

# **COMMONWEALTH OF MASSACHUSETTS**

## **Division of Administrative Law Appeals**

### **Bureau of Special Education Appeals**

In re: Student v. Fall River Public Schools

BSEA #1406929

#### **RULING ON FALL RIVER PUBLIC SCHOOLS' MOTION TO JOIN THE MASSACHUSETTS DEPARTMENTS OF MENTAL HEALTH AND DEVELOPMENTAL SERVICES TO THIS APPEAL**

#### **BACKGROUND**

Student is a sixteen-year-old young man in the tenth grade who has received special education services from Fall River Public Schools (“Fall River”) since Kindergarten due to significant emotional, behavioral and learning challenges, including highly aggressive behavior toward educators and peers, sexualized behavior and language, and borderline cognitive functioning. Currently, Student resides at the Merrimack Center (“Merrimack”), a locked Behaviorally Intensive Residential Treatment Program (“BIRTP”) located at Tewksbury State Hospital. Merrimack is operated by Justice Resource Institute (“JRI”) and funded by the Department of Mental Health (“DMH”). Though Fall River remains responsible for his Individualized Education Program (“IEP”), Student receives educational services at Merrimack from the Department of Elementary and Secondary Education’s (“DESE”) Special Education in Institutional Settings (“SEIS”) division.

Student has resided at Merrimack since May 20, 2013, when he was discharged from an inpatient psychiatric hospitalization. At that time, the providers caring for him in the hospital wrote that Student “has demonstrated persistent, refractory behavior problems in multiple settings... [m]ultiple attempts to manage him outside of a hospital setting have mostly failed.” They requested that he be evaluated by DMH for placement in a locked residential program. DMH found Student to be “eligible by exception” for its services so that he could be admitted to Merrimack. Since admission to Merrimack, Student has for the first time made significant progress socially, emotionally, and academically. In view of this progress, his educators and clinicians and Merrimack service providers have recommended since September 2013 that he be discharged to an unlocked residential special education school.

Specifically, in a letter provided to Fall River in late October 2013, Merrimack recommended a residential setting with an on-site therapeutic school for students who struggle with both cognitive impairments and mental illness. Fall River convened a team meeting to discuss student's placement on December 16, 2013. Fall River rejected Merrimack's recommendations for a residential placement and proposed an IEP that would place Student at Bradley School ("Bradley"), a therapeutic day placement in East Providence, Rhode Island. Student had previously attended Bradley from September 2012 to April 2013 when a string of psychiatric hospitalizations resulted in his admission to Merrimack.

On May 23, 2014 Parent filed for a BSEA Hearing. Fall River's Response included a Motion to Join DMH. After a conference call, Fall River also filed a Motion to Join the Massachusetts Department of Developmental Services ("DDS") to the appeal. A telephonic motion session was held on July 9, 2014 to consider oral arguments from all of the parties/potential parties to this appeal. This Ruling addresses both of Fall River's requests.

## **STATEMENT OF POSITIONS**

Fall River's position is that Student's special education needs can be appropriately addressed in a therapeutic day school placement at Bradley. Fall River contends that it is not responsible for a residential placement for Student for educational reasons and that such residential services are the responsibility of Parent or a state human service agency such as DMH or DDS.

Parent's position is that Student requires a residential placement for educational reasons and that Student must have a residential educational placement in order to receive a free and appropriate public education ("FAPE") under state and federal special education law. Because of the unique circumstances of DMH involvement in this case, Parent does not oppose the joinder of DMH but maintains that any residential placement is for educational reasons and is the responsibility of Fall River. Parents oppose joinder of DDS for the same reasons DDS objects to joinder to be discussed below.

DMH's position is that it opposes joinder. DMH contends that Student is not eligible for DMH services based upon DMH regulations. DMH contends that Student was/is not clinically eligible for DMH services because he does not suffer from a primary qualifying psychiatric disorder. This decision was made May 6, 2013 prior to DMH's authorization for Student's admission to Merrimack which was a placement "by exception" due to Student's unsafe situation and very serious behavioral difficulties. Parent has never appealed DMH's denial of services.

DDS' position is that it also opposes joinder. DDS states that Student is not a DDS client and has never applied to DDS for services. Further, DDS states that DDS regulations prohibit provision of DDS residential services to anyone younger than eighteen years of age.

Pursuant to Rule 1J of the *Hearing Rules for Special Education Appeals* – Joinder:

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.

Further, M.G.L.c.71B s.3 provides, in pertinent part:

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 social services [now called the Department of Children and Families], the department of mental retardation [now called 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. See also 603 CMR 28.08(3) for corresponding regulation.

## RULING

Based upon the written documentation before me, the written and oral arguments advanced by the parties and potential parties, and a review of the applicable law, I rule that:

- 1) Fall River's Motion to Join DDS is **DENIED**.
- 2) Fall River's Motion to Join DMH is **DENIED**.

My analysis follows.

In the instant case Student is not a DDS client nor has his family ever applied for DDS children's services. Further, even if Student had applied for DDS services and was accepted to be a DDS client, DDS regulations specifically prohibit it from funding residential services for children/clients under eighteen years of age. Therefore, I find absolutely no basis to join DDS to this BSEA appeal.

The situation with regard to joinder of DMH is more complicated. DMH has provided services to Student for over one year (See **BACKGROUND**, above.) However, Parent had applied for DMH services prior to Student's placement at Merrimack and DMH had found Student ineligible for DMH services based upon DMH regulations. DMH determined, based upon clinical criteria, that Student does not suffer from a primary qualifying psychiatric disorder but is primarily cognitively impaired with a diagnosis of Pervasive Developmental Delay - Not

Otherwise Specified (PDD-NOS) and he has an IQ of 65. DMH provided Student locked psychiatric hospitalization at Merrimack “by exception” due to the exigent circumstances of Student’s situation, the degree of dangerousness, and to protect Student, as well as society, from Student’s uncontrolled behaviors.

Fall River argues that this case is analogous to another Fall River case in which joinder of DMH was ordered by the Hearing Officer. See 15 MSER 152 (2009). While the fact pattern is similar, there are several crucial distinctions. First, in the case cited, the student had been diagnosed with both oppositional defiant disorder (ODD) and Bipolar Disorder. Second, and most significantly, in the cited case the student was a DMH client who had been receiving extensive services from DMH for up to eight years, so he clearly met the DMH regulatory/clinical criteria for DMH services. In the instant case, Student has been specifically found ineligible for DMH services based upon DMH regulatory/clinical criteria because of his cognitive impairments and PDD-NOS diagnosis and this decision has never been appealed by Parent. The DMH services provided to Student by DMH have always been specifically provided “by exception” to DMH regulations. As such Fall River’s Motion to Join DMH is denied.

## **ORDER**

- 1) Joinder of both DDS and DMH to this appeal as **DENIED**.
- 2) A pre-hearing conference call with attorneys for Parent and Fall River will take place on July 23, 2014 at 4:00p.m.

By the Hearing Officer:

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Dated: \_\_\_\_\_