his family is insufficient to permit a BSEA Hearing Officer to order it to provide residential placement to Student. Furthermore, Gateway has submitted insufficient evidence to ascertain whether there may be other services that the DCF may be required to provide, consistent with its rules and regulations, that may be needed by Student beyond the services for which Gateway may be responsible. At the Hearing on the merits, Gateway and or Parents may call a DCF representative to obtain said information. Also, were the relationship between DCF and Student/ Parents to change prior to the Hearing, either Parents or DCF may re-file a motion for joinder of this agency.

I find that at the present time DCF does not need to be joined to this proceeding in order for Student to receive full relief were the evidence to support his request for residential placement at Hearing. DCF is not found to be a necessary party to this proceeding.

**ORDER:**

1. Gateway’s Motion for Joinder of the DCF is **DENIED without Prejudice**.

So Ordered by the Hearing Officer,

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Rosa I. Figueroa

Dated: July 18, 2012

1. See *In Re: Westford Public Schools*, BSEA #05-0621, 10 MSER 541, 551 (2004, Beron.) [↑](#footnote-ref-1)