**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMININSTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

In re: Xili[[1]](#footnote-1) BSEA **#** 2206000

**RULING ON LEXINGTON PUBLIC SCHOOLS’ MOTION TO JOIN THE DEPARMENT OF CHILDREN AND FAMILIES**

 This matter comes before the Hearing Officer on the *Motion to Join the Department of Children and Families* filed by the Lexington Public Schools (Lexington, or the District) in a matter pending before the Bureau of Special Education Appeals (BSEA). On January 25, 2022, Parents filed a *Hearing Request* against Lexington seeking an extended evaluation in a therapeutic residential school; compensatory services for the District’s failure to provide the special education services and placement for Xili to make effective progress since January 26, 2020; and attorney’s fees. According to Parents, Xili has received extensive services pursuant to an Individualized Education Program (IEP) for an emotional disability for more than two years, but his emotional needs and oppositional behaviors have increased, such that Lexington is not providing him with a free appropriate public education (FAPE). On December 16, 2021, Parents partially rejected the IEP proposed by Lexington for the period from November 30, 2021 to November 29, 2022, which would have continued his current inclusion placement in the Therapeutic Learning Program (TLP) at Lexington High School. They seek an assessment within a “high ratio 24/7 therapeutic milieu which includes a college preparatory curriculum.”

On February 11, 2022, Lexington filed its *Response* to Parents’ *Hearing Request*, asserting that Parents had accepted Xili’s IEPs and placements in full until November 2021; that a residential setting would be too restrictive for Xili; and that its February 3, 2022 proposals for an extended evaluation in a day placement and a home assessment are appropriate for Xili.

 On March 4, 2022, Lexington filed the instant *Motion to Join*, asserting that DCF is a necessary party. Although the District contends that Xili does not need a residential therapeutic assessment, to the extent the Hearing Officer disagrees, Lexington asserts, the residential aspect of that assessment would be for non-educational reasons, and therefore would not be Lexington’s responsibility. Because DCF had custody of Xili for some time and maintains an open case, and because Xili remains eligible for DCF services, the District argues that I might find that DCF is the appropriate entity to fund the residential portion of a residential therapeutic assessment. Moreover, even if I agree with Lexington that a residential assessment is not necessary, I might find that additional home-based services are necessary for Xili to receive a FAPE, and that those services should be provided by DCF.

Parents filed a *Response* to Lexington’s *Motion to Join* on March 9, 2022. They neither opposed nor supported the *Motion*, but reiterated their position that Xili’s social/emotional and behavioral needs are inextricably entwined.

 DCF did not file any document in response to the *Motion*, although Lexington properly served the agency.

Although the Hearing was initially scheduled for March 1, 2022, Parents filed an assented-to request for postponement on February 14, 2022, and the Hearing was postponed for good cause to May 4, 2022 to permit the parties to work together toward resolution.

As no party has requested a hearing on the *Motion*, and as neither testimony nor oral argument would advance the Hearing Officer’s understanding of the issues involved, this Ruling is being issued without a hearing pursuant to *BSEA Hearing Rule VII(D)*. For the reasons set forth below, Lexington’s *Motion to Join DCF* is hereby ALLOWED.

RELEVANT FACTUAL BACKGROUND

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. Xili is a seventeen-year-old eleventh grade student currently placed in the TLP at Lexington High School. As described by Lexington, TLP offers a continuum of integrated academic and social/emotional supports for students. Most major content subject classes are taught collaboratively and/or co-taught by special education and general education teachers. Some content subject classes are delivered in small-group, self-contained settings, as needed. The program provides therapeutic supports during the day.
2. Xili has been diagnosed with Attention Deficit Disorder, Disruptive Mood Dysregulation Disorder, and Oppositional Defiant Disorder. He tests in the cognitively gifted range but has a history of defiance, off-task behavior, school refusal, work avoidance, isolation, and technology addiction. Parents report that over the years, they have battled with Xili over technology and limit-setting.
3. When Xili was in eighth grade, Lexington filed a Child Requiring Assistance (CRA) petition for truancy. DCF became involved and provided support services. Parents requested a special education evaluation; Xili was found ineligible.
4. The following school year, in December 2019, when Xili was in the ninth grade, he was found eligible for special education services under the emotional disability category. The IEP proposed at that time included academic support by special educators for 2 x 55 minutes, and emotional/social support by a social worker for 1 x 30 minutes, per 6-day cycle, as well as consultation/team planning between general and special educators and the social worker 1 x 15 minutes per cycle. Parents accepted this IEP and placement in full.
5. During the COVID-19 pandemic, which began that spring, Xili rarely participated in remote learning.
6. Due to difficulties in the home and failure to follow outpatient treatment during Xili’s tenth grade year, Parents filed a CRA application with the Juvenile Court. DCF assumed custody of Xili and placed him residentially at Brandon Residential Treatment Center from April to August of 2021, at which time he was discharged. During his time at Brandon, Xili’s educational placement continued to be Lexington High School. His attendance increased, but his disengagement continued. The District proposed additional assessments of Xili, and during a Team meeting in May 2021, proposed additional accommodations and supports, including a modified work option, a speech consult, another resource block, up to 20 hours of behavior consult to Parents, and consultation to the Team regarding therapeutic strategies by TLP staff. Parents accepted the IEP that was developed after this meeting, and the corresponding placement, in full.
7. The Team reconvened in June 2021 to consider how Xili has responded to the additional supports, and at that time proposed a change of placement to the TLP with additional goals and services. Parents accepted the IEP and placement in full, and Xili was placed in TLP for the 2021-2022 school year, with increased in-school supports that included additional direct social work services, two periods of substantially separate Academic Support, and four periods of substantially separate Metacognitive services.
8. The Team reconvened for Xili’s annual review in November 2021 and proposed an IEP dated November 30, 2021 to November 29, 2022 (2021-2022 IEP), with continued placement in the TLP.
9. In December 2021, Xili refused to attend school on several occasions and twice assaulted one or both Parents over the use of his cell phone. This resulted in a five-day psychiatric hospitalization, which was followed by ten days of isolation due to a positive COVID-19 test.
10. On December 16, 2021, Parents partially rejected the 2021-2022 IEP proposed by Lexington.
11. Progress reports issued on January 21, 2022 indicate ongoing issues with attendance and lack of measurable progress on Xili’s social/emotional and metacognitive goals.
12. On January 24, 2022, Xili got into an altercation with Parents over technology use, again resulting in a call to the police.
13. Xili underwent an independent neuropsychological assessment in early February 2022. The independent evaluator concluded that Xili’s disabilities prevent him from progressing effectively in regular education, as evidenced by his lack of engagement in school and dangerous and disruptive behavior at home when limits are set. She recommended placement in a residential therapeutic program that could provide Xili with consistent, highly individualized, intensive therapeutic supports, including “in-vivo” support, daily group therapy, psychoeducation, project-based and high interest academics, and executive function skills.

1. As of the filing of the *Hearing Request*, Xili was exhibiting to school refusal. He was also refusing to engage when in school, complete schoolwork or homework, attend appointments with his therapist, take prescribed psychiatric medications, and comply with rules for technology. He was scheduled to begin a ten-day partial hospitalization program.
2. As of the filing of the instant *Motion*, Xili was attending the Arbor-Fuller Partial Hospital Program remotely.
3. In the meantime, on or about February 15, 2022, Lexington proposed an extended evaluation in a therapeutic day placement, a home assessment, and an early triennial evaluation. Parents accepted the extended evaluation in a therapeutic placement and the early reevaluation, though they rejected the District’s failure to provide the evaluations in a therapeutic residential school. Lexington contends that Parents rejected the home assessment, but Parents dispute this claim and assert that this evaluation was scheduled to take place in March, though they do not believe such assessment is necessary.
4. The CRA case was closed on March 4, 2022, the same day the instant *Motion* was filed. It is unclear whether DCF’s clinical case has been closed; the District asserts that it remains open, whereas Parents “understand” that it has been closed. DCF has not offered any clarification on this point.

LEGAL STANDARDS

 The BSEA has jurisdiction to resolve “differences of opinion among school districts, private schools, parents, and state agencies.”[[2]](#footnote-2) The outcome of Lexington’s *Motion to Join the Department of Children and Families* is governed by the BSEA rules for joinder. Pursuant to BSEA *Hearing Rule* I(J):

“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.”

 Parties often use this rule to join state agencies (such as DCF) that the BSEA may determine is responsible for providing services to a student in a matter before it, if such services are necessary for the student to receive a FAPE in the least restrictive environment.[[3]](#footnote-3) The relief the BSEA may order state agencies to provide is limited by Mass. Gen. Laws ch. 71B, § 3, which states:

“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]](#footnote-4)

 Therefore, to decide whether DCF should be joined as a party in the instant matter, I must determine, upon consideration of the joinder factors, whether complete relief may be granted among those who are already parties, or if DCF 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]](#footnote-5)

# ANALYSIS

After a hearing on the underlying case, I may find that Xili requires nothing more than an assessment in a therapeutic day program, as Lexington has proposed. Alternatively, I may find that he requires a residential therapeutic assessment for educational (as Parents contend) or non-educational (as Lexington asserts may be possible) purposes, or that he requires other home services 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]](#footnote-6) It may not, however, provide a placement for a child who is not in its care or custody, voluntarily or otherwise.[[7]](#footnote-7) For a child to receive voluntary DCF services, up to and including placement, DCF must first determine that he is an appropriate candidate for its services.[[8]](#footnote-8) In this case, DCF has been awarded custody of Xili in the past, and has provided residential placement for him. Although DCF no longer has custody of Xili, it is unclear whether the agency maintains an open case, whether DCF would find Xili appropriate for voluntary services, and/or whether the parties would consider a voluntary placement agreement. Furthermore, it is possible that I will find, as Lexington asserts, that Xili does not need to be evaluated residentially, but that he requires additional home-based services in order to access FAPE, that these services are within DCF’s purview, and that providing them is consistent with DCF’s rules and regulations.

As I cannot rule out these possibilities at this early stage in the proceedings, joinder of DCF is appropriate. DCF may have an interest in the matter, and because I may not be able to fashion the complete relief needed to support Xili’s needs, or otherwise enter an appropriate judgment after a hearing, in the agency’s absence, the risk of prejudice to the present parties in the absence of joinder is great. Moreover, joining DCF would foster administrative efficiency.

CONCLUSION

 For the reasons above, DCF is a necessary party in this matter.

**ORDER**

1)Lexington’s *Motion to Join the Department of Children and Families* is hereby ALLOWED.

2) A Virtual Pre-Hearing Conference will take place via Zoom at 11:00 AM on April 8, 2022. The parties are directed to send email addresses for all participants to the Hearing Officer by close of business on April 1, 2022.

3) The Hearing will take place via Zoom on May 4, 9, and 10, 2022, beginning at 10:00 AM each day. Exhibits and witness lists are due April 27, 2022, with a copy to the Court Reporter.

By the Hearing Officer:[[9]](#footnote-9)

 /s/ Amy M. Reichbach

Dated: March 31, 2022

1. Xili is a pseudonym chosen by the Hearing Officer to protect the student’s identity in public documents. [↑](#footnote-ref-1)
2. M.G.L. c 71B, § 2A; see 603 CMR 28.08(3) (corresponding regulations). [↑](#footnote-ref-2)
3. See M.G.L. c 71B, §§ 2A, 3; 603 CMR 28.08(3). [↑](#footnote-ref-3)
4. M.G.L. c 71B, § 3; see603 CMR 28.08(3). [↑](#footnote-ref-4)
5. See BSEA *Hearing Rule* I(J). [↑](#footnote-ref-5)
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.”) [↑](#footnote-ref-6)
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 7.400 (providing for education services for children *in the Department’s care or custody”* (emphasis added)); 110 CMR 4.10 (pertaining to voluntary placement agreements). [↑](#footnote-ref-7)
8. See 110 CMR 4.04-4.06. [↑](#footnote-ref-8)
9. The Hearing Officer gratefully acknowledges the assistance of legal intern Christopher Brosnahan in the preparation of this Ruling. [↑](#footnote-ref-9)