

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

In re: Ugo¹ v. Westford Public Schools
Massachusetts Department of Children and Families
Department of Developmental Services &
Department of Mental Health

BSEA #1607922

**RULING ON PARENTS' MOTION TO JOIN DEPARTMENT OF CHILDREN AND
FAMILIES AND DEPARTMENT OF MENTAL HEALTH'S MOTION TO DISMISS
ITSELF AS A PARTY**

This matter comes before the Hearing Officer on Parents' Motion to Join the Department of Children and Families (DCF) and the Department of Mental Health (DMH)'s Motion to Dismiss itself as a party to a Request for Hearing filed by the Parents on April 4, 2016. Parents initially filed their *Hearing Request* against the Westford Public Schools ("Westford" or "District"), DCF, the Department of Developmental Services (DDS), and DMH. Parents asserted that Westford should fully fund a therapeutic residential placement for Ugo because he requires such a placement in order to access a Free Appropriate Public Education (FAPE). By joining DCF, DDS, and DMH, Parents recognized that the BSEA might find that Ugo requires additional services over and above those that are Westford's responsibility (up to and including a therapeutic residential placement for non-educational reasons), in order to ensure that he is able to access or benefit from the school district's special education program and services. DCF, DDS and DMH each filed a motion to dismiss itself from the proceedings, and both Westford and Parents opposed the agencies' motions. Upon consideration of the parties' arguments, on May 17, 2016, the undersigned Hearing Officer issued an Order allowing DCF's Motion and denying DDS's and DMH's Motions without prejudice. At the time, Ugo was a client of DDS; his family's application to DCF for voluntary services had been denied, and his application to DMH for services was under review.

Subsequently, on May 27, 2016, DMH filed a second Motion to Dismiss DMH as a Party ("Second Motion to Dismiss") and memorandum in support thereof, based on its determination that Ugo does not meet clinical criteria under its regulations and consequent denial of services to him. On June 6, 2016, Westford filed its Opposition to DMH's Motion (*Westford's Second Opposition*), and on June 7, 2016, Parents filed their Opposition (*Parents' Second Opposition*), both accompanied by supporting memorandum. The parties argued these Motions telephonically on June 16, 2016.

¹ "Ugo" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

On June 16, 2016, Parents filed a Motion to Join DCF, arguing that they had filled out a second application for voluntary services from DCF, which had once again been denied, this time as a “pretext to not coming to the table in a matter that could potentially be resolved with services and assistance from the agency and provide the child/family what is needed.” On June 24, 2016, DCF filed its Opposition to Parents’ Motion to Join, asserting that nothing had changed in DCF’s relationship to the family since its previous dismissal from the proceedings. No party requested a hearing and testimony or oral argument would not advance my understanding of the issues involved, so as to this motion I am issuing the ruling without a hearing pursuant to Bureau of Special Education Appeals (BSEA) *Hearing Rule* VII(D).

For the reasons set forth below, Parents’ Motion to Join DCF is hereby DENIED and DMH’s Motion to Dismiss is hereby DENIED without prejudice.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY²

The following facts are not in dispute and are taken as true for the purposes of this Ruling. These facts may be subject to revision in subsequent proceedings.

1. Ugo is a twelve year old resident of Westford, Massachusetts. He is eligible for special education pursuant to 20 U.S.C. §1401 *et seq.* and M.G.L. c. 71 B. (*Hearing Request*)
2. Ugo has been diagnosed with autism spectrum disorder (ASD) and a conduct disorder. (*Hearing Request Ex. 1; Parents’ Opposition*) According to his parents, Ugo has also been diagnosed with “relentless and agitation, aggressive behaviors,” (*sic*) anxiety disorder and intellectual impairment. (*Hearing Request*)
3. Ugo is currently placed, pursuant to an Individualized Education Program (IEP) dated March 11, 2016, at a Westford middle school in a substantially separate classroom specifically geared toward students on the autism spectrum. He receives extended school year services. (*Hearing Request Ex. 1*)
4. Ugo has engaged in self-injurious behaviors (punching leg, running headfirst into wall) aggression towards others (biting, kicking and throwing things at others), yelling and swearing, non-compliance, and property destruction (smashing TVs, throwing objects, kicking doors). Some of these behaviors have led to police involvement. (*Hearing Request; Parents’ First Opposition*)
4. Ugo has been hospitalized psychiatrically at least twice in the last eight months. On November 2, 2015 Ugo was hospitalized due to psychiatric needs, and it was determined that an

² Findings 1-4 were set forth in my May 17, 2016 Ruling on this matter.

inpatient psychiatric placement was necessary because it was not safe for him to return home. In March 2016, he was hospitalized inpatient for psychiatric reasons again. He required hospitalization until on or about May 1, 2016. (*Parents' First Opposition*)

5. Ugo's family has twice applied for voluntary services for him from DCF. The application was denied both times. (*Parents' Motion to Join DCF*)

6. According to Parents, the first time they applied for and were denied services by DCF, they were not provided with written documentation of the reasons underlying this denial. (*Parents' Motion to Join DCF*)

7. After DCF was dismissed from the instant matter, Ugo's mother again sought services for Ugo from DCF on June 1, 2016. On June 3, 2016, Ugo's mother received a denial letter from a DCF supervisor. According to the letter, DCF denied her request for services because DCF was "not able to identify additional support services [it] could provide for [her] family," as the family was already working with "multiple outpatient support services which would be the same services [DCF] could offer." (*Parents' Motion to Join DCF and Denial Letter*, attached)

6. On or about March 30, 2016 an application for DMH services was completed by, or on behalf of, the Parents. DMH received the application on or about April 11, 2016. Ugo's application for DMH services remained in process without a final determination with respect to whether he meets the clinical criteria for service authorization at the time DMH's first Motion to Dismiss was denied. (*Previous Ruling, Ugo v. Westford Public Schools et al.*)

7. After considering Ugo's application, which involved a review of records from various sources, an interview by a licensed independent clinical social worker and a child psychiatrist, DMH reached a determination on or about May 26, 2016 that Ugo does not meet clinical criteria for DMH services. It based this conclusion on its determinations that Ugo's primary functional impairment is directly related to his autism spectrum disorder (ASD) and intellectual disability, and that his anxiety is a feature of his ASD rather than a stand-alone anxiety disorder. DMH informed Ugo's family by written notice on May 26, 2016 that it had denied his application. (*Second Motion to Dismiss*)

8. On May 27, 2016, Parents filed an appeal of DMH's decision. (*Parents' Second Opposition*)

LEGAL STANDARDS

Parents' Motion to Join DCF is governed by the BSEA's joinder rule, which is often used by parties to join state agencies (such as DCF and DMH) that the BSEA may determine must provide services to a student in a matter before it. It is set forth in BSEA *Hearing Rule I(J)*:

“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.”

The joinder rule also applies to DMH’s Motion. Although generally a Motion to Dismiss may be granted if the party requesting the hearing fails to state a claim for which relief is available through the BSEA, 801 CMR 1.01(7) (g)(3) and BSEA *Hearing Rule* XVII(B)(4), in this case DMH has filed a Motion to Dismiss itself as a party in the matter, which requires an assessment of whether DMH is properly before the BSEA at this time.

In addition to the joinder rule, I must consider BSEA jurisdiction to order that services be provided by state agencies in pending cases. The extent to which the BSEA may order such services is set forth in Mass. Gen. Laws ch. 71B, § 3, which provides:

“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 children and families, the department of mental retardation [now 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.”³

As such, to determine whether DCF and DMH are properly before the BSEA in the present case, I must determine, as to each agency, first, whether complete relief may be granted among those who are already parties, or if the agency 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;⁴ and if so, second, whether joinder of that agency is in accordance with the agency’s rules, regulations, and policies.⁵ In so doing, I bear in mind the general principal that although it is a school district’s responsibility to provide a student with FAPE, the BSEA may order a state agency to provide services over and above those that are the responsibility of the school district if the services are found to be

³ M.G.L. c 71B, § 3; *see* 603 CMR 28.08(3) (corresponding regulations).

⁴ BSEA *Hearing Rule* I(J).

⁵ M.G.L. c. 71B, § 3.

necessary to ensure that the student is able to access or benefit from the special education program and services offered by the school district.⁶

ANALYSIS

A. Parents' Motion to Join DCF

At the time I issued my initial Ruling allowing DCF's Motion to Dismiss itself as a party, I reviewed the facts of the case and determined that because Ugo was not in DCF's care or custody, nor was he receiving voluntary services from DCF, there was no formal relationship between the child and the agency that supported joinder. Other than the fact that Ugo's parents applied for voluntary services a second time, and Ugo was denied services a second time, nothing has changed.

As I stated in my earlier ruling, in the matter before me I may, upon considering all of the evidence in the case on the merits, find that Ugo requires nothing more than the services he currently receives. In the alternative, I may find that he requires a residential placement for educational or non-educational purposes, or that he requires other home services in order to access his education. As I indicated before, I cannot order DCF to provide any services, residential or home-based, if to do so would contravene DCF's own regulations.

Pursuant to its regulations, DCF may share the cost of a residential placement for a child under certain circumstances.⁷ It may not, however, provide a placement for a child who is not in its care or custody, voluntarily or otherwise.⁸ For a child to receive voluntary DCF services, up to and including placement, DCF must first determine that he is an appropriate candidate for its services.⁹ In this case, DCF twice denied Ugo's application because it determined that he did not qualify for services, and there is no indication in the record that the agency failed to follow its procedures in making or communicating that determination. Moreover, as DCF pointed out in its

⁶ See, e.g., *In Re Stoughton Public Schools, Department of Developmental Services and Department of Mental Health*, BSEA #1406800 (Crane 2014); *In Re Lexington Public Schools*, BSEA #1305048 (Figuroa 2013).

⁷ See 110 CMR 7.404(2) ("If a child's IEP specifies that a private day school program . . . is necessary to meet the child's special education needs and the Department determines that the child should be placed in community residential care for non-educational reasons, then the Department shall share the cost of the placement with the local educational agency.")

⁸ Cf. M.G.L. c. 119, § 21 (defining as "custody" the power to, *inter alia*, "determine a child's place of abode, medical care and education" and defining "child requiring assistance"); 110 CMR 4.00 (providing for education services for children *in the Department's care or custody*" (emphasis added)); 110 CMR 4.10 (pertaining to voluntary services).

⁹ See 110 CMR 4.04-4.06.

Opposition to Joinder, Parent did not appeal DCF's denial of services through the Department's fair hearing process.¹⁰ As such, its denial of services is final.

As I concluded in my earlier ruling, Ugo is not in DCF's care or custody, and he is not receiving voluntary services from DCF. It remains the case that there is no formal relationship between the child and the agency. Under these circumstances, there is no basis for ordering joinder of DCF at this time.¹¹

B. DMH's Second Motion to Dismiss

In its Second Motion to Dismiss, DMH argues that it adhered to its regulations concerning service authorization, specifically 104 CMR 29.04(2)(b), in determining that Ugo is not eligible to receive DMH services because his primary functional impairment is directly related to his ASD and intellectual disability, and he does not meet the diagnostic criteria for a stand-alone diagnosis of Anxiety Disorder. As such, for the BSEA to order DMH to provide services to Ugo would contravene the directive of M.G.L. c. 71B, § 3 that Hearing Officers make such determinations "in accordance with the rules, regulations, and policies" of the agency. In support of its argument, DMH cites to multiple BSEA cases involving students DMH had found ineligible for services, in which Hearing Officers allowed DMH's Motion to Dismiss. In these cases, however, in contrast to the present case, the agency's decisions had been finalized, in that appeals of DMH's eligibility determinations were not pending.¹²

In their Oppositions, both Parents and Westford highlight Ugo's psychiatric diagnosis and resulting symptoms and behaviors, which have led to recent hospitalizations. They rely on *In Re Lexington Public Schools*, BSEA #1305048 (Figueroa 2013) for the proposition that joinder only requires that they show in a preliminary way that they will be able to present evidence at Hearing that may result in DMH being found responsible to offer some services. In *Lexington*, the student's initial application to DMH was pending; the agency had yet to determine the student's eligibility.

¹⁰ Although the denial of an initial application for services is not specifically listed as grounds for appeal under 110 CMR 10.06 (1), the regulation does permit an applicant for services to appeal the failure of DCF to follow 110 CMR, which resulted in substantial prejudice to the applicant.

¹¹ See *In re Agawam Public Schools and Massachusetts Department of Children and Families* BSEA #1403554 (Crane 2013) (allowing DCF Motion to Dismiss where child was not in DCF care or custody and application for voluntary services had been denied).

¹² See, e.g., *In Re Andover Public Schools and Massachusetts Department of Mental Health*, BSEA #1502640 (Reichbach 2014) ("Parents did not request an informal conference or reconsideration in order to appeal this determination pursuant to 104 CMR 29.16(3)"); *In Re: Fall River Public Schools*, BSEA #1406929 (Oliver 2014); *In Re Stoughton Public Schools, Department of Developmental Services and Department of Mental Health*, BSEA #1406800 (Crane 2014) ("it is clear that DMH currently does not have a pending eligibility application for Student"); *In Re: Boston Public Schools*, BSEA #06-6542 (Figueroa 2006) ("Under DMH Regulations, Parent still has three more appeals available to her in order to exhaust administrative remedies in said agency, including the opportunity for a fair hearing"); *West Springfield Public Schools and Voltan*, BSEA #04-5315 (Byrne 2004).

Moreover the District asserts that to the extent that Ugo may be determined to require any residential services, such services would be non-educational in nature. As such, they would be the financial responsibility of a state agency, which could be DMH given Ugo's diagnosis of an anxiety disorder and his recent psychiatric hospitalizations. For this reason, the District argues DMH is necessary to preserve a reasonable range of alternatives to fashion complete relief, and if the agency is dismissed from the case, the District bears a substantial risk of prejudice because the BSEA could not order a DMH-District cost-share.

At this early stage in the case, I have little information about the extent of Ugo's needs. It is possible that I will determine that FAPE requires that Westford fund a therapeutic residential placement for him. I may find that Ugo does not require such a placement for educational reasons, but that he needs either a therapeutic residential placement or other services to ensure that he is able to access or benefit from the special education program and services offered by the school district. If it this is the case, given Ugo's mental health diagnosis as well as his psychiatric hospitalizations, I might find that DMH is the agency responsible for such services. For this reason it may not be possible to grant complete relief in the absence of DMH. I now consider whether joinder is consistent with DMH's regulations.

In this instance, DMH has determined that Ugo does not meet eligibility criteria, and Parents have timely appealed that determination. Because an appeal pursuant to DMH regulations is pending, the agency's determination has not yet become final and it is possible that DMH's eligibility determination will be reversed on appeal. Remaining a party to this matter at this point in time is not inconsistent with DMH regulations because, in the event that DMH's eligibility determination is not reversed, the BSEA will not order DMH to provide services to Ugo. As such, it would be inefficient to dismiss DMH at this time.

CONCLUSION

In this matter, Parents assert that Ugo requires residential placement for educational reasons. They recognize that the BSEA may find that Ugo requires residential placement, but not for educational reasons. The District argues that Ugo is making effective progress in his current program, that any additional supports he requires are for non-educational reasons and as such, they are the responsibility of one of the state agencies with which Ugo is involved. Pursuant to M.G.L. c. 71B, § 2A and 603 CMR 28.08(3), the BSEA has jurisdiction "to resolve differences of opinion among school districts, private schools, parents, and state agencies." Parents seek the involvement of both DCF and DMH as parties in this matter. At this early stage in the case, I cannot say that I will be able to grant complete relief in the absence of a particular state agency, and to the extent I may order that DMH provide services for Ugo (should he be found eligible for

the agency's services), the District bears the risk of prejudice if I dismiss DMH. The difference between the posture of DCF and the posture of DMH is that Parents have appealed the latter's denial of eligibility, whereas DCF's denial of services stands as the agency's final decision. There is no basis upon which to join DCF in this matter.

For these reasons, I find that DCF is not a necessary party to this matter, but that DMH is.

ORDER

- 1) Parents' Motion to Join DCF is hereby DENIED.
- 2) DMH's Second Motion to Dismiss is hereby DENIED.

By the Hearing Officer:

Amy M. Reichbach
Dated: July 8, 2016