

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

In Re: Student v.
Lexington Public Schools

BSEA # 1305048

Ruling on Lexington Public Schools' Motion to Join the Department of Children and Families and the Department of Mental Health and Parents' Withdrawal of the Expedited Status and Request to Proceed Under the Regular Calendar

On February 1, 2013, Lexington Public Schools (Lexington) filed a Motion to Join the Department of Children and Families (DCF) and the Department of Mental Health (DMH) in the above-referenced matter. Consistent with an Order issued on February 5, 2013, shortening the deadline for Parents and the agencies to respond to Lexington's Motion, DMH and DCF's objections to joinder were received on February 6, 2013. Via letter received on February 6, 2013, Parents did not oppose Lexington's Motion.

This Ruling is issued in consideration of the arguments made by Lexington, DCF and DMH as well as the three exhibits submitted by Lexington labeled SE-1 through SE-3.

RELEVANT FACTS^[1]:

Student is a fourteen year old resident of Lexington who splits her time between Mother's and Father's homes.

During the 2009-2010, 2010-2011 and 2011-2012 school years, Lexington's staff and Parents noticed that Student was struggling academically and emotionally, and that her grades had begun to plummet. Student was not referred for an evaluation (SE-3).

On or about April 2012, Parents informed Student's guidance counselor in Lexington that Student "had seemed depressed, had been drinking alcohol, and would be seeing a therapist" (SE-3).

Parents had Student evaluated at the Child Development Network in Lexington on April 24 and May 4, 2012. Dr. Nelson informed Parents that in her opinion Student presented with a "learning disability and likely an auditory processing disorder". Upon learning this and prior to issuance of Dr. Nelson's report, Parents requested that Lexington provide Student with

^[1] The limited facts stated herein are intended for purposes of issuing a determination on Lexington's Motion for Joinder and in no way limits additional relevant facts which may be presented at Hearing.

learning center support for math, English and science. Dr. Nelson's report confirmed her opinion that Student presented with learning disabilities (SE-3).

Parents provided copies of Dr. Nelson's report to Lexington during the first week in September 2012 and provided a second copy on September 12, 2012. Lexington did not refer Student for an evaluation or otherwise discuss Dr. Nelson's evaluation report. According to Parents, during the beginning of the 2012-2013 school year (Student's ninth grade), Student's depression and anxiety increased significantly and Parents had Student meet weekly with the school social worker and with a private therapist, Dr. Ashley Harmon (SE-3).

On or about October 23, 2012, Dr. Harmon had Student transported to Emerson Hospital, after Student revealed having attempted suicide the night before the first day of school. From Emerson Hospital, Student was transported and hospitalized at the Acute Residential Treatment Program (ART) at McLean Hospital on October 23, 2012. She remained hospitalized at the ART for three weeks (SE-3).

On October 31, 2012, Parents requested that Lexington conduct an evaluation to determine Student's eligibility for special education services.

On November 14, 2012, Student was discharged from the ART and transferred to the 3 East Dialectical Behavioral Therapy program (DBT) at McLean Hospital where she remained through December 18, 2012. The ART discharge summary stated in part

Due to [Student's] depression, continued talk of suicide, poor insight into the consequences of her substance abuse, unwillingness to stop her use and family conflict, a long term residential treatment program was recommended. McLean treatment team felt that a longer-term treatment option would allow for additional sober time, stabilization and a longer evaluation to gain diagnostic clarity (SE-1).

Upon discharge from McLean's DBT, the DBT treatment team recommended immediate transfer and placement in a residential treatment facility that could address Student's substance abuse and mood disorder. The DBT team further recommended that Student be placed in a therapeutically-supportive academic environment after her discharge from the residential treatment program (SE-2).

Prior to discharge from the DBT, Dr. Harmon, Student's therapist, filed a 51A against Parents for neglect, when Parents apparently decided to keep Student out of a residential setting (SE-3).

On January 11, 2013, Lexington convened Student's Team to determine eligibility for special education services. Student was found eligible due to a serious emotional disturbance consistent with 603 CMR 28.02. Lexington's Team recommended that Student be placed in

a therapeutic day placement as the least restrictive environment appropriate for her to receive FAPE (SE-3).

Student's Team reconvened on January 17, 2013 to discuss Student's need for residential placement but the Team did not support residential placement for educational reasons (SE-3).

Parents have applied for DMH services but DMH has not yet entered a determination as to Student's eligibility to receive services from said agency, nor has it determined what services, if any, should be provided (SE-3).

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 disputes between parties regarding the provision of special education to eligible students, the Massachusetts Special Education Regulations specifically grant the BSEA jurisdiction over state agencies. The BSEA's authority is found in 603 CMR 28.08(3) which specifically provides that 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.

In *Auburn Public Schools*, 8 MSER 143, Hearing Officer Byrne explained that

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.

School districts are legally responsible to offer the types of placement required by a student for educational reasons (including residential placements), and as such, are ultimately responsible to fund such placements. If Student requires residential placement for educational reasons, a state agency will not be found responsible for said placement even if residential placement is among the services offered by the particular state agency to its clients.^[2] *In Re: Student v. Boston Public Schools*, BSEA # 06-6542 (July 25, 2006). With this guidance, I turn to facts and arguments in the case at bar.

RULING:

Lexington argues that the recommendations for residential placement of Student stem from her clinical mental health needs, chronic drug use, and familial conflict, and not for educational reasons. Lexington specifically points to the ART team's recommendation that Student “attend a residential treatment center in order to address the high-risk nature of her substance abuse in a specialized setting for adolescent girls” (SE-2). Lexington however, fails to make any specific connection regarding Student's issues, her need for residential

^[2] See *In Re: Westford Public Schools*, BSEA #05-0621, 10 MSER 541, 551 (2004, Beron.)

placement and the need to join DCF. Instead, Lexington generally contends that DCF is involved with the family and may ultimately be ordered to provide services at Hearing.

DCF denies the alleged involvement with the family stating that Parents and Student have not voluntarily requested any services from DCF, have not entered into any agreement for services with this agency, and no services are currently being provided. Student is not in the care or custody of DCF. Clearly no relationship between Parents, Student and DCF exists at present. The fact that at some point a therapist filed a 51A on the family, without any showing that DCF's involvement stretched beyond a preliminary investigation, is insufficient to establish the type of nexus Lexington claims warrants joinder. Any information sought from DCF may be provided by calling a DCF witness who possesses relevant information at Hearing. DCF is correct that joinder of DCF is not appropriate at this time. Lexington's Motion to Join DCF is therefore **DENIED**.

Regarding DMH, Lexington argues that Parents have applied for services and that this agency may become a provider to the family. Furthermore, Lexington states that Student's need for residential placement stems from her emotional/ mental health, familial discord and drug use issues. Since the driving force for residential placement appears to be Student's mental health issues and since DMH is currently evaluating Student's eligibility, Lexington argues that DMH should be joined.

Relying on *In Re: Fall River Public Schools*, 15, MSER 152 (Crane, 2009), Lexington further argued that since the case at bar was placed on an expedited track,

...administrative efficiency supports the need for a quick, consolidated determination about what [Student] requires in order to meet both her educational and non-residential needs.

DMH disagreed that joinder was necessary. Its objection was primarily premised on the fact that DMH has not yet determined whether Student is eligible to receive services through DMH and further that even if Student is found to be eligible to receive DMH services there has not been a finding of what Student would require to receive a FAPE. DMH reserves the right to submit a Memorandum regarding its opposition to joinder prior to the Hearing on the merits. At this juncture, DMH's opposition to joinder is not persuasive because it may find Student eligible to receive DMH services and may be found responsible to offer services consistent with its rules, regulations and policies. Moreover, Lexington only needs to show "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 services... to the student". *In Re: Boston Public Schools*, 12 MSER 209, 210 (Figuroa, 2006). Lexington's Motion to Join DMH is **ALLOWED** without Prejudice.

I now turn to Parents' withdrawal of the Expedited Status of the case.^[3]

^[3] I note that the Parties were offered the opportunity to participate in a Hearing starting on February 11, 2013 but Parents were unavailable to proceed prior to February 13, 2013.

On February 6, 2013, Parents withdrew the Expedited Status in the case herein and requested that all other matters proceed under the regular calendar. As such, the Expedited portion of the case is closed. All non-expedited issues will proceed to Hearing on February 25, 26 and 27, 2013 at 10:00 a.m. at the BSEA, One Congress St., 11th floor, Boston, Ma. Exhibits and witness lists are due by the close of business on February 19, 2013.

Lastly, Parents' Request to hold a Pre-Hearing Conference on February 13, 2013 will be discussed during the telephone conference call scheduled for February 8, 2013, at 3:30 p.m. The Parties are ordered to confirm their availability to participate in a telephone conference call on February 11, 2013, at 3:30 p.m. in case the BSEA is closed on February 8, 2013 due to inclement weather.

ORDERS:

1. Lexington's Motion to Join DCF is DENIED.
2. Lexington's Motion to Join DMH is ALLOWED without Prejudice. DMH's right to submit a Memorandum of Law regarding the joinder issue prior to the Hearing on the merits is reserved.
3. Exhibits and witness lists are due by the close of business on February 19, 2013.
4. The Hearing will be held on February 25, 26 and 27, 2013 at 10:00 a.m. at the BSEA, One Congress St., 11th floor, Boston, Ma.
5. Parents' Request to hold a Pre-Hearing Conference on February 13, 2013 will be discussed during the telephone conference call scheduled for February 8, 2013, at 3:30 p.m.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: February 7, 2013