

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

In re: Alistair<sup>1</sup> v. Andover Public Schools  
and Massachusetts Department of Mental Health

BSEA #1502640

**RULING ON DEPARTMENT OF MENTAL HEALTH'S MOTION TO DISMISS  
DEPARTMENT OF MENTAL HEALTH AS A PARTY**

This matter comes before the Hearing Officer on the Motion of the Department of Mental Health (hereinafter "DMH") to Dismiss DMH as a Party to the Expedited Request for Hearing filed by the Parents on October 1, 2014. The Motion to Dismiss was filed on October 7, 2014. The Parents and the Andover Public Schools (hereinafter "Andover") oppose the Motion, and filed a written Joint Opposition on October 8, 2014. The Hearing Officer took additional arguments during a telephonic motion session held on October 9, 2014. For the reasons set forth below, DMH's Motion is hereby ALLOWED.

**FACTUAL BACKGROUND**

The following facts are not in dispute and are taken as true for the purposes of this Motion. These facts may be subject to revision in subsequent proceedings.

1. Alistair is a 14 year old resident of Andover. Alistair is eligible for special education pursuant to 20 U.S.C. §1401 *et seq.* and M.G.L. c. 71 B.
2. From 2008 to the spring of 2013, Alistair was placed in self-contained, residential educational placements funded by Andover. In 2010, he was placed in the residential program at St. Ann's, where he remained until the spring of 2013. Between 2008 and 2013, Alistair was hospitalized numerous times.
3. During the spring of 2013, pursuant to an Individualized Education Program (IEP) dated 2/13/2013-2/12/2014 and accepted by Alistair's parents (hereinafter "Parents") on March 18, 2013, Alistair was placed in the day program at St. Ann's.
4. In April of 2013, Alistair moved home and continued attending the day program at St. Ann's with extended day programming funded by Andover.
5. During the first six (6) months after he was transitioned to the day program from the residential placement, Alistair was taken to the emergency room five (5) times for suicidal ideation and self-harming behavior.

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<sup>1</sup> "Alistair" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

6. On or about August 20, 2013, Alistair applied for Service Authorization with DMH pursuant to 104 CMR 29.00 *et seq.*
7. In November 2013, Dr. Janice Goldstein, Ph.D. performed a neuropsychological examination of Alistair. She concluded that he “presents with issues consistent with Asperger’s Syndrome, Mood Disorder, Anxiety Disorder, and an emerging Thought Disorder/ Schizoaffective Disorder, as well as a Disorder of Written Expression and Dyscalculia.”
8. On January 15, 2014, Parents were informed by letter that DMH had rejected Alistair’s application because it had determined that he did not have a qualifying psychiatric disorder and therefore did not meet the clinical criteria for DMH service authorization. Parents did not request an informal conference or reconsideration in order to appeal this determination pursuant to 104 CMR 29.16(3)<sup>2</sup>.
9. A proposed IEP dated 2/3/2014-2/2/2015 continued Alistair’s placement in the day program at St. Ann’s. Parents partially rejected this IEP on September 23, 2014 and rejected placement in the day program at St. Ann’s.
10. During May 2014, Alistair was placed in a Community Based Acute Treatment Program (CBAT) for a week after a suicide attempt. In June 2014, he was admitted to Cambridge Hospital for seven (7) days after a suicide attempt, then stepped down to the CBAT again.
11. Alistair is currently hospitalized at Arbour Fuller Hospital following a suicide attempt on September 25, 2014.
12. On or about September 29, 2014, Parents, through Counsel, sent a letter to the Area Director of Child/Adolescent Services for DMH requesting that Alistair’s application be reconsidered.<sup>3</sup>
13. On October 1, 2014, Parents filed an Expedited Hearing Request at the Bureau of Special Education Appeals (hereinafter “BSEA”) seeking a determination that, among other things, Alistair required placement at the Wediko School or other similar appropriate self-contained residential educational placement in order to receive a free appropriate public education.
14. On October 7, 2014, DMH filed a Motion to Dismiss DMH as Party from Parents’ BSEA Hearing Request, asserting that: (1) Alistair does not meet the clinical criteria for DMH service authorization and DMH has in fact previously rejected Alistair’s application because it had determined that his primary impairment is as a result of Traumatic Brain Injury, which excludes

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<sup>2</sup> 104 CMR 29.16(3) provides for appeals of denial of an individual’s application for DMH services based on clinical criteria through a Request for Informal Conference within ten days of receipt of the denial of the application (which may be waived), or through a Request for Reconsideration submitted in writing within ten days after conclusion of the informal conference or the agreement to waive such conference. There is no provision for appeals submitted outside of this window.

<sup>3</sup> See note 2, *supra*, and accompanying text.

him from DMH services pursuant to 104 CMR 29.04(3)(a);<sup>4</sup> (2) there has been no showing that DMH is either a necessary party or that it has an interest in these proceedings; and (3) there has been no showing of need for services in addition to those to be provided by the school district.

15. In a letter dated October 7, 2014, members of Alistair's clinical team at Arbour Fuller stated that Alistair had been diagnosed with Bipolar Disorder by the clinical staff at Arbour Fuller Hospital.

16. On or about October 7, 2014, Parents submitted a new application for Service Authorization with DMH pursuant to 104 CMR 29.00 *et seq.*

17. On October 8, 2014, Parents and Andover filed a written Joint Opposition to DMH's Motion to Dismiss DMH as a Party, asserting that given Alistair's increase in psychiatric symptoms and changes in his presentation since DMH's denial of services it is likely he would be found eligible, and that in addition, DMH has been sending a case manager to attend Alistair's IEP meetings, which indicates DMH's expectation that it will provide services to him despite having rejected his application.

## LEGAL STANDARDS

Although generally a Motion to Dismiss may be granted if the party requesting the hearing fails to state a claim for which relief is available through the BSEA, 801 CMR 1.01 (7) (g)(3) and BSEA Hearing Rules XVII (B)(4), in this case DMH has filed a Motion to Dismiss DMH as a party in the matter, which requires an assessment of whether DMH is properly before the BSEA as a party in this matter at this time. For this reason, although Parents initially filed their hearing request against both Andover and DMH rather than filing a motion to join DMH, the outcome will be governed by the rules for joinder of additional parties and BSEA jurisdiction to order that services be provided by state agencies in pending cases.

The BSEA's joinder rule, set forth in Rule J of the *Hearing Rules for Special Education Appeals*, provides as follows:

“Upon written request of a party, a Hearing Officer may allow for the joinder of a party in cases where complete relief cannot be granted among those who are already parties, or if the party being joined has an interest relating to the subject matter of the case and is so situated that the case cannot be disposed of in its absence. Factors considered in determination of joinder are: the risk of prejudice

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<sup>4</sup> Though DMH cites to 104 CMR 29.04(3)(a), the text it cites appears in 104 CMR 29.04(2)(b). Under the latter provision, a child or adolescent with a serious emotional disturbance that, *inter alia*, meets the diagnostic criteria specified in the *Diagnostic and Statistical Manual of Mental Disorders* but that is solely within one of several categories including “mental disorders due to a general medical condition not elsewhere classified,” does not qualify for DMH services. 104 CMR 29.04(2)(b)(3)(c). DMH's *Interpretive Guidelines for Determining Service Authorization* (Dec. 2009), of which this Hearing Officer takes judicial notice, includes traumatic brain injury in this category.

to the present parties in the absence of the proposed party; the range of alternatives for fashioning relief; the inadequacy of a judgment entered in the proposed party's absence; and the existence of an alternative forum to resolve the issues.”

This mechanism is often used by parties to join state agencies, such as DMH, that the BSEA may determine must provide services to a student in a matter before it. The extent to which the BSEA may order such services is set forth in Mass. Gen. Laws ch. 71B, § 3, which provides:

“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 children and families, the department of mental retardation [now called the Department of Developmental Services], 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.”<sup>5</sup>

## ANALYSIS

In its Motion to Dismiss, DMH asserts that despite Alistair's complex presentation it found him ineligible for services in January 2014 due to its determination that his primary impairment is as a result of Traumatic Brain Injury, which under its regulations is considered a disqualification for services. DMH has never provided services to Alistair.<sup>6</sup>

Since August 2013, when Parents submitted Alistair's initial application to DMH, his behavior appears to have escalated, leading to additional psychiatric diagnoses. He has been described in Parents' hearing request as “a student with a complex profile, which includes psychiatric, developmental and several emotional disabilities [who] has exhibited dangerous behaviors and has required intensive social, emotional and educational interventions in order to access his education, make progress and remain safe.” Although Parents may be right that Alistair is likely to be found eligible for DMH services based upon his recent diagnosis by Arbour Fuller clinicians of bipolar disorder and/or the emerging thought disorder/schizoaffective disorder observed by Dr. Goldstein during an evaluation that occurred in the fall of 2013, this determination is DMH's – not the BSEA's – to make in the first instance.<sup>7</sup>

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<sup>5</sup> See M.G.L. c 71B, § 3; see also 603 CMR 28.08(3) (corresponding regulations).

<sup>6</sup> Parents assert that a DMH case manager's attendance at meetings regarding Alistair even though he was not officially a client suggests that DMH anticipated that Alistair would become a client of DMH in the future. The Hearing Officer does not interpret this action as providing a formal relationship between Alistair and DMH that justifies joinder over DMH's opposition where Alistair has been found ineligible for DMH services and where, during at least some of the time the case manager was attending these meetings, no application for services was pending.

<sup>7</sup> Even if DMH were to accept these diagnoses, it is possible that again DMH would trace their root to a traumatic brain injury and reject his application pursuant to 104 CMR 29.04(2)(b) . It might not. At this point, the outcome of Alistair's pending application to DMH is a matter of speculation.

Between August 2013 and January 2014, DMH had before it Alistair's application for services, and it determined based upon its own interpretation of its regulations that he did not qualify for services. Parents did not appeal this determination in accordance with DMH's regulations. For a BSEA Hearing Officer to hold that submitting a new application for services to a state agency, where a previous application has been rejected and that rejection stands, is a sufficient basis for joinder over the opposition of the party whose joinder is sought would be inconsistent with Mass. Gen. Laws ch. 71B, § 3's directive that the hearing officer may order services provided by state agencies "in accordance with the rules, regulations and policies of the respective agencies."

In this case, the regulations in issue are DMH's clinical criteria for service authorization. Generally, in reviewing an agency's decision, including a determination as to whether a potential client meets its clinical criteria, the reviewing court or agency gives "deference to the decision of an agency interpreting its own regulations," *Friends & Fishers of Edgartown Great Pond Inc. v. Dep't of Env. Prot.*, 446 Mass. 830, 837 (2006); *Hurst v. State Ballot Law Comm'n*, 428 Mass. 116, 120 (1998). Because such a determination is within an agency's area of expertise, we do "not intrude lightly." *Brookline v. Comm'r of the Dep't of Envtl. Quality Eng'g*, 398 Mass. 401, 410 (1986).

This case is distinguishable from *Georgetown Public Schools*, BSEA #1500020, cited by Parents. In that case Parents had timely appealed Student's rejection for services from DMH, and an appeal hearing was expected to take place in the near future. Parents in that case expressed confidence that due to Student's primary diagnosis of Schizoaffective Disorder, DMH would reverse its position. In the present case, to reverse its previous determination as to Alistair's eligibility, DMH would have to find both that Alistair has a qualifying diagnosis and that the traumatic brain injury that blocked his eligibility last time was not the cause of the qualifying diagnosis.

Because DMH's most recent determination according to its regulations is that Alistair does not qualify for services, ordering DMH to provide services to Alistair would violate Mass. Gen. Law ch. 71B, § 3's admonition that a hearing officer may make such a determination only "in accordance with the rules, regulations and policies" of the agency. Given that the Hearing Officer cannot at this time order DMH to provide services to Alistair, it cannot be said that complete relief cannot be granted among the parties, or that the DMH "has an interest related to the subject matter of the case and is so situated that the case cannot be disposed of in its absence." *Hearing Rules for Special Education Appeals*, Rule J.

## CONCLUSION

For the reasons set forth above, DMH's Motion to Dismiss DMH as a Party to the Parents' Expedited Hearing Request is hereby ALLOWED. It may be that DMH will find Alistair eligible for services based on the application submitted by his parents on or about October 7, 2014. In that case, Parents and/or Andover will be free to file a Motion for Joinder of DMH.

**ORDER**

- 1) DMH's Motion to Dismiss DMH as a Party to this appeal is **ALLOWED**.
- 2) A hearing in this matter will take place on October 24 and November 5, 2014 at the Bureau of Special Education Appeals, One Congress Street, Boston Massachusetts 02114.

By the Hearing Officer:

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Amy M. Reichbach  
Dated: October 10, 2014