COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS

In Re: Gloucester Public Schools  BSEA # 04-3543

RULING ON MOTION TO JOIN DMR

On March 19, 2004, the Gloucester Public Schools (Gloucester) filed a Motion to Join the Department of Mental Retardation in the above referenced matter. A written opposition was filed by the Massachusetts Department of Mental Retardation (DMR) on April 9, 2004 and a Motion Hearing was held by telephone on April 15, 2004.

FACTS

The relevant facts are not in dispute. Student, an eight-year-old girl, is currently living at home with her mother (Parent). Student is diagnosed with global delays, attention deficit hyperactivity disorder and mental retardation. Parent is single, has other children living at home and is employed on a full-time basis.

Although at a relatively young age, Student exhibits extremely troublesome behaviors that are difficult, if not impossible, for Parent to manage safely and effectively without supportive services in the home or, alternatively, without a residential placement.

During the school day, Student is receiving special education services in a substantially separate program provided by Gloucester and accepted by Parent. Gloucester has provided in the past (but is not currently providing) behavior consultation services within the home. Gloucester reports that Student has made significant educational progress within the program attended by Student, and takes the position that it is providing Student with a free appropriate public education (FAPE), in compliance with state and federal special education laws.

Parent agrees that Student may have made progress as evidenced by her behavior and educational development within the classroom context, but takes the position that this progress has been only minimal, and that what Student has learned in the classroom has not been generalized in other settings. More specifically, Parent believes that Student continues to have many significant, un-met educational needs (for example, Student needs more skill-building in the areas of safety, speech-language life skills and community access skills) and that it is simply not possible to provide sufficient education to Student during a six-hour school day in order for Student to be successful and learn these skills so that they can be sufficiently generalized.
Parent is unsure whether Student’s needs may be met with additional services provided outside of the school day or whether her needs may be met only within a residential placement. Parent has engaged an expert who is in the process of evaluating and observing Student within the home and school environments, and who is likely to make recommendations regarding Student’s needs and how they can be met.

DMR has found Student eligible for family support services for children with a developmental disability, pursuant to its regulations (115 CMR 6.05). Pursuant to this eligibility, DMR has been providing Student and her Parent with family support services within the home, as well as the services of a DMR services coordinator. One or more DMR representatives have been attending the recent IEP Team meetings for Student.

**POSITIONS OF THE PARTIES**

Gloucester takes the position that Student’s potential needs for residential or home support services are for reasons related to Student’s home situation rather than for educational reasons that would be the responsibility of Gloucester as the School District. Gloucester therefore looks to DMR (and seeks its joinder) to provide those additional services.

Parent supports the Motion to join DMR but is not certain, at this point in time, whether the additional services required for Student are properly characterized as educational (and therefore the responsibility of Gloucester) or non-educational (and arguably the responsibility of DMR).

DMR takes the position that any potential needs for residential or additional home support services can and should be met by Gloucester pursuant to its responsibilities to provide FAPE, that DMR is providing significant family support services, that DMR may not be ordered to provide any additional day or residential services and therefore joinder of DMR is neither necessary nor appropriate.

**DISCUSSION**

**Legal framework.**

The issue before me is whether DMR should be joined as a necessary party pursuant to BSEA Hearing Rule 1F. Statutory language regarding the jurisdiction of a BSEA Hearing Officer over state agencies (for example, DMR) includes the following language:

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 social services, the department of mental retardation, the department of

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1 Pursuant to BSEA Hearing Rule 1F (entitled “Joinder”), joinder may be ordered upon a finding that (1) complete relief cannot be granted among the existing parties, or (2) the proposed party to be joined has an interest in this matter and is so situated that the dispute cannot be disposed of in its absence.
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.2

The “in addition to” language within this statute means that if a student’s needs can be met through the special education and related services which are the responsibility of the school district, complete relief can be granted without the need for the human service agency to become a party. This language maintains the school district as the entity with sole responsibility for all those services to which the student is entitled pursuant to state and federal special education law.3

Additional services from a human services agency may be considered but only if such additional services may be necessary to ensure that the student will be able to access or benefit from the school district’s special education program and services.4

I now turn to the question of whether the additional services from DMR could be ordered by a BSEA Hearing Officer in accordance with rules, regulations and policies of the particular human services agency, and if so, whether DMR is a necessary party and should therefore be joined pursuant to BSEA Hearing Rule 1F.

DMR residential services for Student.

Gloucester seeks joinder so that DMR may be ordered to provide or pay for (1) the residential portion of Student’s placement in the event that I were to conclude that a residential placement is necessary, (2) services pursuant to a DMR/DOE Interagency Agreement of December 2002, and/or (3) family support services. I will consider each of these DMR services, beginning with DMR residential services.

DMR eligibility regulations provide three categories of eligibility – general eligibility, special eligibility and eligibility based on developmental disability.5 On its face, Student does not qualify for general eligibility because she is not 18 years of age or older, and she does not qualify for special eligibility because she has apparently not resided at one of the DMR residential programs listed within the regulation.6

It is not disputed that Student is eligible for DMR services based on her having a developmental disability as that term is defined within the DMR regulations.7 I consider

2 MGL c. 71B, s. 3. See also 603 CMR 28.08(3) (regulatory language similar to above-quoted statutory language).
3 In Re: Attleboro Public Schools, BSEA # 02-4839, 8 MSER 326 (2002); In Re: Ipswich Public Schools, BSEA # 02-4324, 8 MSER 185 (2002) and BSEA decisions/rulings cited in footnote 2 of Ipswich Ruling.
4 In Re: Attleboro Public Schools, BSEA # 02-4839, 8 MSER 326 (2002); In Re: Ipswich Public Schools, BSEA # 02-4324, 8 MSER 185 (2002) and BSEA decisions/rulings cited in footnote 3 of Ipswich Ruling.
5 115 CMR 6.03, 6.04 and 6.05.
6 115 CMR 6.03 and 6.04.
7 115 CMR 6.05.
whether I have the authority to order that DMR pay for residential services pursuant to this eligibility.

DMR regulations describing services available to families of children with developmental disabilities (entitled “Prioritization for Supports to Children and Families”) explain that DMR seeks to provide supports to and assist (but not replace) the families of children with developmental disabilities. This regulatory section includes the following language relevant to the priority for allocation of these supports:

The following priorities will apply to individuals who are younger than 18 years of age and to individuals ages 18 through 21 who are in the care or custody of, committed to, subject to court-ordered supervision of, or eligible for or receiving 24-hour residential services from or through another Massachusetts public agency, including, but not limited to the Department of Social Services, the Department of Youth Services, the Department of Mental Health, the Department of Public Health, and state or local education agencies; provided, however, that in no case shall the Department provide residential supports to children younger than 18 years of age or to individuals ages 18 through 21 years of age eligible for or receiving residential services from a local educational authority, local school district, or any other public agency.

Although the language is not written so precisely as to know for an absolute certainty whether the phrase “and eligible for or receiving residential . . .” applies only to individuals ages 18 through 21 years or also to children younger than 18 years, it appears that the most likely intent of the drafters is for this quoted phrase to apply only to individuals ages 18 through 21 years, with the result that these DMR regulations explicitly preclude the provision of residential supports as part of any family support services being provided to a person under the age of 18 years.

This reading is consistent within DMR’s so-called “New Family Support Guidelines & Procedures”, dated July 2002, which state unequivocally that DMR does not provide funding for “out of home placements such as residential schools, community group home, foster care, etc.” for persons under the age of 22 years.

Gloucester argues that this regulatory language and the DMR guidelines are at odds with language within DMR’s enabling statutes which states that DMR has the authority and responsibility to develop and maintain comprehensive services for children, including residential care and educational services, as well as DMR statutory language which

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8 118 CMR 6.07(2)(a).
9 118 CMR 6.07(2)(b) (emphasis supplied). Apparently, the underlined regulatory language was added by DMR subsequent to my addressing this issue in In Re: Attleboro Public Schools, BSEA # 02-4839, 8 MSER 326 (2002).
10 Part F1 of the Guidelines, at page 22.
11 MGL c. 19B, s. 13; c. 123B, s.2. See also In Re: Fitchburg Public Schools, BSEA # 02-0038, 8 MSER 141, 143 (May 9, 2002) (citing these statutes and cases cited therein at note 4. But see In Re Brockton Public Schools, BSEA # 02-3337 (August 1, 2002) (denying joinder, in part, because student was under the age of 18 years).
provides: “Those eligible for participation in any one service must be eligible for and have access to other services made available by the department [of mental retardation].”

I am not persuaded by Gloucester’s arguments that the DMR regulations and guidelines violate the statute and may be ignored, and that I may therefore order DMR to provide what it clearly intends never be offered to someone of Student’s age and disability -- that is, DMR residential services.

For these reasons, I decline to allow joinder on the basis of Student’s possible need for residential services from DMR.

**DMR services pursuant to the DMR/DOE Interagency Agreement.**

The parties agree that DMR has declined to provide any services pursuant to the DMR/DOE Interagency Agreement of December 2002, describing the Community Residential/Education Project (DMR/DOE Interagency Agreement). Parent and Gloucester have argued that DMR should provide Student with services pursuant to this Agreement. I now consider whether joinder should be allowed to address this apparent dispute.

At the outset, DMR points out that part V, subpart 2 of the DMR/DOE Interagency Agreement provides that the BSEA “shall have no jurisdiction or authority to order DMR to approve a Student for Project participation, or to order DMR to provide a Student participating in the Project with particular supports or services.” From this, DMR argues that as a BSEA Hearing Officer, I may not consider the issue of Student’s eligibility or provision of supports or services under the DMR/DOE Interagency Agreement.

I am not persuaded that DMR can so easily limit the BSEA’s jurisdiction. It is self-evident that whatever jurisdiction is given to the BSEA through statutory enactment of the Massachusetts legislature cannot be curtailed through the administrative actions or agreement of one or more state agencies subject to that statutory jurisdiction – in this case, by DMR seeking simply by agreement with DOE to carve out an exception to the BSEA’s statutory jurisdiction over certain services to be provided by DMR.

The more relevant question is whether the statute in question (quoted above in this ruling in the text accompanying footnote 2) confers BSEA jurisdiction over services that DMR would provide pursuant to the DMR/DOE Interagency Agreement. Neither DMR, Gloucester nor Parent addressed this issue, and I decline to resolve it without further argument. In light of the analysis below, I conclude that I need not resolve this jurisdictional dispute at this time.

I turn to the question of whether there is a genuine dispute regarding services pursuant to the DMR/DOE Interagency Agreement so that joinder may be appropriate to address that dispute.

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**Footnote:**

12 MGL c. 18B, s. 13.
DMR argues that in order to be eligible for these services, a parent must be available in the home for certain periods of time during the day so that the service providers can work with the parent effectively, for the ultimate purpose of increasing the parent’s ability to support the student within the home and avoid residential placement. Neither Parent nor Gloucester argues that Parent can meet this eligibility requirement.

DMR further argues that the purpose of the DMR/DOE Interagency Agreement is to provide support services in the home for a student who would otherwise require placement at a “residential special education school”. Neither Gloucester nor Parent takes the position at this time that Student requires a residential educational placement.

Any determination by me as a BSEA Hearing Officer would necessarily be consistent with the eligibility requirements, as well as the purposes for provision of these services, as reflected within the DMR/DOE Interagency Agreement.

In addition, the DMR/DOE Interagency Agreement provides for an application and appeal process. Apparently, Parent has not filed a formal application and, in any event, has not filed an appeal.

For these reasons, I conclude that it would be premature for me to find that there is a genuine dispute regarding support services under the DMR/DOE Interagency Agreement.

DMR family support services for Student.

Gloucester also seeks joinder so that DMR may be ordered to provide or pay for additional family support services.

As discussed above, there is no dispute that Student and her Parent are eligible for DMR family support services on the basis of Student having a developmental disability and being under the age of 18 years. There also is no dispute that Parent and Student are appropriately receiving these services from DMR at this time.

Parent will likely continue to require significant assistance within the home in order to maintain the safety of that environment unless Student is placed within a residential program.

13 DMR/DOE Interagency Agreement, part III, subparts 4 & 5.
14 Id. at part I, subparts 1, 2, 3 & 4.
15 Gloucester takes the position that any residential needs are not for educational purposes and therefore Student does not require a residential educational placement; Parent takes the position that Student potentially requires a residential placement but at this juncture in the dispute does not know whether Student’s needs may actually be met through sufficient family support services.
17 I also note that DMR takes the position that there is a waiting period of approximately two-years for the provision of services under the Agreement because of the number of students already found eligible to receive them and the limited funds available. No one has argued that I have the authority to circumvent this waiting period.
Student and her Parents may fall within DMR priority one, two or three for the receipt of family support services.\textsuperscript{18}

In seeking joinder of DMR, Gloucester has relied on my previous ruling involving DMR and the Attleboro Public Schools, in which I joined DMR as a necessary party in order to ensure the provision of family support services that may be necessary so that Student could access or benefit from his special education services.\textsuperscript{19} On the face of it, the \textit{Attleboro} ruling addressed issues similar to those in the instant dispute.

An important basis for the \textit{Attleboro} ruling was that DMR had indicated in that case that within a few months, its family support services may be reduced and then terminated. Within the present dispute, neither DMR, Gloucester nor the Parent has expressed such concerns. The parties are in agreement that DMR has not refused to provide any requested family support services. DMR appears to be fully engaged through its participation in Team meetings, service coordination services and, most importantly, the continuing provision of significant family support services.

Gloucester’s argument to the contrary that additional DMR family support services might be requested by Parent in the future and that DMR might then deny them, is simply not sufficient to persuade me that the parties have (or will have) a dispute that needs to be resolved by the BSEA regarding family support services.

\textbf{Conclusion.}

Pursuant to BSEA Hearing Rule 1F, joinder may be ordered upon a finding that (1) complete relief cannot be granted among the existing parties, or (2) the proposed party to be joined has an interest in this matter and is so situated that the dispute cannot be disposed of in its absence. Since there appears to be no current, genuine dispute regarding DMR’s services for which Student may be eligible, I do not believe that the Rule 1F standard is satisfied. In effect, it is not presently necessary that DMR be a party to this BSEA proceeding, nor is it possible for me to determine whether DMR’s participation will be necessary in the future. For these reasons, I find that joinder is not appropriate at this time.

DMR’s interests and its option to intervene in order to protect its interests.

Without DMR as a party, this matter may proceed to a BSEA Hearing to resolve the dispute between Parent and Gloucester. My Decision following the Hearing is likely to resolve issues regarding the nature and extent of Student’s needs, whether Gloucester is appropriately addressing Student’s educational needs, and if not, what additional special education or related services may need to be provided by Gloucester.

\textsuperscript{18} 115 CMR 6.07(2)(b).
\textsuperscript{19} \textit{In Re: Attleboro Public Schools}, BSEA # 02-4839, 8 MSER 326 (2002) (\textit{Attleboro} ruling).
Depending on what is included within my Decision, Parent might then decide that additional DMR services are necessary for Student to access or benefit from Gloucester’s special education services, and proceed in a separate BSEA proceeding against DMR (for example, through a new Request for Hearing, naming DMR as a party).

DMR is advised that any findings from my Decision regarding Student’s needs and Gloucester’s responsibilities would likely apply to any subsequent BSEA Hearing relevant to DMR services. In light of this, DMR may decide either to await the outcome of the BSEA Hearing without participating or to file a motion to intervene in order to participate in part or all of the Hearing regarding Student’s needs and Gloucester’s responsibilities.\(^{20}\)

**ORDER**

Gloucester’s *Motion to Join the Massachusetts Department of Mental Retardation* is DENIED.

By the Hearing Officer,

William Crane  
Dated: April 28, 2004

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\(^{20}\) Although the joinder standards have not been met, the standards for intervention pursuant to BSEA Hearing Rule 1E would likely be met if DMR should seek to intervene as a party. Hearing Rule 1E allows DMR “to intervene or participate in the entire process or any part of it” if DMR “may be substantially and specifically affected by the proceeding”. As explained above, DMR has a substantial and specific interest in the hearing since any determination that I might make regarding Student’s needs and Gloucester’s responsibilities may affect DMR’s ultimate responsibilities to Student.