

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

IN RE: GALE¹

&

BSEA #1403852

BERKSHIRE HILLS REGIONAL SCHOOL DISTRICT

**RULING ON SCHOOL MOTION TO JOIN
DEPARTMENT OF MENTAL HEALTH**

This matter comes before the Hearing Officer on the March 2, 2016 Motion of the Berkshire Hills Regional School District (“the School”) to Join the Massachusetts Department of Mental Health (“DMH”) to this special education appeal. The Parents support joinder of DMH. DMH filed a written opposition to joinder on March 14, 2016. Oral arguments on the Motion were heard March 30, 2016.

FACTUAL BACKGROUND

The factual record is not fully developed and some background information not pertinent to the resolution of the contested Motion to join is vigorously disputed. The parties and DMH do not disagree about the facts necessary to determine the party status of DMH, however. Where there is slight variance I view the facts available in the administrative record in the light most favorable to the Parents’ position.

1. Gale is seventeen years old. She is a lifelong resident of the Berkshire Hills Regional School District. She has not attended school since the 2012-2013 school year. At all times while attending school Gale was a general education student.
2. Gale began experiencing serious psychiatric symptoms and seizures in May 2011.
3. The Parents filed a Request for Hearing at the BSEA on November 29, 2013.
4. The School found Gale eligible for special education after a Team meeting on April 1, 2014.

¹ “Gale” is a pseudonym assigned by the Hearing Officer to protect the privacy of the Student in documents available to the public.

5. Since leaving school Gale has had a series of long term psychiatric hospitalizations. Due to the serious and chronic nature of her illness Gale has been only intermittently and briefly available for educational services. The Parties have been working cooperatively to determine an appropriate program and placement for Gale. The School is offering a therapeutic residential school. The Parents believe that a residential program might be appropriate at some point in the future. Currently Gale is living at home pursuant to the recommendation of her mental health providers. Gale sees a psychiatrist for one hour each day and the family participates in therapy weekly. The Parents arrange for and fund these medical services.

6. The School is currently providing home tutoring to the extent tolerated by Gale. The School is offering to provide additional hours of home tutoring, related services consistent with recommendations made by occupational and physical therapy/adaptive physical education evaluators, and community based academic and non-academic courses and activities as tolerated by Gale with the consent of her parents.

7. Gale's most recent hospitalization was at Worcester State Hospital. Gale has been determined to be eligible for DMH services. She is currently receiving "the most intensive community based services available" through DMH: one hour per week of therapeutic mentor services and bi-weekly in-home therapy.

8. The Parents and the School agree that Gale's participation in educational services could be improved with more intensive, appropriate therapeutic support than she is currently receiving through DMH.

LEGAL FRAMEWORK

BSEA Hearing Rule 1J provides for involuntary joinder of a party to a BSEA proceeding when complete relief cannot be granted among the existing parties, or when the proposed party has an interest in the matter and is so situated that the dispute cannot be disposed of in its absence. Factors to be considered in determining whether to join a party are:

- (1) the risk of prejudice to the present parties in the absence of the proposed party;
- (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.

When the proposed party is a state agency, the Hearing Officer must also consider whether an exercise of jurisdiction over the agency is, in the language of the applicable statute, "in accordance with" that agency's own legislative mission and administrative regulations. M.G.L. c.71B §3. Further the Hearing Officer must determine whether the services, program, personnel or expertise unique to that agency are a necessary "addition" to the special education program proposed for a student by the school district such that without them the student cannot receive a free appropriate public education. See also: 20 U.S.C. § 1412 (12); 603 CMR 28.08 (3); *Silver Lake Regional School District*, 18 MSER 186 (2012); *Fall River Public Schools*, 15 MSER 152 (2009). Every joinder determination is unique and highly fact dependent.

DISCUSSION

In this matter the Parents and the School have been working together for years to craft an appropriately responsive educational program for a student who is seriously, chronically ill and whose status and needs change daily, if not hourly. To deliver the high school curriculum Gale is cognitively capable of handling, requires intensive, flexible, trauma-informed therapeutic supports by expert mental health providers. At this moment, according to Gale's medical team, those supports must be delivered in her home and community. Only with those clinical supports and interventions will Gale be able to access and benefit from the tutoring and community based educational services offered by the School.

While the School is offering a therapeutic residential placement for Gale, the Parents have thus far declined that type of program on the advice of their medical team. As Gale recovers the School is willing and able to deliver or arrange for home and community based educational services to Gale.

Since becoming ill, Gale's participation in educational services has been severely limited. Currently she has begun to participate in some home tutoring. The Parents and School argue that DMH provided home-based clinical services, minimal though they may be, are supporting Gale's foray into tutoring. The additional clinical supports the School and the Parents seek are uniquely within the expertise and control of DMH. DMH determines the type, level and frequency of clinical services to Gale. The history of Gale's participation in educational services supports the arguments of the Parents and the School that without the necessary intensity and flexibility of DMH-provided clinical supports Gale cannot access the education offered by the School, whether that education is home based, as it is now, or in a community setting, as the Parties are working toward for the future.

I find that the home and community based therapeutic services currently provided to Gale and her family by DMH, as well as more intensive supports requested by the Parents that could potentially be provided to Gale, are consistent with the DMH mission, statute and regulations. I further find that these DMH services are a necessary "addition" to the educational services provided to Gale by the School, without which Gale is unlikely to be able to access or participate in any educational services. I am not persuaded by the argument of DMH that it is currently providing the most "robust" set of "wrap-around" community-based therapeutic services available to Gale under the current DMH statute and its contract with local providers and that, therefore, the BSEA could not order a different type, level, or intensity of clinical intervention. On the contrary I find nothing in the DMH statute or regulations, and certainly not in governing judicial precedent, that compels a time, frequency or functional limitation on DMH-provided services to eligible clients. Similarly, other than mission consistency, there is no language in M.G.L. c. 71B or 603 CMR 28.08 that limits a BSEA determination on the scope of public agency services "in addition" to those provided by the responsible school district that would be "necessary" to ensure the Student's access to a free appropriate public education.

Here, the risk of prejudice to Gale, and to the School, absent the participation of DMH is real and significant. The clinical services currently and potentially available through DMH are critical to ensuring Gale's access to the educational services available through the School.

There is no corresponding risk of prejudice to DMH as an unwilling participant in this BSEA matter. The only participation risk for DMH is an order directing compliance with obligations imposed by relevant statutes and court orders to which it is already subject.

The DMH services sought by the current parties are not “educational” in nature and are clearly “in addition” to those provided by the School and by the Parents. Furthermore as the BSEA is the only state agency charged with determining and enforcing a disabled student’s right to a free, appropriate public education under 20 U.S.C. §1400 *et seq.* and M.G.L. c. 71B, and administrative exhaustion is required before presenting special education issues to a court, there is no other forum to which the current Parties could repair to address and preserve their claims under those statutes.

Therefore, after careful consideration of the unique facts of this matter, and of the applicable law, I find that DMH is a necessary party to this dispute. Complete relief cannot be afforded to the Parties without the active participation of DMH. The services, programs, personnel and expertise uniquely within the control of DMH are a necessary addition to, and permit Gale to access, the free appropriate public education to which she is entitled.

ORDER

The criteria for involuntary joinder under BSEA Rule 1J has been met. The School’s Motion to Join DMH is GRANTED.

By the Hearing Officer

Lindsay Byrne
Dated: April 8, 2016