**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re**: **Marshfield Public Schools & Student BSEA #2310789**

**RULING ON MARSHFIELD PUBLIC SCHOOLS’ MOTION TO JOIN**

**CARDINAL CUSHING CENTERS**

This matter comes before the Hearing Officer on the Marshfield Public School’s (Marshfield or the District) *Motion to Join Cardinal Cushing Centers* (*Motion*), filed with the BSEA on May 3, 2023. The District seeks joinder of Cardinal Cushing Centers (Cardinal Cushing) as a necessary party in accordance with Rule I(J)[[1]](#footnote-1) of the Bureau of Special Education Appeals (BSEA) *Hearing Rules for Special Education Appeals* (*Hearing Rules*).

For the reasons articulated below, the District’s *Motion* is **DENIED** as to its request for joinder of Cardinal Cushing.

**RELEVANT FACTS[[2]](#footnote-2) AND PROCEDURAL HISTORY:**

1. Student is a 16-year-old student who resides in Marshfield, Massachusetts with her parents. She attended Cardinal Cushing Centers School until February 2022, when she was unilaterally removed from her program by her parents following her hospitalization. Specifically, on February 11, 2022, Marshfield received a Physician’s Affirmation of Need for Temporary Home or Hospital Education for Medically Necessary Reasons (hereinafter, “Home/Hospital Form”) from Dr. Masanori Takeoka of Children's Hospital, Boston, recommending that Student receive educational and therapeutic services at home, during the daytime hours of 9 AM and 3 PM when her symptoms of mood swings, aggressive behavior, and dysregulation of behavior control are minimized.
2. Since Marshfield received the first Home/Hospital Form on February 11, 2022, the District has received seven (7) additional Home/Hospital Forms, all with substantially similar wording and recommendations.[[3]](#footnote-3) Marshfield has honored those authorizations while continuing to fully fund Student’s placement at Cardinal Cushing.
3. During the relevant time period, Student has participated in swimming and other activities outside of the home.
4. Marshfield has found it difficult to provide Student with tutoring, given difficulties locating certified staff available to work with Student in her home between the hours indicated on the Home/Hospital Form.[[4]](#footnote-4) Student’s current tutor works under the direction of the special education teacher at Cardinal Cushing but is not a licensed teacher.
5. The staff at Cardinal Cushing indicate that they can meet Student’s needs, but Parents disagree.
6. Parents do not believe that Student is receiving sufficient home tutoring services.
7. On May 3, 2023, the District filed a *Hearing Request* seeking a finding that certain Home/Hospital Forms provided to the District by Student’s doctors are “facially invalid, as the criteria for home/hospital services is not applicable to [Student’s] circumstances”; a determination that Student is currently being “denied FAPE through the inaction or misplaced directives of her parents”; and a determination as to the legal obligation of the District to offer Student a day and/or residential placement rather than providing her with her current home program. The District further sought joinder of Cardinal Cushing, contending that the private school program should be joined, as Student’s “stay put” placement is at Cardinal Cushing, Parents have advised that they hold both the District and Cardinal Cushing responsible for providing Student with a FAPE, Parents’ complaints against the District are often “intertwined with complaints against Cardinal Cushing”, the District and Cardinal Cushing are “aligned in their efforts to educate [Student] and to facilitate her return to the school program”, and Cardinal Cushing does not oppose joinder.
8. On May 4, 2023, the BSEA issued a *Notice of Hearing* in this matter. The matter was assigned to Hearing Officer Marguerite Mitchell, and an initial Hearing date was set for May 23, 2023.
9. On May 15, 2023, Cardinal Cushing filed its *Response to* [*the District’s*] *Request for Hearing and Motion to Join* [*Cardinal Cushing*] (*Cardinal Cushing Response*), confirming it “has no objection to being joined as a party in th[is] matter”[[5]](#footnote-5).
10. On May 15, 2023, the District, Parents and Cardinal Cushing participated in a Conference Call with Hearing Officer Mitchell wherein they discussed postponing the initial hearing date to provide time for all of them to participate in a Pre-Hearing Conference and to engage in informal resolution discussions. They also agreed that Parents would have until May 23, 2023, to file any responsive documents to the *Hearing Request* and the *Motion*. Thereafter, on May 15, 2023, following the submission of a joint (inclusive of Cardinal Cushing) written request for postponement, a *Ruling* was issued by Hearing Officer Mitchell postponing the Hearing until August 10, 2023.
11. On May 23, 2023, Parents filed [*Student’s*] *Objection and Reasons Therefore to* [*the District’s*] *Request for Hearing and Motion to Join* [*Cardinal Cushing*] (*Parents’ Response*)[[6]](#footnote-6). Despite the title of this document, the substance of the *Parents’ Response* fails to address the *Motion* nor to take any position on the requested joinder of Cardinal Cushing.
12. On May 25, 2023, the matter was reassigned for administrative reasons to Hearing Officer Alina Kantor Nir.

**LEGAL STANDARD:**

Rule I(J) of the *Hearing Rules* states that,

“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 judgement entered in the proposed party’s absence; and the existence of an alternative forum to resolve the dispute.”

To properly analyze a joinder request, I must also consider the state and federal laws that establish the limited jurisdictional authority of the BSEA. Specifically, 20 USC § 1415(b)(6), grants parties the right to file timely complaints with the state educational agency designated to hear such “with respect to any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child”. Similarly, M.G.L. c. 71B § 2A establishing the BSEA, authorizes it to resolve special education disputes,

“…  between and among parents, school districts, *private schools* and state agencies concerning: (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child arising under this chapter and regulations promulgated hereunder or under the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 et seq., and its regulations; or (ii) a student's rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, and its regulations” (emphasis added).

The *Hearing Rules* also allow a party to be included in a BSEA matter through the process of intervention. Specifically *Rule I(I)*, entitled “Intervention”, provides that “upon written request, a Hearing Officer may allow any person or entity that may be substantially and specifically affected by the proceeding to intervene or participate in the entire proceeding or any part of it.”[[7]](#footnote-7)

With these statutory and procedural requirements in mind, I turn to consider the District’s *Motion.*

**APPLICATION OF LEGAL STANDARD:**

Here, the District is requesting joinder of a private school in a matter concerning a dispute over whether the home/hospital educational program currently being provided to Student in accordance with the affirmation of her medical providers is appropriate and provides her with a FAPE, or whether she requires a day or residential program at Cardinal Cushing or another public or private special education school. This dispute falls within the jurisdictional authority of the BSEA.[[8]](#footnote-8) Although Cardinal Cushing and the District dispute whether Student’s stay-put placement is Cardinal Cushing, they do not dispute it was her last placement prior to being educated in accordance with the Home/Hospital Forms provided to the District continuously since February 11, 2022. Additionally, Cardinal Cushing has advised that it has no objection to “being joined as a party” in this matter. Further, while Parents do not explicitly take a position on Cardinal Cushing’s involvement in this matter, *Parents’ Response* sets forth objections about alleged actions and inactions on the part of both the District and Cardinal Cushing, separately and jointly.

Having considered the requisite factors for joinder, I do not find the joinder standard to be met for Cardinal Cushing. Complete resolution of the issues raised in the *Hearing Request* can be granted without the involvement of Cardinal Cushing as a party as none of them necessitates Cardinal Cushing’s joinder. It is the District, not Cardinal Cushing, that maintains the underlying obligation to provide Student both with a FAPE, as well as a home educational program should it be in receipt of appropriate Home/Hospital Forms. Moreover, Cardinal Cushing acknowledges that its day program remains available to Student should the Hearing Officer determine, after a hearing on the merits, that Student requires such a placement to receive a FAPE. Thus, there is no risk that complete relief could not be granted in this matter without the involvement of Cardinal Cushing.

Moreover, while Cardinal Cushing has a substantial interest relating to the subject matter of the case, the District has not shown how Cardinal Cushing is so situated that the matter cannot be disposed of in its absence as a party. Although Cardinal Cushing staff may be necessary and essential witnesses in this proceeding, and Cardinal Cushing may have evidence in its possession that will be relevant and admissible in a hearing on the merits, this witness testimony and evidence can still be provided without requiring joinder of Cardinal Cushing as a party as subpoenas are commonly requested of (and issued for) non-parties in BSEA proceedings.[[9]](#footnote-9)

Joinder, however, is not the only available method for an entity to become a party in a matter pending before the BSEA. Here, Cardinal Cushing has advised that it has no objection to becoming a party in this matter, and it has proceeded as such, having timely filed the *Cardinal Cushing Response* to the District’s *Hearing Request*, and having participated fully in the initial Conference Call held in this matter.[[10]](#footnote-10) Nor have Parents raised any objection to Cardinal Cushing’s involvement as a party.[[11]](#footnote-11) In light of this, should Cardinal Cushing wish to seek party status in the instant matter, the private school program may, consistent with *Hearing Rule I(I),* proceed with a written request for Intervention. Such request will be promptly considered by the undersigned Hearing Officer.

**ORDER:**

The District’s *Motion* is **DENIED** as to its request for joinder of Cardinal Cushing. Accordingly, the above-referenced matter will proceed as follows:

1. Should Cardinal Cushing wish to seek party status in the instant matter, it may proceed with a written request for Intervention, which request shall be filed by close of business on June 6, 2023.
2. The Hearing will take place on August 10, 2023, at the Bureau of Special Education Appeals, 14 Summer Street, 4th Floor, Malden, MA 02148. It will begin at 10:00 a.m.
3. The Parties will participate in a Pre-Hearing Conference on June 14, 2023, at 9:00 a.m., via a virtual platform. A virtual link will be provided separately. The Parties will provide the Hearing Officer with the email address of all persons participating in the Pre-Hearing Conference prior to the close of the business day on June 12, 2023.
4. Exhibits and witness lists are due by the close of the business day on August 3, 2023.

The parties are reminded that all requests for postponement must be in writing and specify the reasons for requesting the postponement and the length of the postponement desired/agreed upon. Should the parties reach a settlement agreement prior to the Hearing, the moving party shall submit a written withdrawal of the hearing request. Failure to appear at the Hearing on the merits may result in dismissal of the matter with or without prejudice.

**All requests for a stenographer at the Hearing on the merits must be made in writing.**

So Ordered by the Hearing Officer

/s/ Alina Kantor Nir

Alina Kantor Nir

Dated: May 31, 2023

1. The *Motion* cites *Hearing Rule* I(F) as its authority; however, this appears to be a typographical error, as joinder of additional parties is governed by *Hearing Rule* I(J). *Hearing Rule* I(F) pertains to holding a Resolution Session in matters involving parent and/or student-filed hearing requests. The *Motion* also references 801 CMR § 1.01(7)(g) as grounds for its joinder request; however, that provision relates to motions to dismiss filed in administrative proceedings, which is inapplicable to the underlying *Motion*. Finally, the *Motion* relies on 603 CMR § 28.10(2)(a)(2) in support of the joinder request. However, as that regulation pertains to school district responsibility for the education of a student who requires an out-of-district placement but whose parents reside in two different school districts, it is also inapplicable to the District’s request. I, therefore, do not analyze the *Motion* under either inapplicable regulatory provision or Rule. Rather, my analysis is based on the statutory and *Hearing Rules* provisions identified below. [↑](#footnote-ref-1)
2. These facts are subject to change following a hearing on the merits. [↑](#footnote-ref-2)
3. The last two home/hospital authorization forms, both dated April 13, 2023, were provided by two separate doctors. [↑](#footnote-ref-3)
4. A log of compensatory service owed to Student is maintained by Marshfield. [↑](#footnote-ref-4)
5. Although Cardinal Cushing agreed substantively with the District’s factual allegations, it advised that it “does not concede” that it is Student’s stay-put placement as the District alleged, instead arguing that Student is entitled to “the array of special education and related services detailed in her last accepted IEP, regardless of where she receives those services” not to a placement at a specific school. Cardinal Cushing took no position on whether or not Student is currently receiving a FAPE, or on the validity of the Home/Hospital Forms challenged by the District. [↑](#footnote-ref-5)
6. With regard to the objection to the *Hearing Request*, Parents challenged the District’s objections to certain of the Home/Hospital Forms executed by Student’s doctors, noting that neither the District nor Cardinal Cushing has ever made “additional inquiries of [Student’s] providers” as they are allowed to do, and that the forms are “signed by board certified physicians,” thereby “attest[ing] that the information they have provided is accurate, appropriate, and should be relied upon.” Parents also disputed the District’s claim that Student’s ability to leave and participate in activities outside her home establishes the alleged inappropriateness of the challenged Home/Hospital Forms, noting that “603 CMR § 28.03(3)(c) does not state that a student must be bedridden.” Parents requested a finding that the Home/Hospital Forms are “facially valid and ensure that her services remain in place so that [Student] continues to receive [a] FAPE.” [↑](#footnote-ref-6)
7. See 801 CMR § 1.01(9). [↑](#footnote-ref-7)
8. 20 USC § 1415(b)(6); M.G.L. c. 71 § 2A; see 34 CFR § 300.507(a)(1); 603 CMR § 28.08(3)(a) (providing for the BSEA to hear “… any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law or the procedural protections of state and federal law for students with disabilities”). I note that at this time I take no position as to my jurisdiction to determine the validity of the challenged Home/Hospital Forms, to the extent that they otherwise meet the regulatory requirements for such forms. [↑](#footnote-ref-8)
9. See *Hearing Rule VII* (authorizing any party to seek a subpoena of any person, not just parties, “to appear and testify, and, if requested, to produce documents at the hearing”); *In re: Stewart v. Acton-Boxborough Regional School District*, BSEA # 21-01061 (Reichbach, 2001) (declining to join the Town of Acton as a party in the matter, in part, as “… Parent noted in her *Joinder Motion* that she would call the [Town of Acton employee] as a witness in this case irrespective of my ruling on her motion. Likewise, the District suggested during oral argument that the [Town of Acton employee] and/or other relevant officers could be subpoenaed to testify”). [↑](#footnote-ref-9)
10. Additionally, Cardinal Cushing’s counsel has not filed a limited Notice of Appearance, as is generally the case in situations where a potential party is opposing being involved in a matter. [↑](#footnote-ref-10)
11. Rather, as Parents’ arguments against the claims raised in the *Hearing Request* are directed at both the District and Cardinal Cushing, it appears Parents are also proceeding with the expectation of Cardinal Cushing being included as a party in this matter. [↑](#footnote-ref-11)