

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

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In Re Student

&

Southbridge Public Schools

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BSEA No. 2100615

**RULING ON MOTION OF PARENT TO JOIN THE MASS. DEPT. OF ELEMENTARY  
AND SECONDARY EDUCATION (DESE) AS A PARTY**

The instant case involves a special education student (Student) who is a resident of Southbridge. Student was in the custody of the Massachusetts Department of Youth Services (DYS) for intermittent periods totaling approximately 199 days between July 2018 and January 2020.<sup>1</sup> On July 22, 2020, Parent filed a hearing request with the BSEA alleging that the Southbridge Public Schools (Southbridge or SPS) had denied, and was continuing to deny Student a free, appropriate public education (FAPE) by failing to provide her with an appropriate IEP and placement. On November 20, 2020, Parent filed an amended hearing request together with the *Motion to Join DESE* as a party that is the subject of this *Ruling*. The amended hearing request alleges, in pertinent part, that while in DYS custody, Student was denied a FAPE because she did not receive the services set forth in her accepted IEPs. The amended hearing request seeks relief from both Southbridge and DESE.<sup>2</sup>

In her *Motion to Join DESE* as a party in this matter, Parent elaborates that DESE was responsible for ensuring that Student received a FAPE while in DYS custody, but failed both to provide the services for which it was responsible and to comply with the procedural requirements for allocating responsibility for Student's special education services between DESE and Southbridge. On December 23, 2020, DESE filed an *Opposition* to Student's *Motion*. Southbridge has not filed a response to the *Motion*, and, during a conference call held on January 22, 2021, the District's

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<sup>1</sup> Student actually began moving in and out of DYS custody beginning in the summer of 2016; however, she seeks relief only for the period from July 22, 2018 to December 6, 2019.

<sup>2</sup> By agreement of the parties, the hearing has been bifurcated. Issues pertaining to Student's prospective IEP and placement will be determined after a hearing on March 22-24, 2021. Evidence regarding alleged past denials of FAPE and compensatory services will be heard on April 26, 27 and 29, 2021. The parties agree that the *Motion to Join DESE* applies only to the second hearing because any potential liability on the part of DESE would be confined to compensatory services.

counsel reported that Southbridge takes no position on the issue of joinder. On January 26, 2021, I heard the oral arguments of Student and DESE.

For reasons stated below, the *Motion to Join DESE* as a necessary party is GRANTED.

### **PERTINENT FACTUAL BACKGROUND**

The following assertions, gleaned from the hearing request, Southbridge's response thereto, Student's *Motion to Join DESE*, and DESE's *Opposition* are considered true for purposes of this ruling only.

1. Student is a sixteen-year-old child with disabilities who is eligible for special education and related services pursuant to applicable federal and state law. Student is a resident of Southbridge, and the Southbridge Public Schools (Southbridge or SPS) is the Local Education Authority (LEA) responsible for providing Student's special education services.
2. Student began attending the SPS in kindergarten. During elementary school, Student earned good grades but had some difficulties with organizing her materials and being respectful to teachers.
3. During the 2015-2016 school year (sixth grade), Student developed significant and escalating difficulties with emotional dysregulation. During that year, Student had 38 documented disciplinary incidents and was hospitalized on multiple occasions.
4. During the spring of 2016, Southbridge completed a 45-day extended evaluation of Student. Based on the information in the pleadings, this was Student's initial special education evaluation. Although the evaluation was completed in June 2016, Southbridge did not issue an initial IEP, which called for placement in a therapeutic day school, until mid-January 2017.
5. Meanwhile, during the summer of 2016, Student moved between DYS and DCF out-of-home placements. During the spring and summer of 2017, Student was intermittently in DYS custody for varying periods of time. She was committed to DYS on September 18, 2017. Subsequent to her commitment, Student was in the physical custody of DYS during approximately the following periods: September 18, 2017-May 31, 2018; September 14-December 18, 2018; January 22-28, 2019; February 5-March 14, 2019; August 30-September 17, 2019 and October 11-December 6, 2019. For purposes of this case, the relevant period is any time that Student was in DYS custody from July 22, 2018 to December 6, 2019.
6. From July 2018 to August 2019, Student's IEP provided for five hours per day of academic, behavioral, and social support services with a special education teacher in a substantially separate setting as well as 30 minutes per week of counseling. The IEP in effect between August 2019 and January 2020 called for 6.75 hours per

day of support for self-regulation and coping skills delivered by a special education teacher, general education teacher, and clinician, all in a substantially separate setting.

7. Between July 2018 and December 2019, Student spent approximately 199 days in DYS custody. Student alleges that during that period, SEIS, which is DESE's division charged with providing services to students in custody of state agencies such as DYS, failed to provide Student with the services set forth in applicable IEPs. Student further alleges that records from Southbridge Public Schools contain neither "Non-SEIS Services" (NSS) letters, which would indicate that SEIS could not perform the service, and as such was requesting that Southbridge either provide or pay for the service, nor quarterly progress reports from SEIS staff.

### **ISSUE PRESENTED**

At issue is whether DESE is a necessary party in this matter.

### **Position of Student**

Under federal and state law, DESE was responsible for ensuring that Student received a FAPE while in the custody of DYS, as well as for complying with various procedural requirements such as notifying Southbridge if it was not able to provide certain services. DESE failed to do so, in violation of the relevant statutory provisions. Consequently, DESE may be liable for relief including compensatory services. Unless DESE is made a party in this matter, such relief cannot be granted.

### **Position of DESE**

Joinder is unnecessary and inappropriate because Parent has not alleged that DESE failed to fulfill its obligation to provide her with special education services or denied her access to such services while she was in DYS custody. Rather, the primary issue in this case is the appropriateness of Southbridge's proposed out-of-district placement.

### **ANALYSIS AND RULING**

Rule 1.J. of the *Hearing Rules for Special Education Appeals (Hearing Rules)* allows a hearing officer to join a person or entity as a party to a special education appeal upon the written request of an existing party where: "complete relief cannot be granted among those who are already parties, or the person 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 their absence." *Id.* This Rule lists the following factors to be considered in determining whether a person or entity should be joined: "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." *Hearing Rules*, Rule 1.J.

Whether DESE is a proper party in this matter depends on its potential liability for any of the relief sought. As Parent points out in her memorandum, under both federal<sup>3</sup> and state<sup>4</sup> law, DESE, is responsible for providing special education services to eligible students in DYS custody. As such, DESE may be responsible for prospective or compensatory services if it fails either to deliver a student's IEP services directly or to follow established procedures to secure from the school district of residence any IEP services which DESE cannot provide itself through its service delivery division, SEIS.<sup>5</sup>

In the instant case, contrary to the assertions of DESE, Parent has alleged that during Student's time in DYS custody, DESE/SEIS failed to provide Student with the educational services set forth in her accepted IEPs. Parent further alleges that DESE/SEIS failed to fulfill certain procedural requirements, such as informing Southbridge of its inability to provide certain services and issuing quarterly progress reports. They seek compensatory relief corresponding to the alleged denial of FAPE while Student was in the custody of DYS.

Based on the foregoing, it is clear that the criteria for joinder set forth in Rule I.J. have been met. Complete relief, which could include compensatory services, is not available unless DESE is a party; DESE has an interest in the subject matter of this case, which cannot be disposed of in its absence; and there is a risk of prejudice to the existing parties if DESE because Parents would be unable to obtain relief (such as compensatory services) for which DESE may be liable if DESE is not a party in this matter.<sup>6</sup>

### **CONCLUSION AND ORDER**

Parent's/Student's Motion to Join DESE as a party in the matter is GRANTED. As stated in Note 1, above, such joinder is applicable solely to the second portion of the bifurcated hearing, which will take place on April 26, 27, and 29, 2021.

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<sup>3</sup> 20 USC § 1412(a)(1)(A); (a)(11); 34 CFR 300.2(b)(1).

<sup>4</sup> MGL c. 71B §12; 603 CMR 28.06(9)

<sup>5</sup> See 603 CMR 28.06(9)(c)-(d), which, supplemented by DESE guidance documents and an interagency agreement between DESE and DYS, outlines procedures for allocating responsibility among DESE, DYS, and a student's LEA, including the requirement that DESE notify the LEA if it cannot provide all of a student's IEP services such that the LEA becomes responsible for doing so.

<sup>6</sup> Joinder of DESE in this case is consistent with several prior BSEA rulings on the same issue. See, e.g., *Student v. Boston Public Schools & DESE*, BSEA No. 2006658 (Figueroa, June 17, 2020); *Student v. Boston Public Schools & DESE*, BSEA No. 2008658 (Berman, August 10, 2020)

By the Hearing Officer

*/s/ Sara Berman*

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Sara Berman

Dated: February 9, 2021