

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

In re: Student v.
Acton-Boxborough Regional School District

BSEA #1703770

**RULING ON ACTON-BOXBOROUGH REGIONAL SCHOOL DISTRICT'S
MOTION TO JOIN THE DEPARTMENT OF DEVELOPMENTAL SERVICES AND
PARENTS REQUEST FOR POSTPONEMENT OF THE HEARING**

On December 19, 2016, Acton-Boxborough Regional School District (AB) filed a Motion to Join the Massachusetts Department of Developmental Services (DDS) in the above-referenced matter, asserting that Parents/Student are seeking funding for residential placement for Student based on Student's issues in the home which are non-educational. AB has drafted an IEP calling for Student to attend the League School's day program and argues that any additional supports are the responsibility of DDS. Student has been found eligible to receive DDS services and DDS participated in his most recent IEP meetings. AB argues that the Hearing Officer may determine that Student does not need residential placement but rather requires additional supports while remaining in the home which may be the responsibility of DDS. Thus, AB seeks joinder of DDS.

Parents assented to AB's Motion for Joinder on December 22, 2016.

On December 27, 2016, DDS filed an Opposition to AB's Motion for Joinder arguing that it should not be joined and that its presence at Hearing was not required to fashion the remedy Parents seek.

On December 28, 2016, Parents filed a Response to DDS' Memorandum denying DDS's allegations that neither Parents nor Student requested any services from DDS, or that DDS offered services which Parents rejected.

Also, on January 10, 2017, Parents requested a postponement of the Hearing so that they could proceed to a settlement conference in late January 2017.

Facts:

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

1. Student is a 21 year old resident of Acton who has been diagnosed with Pervasive Developmental Disorder (NOS) and bi-polar disorder. As such, he has been found eligible to receive special education and related services.
2. On February 6, 2015, DDS found Student eligible to receive Adult Community Developmental Disability Supports on or after August 25, 2017, Student's twenty second birthday. Until then, Student has been found eligible to receive Children's Supports through DDS.
3. In March 2015, Student began receiving Service Coordination through DDS, and his assigned case manager is Deb Foster Smith. At the same time Student began receiving Family Support Services, that is, the allocation of flexible funding (stipends) which can be used to purchase "allowable supports, goods and services including but not limited to respite, family training, individual goods and services, adaptive aids, therapy and behavioral consultation." Allocations are based on family need and availability of funding resources.
4. DDS has also offered Student Intensive Family Flexible Supports (IFFS), the most comprehensive service plan available through DDS, for eligible individuals Student's age.
5. DDS asserts that IFFS have been offered to Student's Guardian/Parents but were rejected, however, Parents deny said statement, asserting that while the possible services to be offered by DDS have been discussed on numerous occasions, Parents have not refused any potential in-home services. Instead Parents assert that:
 - a) [Student] has repeatedly refused in-home services;
 - b) [He has a] propensity for violence (especially when he is asked to do something he does not want to do) towards family members and others; and
 - c) [There is a] very real possibility of serious harm to Parents and other family members, as well as home service providers in the event that the provision of home services is attempted, as documented by Kevin Russo, [and this] has been discussed on several occasions.
6. IFFS consist of short term services "that help address more imminent needs, such as the need for crisis management or the intervention of an in-home behavioral team."

7. DDS does not offer residential services under Children's Supports and as such Parents' request for such funding has been denied.
8. According to Parents, DDS has not presented a proposal for provision of home-based services noting that provision of such services is dependent on the budget. To date, DDS has not provided Parents with respite services despite their numerous requests.
9. Student has been receiving educational services at the League School under an IEP drafted and funded by AB since March 9, 2015. While Student has completed the requirements to earn a high school diploma, his continued placement at the League School seeks to facilitate Student's post-secondary transition.
10. On April 26, 2016, the Middlesex Probate and Family Court appointed Father as Student's Guardian.
11. Student's most recent IEP, covering the period from March 3, 2016 to March 2, 2017, calls for Student to continue to receive educational services at the League School. Parents rejected this IEP and seek funding from AB for residential placement.

Legal Standard Regarding Joinder:

In situations where multiple public entities may share the responsibility for ensuring provision of FAPE to eligible students, federal special education law and regulations mandate that states establish mechanisms for interagency coordination in resolving disputes involving responsibility for providing special education and related services to students. 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 grant 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 (May 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.

Conclusions of Law:

Here, AB disputes Student's need for residential placement, arguing that the day program it has offered is appropriate to meet Student's needs, and that any need for residential placement is not based on Student's educational needs but rather on home related issues. AB asserts that residential placement is not required for educational reasons. AB however argues that the Hearing Officer could find that while Student is not in need of residential placement, in order for him to access or benefit from his special education program he requires additional services, including additional home supports, which supports are within the array of services/supports offered by DDS and as such, DDS should be joined.

AB notes that DDS has already found Student eligible for DDS services consistent with its own policies and regulations. Were the evidence at Hearing to show that Student requires additional supports to access his education for non-educational reasons and DDS was not a party this would prejudice both Student and AB. AB argues that joinder would ensure that the educational and non-educational needs of Student would be addressed in a coordinated, efficient manner and as such seeks joinder of DDS.

DDS argues that AB is ultimately responsible for all types of placements required by a student for educational reasons, including residential placement, and asserts that the parties will not be prejudiced by its lack of DDS participation. DDS asserts that it is already offering Student in-home services and notes that DDS services are voluntary, not mandatory, and that Student's Parents have already rejected further supports. Even if the Hearing Officer were to order DDS to provide additional supports DDS could not do so without Parents' authorization. DDS argues that joinder is not necessary to develop a record of services available through DDS since this information may be provided through testimony, and further argues that having found Student eligible is not dispositive on the issue of joinder.

DDS is correct that Parents seek residential placement for Student, but at this juncture one must consider the possibility that the evidence may not support a finding that Student requires residential placement but does require additional services in the home that will

enable him to access his educational program, even if this is not the preferred remedy sought by Parents.

Here, AB does not seek DDS' participation to fund residential placement but rather to support Student in the home, a service within the array of services offered by DDS for which Student has been found eligible. Whether or not Parents ultimately accept any services DDS may be ordered to provide to Student is not a question which need be answered at this juncture. (I note that Parents have also asserted that they have not refused services but rather raise concerns regarding provision of those services given Student's propensity for violence.)

Parents are correct that DDS' and AB's present and future responsibilities to Student are "inextricably intertwined" and as such, DDS should be joined. See *In Re: Nauset Regional School District, Ruling Re Joinder of Massachusetts Department of Developmental Services*, 18 MSER 342 (2012).

The sole question before the BSEA relates to the services to which Student is entitled in order to access a FAPE whether through residential placement or through additional supports in the home which may ultimately be the responsibility of DDS and as such whether DDS should be joined.

I find that AB has shown at least in a preliminary way that it may be able to present evidence at Hearing which may result in DDS being found responsible to offer some services to Student and as such, DDS is hereby joined. See *In Re: Boston Public Schools, Ruling on Boston Public Schools Motion to Join the Department of Mental Health*, BSEA #02-4553 (July 3, 2002).

Lastly, Parents' request for postponement of the Hearing so as to proceed to a settlement conference is hereby Granted. New Hearing dates will be issued via a separate order.

ORDER:

1. AB's Motion to Join DDS as a Party is **ALLOWED**.
2. Parents' request for postponement of the Hearing is **GRANTED**.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: January 10, 2017