COMMONWEALTH OF MASSACHUSETTS

Bureau of Special Education Appeals

In Re: Callie¹ BSEA#03-2013 &
the Southern Berkshire Regional School District

Ruling on Motion To Join

This matter comes before the Hearing Officer on the Motion of the Southern Berkshire Regional School District to Join the Department of Mental Retardation, and the Department’s Opposition thereto. The Student did not oppose the Motion. All interested entities submitted written arguments on the Motion and oral arguments were presented on April 9, 2003, by teleconference.

Factual Background

Although many facts remain to be determined at hearing, those essential for resolution of this Motion to Join are not in dispute:

1) Callie is a nineteen year old student currently under the guardianship of her mother. She has received special education services through the Southern Berkshire Regional School District since the early elementary grades. She has been diagnosed with mental retardation, post-traumatic stress disorder and bipolar disorder. Callie’s most recent accepted IEP continues her previous successful placement in an inclusion program at Mt. Everett Regional High School.

2) On October 2, 2002, Callie was admitted to the locked psychiatric unit at Berkshire Medical Center known as “Jones III.” She has remained there without interruption through the date of this ruling.

3) On October 25, 2002, the guardian filed a request for a hearing seeking an Order placing Callie in a residential special education program.

4) A Team meeting was held on November 8, 2002. The Berkshire Medical Center stated that, clinically, Callie was ready to be released from Jones III. The School offered to provide transportation between Jones III and Mt. Everett High School so that Callie could resume her educational program

¹“Callie” is a pseudonym chosen by the Hearing Officer for us in publicly available documents in order to protect the privacy of the Student.
during the day. No alternate available educational program or residential arrangement was identified by the Team. Therefore, since shortly after the Team meeting, Callie has lived on Jones III and gone to school at Mt. Everest. All parties agree that Jones III is inappropriate and unduly restrictive for Callie.

5) Callie has been determined to be generally eligible for adult services from the Department of Mental Retardation.

6) On December 26, 2002, the School submitted a Motion to Join the Department of Mental Retardation in this action asserting residential Services provided by the Department were necessary in order for Callie to access the Mt. Everett High School where her free, appropriate public education is available.

7) Callie's family is not able to meet her residential needs at this time.

Conclusions of Law

This motion touches on a tricky and evolving area of law; one which, it is hoped could and should be simplified by less funding territoriality, more precise regulatory language, and better public policy aimed at the needs of the 18 to 22 year old disabled population. There are two fundamental issues in this matter: does Callie need a twenty-four hour program for educational reasons? And if not, where does she live while receiving appropriate special education services in a mainstream setting? The School argues that it is obligated to provide, and is providing, an appropriate special education program in the least restrictive setting. In order to continue making progress in this program Callie requires a residence appropriate to her needs which allows her to attend. It argues that these circumstances are nearly indistinguishable from those presented to the Hearing Officer in Medford Public Schools, 7 MSER 75 (2001). The Department of Mental Retardation (hereinafter “DMR”) argues that it never provides residential services to individuals between the ages of 18 and 22 and therefore should not be involved in any proceeding to determine Callie’s appropriate residence. The Department also argues that Medford was wrongly decided and should not be followed by this Hearing Officer. Finally the Student seeks a quick resolution as she is currently inappropriately confined to a locked psychiatric facility. The Student notes that although she believes a residential education program would provide FAPE, no such program has been located despite an extensive search. The Student contends that the Medford analysis is applicable in the circumstances presented here. After careful consideration of the undisputed facts, and of the arguments of the interested participants, it is my determination that joinder of the Department of Mental Retardation is warranted under these facts and is consistent with M.G.L c. 71B § 3 as amended by Chapter 159; § 162 of the Acts of 2000 (“section 162”); 603 CMR 28.08 (3) and BSEA Hearing Rule 1F, my reasoning follows:
First I note that the authority of BSEA Hearing Officer to join a state agency in a special education appeal is well established. See Medford, supra. Whether to exercise that authority in any particular matter is primarily a question of fact. Here the facts show unequivocally that Callie has been determined to be eligible for DMR services. The facts also demonstrate that her current supports are inappropriate and unduly restrictive. While the Student may succeed in proving at a hearing that she requires a twenty-four hour placement for educational reasons, thus placing the entire programmatic and fiscal responsibility on the School, it is equally likely at this juncture that the School could prove that its inclusion program at Mt. Everett High School provides FAPE. It is to that latter possibility that much of the statutory and regulatory joinder language is addressed. As Hearing Officer Crane concluded in Medford, a BSEA Hearing Officer has the authority to order a human services agency such as DMR to provide services beyond those determined to be the responsibility of the school district so long as they are necessary to ensure that the federal and state special education obligations to the Student are satisfied. Two years after the Medford ruling, there has been no legislative change or judicial redirection of this conclusion. Therefore I conclude both that DMR is an appropriate entity to be joined, as it has been determined to be the appropriate adult service agency for Callie, and that I can order DMR to provide specific supportive services to Callie if they are necessary to enable her to access a free, appropriate public education.

DMR argues that I cannot order it to provide residential services to Callie because, as a matter of policy and practice, DMR does not provide residential services to individuals between the age of 18 and 22. (See attachment A to DMR Opposition to Motion to Join) Since there is impossibility of performance DMR should not be required to participate in this special education hearing. I disagree. While I acknowledge that DMR has consistently denied responsibility for residential services for 18-22 year olds in the BSEA forum, I do not find any such prohibition in the DMR’s regulations or policies. Instead the language there appears to be carefully crafted to ensure a wide variety of individually tailored, client driven supports to promote an individual’s integration and functioning in the community. These supports include residential services. (See: Attachment B to DMR opposition to Motion to Join) There is regulatory language barring DMR support if that same support could or should be provided by another public agency. See e.g. 115 CMR 6.07. However DMR’s argument that Callie is entitled to any necessary residential services through the school is premature. Whether Callie needs residential services for educational reasons, or for improved/continued access to an appropriate educational program, is the fundamental factual question for hearing. Similarly DMR’s argument that Callie could or should receive residential services from another public agency such as the Department of Social Services, is a question of fact for hearing. DMR’s participation in this hearing is necessary to elicit all the information pertinent to assessing the Student’s current needs and available resources, and to efficiently
develop a program that ensures her receipt of a free, appropriate public education in the least restrictive setting.

**Order**

For the reasons discussed above the School’s Motion to Join the Department of Mental Retardation is GRANTED.

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Date:                           Lindsay Byrne, Hearing Officer