

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

In re: Student v.
Boston Public Schools

BSEA #1702809

RULING ON BOSTON PUBLIC SCHOOLS' MOTION FOR JOINDER

On November 7, 2016, Boston Public Schools (Boston) filed a Motion for Joinder of the Department of Developmental Services (DDS) in the above-referenced matter, asserting the BSEA's jurisdiction over DDS pursuant to 603 C.M.R 28.08(3)¹, and relying on Rule 1(J) of the *Hearing Rules for Special Education Appeals*, arguing that "services from DDS in a residential placement are necessary to ensure that Student is able to access the special education program provided by Boston".

Student presents with extensive physical and mental health deficits which qualify her to receive her education in a private, out-of-district placement. According to Boston, in the past, Student has been able to access her education when DDS has provided her with residential services. Boston states its willingness to continue funding Student's day placement and cost-share the residential portion with DDS, arguing that Student's psychiatric care (especially her Disruptive Behavior Disorder) and complex medical needs are the reasons Student requires residential placement. Boston asserts that Student's medical issues are distinct from her educational needs and they have in the past required Student to be hospitalized for months. As such Boston asserts that DDS is a necessary party and must be joined.

Consistent with Rule VII C of the *Hearing Rules of Special Education Appeals*², DDS filed an Opposition to the Motion for Joinder on November 9, 2016 arguing that it should not be joined and that its presence at Hearing was not required to fashion the remedy Parent seeks.

Facts:

The facts stated herein are considered to be true solely for purposes of this Ruling.

¹ 603 CMR 28.8(3) grants the BSEA jurisdiction to resolve special education disputes involving provision of services by state agencies in accordance with the rules regulations and policies of said agencies. See also 2000 Mass. Acts ch. 159, §162.

² Any party that objects to the allowance of a Motion may do so by filing a written objection within seven calendar days of the date of receipt of the Motion.

1. Student is a 17 year old resident of Boston Massachusetts who presents with Autism Spectrum Disorder, Down Syndrome, a Communication Disability, Emotional Disability, Intellectual Disability and Health Disability. As such, she has been found eligible to receive special education and related services.
2. On July 7, 1999, Student was found eligible to receive services from the then Department of Mental Retardation pursuant to its eligibility criteria for children.
3. Through three legislative acts (Chapter 182 of the Acts of 2008, Chapter 451 of the Acts of 2008 and Chapter 239 of the Acts of 2010), the Department of Mental Retardation was renamed to the Department of Developmental Services (DDS).
4. When a DDS eligible individual turns 18 years of age, families can apply for DDS adult services which are available to eligible individuals until they turn 22 years old. According to DDS, subject to funding, eligible children ages 18 to 22 may receive service coordination and family support services the purpose of which is to provide assistance to the family in order to keep the family together and if possible avoid placement of the DDS eligible individual outside the family home.
5. DDS has provided basic support services to Student's family involving information and referrals with regards to how to care for her.
6. DDS relies on school systems and insurance-based services to provide in-home behavioral support. Student's medical issues are addressed by her outpatient healthcare team.
7. On May 1, 2007, Student began participating in the DDS/Department of Elementary and Secondary Education (DESE) in-home prevention program. Since that time the DDS coordinator has been meeting with the vendor agency that administers the plan to discuss the status of the in-home services, and to review the plan and budget. These meetings occur in January and June of each year and seek to maintain Student living at home.
8. The DDS/DESE staff are not employees of DDS, but rather, contracted providers from the community who offer skills training, respite, opportunities for participation in community outings, adaptive clothing for Student, educational materials, parent trainings and parent conferences. Additionally, DDS staff offers supports for Parent regarding tasks she must complete for Student including participating in Team meetings and hospital meetings. DDS is also the liaison with Boston Emergency

Service Team which was responsible for covering the cost of Student's after-school program which offers 24 hours response to individuals in crisis.

9. On March 19 and September 27, 2009, the DDS service coordinator participated in Student's Team meetings. According to the service coordinator, Parent requested Applied Behavior Analysis (ABA) services to address Student's increasingly aggressive behaviors, but Boston rejected this request. At the time, Boston recommended Student continued participation in inclusion programs with a staff person who remained within five (5) feet of Student. DDS/DESE then decided to provide Student with ABA services in the home shifting its focus from a "home prevention program" to "behavior management". The DDS service coordinator continued to support Parent when she visited a learning group and in preparing for the Team meeting occurring on March 20, 2010.
10. In 2011, DDS offered Parent respite services while Student was hospitalized at Bradley Hospital.
11. Starting in December of 2011, the DDS service coordinator has been Kathy Touzjian.
12. In April 2012, Ms. Touzjian requested additional funding from DDS/DESE and thereafter met with Parent on several occasions between May 29, 2012 and September 2013. During that time Parent reported that Boston was seeking guidance from Parent on how to address Student's behaviors in school and when transitioning off the school bus.
13. In October 2013, Student was placed as a day student at Cardinal Cushing School (Cardinal Cushing), Hanover, MA. According to DDS, Student had difficulty getting on the bus to return home, which difficulty she continues to experience to date as Student continues to participate in the day program at Cardinal Cushing.
14. In the spring of 2016, Boston conducted Student's three-year-re-evaluation and concluded that Student had made effective progress in her day placement at Cardinal Cushing.
15. In May 2016, Boston offered Student an IEP proposing that Student continue to receive special education services at the day program at Cardinal Cushing. Parent rejected Boston's failure to offer Student residential placement at Cardinal Cushing but accepted the remainder of the IEP. Student has continued to attend Cardinal Cushing's day program.

16. In July 2016, Parent reported that there was still no one-to-one monitor on the bus and that she continued to be called to assist Student in getting on the bus.
17. According to DDS, at the September 12, 2016 meeting, Parent noted the need for a one-to-one bus monitor to be assigned to Student. In May of 2016, Boston had agreed to provide the one-to-one bus monitor, but had not yet done so. At the September 12th meeting, Parent reiterated her desire to have Student placed residentially at Cardinal Cushing.

Legal Standard Regarding Joinder:

The establishment of mechanisms for interagency coordination in resolving disputes involving responsibility for providing special education and related services to students, where multiple public entities may share the responsibility for ensuring receipt of FAPE, is mandated by federal special education law and regulations. 20 U.S.C. §1412(12)(A); 34C.F.R. 300.142(a).

In Massachusetts this federal mandate is embodied in Chapter 159, section 162 of the Acts of 2000, amending M.G.L. c 71 B §3, which authorizes the BSEA to order state agencies to provide services “in addition to the program and related services to be provided by the school committee” when applicable. See *In Re: Lunenburg Public Schools and Department of Mental Health (ruling on Motion to Dismiss)*, 10 MSER 478 (2004); see also, ruling on motion to join DMH and DMR in *In Re: Medford Public Schools*, BSEA # 01-3941 (2002). Consistent with Massachusetts law, the Massachusetts Special Education Regulations specifically grants the BSEA jurisdiction over state agencies in order to resolve differences between parties regarding the provision of special education to eligible students.

603 CMR 28.08(3) specifically states that the BSEA may order a state agency to provide services “in accordance with the rules, regulations, and policies of the respective agenc[y]” in addition to the IEP services that the school district is responsible to provide. 603 CMR 28.08(3). This regulation allows the BSEA to order a state agency to “provide services that are found to be necessary for the student to be able to receive a FAPE through the school district, or, provide services over and above those that are the responsibility of the school district if the services are necessary to ensure that the student is able to access or benefit from the special education program and services offered by the school district. *Lowell Public Schools*, 107 LRP 655543 (2007).

A party to a BSEA Hearing that seeks mandatory participation of a state agency after the Hearing Request has been filed, may seek such participation through joinder pursuant to Rule

1J of *The Hearing Rules for Special Education Appeals*. This rule provides that a Hearing Officer may join a state agency upon finding that

- (1) complete relief cannot be granted by the originally named parties or
- (2) the third party has an interest in the matter and is so situated that the case cannot be disposed of in its absence.

Pursuant to Rule 1J certain factors must be considered in determining if joinder is warranted, those are:

- (1) risk of prejudice to the present parties;
- (2) the range of alternatives for fashioning relief;
- (3) the inadequacy of a judgment entered in the proposed party's absence; and
- (4) the existence of an alternative forum to resolve the issues.

Under Rule 1J, the party seeking joinder of the state agency "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." *In re: Boston Public Schools District*, BSEA #02-4553 (2002). If the state agency is joined, the Hearing Officer may only order services consistent with the rules, regulations, and policies governing that state agency, and may only order services that fall within the array of services provided by that particular agency. Moreover, in order for the Hearing Officer to order the state agency to offer services, the student must be eligible to receive those services from that state agency. See G.L. c.71B §3.

As explained by Hearing Officer Byrne in *Auburn Public Schools*, 8 MSER 143, (5/16/2002),

In the context of a special education hearing since school districts are ultimately responsible for all types of placements required by a student for educational reasons, the question of joinder turns on whether provision of a FAPE to the student can be guaranteed without the participation of the state agency sought to be joined. If it cannot, and the state agency can offer necessary services to support the student's education, then joinder will be allowed. See *Auburn Public Schools*, 8 MSER 143, (May 16, 2002).

If at a Hearing on the merits it is then found that the student requires the residential placement for educational reasons, the state agency will not be found responsible for said placement, even if residential placement is among the services offered by the state agency to

its clients.³ *In Re: Student v. Boston Public Schools*, BSEA # 06-6542 (July 25, 2006); *In re: Tantasqua Regional School District*, BSEA # 1403256 (December 11, 2013).

Conclusions of Law:

In the case at bar Boston argues that Student requires residential placement for non-educational reasons; that is, because of Student's complex psychiatric and medical needs which are separate and distinct from her educational needs. These needs however, must be addressed to enable Student to access her education. See *In re: Fall River Public Schools and Massachusetts Department of Mental Health*, BSEA 09-6962 (July 17, 2009).

Relying on *In Re: Ugo v. Westford Public Schools, Massachusetts Department of Children and Families, Department of Developmental Services & Department of Mental Health*, BSEA #1607922 (May 17, 2016), Boston asserts that the cost of residential placements may in some instances be borne by school districts together with a state agency. Specifically, Boston points to certain regulations governing DDS, such as, 115 CMR 2.01 and 115 CMR 6.06 which allows DDS to find children under 22 years of age who reside in Massachusetts eligible for Children Supports if that individual presents with "a severe chronic disability that is likely to continue indefinitely and results in substantial functional limitations", as does the student in the case at bar.

According to Boston DDS has an interest relating to the subject matter of the instant case because Student presents with serious health and safety issues and DDS is better equipped to address the Student's medical needs which will indefinitely, substantially limit Student's functioning. Boston asserts that the Hearing Officer may find that the residential services needed by Student are in addition to and separate from the special education program for which Boston is responsible. Proceeding to Hearing in the absence of DDS may be prejudicial to Boston as Boston lacks information about the DDS services which may be available for Student, and necessary for her to access her education even if it is found that Student needs residential placement for educational reasons. Thus, according to Boston this case cannot be disposed of in DDS' absence, and as such, it must be joined.

DDS in turn argued that it should not be joined and that complete relief can be fashioned in its absence.

While DDS admits that Student has been found eligible for DDS services, and has received said services, the supports the agency offers to eligible children are subject to availability and do not include educational residential placement per its regulations. See 115 CMR 6.07(2)(c)⁴. Moreover, DDS argues that the purpose of DDS family support is to keep

³ See *In Re: Westford Public Schools*, BSEA #05-0621, 10 MSER 541, 551 (2004, Beron.)

⁴ 115 CMR 6.07(2)(c) provides that

eligible individuals in the home.⁵ The DDS regulations specifically provide that “in no case shall [DDS] provide residential supports to children younger than 18 years of age or to individuals ages 19 to 21 years of age eligible for or receiving residential services from a local educational authority, local school district or any other public agency”. 115 CMR 6.07(2)(c). As such, DDS argues that an out of home placement funded and arranged for by DDS is contrary to its own policies and regulations and is therefore, impermissible.⁶

Whereas in the instant case the agency’s own regulations and policies specifically preclude funding of residential placements for students such as Student, and in light of the BSEA’s limited jurisdiction over state agencies, the BSEA lacks authority to order the remedy Boston seeks.

While DDS may have an interest relating to the subject matter of the instant case, it would be for reasons other than cost sharing a residential placement for Student. Even if that were the case, Boston has not advanced any arguments to suggest that DDS would not continue to offer Student’s family support services. In contrast, DDS asserts that Student is currently “receiving DDS/DESE in-home prevention services, the most robust services available to individuals under 22 years of age” and no other services or home supports have been identified by Boston or Parent required for Student to be able to remain at home.

Joining DDS is also not the only manner in which Boston can build a record containing information about the services DDS may be uniquely able to provide. Nothing precludes Boston, or Parent, from calling DDS staff as witnesses at Hearing and inquire about the services it currently offers, or may offer in the future, to further support Student’s day or

The Department shall not provide residential supports to children from birth through 22 years of age and eligible for or receiving residential services from a local educational authority, local school district, or any other public agency. The failure of an individual to apply for or the voluntary refusal of services that may be available from another public agency and for which an individual is otherwise entitled shall not constitute ineligibility to receive those services for the purpose of establishing priority to receive Department services under 115 CMR 6.07.

⁵ See DDS Family Support Guidelines, July 2002; 115 CMR 6.07.

⁶ DDS advanced an additional argument regarding DDS’ interim funding budget. While Boston has not argued that DDS should cover the residential placement through DDS’ interim funding budget, DDS nevertheless explained that this budget is “tied to an Executive Office of Human Services interagency policy between the DDS and DCF” and requires that Student apply for Voluntary Out of Home Placement through DCF which Student has not done. Thus, DDS argued that it would not be able to use its “interim funding” were Boston to later raise this argument. Moreover, according to DDS, since Student is already 18 years of age, she would not qualify for this type of Voluntary Placement through DCF especially where there does not appear to be any involvement between the family and DCF. Lastly, DDS failed to develop its argument involving alleged statements appearing in July 2016 documents issued by Boston noting that the Cardinal Cushing placement “is a Department of Public Health placement and that there is a share agreement between DCF/DMH”.

residential placement at Cardinal Cushing. Should the circumstances change in the future, Boston may renew its joinder request.

In light of the facts delineated *supra* and upon consideration of the arguments made by the Parties, the applicable laws and regulations, I find that joinder of DDS is not warranted for purposes of cost-sharing a possible residential placement of Student at Cardinal Cushing.

ORDER:

1. Boston's Motion to Join DDS as a Party is **DENIED**.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: November 22, 2016