

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

In re: Ugo¹ v. Westford Public Schools
Massachusetts Department of Children and Families
Department of Developmental Services &
Department of Mental Health

BSEA #1607922

**RULING ON MOTIONS OF DEPARTMENT OF CHILDREN AND FAMILIES,
DEPARTMENT OF DEVELOPMENTAL SERVICES, AND DEPARTMENT OF
MENTAL HEALTH TO DISMISS THEMSELVES AS PARTIES**

This matter comes before the Hearing Officer on Motions filed by three different state agencies named by Parents of Ugo as parties to a Request for Hearing filed on April 4, 2016. Parents captioned their *Hearing Request* to include the Westford Public Schools (Westford or “District”), the Massachusetts Department of Children and Families (DCF), the Massachusetts Department of Developmental Services (DDS), and the Massachusetts Department of Mental Health (DMH), and the case was processed as such. DMH filed its *Opposition to Motion to Join the Department of Mental Health* on April 12, 2016 along with a memorandum in support of its motion. On April 14, 2016, DDS filed its *Objection to Joinder* along with a memorandum in support thereof. On April 15, 2016, the undersigned Hearing Officer issued an Order explaining that these documents would be construed as Motions to Dismiss each party from the case, for reasons explained below. On April 21, 2016, DCF filed a *Motion to Dismiss the Department of Children and Families* as a Party to the matter, along with a memorandum in support thereof. In addition to its own Response to the Parents’ *Hearing Request*, filed on April 14, 2016, Westford filed timely oppositions to each agency’s motion. Specifically, on April 19, 2016 the District filed its *Opposition to [DMH]’s Opposition to Parents’ Motion to Join [DMH]*; on April 21, 2016 it filed an *Opposition to the Objection of [DDS] to Joinder*; and on May 3, 2016, the District filed its *Opposition to Motion to Dismiss DCF*, all accompanied by supporting memoranda. On May 4, 2016, Parents filed their *Opposition to Named Human Service Agency’s [sic] Motions to Dismiss*.

The parties provided additional information regarding the status of Ugo as a client and/or prospective client of the agencies during a Conference Call that took place on April 25, 2016. As clarified during that Conference Call, no party requested a hearing on any of the motions and as testimony or oral argument would not advance my understanding of the issues involved, I am issuing this ruling without a hearing pursuant to Bureau of Special Education Appeals (BSEA) *Hearing Rule VII(D)*.

For the reasons set forth below, DCF’s Motion is hereby ALLOWED. DDS’s Motion and DMH’s Motion are hereby DENIED without prejudice.

¹ “Ugo” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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

1. Ugo is a twelve year old resident of Westford, Massachusetts. He is eligible for special education pursuant to 20 U.S.C. §1401 *et seq.* and M.G.L. c. 71 B. (*Hearing Request*)
2. Ugo has been diagnosed with autism spectrum disorder (ASD) and a conduct disorder. (*Hearing Request Ex. 1; Parents' Opposition*) According to his parents, Ugo has also been diagnosed with “relentless and agitation, aggressive behaviors,” (*sic*) anxiety disorder and intellectual impairment. (*Hearing Request*)
3. Ugo is currently placed, pursuant to an Individualized Education Program (IEP) dated March 11, 2016, at a Westford middle school in a substantially separate classroom specifically geared toward students on the autism spectrum. He receives extended school year services. (*Hearing Request Ex. 1*)
4. Ugo has engaged in self-injurious behaviors (punching leg, running headfirst into wall) aggression towards others (biting, kicking and throwing things at others), yelling and swearing, non-compliance, and property destruction (smashing TVs, throwing objects, kicking doors). Some of these behaviors have led to police involvement. (*Hearing Request; Parents' Opposition*)
4. Ugo has been hospitalized psychiatrically at least twice in the last six months. On November 2, 2015 Ugo was hospitalized due to psychiatric needs, and it was determined that an inpatient psychiatric placement was necessary because it was not safe for him to return home. In March 2016, he was hospitalized inpatient for psychiatric reasons again. He required hospitalization until on or about May 1, 2016. (*Parents' Opposition*)
5. Ugo's family applied for voluntary services for him from DCF. This application was denied. (*Hearing Request; DCF Motion*)
6. Ugo currently receives services in the form of Intensive Family Support from DDS. He was not found generally eligible for DDS services as he is only twelve years old. (*DDS Motion*)
7. On or about March 30, 2016 an application for DMH services was completed by, or on behalf of, the Parents. DMH received the application on or about April 11, 2016. Ugo's application for DMH services remains in process without a final determination with respect to whether he meets the clinical criteria for service authorization. (*DMH Motion*)
8. Ugo also receives privately-funded services outside of his school day. (*Hearing Request*)
9. On April 4, 2016, Parents filed a *Hearing Request* at the BSEA, seeking a residential placement to meet Ugo's needs.

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 Rule XVII(B)(4)*, in this case DCF has filed a Motion to Dismiss itself as a party in the matter, which requires an assessment of whether DCF is properly before the BSEA at this time. DDS and DMH each filed Motions opposing or objecting to joinder. Because all three agencies were named in the *Hearing Request* as parties, the Motions of DDS and DHS are more appropriately interpreted as Motions to dismiss themselves as parties as well. In any event, deciding these two motions requires an assessment of whether each agency is properly before the BSEA as a party in this matter at this time. As such, the outcome of all three Motions will be governed both by the rules for joinder of additional parties and BSEA jurisdiction to order that services be provided by state agencies in pending cases.

Pursuant to the BSEA's joinder rule, set forth in Rule I(J) of the *Hearing Rules for Special Education Appeals*:

“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 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 DCF, DDS, and 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 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.”²

As such, to determine whether DCF, DDS, and DMH are properly before the BSEA in the present case, I must determine, as to each agency, first, whether complete relief may be granted among those who are already parties, or if the agency 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;³ and if so,

² M.G.L. c 71B, § 3; *see* 603 CMR 28.08(3) (corresponding regulations).

³ BSEA *Hearing Rule I(J)*.

second, whether joinder of that agency is in accordance with the agency's rules, regulations, and policies.⁴

ANALYSIS

A. DCF

DCF argues in its Motion that because the Parents have asserted that Ugo requires residential placement for educational reasons, complete relief may be granted without the agency. Moreover, as it has neither care nor custody of Ugo, it has no interest relating to the subject matter, and an order that DCF provide any kind of placement for him would violate DCF regulations.

Parents' position is that although they believe Ugo requires residential placement for educational reasons, the BSEA may find that he requires such a placement but for non-educational reasons. If that is the case, according to Parents, DCF may be required to share the cost of the placement with the school district. To support their position, Parents cite a BSEA case in which Parents sought residential placement of a child receiving only minimal voluntary services, and Hearing Officer William Crane allowed joinder over DCF objection.⁵

The District's position is that Ugo is making effective process in a substantially separate in-district placement, and that to the extent any residential or home wrap-around services are needed, they are not educational in nature. As such, if the BSEA were to find that Ugo requires home supports or residential placement for non-educational purposes and that DCF would be the appropriate provider of these services, complete relief could not be effectuated in the agency's absence.

In the matter before me I may, upon considering all of the evidence in the case on the merits, find that Ugo requires nothing more than the services he currently receives. In the alternative, I may find that he requires a residential placement for educational or non-educational purposes, or that he requires other home services in order to access his education. It appears, therefore, that the first part of the analysis weighs in favor of joinder. But I cannot order DCF to provide any services, residential or home-based, if to do so would contravene DCF's own regulations.

Pursuant to its regulations, DCF may share the cost of a residential placement for a child under certain circumstances.⁶ It may not, however, provide a placement for a child who is not in its care or custody, voluntarily or otherwise.⁷ For a child to receive voluntary DCF services, up

⁴ M.G.L. c. 71B, § 3.

⁵ *In Re Lawrence Public Schools*, BSEA #09-0746 (Crane 2009).

⁶ See 110 CMR 7.404(2) ("If a child's IEP specifies that a private day school program . . . is necessary to meet the child's special education needs and the Department determines that the child should be placed in community residential care for non-educational reasons, then the Department shall share the cost of the placement with the local educational agency.")

⁷ Cf. M.G.L. c. 119, § 21 (defining as "custody" the power to, *inter alia*, "determine a child's place of abode, medical care and education" and defining "child requiring assistance"); 110 CMR 4.00 (providing for education

to and including placement, DCF must first determine that he is an appropriate candidate for its services.⁸ In this case, DCF denied Ugo’s application because it determined that he did not qualify for services, and there is no indication in the record that the agency failed to follow its procedures in making or communicating that determination.

As Ugo is not in DCF’s care or custody, and he is not receiving voluntary services from DCF, there is no formal relationship between the child and the agency. Under these circumstances, there is no basis for ordering that DCF remain a party.⁹ Should this change, the parties are welcome to file a Motion to Join DCF at a later date.

B. DDS

In support of its Motion, DDS argues that it provides only family support services to Ugo, and that the goal of such supports is to provide assistance to the family of an eligible child in order to keep the family together and, if possible, to avoid having the child placed out of the home.¹⁰ Pursuant to its own policies, the agency does not provide or fund any residential services for children; it offers case management and family support services only to individuals who are not at least eighteen years old.¹¹ As such, the BSEA cannot order that DDS fund a residential placement for Ugo.

Parents’ position is that although they seek residential placement, the BSEA may deny that placement and instead, order certain home supports that could be the responsibility of DDS consistent with its policies. In support of their argument, they cite to *In Re Silver Lake Regional School District and Ulrike*, in which Hearing Officer Lindsay Byrne allowed joinder where the parents sought a therapeutic residential school but the District asserted that DDS family supports might enable the student to continue to benefit from an effective day school program and avoid placement out of the home.¹²

The District indicates that although the Parents seek residential placement for Ugo, the BSEA – in its determination of what constitutes a free appropriate public education in the least restrictive environment for Ugo – must have access to a reasonable range of alternatives. Citing *Silver Lake*, the District argues that because DDS currently provides family support services to Ugo, to the extent the BSEA might find that Ugo requires certain home supports in order to

services for children *in the Department’s care or custody*” (emphasis added); 110 CMR 4.10 (pertaining to voluntary services).

⁸ See 110 CMR 4.04-4.06.

⁹ See *In re Agawam Public Schools and Massachusetts Department of Children and Families* BSEA #14-03554 (Crane 2013) (allowing DCF Motion to Dismiss where child was not in DCF care or custody and application for voluntary services had been denied).

¹⁰ See 115 CMR 6.07(2)(a) (“The Department seeks to provide supports to children . . . with developmental disabilities and their families, to enable the family to stay together and to be contributing members of their communities”).

¹¹ See 115 CMR 6.07(2)(c) (“The Department shall not provide residential supports to children from birth to 22 years of age and eligible for or receiving services from a local educational authority, local school district, or any other public agency”).

¹² BSEA # 12-5819 (Byrne 2012) (noting that school had identified a unique set of services, to which Student was entitled, “which are uniquely within the control of the DDS and which can reasonably be expected to contribute to the proper implementation of an appropriate special education program for her”).

avoid being moved unnecessarily into a more restrictive educational placement, DDS may be financially responsible for these services.

Should I find, upon considering all of the evidence in this matter, that Ugo requires residential placement for educational or non-educational reasons, it would not be within my authority to order that DDS fund this placement because such an order would contravene DDS regulations.¹³ Should I find, however, that although Ugo does not require residential placement, he does require additional home supports in order to derive meaningful educational benefit from the special education program available to him through the Westford Public Schools, I may also find that DDS would be the appropriate provider of these services. Moreover providing these services to a child it has already deemed eligible is consistent with DDS's own policy and regulations. In these circumstances, it may be that complete relief could not be effectuated in the agency's absence.

C. DMH

In its Motion to Dismiss, DMH argues that although Ugo's family has submitted an application to the agency for services, he has not been authorized previously for DMH services and is not currently authorized to receive them. Pursuant to its regulations, DMH must determine whether Ugo meets clinical criteria for DMH services and whether he needs a DMH service for which there is capacity, before it is able to provide any services for him.¹⁴ This determination could take up to ninety days from the submission of his application.¹⁵

Parents' position is that Ugo's diagnosis of an anxiety disorder and multiple recent psychiatric hospitalizations suggest that he may well be found eligible for services through DMH, notwithstanding his ASD diagnosis. They cite to BSEA precedent allowing joinder in a case where a student had been hospitalized psychiatrically and his application to DMH was pending, distinguishing cases in which students' applications for services had been denied by DMH and these denials had not been appealed to the agency.

As in its Opposition to DCF's Motion, the District argues that to the extent any residential or home wrap-around services are needed, they are not educational in nature. As such, if the BSEA were to find that Ugo requires home supports or residential placement for non-educational purposes in order to receive a free appropriate public education and that DMH would be the appropriate provider of these services, complete relief could not be effectuated in the agency's absence. Furthermore, DMH might well be the agency responsible for such services given Ugo's diagnosis of an anxiety disorder and his recent psychiatric hospitalization. If DMH is not joined, the District bears a substantial risk of prejudice because the BSEA could not order a DMH-District cost-share. Like the Parents, the District cites to *In Re Lexington Public Schools* in support of its position. In that case, Hearing Officer Rosa Figueroa ordered joinder of DMH,

¹³ See 115 CMR 6.07(2)(b).

¹⁴ See 104 CMR 29.04(2)-(4) (delineating application criteria and procedures, and specifying in 29.04(4) that an individual's application will be approved "[i]f it is determined that the individuals needs DMH services, and that there is existing capacity in an appropriate service").

¹⁵ See 104 CMR 29.04(1)(e).

where the student had been hospitalized psychiatrically and had an initial application pending with DMH.¹⁶

As I discussed with regard to DCF's Motion, above, it is possible that I will determine that Ugo requires residential services for non-educational reasons. Given Ugo's mental health diagnosis as well as his psychiatric hospitalizations, I might find that DMH is the agency responsible for such services. For this reason it may not be possible to grant complete relief in the absence of DMH. I now consider whether joinder is consistent with DMH's regulations.

In this instance, in contrast to the cases DMH cites in support of its position, in which DMH had previously determined that the student did not meet eligibility criteria,¹⁷ DMH has not determined previously that Ugo does not meet the clinical criteria for DMH service authorization. Ugo's application is pending, and he may be found eligible for DMH services. In light of this possibility, and the fact that remaining a party to this matter is not inconsistent with DMH regulations, it would be inefficient to dismiss DMH at this time. Should DMH determine in the future that Ugo is not eligible for DMH services, it may renew its Motion to Dismiss.

CONCLUSION

In this matter, Parents assert that Ugo requires residential placement for educational reasons. They recognize that the BSEA may find that Ugo requires residential placement, but not for educational reasons. The District argues that Ugo is making effective progress in his current program, and that any additional supports required are for non-educational reasons and as such, they are the responsibility of one of the state agencies with which Ugo is involved. Pursuant to M.G.L. c. 71B, § 2A and 603 CMR 28.08(3), the BSEA has jurisdiction "to resolve differences of opinion among school districts, private schools, parents, and state agencies." At this early stage in the case, I cannot say that I will be able to grant complete relief among these two parties, and to the extent I may order that they provide services for Ugo, the District bears the risk of prejudice if I dismiss the state agencies the Parents have joined. For these reasons, I find that DCF is not a necessary party to this matter. I also find that both DDS and DMH are necessary parties.

ORDER

- 1) DCF's Motion to Dismiss Itself as a Party is hereby ALLOWED.
- 2) DDS's Objection to Joinder is hereby DENIED.
- 3) DMH's Opposition to Joinder is hereby DENIED.
- 4) A Pre-Hearing Conference in this matter will take place at 9:00 AM on June 1, 2016 at the Bureau of Special Education Appeals, One Congress Street, Boston Massachusetts 02114.

¹⁶ BSEA #13-05048 (Figueroa 2013).

¹⁷ *In Re Stoughton Public Schools, Department of Developmental Services and Department of Mental Health*, BSEA #14-06800; *In Re Fall River Public Schools*, BSEA #1406929.

- 5) A Hearing will take place on June 15, 20, 21, and 22, 2016, also at the BSEA in Boston.

By the Hearing Officer:

Amy M. Reichbach
Dated: May 17, 2016