

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

In re: Student v.
Middleborough Public Schools

BSEA #1908850

**RULING ON MIDDLEBOROUGH PUBLIC SCHOOLS' MOTION TO JOIN THE
DEPARTMENT OF DEVELOPMENTAL SERVICES AND THE DEPARTMENT OF
CHILDREN AND FAMILIES**

On May 28, 2019, Middleborough Public Schools' (MPS) filed a Motion for Joinder of the Department of Developmental Services (DDS) and the Department of Children and Families (DCF), asserting the BSEA's jurisdiction over both agencies pursuant to 603 CMR 28.08(3)¹ and relying on Rule 1J of the BSEA *Hearing Rules for Special Education Appeals*. The District argues that DDS and DCF should be "responsible for the residential portion of Student's placement/ non-educational residential services." According to MPS, both agencies have determined that Student is eligible for available services and have provided support to him. MPS argues that the question of whether or not a state agency is responsible for providing any services to Student can only be determined following an evidentiary hearing, thus arguing that the state agencies, namely DDS and DCF, must be joined.

On May 30, 2019, DDS filed an Opposition to MPS's Motion for Joinder, arguing that Student has only been found eligible for limited services and has not been found generally eligible for DDS adult services. According to DDS, Student is eligible for child coordination and in home family supports, which are services designed to keep a student in the home. DDS argues that it is not lawfully responsible for residential placement of a child under the age of 18 who has not been found generally eligible for adult services and as such DDS should not be joined as a party to this matter.

On June 3, 2019, DCF filed an Opposition to MPS's Motion for Joinder, arguing that it cannot provide access to placement where at present it has neither care nor custody of the child. DCF asserts that it does not currently have a case open with Student's family for the provision of voluntary services and also that there is no formal relationship between DCF and Student. Accordingly, DCF asserts that it is not a necessary party and should not be joined.

A Motion Session was initially scheduled for June 12, 2019, but on that day Parent's attorney became unavailable and requested a postponement. The request was granted and the

¹603 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.

Session rescheduled. The Motion Session was held on June 26, 2019. Attorneys for Middleborough, DDS, DCF, and Parents participated in the Motion Session.

Facts:

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

1. Student is a 16-year-old resident of Middleborough, who attends Middleborough High School. Student lives with his mother and a sibling. Father lives separately.
2. Student has been diagnosed with autism spectrum disorder (ASD), attention- deficit/ hyperactivity disorder (ADHD), disruptive mood dysregulation disorder (DMDD) and epilepsy. He also presents with a specific learning disability with impairments in reading and writing. As such, he has been found eligible to receive special education and related services.
3. In October 2018, Student was hospitalized at the Hasbro/ Bradley Hospital. Student had reportedly stated that he was having homicidal thoughts. Student remained at Hasbro/ Bradley until December 2018 when Student's participation in a forty-five day evaluation through the Comprehensive Assessment and Short Term Treatment (CAST) program at Mount Pleasant Academy (part of the Beckett Family Services), was facilitated with the support of DDS and financial support of DCF. Student remained at Mount Pleasant Academy from December 2018 through February 2019. The CAST report recommended that upon returning home from school, wrap around support services be offered to the family.
4. In February 2019, while at Mount Pleasant Academy, Student underwent a neuropsychological evaluation conducted by clinicians at Massachusetts General Hospital (MGH). As part of the evaluation, a Behavior Assessment System for Children (BASC) was completed by a teacher at Mount Pleasant and Student's mother. Middleborough was not contacted for input. The MGH report recommended residential placement for Student.
5. In February of 2019 Student was discharged from Mount Pleasant Academy and returned to his placement at Middleborough High School.

6. On March 11, 2019, Middleborough conducted its own risk assessment through READS Collaborative. Thomas Vautrinot, Psy. D. recommended that the Team consider placing Student in a smaller structured environment in a collaborative setting.
7. Between March and April 2019, Student's IEP Team met twice, first on March 14, 2019 to consider the CAST and MGH reports as well as to review previously rejected IEP and placement, and again on April 1, 2019, to consider the READS report. After the second meeting, the Team recommended Student's placement in a collaborative to better support Student's needs. The Team continued to recommend home-based services. Parent, however, did not accept them. Parent noted on the IEP Consent Form dated April 1, 2019 that she rejected home services because the family was working with their own ABA therapists.
8. At present, Student attends Middleborough High School. His schedule has been adjusted to facilitate his return from the extended absence while at Mount Pleasant and to support his therapeutic needs.
9. Sometime after Student returned to Middleborough in February 2019, Parents filed a complaint through the Problem Resolution System (PRS) at the Massachusetts Department of Elementary and Secondary Education in response to the change in schedule. This complaint was resolved in favor of Middleborough.
10. On April 19, 2019, Parents filed a Hearing Request with the BSEA seeking residential placement for Student. Thereafter on May 28, 2019, Middleborough filed the instant Motion for Joinder of DDS and DCF.

Legal Standard Regarding Joinder:

A party to a BSEA Hearing may seek participation of a state agency after the Hearing Request has been filed through joinder. Rule 1J of *The Hearing Rules for Special Education Appeals* sets the standards for joinder. 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 when 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 1 J, 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. 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.

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.

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 eligible 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 grants the BSEA authority to order provision of services by state agencies “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). The BSEA's jurisdiction over state agencies is also found in the special education regulations at 603 CMR 28.08(3) which 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. This regulation allows the BSEA to order a state agency in accordance with the rules, regulations and policies of such 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).

Conclusions:

Here, Middleborough disputes Student’s need for residential placement, arguing that the reports that Parents are relying upon do not portray a student that requires residential services in order to receive a free appropriate public education (FAPE). Middleborough notes that the issues driving the request for residential placement seem to stem from home-based, rather than educationally-based issues. Therefore, Middleborough asserts, that because DCF and DDS are appropriately situated to offer and have offered services to Student, the Hearing Officer has the authority to order the state agencies to take responsibility for the residential portion of Student’s placement and/or non–educational services. As such, MPS concludes that the question of whether or not the agencies are responsible for providing services to Student can only be determined following an evidentiary Hearing. Therefore, Middleborough asserts that DDS and DCF must be joined.

Parents take no position on whether or not DCF and/or DDS should be joined as Parties to this matter.

A. Joinder of DCF:

DCF argues that it should not be joined as a party because Student is not and has never been found eligible for services through DCF. DCF explains that its involvement in the arrangement and funding of Student’s placement at Mount Pleasant Academy was the result of an Executive Office of Health and Human Services Policy, 93-1, entitled “Interim Policy for Voluntary Out –of–Home Placements for Children with Disabilities” (hereinafter “Interim Policy”). The aforementioned policy allowed DCF to provide funding for a qualifying student without DCF’s further involvement.

The Interim Policy, which was in effect until December 2018, provided that when DCF (formerly Department of Social Services, for purposes of the Interim Policy) received a request for out–of–home services for children with disabilities “where there [were] no

protective concerns and no parenting issues unrelated to the child’s special needs,” DCF was responsible to refer the request to the human services agency responsible for the child. In the instant dispute, Student has been receiving services from DDS. Under the Interim Policy, DDS could in turn seek funding from DCF for the out-of-home services in the event that DDS determined that student needed such services “beyond the respite level” in order to prevent an out-of-home placement.² The Interim Policy no longer in effect, would have allowed DCF’s limited involvement for funding purposes without further requiring DCF’s involvement.

The Interim Policy may be understood as providing for a fiscal arrangement between human service agencies, pursuant to which the agencies have significant discretion to allocate funds appropriated by the legislature for this specific purpose. The Interim Policy may be considered a potential vehicle for DDS to access DCF funding to pay for limited services for Student. However, in so doing, the Interim Policy does not create a legal obligation on DCF to provide services to Student. Rather, under the Interim Policy, any legal responsibility to Student remains with DDS—that is, DCF’s role is only to provide funding to DDS so that DDS may, in turn, provide services to Student that DDS believes to be appropriate.³

The Interim Policy provides no basis upon which DCF could be found to have legal responsibility to provide residential (or other) services to Student.

Furthermore, the BSEA’s authority to order DCF to provide services to Student is limited under MGL c. 71B, s. 3, to services that may be offered “in accordance with the rules, regulations and policies” of the particular agency.

DCF persuasively argued that statutory and regulatory standards provide no foundation that would support a determination that DCF must provide services to Student in the instant case, because there is no legal relationship between Student and DCF. There is neither a court custody order placing Student in the temporary or permanent custody of DCF, nor a voluntary placement agreement between Parents and DCF. Thus, since Student had never been in the care or custody of DCF, Student is not (nor has he ever been) a client of DCF.⁴

Moreover, any involvement by DCF was extinguished by operation of law consistent with the Interim Policy (no longer in existence) when Student returned to Middleborough. DCF’s limited involvement with Student is insufficient to create the nexus necessary to deem this agency a necessary party. As such, I am persuaded that DCF should not be joined as a party in the instant dispute.

Middleborough’s Motion to Join DCF is **DENIED**.

²*In Re: Agawam Public Schools and Massachusetts Department of Children and Families*, BSEA #14-03554 (Crane, 2014).

³*Id.*

⁴*Id.*

B. Joinder of DDS:

DDS argues that it should not be joined and that complete relief can be fashioned in its absence. DDS concedes that Student has been found eligible for limited services, including child coordination and in home family supports, but asserts that Student has not been found generally eligible for adult services. DDS also notes that all the supports and services it offers to qualified children are subject to availability and do not include residential placement. As such it requests that joinder be denied.

The situations of DDS and DCF with respect to this matter are very different, because Student is currently a client of DDS and is receiving DDS' services. Also, with respect to DDS, Middleborough seeks its participation to either fund residential placement, or support Student in the home in the form of non-educational services within the array of services offered by said agency, for which student has been found eligible.

The issue for Hearing is the appropriateness of the program and placement proposed by Middleborough and whether Student requires residential placement (as requested by Parent), or a day placement with in home supports (as suggested by Middleborough) to access a FAPE. At this stage one must consider both options as well as the possibility that DDS may be found responsible to continue offering the level of in-home support services it now offers or additional ones in order for Student to access his educational program.

I find that Middleborough has shown at least in a preliminary manner that it may be able to present evidence at Hearing which may result in DDS being found responsible to offer some services to Student. As such, Middleborough's Motion for Joinder of DDS must be **ALLOWED**.⁵ DDS is hereby joined to the instant matter.

ORDER:

1. Middleborough's Motion to Join DCF as a Party is DENIED.
2. Middleborough's Motion to Join DDS as a Party is ALLOWED.

So Ordered by the Hearing Officer,

Rosa I. Figueroa
Dated: June 27, 2019

⁵ 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).

The Hearing Officer gratefully acknowledges the contribution of legal intern Melanie Howland to this Ruling.