

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

In Re: Nauset Regional School District

BSEA # 1300562

**RULING RE JOINDER OF
MASSACHUSETTS DEPARTMENT OF DEVELOPMENTAL SERVICES**

Introduction

This dispute requires that I determine whether the Massachusetts Department of Developmental Services (DDS) should be joined as a necessary party.

On September 12, 2012, Nauset Regional School District (Nauset) filed with the Bureau of Special Education Appeals (BSEA) a motion to join DDS. On September 24, 2012, DDS filed its opposition. On October 16, 2012, a telephonic hearing was held on the motion. Parents, who filed the Hearing Request with the BSEA, did not file a response to the motion to join but during the motion hearing, supported the motion to join DDS.¹

Factual Background

The following facts are not disputed and are assumed to be true for purposes of this Ruling only.

Student is a nineteen-year-old young man who lives with his father (Father) in Brewster, MA. Student's parents (Parents) are divorced, and his mother lives in California. Both Parents filed the Hearing Request in the instant dispute and are Student's legal guardians.

Student has significant global delays related to a diagnosis of complex unbalanced translocation syndrome of the 7th and 9th chromosomes. As a result of this disability, he is profoundly compromised regarding communication, mobility and self-help skills. For example, he requires assistance with ambulating, toileting and eating. Student is non-verbal.

Student has attended the Nauset Regional Schools since the time he was a young boy. He currently attends the Nauset Regional High School. Parents' Hearing Request seeks an order from the BSEA requiring Nauset to place Student in a year-round residential placement at the Crotchet Mountain School "that would allow him access to peers, communication

¹ Parents are represented by attorney Michael Turner; Nauset is represented by attorney Mary Joann Reedy; and DDS is represented by attorney Elizabeth Duffy.

development, daily living skills in a natural environment, social opportunities on daily basis, and transitional skills to prepare him for adulthood.” Hearing Request, 5th page, par. 3.

Student has been found generally eligible for services from DDS. Currently, DDS provides Student with children’s coordination services, and home-based services of a personal care attendant and respite services.

Student’s Father has serious medical challenges that may soon compromise his ability to care for Student at home. DDS has identified a home in the community (in Sandwich, MA) that it is prepared to fund as Student’s residence if Father’s medical challenges make it not possible for him to care for Student.

Positions of the Parties

Through its motion to join, Nauset takes the position that DDS is a necessary party to this dispute. Nauset notes that DDS has agreed that it is now and will remain (for the foreseeable future) responsible for providing DDS services to Student. Nauset argues that the BSEA hearing must include DDS as a party so that DDS’s non-educational responsibilities can be considered together with Nauset’s educational responsibilities in order to ensure that all of Student’s needs can be appropriately addressed at one time, in a coordinated and consistent manner.

Through their Hearing Request, Parents take the position that, under state and federal special education laws, Student requires placement in a year-round, 24-hour residential school—specifically, the Crotchet Mountain School which is located in New Hampshire. Parents support joinder, arguing that if joinder is allowed, Parents may take the position that DDS has responsibility for funding the residential portion of Student’s placement, either in the community as proposed by DDS or at a residential school such as Crotchet Mountain.

DDS opposes joinder. DDS argues that Nauset, not DDS, has responsibility to provide special education services to Student and that DDS services will be provided regardless of whether it is joined as a party. Thus, DDS takes the position that joinder is unnecessary because complete relief can be provided to Student without involvement of DDS.

Legal Framework

Pursuant to BSEA Hearing Rule 1J, joinder may be ordered upon a finding that (1) complete relief cannot be granted among the existing parties, or (2) the proposed party to be joined has an interest in this matter and is so situated that the dispute cannot be disposed of in its absence. Pursuant to Rule 1J, 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 party's absence; and (4) the existence of an alternative forum to resolve the issues.

Statutory language regarding the jurisdiction of a BSEA Hearing Officer over state agencies (including DDS) provides, in part, as follows:

The [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 social services, the department of mental retardation, the department of mental health, the department of public health, or any other state agency or program, in addition to the program and related services to be provided by the school committee.²

The phrase “in addition to” within this statutory language has been interpreted by BSEA Hearing Officers to mean 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 and joinder is not warranted, at least for the purpose of requiring the agency to provide services. This maintains the school district as the entity with sole responsibility for all those services to which the student is entitled pursuant to state and federal special education law.

However, if additional services from a human services 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 and services, then joinder of the state agency may be appropriate, so that the BSEA may then consider what, if any, additional services should be ordered.³

Discussion

Parents’ Hearing Request seeks an order requiring placement at a residential school in New Hampshire. In the event that I were to find that Student requires, for educational reasons, a 24-hour, year-round placement in order to make meaningful progress commensurate with his educational potential, I may order Nauset to fully fund a residential placement.⁴ This may result in not needing any additional services from DDS in order that Student access and benefit from his special education.

However, the dispute may become more complicated in the event that I were to determine that Student’s educational needs can be met through a day placement and that Father is not able to care for Student in the home. To its credit, DDS has taken responsibility not only to

² MGL c. 71B, s. 3. See also 603 CMR 28.08(3) (regulatory language similar to above-quoted statutory language).

³ See, e.g., *In Re: Fall River Public Schools*, BSEA # 09-6962, 15 MSER 152 (SEA MA 2009); *In Re: Lowell Public Schools*, BSEA # 07-2412, 13 MSER 40 (SEA MA 2007); *In Re: Gloucester Public Schools*, BSEA # 04-3543, 10 MSER 389 (SEA MA 2004); *In Re: Whitman-Hanson Public Schools*, BSEA # 02-4839, 8 MSER 326 (SEA MA 2002); *In Re: Ipswich Public Schools*, BSEA # 02-4324, 8 MSER 185 (SEA MA 2002) and other rulings cited therein.

⁴ See *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) (IEP must be “reasonably calculated to confer a meaningful educational benefit”); *Gonzalez v. Puerto Rico Department of Education*, 254 F.3d 350 (1st Cir. 2001) (residential placement required when educational benefits to which a student is entitled can only be provided through around-the-clock special education and related services).

provide needed services to Student (and Father) currently, but also to identify a home placement in Sandwich, MA, which DDS is prepared to fund for Student in the event that Father becomes unable to care for Student. However, depending on the outcome of the BSEA hearing and the BSEA's determination of the locus of Student's educational placement, the Sandwich home proposed by DDS may or may not be appropriate from the perspective of allowing Student to access his special education, and Student's educational needs and his residential needs may then be inextricably intertwined.

Under these circumstances, it seems possible that the BSEA would have to consider ordering DDS to provide residential or other services (different than what it has already voluntarily agreed to provide) in order that Student access and benefit from the educational services to be provided by Nauset. DDS disputes the BSEA's authority to order DDS to provide residential services, particularly at a specific placement determined by the BSEA, and I therefore briefly consider the BSEA's authority to do so.

It is unusual for a BSEA Hearing Officer to order a state agency (such as DDS) to provide residential services, but on two occasions I have done so.⁵ Case law has not addressed the extent of the BSEA's authority to order DDS to provide services at a particular placement pursuant to MGL c. 71B, s. 3. However, BSEA decisions have routinely ordered school districts to provide or fund specific educational placements, and these decisions have been upheld by the courts.⁶ One might arguably conclude within the context of a particular special education dispute that MGL c. 71B, s. 3 similarly allows the BSEA to find that additional services from a state agency such as DDS must be provided at a specific placement. This might occur, for example, in the event that the BSEA were to determine that the specific residential services were the *only* way that DDS could fulfill its obligations and allow Student to receive the special education services to which he is entitled.⁷

Finally, I note that under the above-quoted provisions of MGL c. 71B, s. 3, I may order DDS to provide additional services "in accordance with [its] rules, regulations and policies." DDS

⁵ See, e.g., *In Re: Lowell Public Schools & Mass. Dept. of Children and Families*, BSEA # 12-1912 (2011) (ruling ordering Massachusetts Department of Children and Families to provide residential services under stay put principles); *In Re: Medford Public Schools*, BSEA # 01-3941, 7 MSER 75 (2001) (decision ordering DDS, then referred to as the Massachusetts Department of Mental Retardation, to provide residential services).

⁶ See, e.g., *Mohawk Trail Regional School Dist. v. Shaun D. ex rel. Linda D.*, 35 F.Supp.2d 34, (D.Mass. 1999) (affirming BSEA Hearing Officer's determination that school district was responsible for student's placement at Whitney Academy); *In Re: Southwick-Tolland Regional School District*, BSEA # 06-6583, 12 MSER 279 (SEA MA 2006) (ordering student's placement at the White Oak School), aff'd CA No. 07-30010-MAP (D.Mass. 2008) (unpublished); *In Re: Manchester-Essex Regional School Dist. School Committee*, BSEA # 04-5309, 11 MSER 62 (SEA MA 2005); (ordering school district to send student to the Active Healing program for purposes of evaluation), rev'd on other grounds, 490 F.Supp.2d 49 (D.Mass. 2007); *In Re: Lunenburg Public Schools*, BSEA # 05-0799, 10 MSER 518 (SEA MA 2004) (ordering residential placement of student at the Franklin Perkins School), aff'd CA No. 04-12695-NMG (D.Mass. 2007) (unpublished); *In Re: Southwick-Tolland Regional School District*, BSEA # 06-6583, 12 MSER 279 (SEA MA 2006) (ordering student's placement at the White Oak School), aff'd CA No. 07-30010-MAP (D.Mass. 2008) (unpublished).

⁷ See *Care and Protection of Isaac*, 419 Mass. 602, 606-607, 646 N.E.2d 1034 (1995) ("Only when, at the time a judicial order is entered, there is but one way in which that obligation may properly be fulfilled, is a judge warranted in telling a public agency precisely how it must fulfil its legal obligation.").

regulations provide that “in no case shall the Department provide residential supports to ... individuals ages 18 through 21 years of age and eligible for or receiving residential services from a local educational authority” but do not otherwise limit DDS’s authority to provide residential services to Student.⁸ In the instant dispute, Student is currently not receiving residential services from a local education authority nor, at this juncture, has he been determined to be eligible to receive residential services from a local education agency.

Because Nauset’s and DDS’s responsibilities to Student may become inextricably intertwined and because the BSEA may arguably have the authority to order DDS to provide residential services that would allow Student to access and benefit from the special education provided by Nauset, I am persuaded that Nauset’s educational responsibilities to Student and DDS’s responsibility to provide additional services to Student should be addressed through a BSEA single hearing. Also, DDS’s presence as a party will likely provide the Hearing Officer with valuable assistance towards the resolution of all aspects of this dispute and will not unduly delay the resolution of this matter.

For these reasons, joinder will be allowed.

Order

Nauset’s motion to join the Massachusetts Department of Developmental Services is ALLOWED.

By the Hearing Officer,

William Crane
Date: October 23, 2012

⁸ See 115 CMR 6.07(2)(b).