

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

In re: Wanda¹ v. Arlington Public Schools

BSEA #1700442

**RULING ON DISTRICT'S MOTION TO JOIN THE MASSACHUSETTS
DEPARTMENT OF DEVELOPMENTAL SERVICES**

This matter comes before the Hearing Officer on a Motion filed by the Arlington Public Schools ("District") in a pending matter. The *Hearing Request* filed by Wanda's Parents against the District on August 12, 2016 seeks residential placement of Wanda in the private program she currently attends as a day student. The matter was continued at the District's request, with Parents' assent, and on September 7, 2016, the District filed the instant *Motion to Join the Department of Developmental Services (Motion to Join)*. The Department of Developmental Services (DDS, or the Department) filed a *Memorandum in Opposition to the Arlington Public Schools' Motion to Join (Opposition)* on September 23, 2016.² Parents have taken no position on this issue. A telephonic Motion Session was held on September 29, 2016.

For the reasons set forth below, the District's *Motion to Join* is hereby ALLOWED.

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. Wanda is a nineteen year-old resident of Arlington, Massachusetts. She is eligible for special education pursuant to 20 U.S.C. §1401 *et seq.* and M.G.L. c. 71 B and there is no dispute that she will likely require special education services until the age of twenty-two (22). (*Hearing Request*)
2. Wanda has been diagnosed with hypoxic ischemic encephalopathy secondary to perinatal asphyxia, spastic cerebral palsy, and cortical visual impairment. (*Hearing Request*)
3. Wanda attended the Cotting School in Lexington, Massachusetts until 2006, when she transferred to the Perkins School for the Blind ("Perkins"). (*Hearing Request*)

¹ "Wanda" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

² In support of its Memorandum, the Department of Developmental Services (DDS) submitted two exhibits: (A) Department of Elementary and Secondary Education (DESE)/DDS Family Requirements and Agreement, Fiscal Year 2017; and (B) a DESE/DSS Program Goals, Objectives, Progress and Reporting worksheet for Wanda.

4. Wanda currently attends Perkins as a day student and lives with her parents.³ At Perkins, she has a one-to-one aide and participates in speech therapy, occupational therapy, physical therapy, adaptive physical education, and orientation and mobility services, in addition to language arts, math, science, social studies, home and personal management, work activities, computer, music, health, and swimming. She receives behavioral services in her home from Arlington five hours per week. (*Hearing Request*)

5. On April 28, 2016, Wanda's Team convened for her annual review. The District proposed continued placement in the therapeutic day program at Perkins. Parents rejected the absence of residential programming, and accepted the remainder of the proposed Individualized Education Program (IEP). (*Hearing Request; Motion to Join*)

6. Parents report that Wanda has had a history of aggressive behaviors, uncontrolled tantrums and self-injurious behaviors within the home setting. According to the District, these behaviors do not occur in the school setting. (*Motion to Join*)

7. Wanda has been found eligible by DDS for Children's Supports. DDS describes this program as "family support services provided to individuals younger than 22 years old who reside in their family home or enhanced or specialized family supports available upon referral and assessment by the Department." (*Opposition*)

8. In October 2013, Wanda was accepted into the program of the Department of Elementary and Secondary Education (DESE) and DDS ("DESE/DDS Program"). The DESE/DDS Program is administered by DDS with funding from the DESE. According to DDS, the program is designed to provide in-home services/wrap-around supports to school-aged participants, with the goal of preventing a more restrictive educational or out-of-home residential placement. (*Opposition; Ex. A to Opposition.*)

LEGAL STANDARDS

The outcome of the District's Motion 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

³ Wanda's parents are her legal guardians, pursuant to court order. (*Hearing Request*)

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 DDS) 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.”⁴

As such, to determine whether DDS is properly before the BSEA in the present case, I must make two determinations. First, I must consider whether: (1) complete relief may be granted among those who are already parties; or (2) DDS 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.⁵ If DDS is a necessary party for either of these reasons, I must then determine whether joinder of DDS is in accordance with the agency's rules, regulations, and policies.⁶

ANALYSIS

A. The Parties' Positions

In its Response to Parents' *Hearing Request*, the District asserts that the currently proposed IEP, which continues Wanda's placement at Perkins as a day student, would provide her with a free, appropriate public education (FAPE) in the least restrictive environment. In support of its *Motion to Join*, the District argues that to the extent the BSEA may determine that Wanda requires a residential placement, such placement would not be for educational purposes because she can be appropriately educated in a therapeutic day placement and her troubling behaviors occur only within the home. Moreover, the BSEA may determine that additional services in the home setting, rather than residential placement, are required to ensure that Wanda is able to access her education and remain safely in her home and community. Should that happen, DDS is the appropriate agency to administer these services, consistent with its legislative mandate, because it is the state agency through which Wanda currently receives benefits and services. In either of these circumstances, DDS would be a necessary party.

DDS asserts that it is not a necessary party for two reasons: (1) Parents seek residential placement for Wanda, and providing such services would not be consistent with DDS' mandate as it applies to individuals her age; and (2) DDS is already providing the most robust services it has to Wanda, and as such, no additional services could be ordered by the BSEA.

⁴ M.G.L. c 71B, § 3; *see* 603 CMR 28.08(3) (corresponding regulations).

⁵ BSEA *Hearing Rule I(J)*.

⁶ M.G.L. c. 71B, § 3.

B. DDS Regulations

In support of its *Opposition*, DDS cites several regulations that circumscribe its ability to provide services to individuals Wanda's age. Specifically, the goal of "Children's Supports," the category of services provided to individuals under the age of twenty-two (22), is "to enable the family to stay together and to be contributing members of their communities."⁷ Pursuant to its own policies, the agency "shall not provide residential supports to children from birth through 22 years of age and eligible for or receiving residential services from a . . . local school district."⁸ Similarly, the goal of the DESE/DDS Program is "to help prevent a more restrictive educational or out-of-home residential placement."⁹

C. Analysis

Should I find, upon considering all of the evidence in this matter, that Wanda requires residential placement for educational reasons, DDS would not be a necessary party. Should I find at that point that Wanda requires residential placement for 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.¹⁰

As for the agency's second argument, that Wanda is "already receiving the most comprehensive package of services available through DDS for this age range," this is a question of fact that cannot be decided at this stage of the proceedings.¹¹ Should I find that although Wanda does not require residential placement, she does require additional home supports in order to derive meaningful educational benefit from the special education program available to her through the Arlington 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.

CONCLUSION

In this matter, Parents assert that Wanda requires residential placement for educational reasons. The District argues that Wanda is making effective progress in her current program, and that any additional supports required are for non-educational reasons and as such, they are not the District's responsibility. 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 those who already parties, and to the extent I may order additional

⁷ 115 CMR 6.07(2)(a).

⁸ 115 CMR 6.07(2)(c).

⁹ Exhibit A to DDS *Opposition*.

¹⁰ See 115 CMR 6.07(2)(c).

¹¹ The exhibits submitted by DDS in support of its *Opposition* describe services Wanda is receiving, but in the absence of evidence I cannot determine at this time whether any additional DDS services might be available to her.

services, the District bears the risk of prejudice if I deny its *Motion to Join*. For these reasons, I find that DDS is a necessary party.

ORDER

- 1) The District's *Motion to Join the Department of Developmental Services* is hereby ALLOWED.
- 2) In light of the Parties' October 24, 2016 Joint Request to postpone the Hearing scheduled to begin on December 8, 2016 in order to work together to explore alternative resolutions, a Conference Call will be scheduled to select new Hearing dates.

By the Hearing Officer:

Amy M. Reichbach
Dated: October 28, 2016