**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student & Franklin Public Schools & BSEA # 2500429**

 **Massachusetts Department of Developmental Services**

**RULING ON PARENT’S MOTION TO JOIN DESE**

This matter comes before the Hearing Officer on Parent’s February 11, 2025, *Motion to Join the Department of Elementary and Secondary Education (DESE)* (*Motion*). On February 28, 2025[[1]](#footnote-1), DESE filed its *Opposition to Parent’s Joinder Motion* (*Opposition*). Neither the District nor the Department of Developmental Services (DDS) has taken any position on the *Motion*.

As none of the Parties have requested a hearing on the *Motion*, and, because neither testimony nor oral argument would advance the Hearing Officer's understanding of the issues involved, this Ruling is issued without a hearing, pursuant to Bureau of Special Education Appeals Hearing Rule VII(D). For the reasons articulated below, Parent’s *Motion* is **DENIED without prejudice**.

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

Student’s last school placement was in a residential educational program at the Perkins School for the Blind (Perkins). Perkins terminated this placement on or about February 6, 2024, for reasons not substantially relevant to the *Motion*. In May of 2024, Student was accepted to the Evergreen Center’s (Evergreen) residential educational program, pursuant to the IEP he had had while attending Perkins, as modified. This modified IEP made adjustments to the service delivery grid, including but not limited to replacing direct services with staff consultation. Additionally, the District proposed to hire a TVI to provide consultative support to Student at Evergreen. Parent[[3]](#footnote-3) wholly rejected the modified IEP and subsequently filed the underlying *Hearing Request*. Upon learning of Parent’s rejection, Evergreen filled Student’s seat and at no time during the pendency of this matter has it re-offered Student a placement.

Since Student’s termination from Perkins, he has been at home receiving some but not all of the educational and related services and supports: a) as called for by the IEP; and b) as previously provided by DDS. He was also recently found eligible to receive services through a joint DESE/DDS in-home educational services program (DESE/DDS Program) consisting of 44 hours of Family Support Navigation for FY 25 and 48 hours for FY26, as well as $5,000 for DESE/DDS support services for FY 25 and $10,000 for FY26[[4]](#footnote-4). The Parties do not disagree that the services Student has received on an interim basis at home do not replicate a school program or constitute a free appropriate public education (FAPE). Thus, they have continuously engaged[[5]](#footnote-5) in an expansive search to locate a new residential educational program for Student, or, on an interim basis, an out of district day program for Student throughout the pendency of this matter. Additionally, the Parties explored options to obtain assistance from other agencies in identifying a new school placement, including pursuing the Interagency Review Team for Complex Cases (“IRT”) process from the Executive Office of Health and Human Services (EOHHS) pursuant to 101 CMR 27.01, and pursuing placement at non-approved programs with the assistance of DESE, pursuant to 603 CMR 28.06(3)(e).

According to written status reports filed by the District on February 14 and 27 and March 4, 10, and 17,2025 and by Parent on February 28, and March 7, 12, and 19, 2025, Student has recently been accepted to the BICO Collaborative program (BICO), on an interim day basis, and to the residential educational program at Crotched Mountain School (Crotched Mountain). Additionally, Parent is scheduled to tour a second potential approved private day school program on March 21, 2025 and a second potential approved residential program has offered Parent two virtual intake sessions, that did not attend[[6]](#footnote-6). The District is working to reschedule a third session, if possible. No other interim day or residential program referrals remain open at this time. Further, EOHHS declined to pursue the IRT process with the Parties in light of the pending matter, however they offered Parent support to ensure Student was connected with all available state agency services. Further, given the pending day and residential program offers and open referrals, the prerequisites to pursuing non-approved programs with the assistance of DESE under 603 CMR 28.06(3)(e)[[7]](#footnote-7) are not met.

In March 2025, Parent conditionally accepted placement at BICO on an interim day basis, although the Parties dispute if Parent’s conditions are appropriate or necessary, and Student has not yet begun attending BICO. Parent also shared concerns and conditions to accept Crotched Mountain that the Parties attempted to resolve, despite also disputing their appropriateness. However, according to the District, on or about March 14, 2025, Parent ultimately rejected placing Student at Crotched Mountain[[8]](#footnote-8). As a result, on March 14, 2025, the District pursued emergency action in the Superior Court that was denied without prejudice based in part upon the Court’s conclusion that “other openings may occur and other schools may respond in the near future” and that “this Court cannot find today that [Parent’s] conduct [of rejecting placement at Crotched Mountain] is done with that purpose [of unreasonably withholding consent for Student’s placement into a residential program] given her testimony, as it creates real disputes in fact, but this question is a close call”.

**POSITION OF THE PARTIES**

1. Parent

Parent seeks DESE’s joinder pursuant to the provisions of 20 USC 1401(32) and 34 CFR 300.101(b) that Parent claims “obligate[s DESE] to ensure an appropriate placement is available for [Student]”. DESE is a necessary party in this matter as “it has become clear that a [FAPE] cannot be delivered or guaranteed without DESE’s joinder”. Specifically, Parent contends that DESE is needed to assist in identifying or providing Student with an alternative placement that has yet to be located “successfully” for over a year, and that Student needs such a placement to receive a FAPE.

2. DESE

DESE opposes joinder, contending complete relief can be granted to the Parties without its involvement and disputing that its general supervisory authority under Part B of the Individuals with Disabilities Education Act (IDEA) obligates its joinder in this matter. DESE notes that Parent fails to allege the necessary elements for joinder in her *Motion*. Relying on prior BSEA Rulings and the IDEA provisions cited by Parent, DESE contends that its general supervisory obligations by themselves do not justify its joinder particularly where, as here, it was not directly involved in the development or implementation of Student’s IEPs, any of the allegations in the *Hearing Request* pertaining to a denial of a FAPE to Student, or the ongoing search for alternative approved placements[[9]](#footnote-9). Thus, DESE submits that joining it in this matter “… under the[se] circumstances risks including DESE as a party to all disputes between families and school districts filed in the BSEA.” Specifically, DESE contends that the provisions of 603 CMR 28.06(3)(e), as they are not yet applicable to Student, do not provide justification for joinder in this matter based solely on the possibility that they may apply in the future. Further, DESE disputes that Student’s eligibility for services through the DESE/DDS Program justifies joinder here, as it is DDS, not DESE, that determines eligibility and level of funding and support for students who qualify for this Program.

**LEGAL STANDARD**

A. Joinder of a State Agency

As previously explained in the *Joinder Ruling* and the *Reconsideration Ruling*,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.”

In order for the BSEA to order a State agency to offer services, the student must be eligible to receive the services from that agency[[10]](#footnote-10). Under Mass. Gen. Laws c. 71B, § 3:

"The [BSEA] hearing officer may determine, in accordance with the rules, regulations and policies of the respective agencies, that services shall be provided by … any other state agency or program, in addition to the program and related services to be provided by the school committee”[[11]](#footnote-11).

The ”in addition to” language within the statute has been consistently interpreted by BSEA Hearing Officers to mean that if services that the human service agency provides in accordance with its rules and policies, are necessary for a student to access or benefit from the school district’s special education program “(over and above those services that are the responsibility of the school district)”, joinder may be appropriate[[12]](#footnote-12).

B. DESE as a Party to IDEA Due Process Appeals

Section 1412 of the IDEA establishes the overarching oversight obligations of the State educational authority (SEA) [[13]](#footnote-13). Specifically, 20 USC 1412(a)(11) imposes on DESE the responsibility for ensuring that “all requirements of [Part B of the IDEA] are met; [and] all educational programs for children with disabilities in the State … are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and meet the educational standards of the [SEA] …”[[14]](#footnote-14). As I have previously recognized, however, no private right of action for DESE’s violations of Section 1412 of the IDEA exists in Section 1415 of the IDEA[[15]](#footnote-15). Moreover, other provisions in Section 1412 of the IDEA recognize that DESE’s general supervisory obligations are distinct from a local educational agency’s (LEA’s) obligations to provide a FAPE or direct services to students with disabilities[[16]](#footnote-16).

The lack of a private right of action for DESE’s violations of Section 1412 does not mean DESE can never be named as a party in a due process proceeding under Section 1415. Federal guidance has long supported the right of a “parent [to] file a due process complaint against an SEA and the [corresponding right of a] hearing officer [ ] to determine, based on the individual facts and circumstances in the case, whether the SEA is a proper party to the due process hearing”[[17]](#footnote-17). In the same way, a party could seek joinder of an SEA (DESE) and it is up to the BSEA hearing officer to determine the appropriateness of such a request, in accordance with the statutory, regulatory and procedural requirements governing joinder.

For an SEA to be liable for denials of FAPE, however, specific actions or inactions by the SEA must have contributed to or caused such a denial[[18]](#footnote-18). “In other words … IDEA does not create a type of respondeat superior liability, imputing liability to SEAs for every local deviation from the State-created standards”[[19]](#footnote-19). The First Circuit has long recognized that the IDEA “places obligations upon the LEAs and designates the states as the enforcers of compliance with the federal laws”[[20]](#footnote-20). Relying on this holding, the Tenth Circuit subsequently concluded that this statutory scheme in the IDEA “does not turn every ‘local educational agency’ under the statute … into the agent of the ‘State educational agency’ as a matter of federal law, so that the latter automatically becomes legally liable for all transgressions of the former”[[21]](#footnote-21). Thus, while DESE may, in certain circumstances, be an appropriate party to a BSEA due process proceeding, something more than just its general supervisory authority obligations must be involved to support a grant of party status[[22]](#footnote-22).

It is with these statutory and procedural dictates in mind that I consider the *Motion.*

**APPLICATION OF LEGAL STANDARD**

According to the *Motion*, Parent seeks joinder of DESE, as the SEA in the Commonwealth, based upon its general supervision responsibilities to ensure that a FAPE is provided to all eligible students over the age of 3. Student’s eligibility and right to receive a FAPE are not in dispute in this matter. The Parties also do not dispute the need for Student to be in a residential educational program to receive a FAPE, and they agree that Student’s failure to be so placed during the pendency of this proceeding has resulted in a denial of a FAPE to him.

Rather, the disputes in this matter pertain to the identification of a new placement wherein Student will receive a FAPE, and the reason for the failure to so identify such a placement to date, as well as the appropriate compensatory services owed to Student at this time. According to Parent, DESE’s joinder is necessary so as to assist in locating such a placement; a task that has proven unsuccessful by the Parties for a variety of disputed reasons for over a year. However, Parent does not allege any specific actions or inactions by DESE that have contributed to Student’s failure to receive a FAPE during the pendency of these proceedings.

In analyzing this joinder request, I first consider the state and federal laws establishing the limited jurisdictional authority of the BSEA, and the available entities over which it can exercise such subject matter jurisdiction[[23]](#footnote-23). While I have the authority to order joinder of DESE, my authority is limited to:

“…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”[[24]](#footnote-24).

Moreover, in order for DESE to be joined, in addition to consideration of the risk of prejudice to the present parties in allowing joinder, the alternatives available to issue a judgement without joinder, and the existence of an alternative forum to resolve any disputes, I must also find that complete relief cannot be granted among the existing parties and thus the case cannot be disposed of in DESE’s absence. In other words, for joinder of DESE to be allowed, Parent “… must be able to show, at least in a preliminary way, that it will be able to present evidence at a Hearing that may result in the entity being found responsible to offer some service … to the student[[25]](#footnote-25).”

After consideration of Parent’s *Motion*, and her subsequent written status reports, I do not find that Parent has presented any evidence that DESE either has specific responsibility for Student or has taken actions or inactions with regard to Student or his receipt of a FAPE. While at some point in the future the Parties may need to pursue placement at an unapproved out of district program with DESE pursuant to 603 CMR 23.06(3)(e), this regulation is not yet applicable to Student’s present circumstances. There are both approved residential and interim day programs that have offered placement to Student currently or remain as open referrals. Further, although Student is eligible for services through the DESE/DDS Program, Parent has not alleged any action or inaction by DESE that impacts Student’s receipt of these services, and DESE’s argument that it has no role in determining eligibility or level of funding and support for students who qualify for this Program is unchallenged.

This lack of specific responsibility, action or inaction by DESE ends the joinder inquiry at this time, as DESE does not currently have any responsibility, potentially or otherwise, to provide any services to Student. This does not mean that DESE may not have such responsibility in the future. For now, however, Parent’s *Motion* is **DENIED without prejudice[[26]](#footnote-26)**.

Accordingly, the above-referenced matter will proceed with the current Parties, exclusive of DESE, participating in a Conference Call on March 20, 2025, at 9:00 a.m. The Parties are instructed to call the following phone number: 1-(857) 327-9245 at that time and then enter the following passcode when prompted: 133 966 91#.

By the Hearing Officer,

/s/ Marguerite M. Mitchell
Marguerite M. Mitchell

Date: March 19, 2025

1. DESE requested and was allowed an extension until this date to file its reply to the *Motion*. [↑](#footnote-ref-1)
2. Much of the procedural history and relevant factual information has been previously set forth in prior *Rulings* in this matter, that are incorporated herein by reference and will not be repeated here, unless relevant to the current underlying issue. Specifically, the Parties are referred to the January 22, 2025 *Ruling on Motion to Join DDS* (*Joinder Ruling*) and to the February 26, 2025 *Ruling on [DDS’s] Motion to Reconsider its Joinder* (*Reconsideration Ruling*). Further, to the extent any factual statements are provided here, they are subject to revision after a hearing on the merits. [↑](#footnote-ref-2)
3. Parent is Student’s permanent legal guardian. [↑](#footnote-ref-3)
4. DESE’s *Opposition* advises that this Program is entitled “DESE/DDS Residential Prevention Program and that information about the Program can be found at https://www.mass.gov/info-details/desedds-frequently-asked-questions. [↑](#footnote-ref-4)
5. Although not relevant to the underlying Motion, I note that this search process has not been without delay and/or disagreement by and between the Parent and the District. [↑](#footnote-ref-5)
6. According to Parent, she missed the first session due to “behavioral issues happening in the home” and missed the second session as it occurred when she was in the Superior Court to address the District’s emergency action discussed *supra*. [↑](#footnote-ref-6)
7. 603 CMR 28.06(3)(e), provides, that “if the Team is unable to identify an appropriate placement in an approved school, the Administrator of Special Education may request assistance from [DESE] …”. [↑](#footnote-ref-7)
8. According to Parent her rejection was primarily based on disputes concerning medications that Student would not be able to receive given the current Roger’s Orders paperwork from the Probate and Family Court. [↑](#footnote-ref-8)
9. See *In Re: Parent and Student v. Springfield Public Schools, et. al.*, BSEA No. 2309351, 29 MSER 154 at ftnt 48 (Mitchell, 2023); *In Re: Lawarence Public Schools*, BSEA No. 217071, 27 MSER 193 (Nir, 2021). [↑](#footnote-ref-9)
10. *In Re: Acton-Boxborough Reg. Sch. Dist.*, BSEA No. 1703770, 23 MSER 99 (Figueroa, 2017); see M.G.L. c. 71B §3; *In Re: Boston Pub. Sch. Dist.*, BSEA No. 02-4553 (Figueroa, 2002). [↑](#footnote-ref-10)
11. MGL c. 71B, §3; see 603 CMR 28.08(3). [↑](#footnote-ref-11)
12. *In Re: Plymouth Pub. Sch.* BSEA No. 06-2584, 12 MSER 33 (Crane, 2006) (internal citations omitted); *In Re: Fitchburg Pub. Sch.* BSEA No. 02-0038, 8 MSER 141 (Byrne, 2002). [↑](#footnote-ref-12)
13. In Massachusetts the SEA is DESE. [↑](#footnote-ref-13)
14. The IDEA and its regulations impose other obligations on an SEA (defined in 20 USC 1401(32), the statutory provision Parent relies on in her *Motion*, to be the “State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law”) including 34 CFR 300.101(b), the regulation Parent relies on in her *Motion*, that sets forth each state’s obligations to provide every eligible child with a FAPE starting at age 3. [↑](#footnote-ref-14)
15. *In Re: Springfield Public Schools et. al.* BSEA No. 2309351, 29 MSER 154 (Mitchell, 2023) citing *Larach-Cohen v. Porter*, 2021 WL 1203686, 2 (SDNY 2021); *Y.D. v. N.Y. City Dep't of Educ.,* 2016 WL 698139 (S.D.N.Y. Feb. 9, 2016); see *Coningsby v. Oregon Dep't of Educ*., 2016 WL 4844078, at \*5 (D. Or. 2016), *aff'd sub nom.* *M.C. by & through D.C. v. Oregon Dep't of Educ.*, 695 F. App'x 302 (9th Cir. 2017) (“Accordingly, the Court finds that [the SEA] was properly exempted from the due process proceeding because it, ‘as the SEA, was not involved in the actual provision of [the child's] IEP’”) (quoting *Chavez ex rel. M.C. v. New Mexico Pub. Educ. Dep't*.,621 F.3d 1275, 1283 (10th Cir. 2010)) (comparison citation omitted). [↑](#footnote-ref-15)
16. See 1412(b), entitled “State educational agency as provider of free appropriate public education or direct services” (providing that “*if* the [SEA] provides [FAPE] to children with disabilities, or provides direct services to such children, such agency shall comply with any additional requirements of section 1413(a) [of the IDEA] *as if such agency were a local educational agency* …”) (emphasis added). [↑](#footnote-ref-16)
17. See *Letter to Anonymous*, 69 IDELR 189 (OSEP, 2017) (referencing a previous OSEP letter to the State of New Mexico dated February 15, 2012 that provided the same analysis); *In Re: Lawrence P.S.*, 27 MSER 193. [↑](#footnote-ref-17)
18. See *Carnwath v. Grasmick*, 115 F. Supp. 2d 577, 582 (D. Md. 2000) (“The SEA may also be liable where its own failure to follow the procedural requirements of the IDEA leads to denial of FAPE. The critical point, however, is that the SEA may not be held liable where it was not responsible for the procedural failure”). (internal citations omitted); *R.V. v. Rivera*, 220 F. Supp. 3d 588, 594 (E.D. Pa. 2016) (finding the SEA to be a proper party in a FAPE claim against a failed charter school that was no longer in existence, reasoning that,

“[i]t does not follow from this, as [the SEA] fears, that in every instance where an LEA is alleged to have failed to provide a FAPE or otherwise comply with its IDEA obligations an SEA may be named in a due process complaint regarding those allegations. Where there is an existing LEA that could be held responsible for alleged FAPE violations, then it, and not the SEA, would be the proper party in a due process hearing. Where, as here, there is no other educational agency to which a parent may look to vindicate her child's rights to a FAPE because the LEA in which the alleged violations occurred has since ceased to exist, the SEA's obligations as the backstop to the state's IDEA obligations kick in. Accordingly, [the SEA] was a proper party to the IDEA due process complaint in this case”). [↑](#footnote-ref-18)
19. *Id*.; see *In Re: Massachusetts Department of Education* BSEA No. 03-1785, 9 MSER 1 (Crane, 2003). [↑](#footnote-ref-19)
20. *Town of Burlington v. Dep't of Educ. for Com. of Mass.*, 736 F.2d 773, 787 (1st Cir. 1984), *aff'd sub nom. Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359 (1985). [↑](#footnote-ref-20)
21. *Beard v. Teska*, 31 F.3d 942, 954 (10th Cir. 1994), *abrogated on other grounds by Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598 (2001) [↑](#footnote-ref-21)
22. See *In Re: Lawrence P.S.*, 27 MSER 193, (dismissing DESE from a matter as “Parent asserted no facts suggesting that DESE was involved in the IEP process, was asked to participate in Student's assessment or placement, or was called upon to fund Student's education or to respond to complaints regarding Student's program”) (citing *Carnwath,* 115 F. Supp. 2d at 585); compare *In Re: Mass. Dept. of Ed*., 9 MSER 1, (distinguishing *Carnwath* 115 F. Supp. 2d at 585 and *Beard* 31 F.3d at 954) (concluding DESE may be liable for compensatory services due to allegations that [it] was aware of the lack of an identified responsible LEA during the relevant timeframe in that matter, had failed to assign a responsible LEA despite being requested to do so, and had provided Student with tutoring services while also refusing to develop an IEP for her). [↑](#footnote-ref-22)
23. See 20 USC §1415(b)(6); M.G.L. c. 71B §2A. [↑](#footnote-ref-23)
24. *BSEA Hearing Rules I(J)*; see *Letter to Anonymous*, 69 IDELR 189. [↑](#footnote-ref-24)
25. *In Re: Boston Public School District*, BSEA No. 02-4533 (Figueroa, 2002); see *In Re: Acton-Boxborough Regional School District*, BSEA No. 1703770, 23 MSER 99 (Figueroa, 2017). [↑](#footnote-ref-25)
26. Consistent with its general supervision responsibilities and given the extensive unsuccessful placement search to date by the Parties, DESE is strongly advised to ensure that Student receives all DESE/DDS Program supports that DDS has identified he is eligible. [↑](#footnote-ref-26)