

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

In re: Sergio¹

BSEA #2003363

**RULING ON THE DEPARTMENT OF ELEMENTARY AND SECONDARY
EDUCATION'S MOTION TO DISMISS AND PARENT'S MOTION FOR SUMMARY
JUDGMENT**

This matter comes before the Hearing Officer on two motions: the Department of Elementary and Secondary Education (DESE)'s *Motion to Dismiss* itself as a party from Parent's *Hearing Request*, filed October 21, 2019, and Parent's *Motion for Summary Judgment*, filed October 7, 2019.² A telephonic *Motion Session* was held on November 7, 2019 and additional arguments were heard during a Pre-Hearing Conference that took place on December 4, 2019. For the reasons set forth below, both motions are hereby DENIED.

I. BACKGROUND³

A. PROCEDURAL HISTORY

On September 24, 2019, Sergio's mother (Parent) filed a *Request for Accelerated Status*, accompanied by an *Emergency Motion for Stay Put*. According to Parent, Sergio, who resides in Lynn, had been enrolled in KIPP Academy, Lynn (KIPP), which had placed him for the 2018-2019 school year in the TIDES Program within the Marblehead Public Schools (MPS). Parent asserted stay-put to that placement for the 2019-2020 school year, but at the time she filed, Sergio had not yet been permitted to return to TIDES. Parent requested an Order requiring KIPP to immediately take steps to reinstate Sergio's enrollment at TIDES; an Order stating that KIPP Academy is the program school programmatically and financially responsible for Sergio; findings in support of and an Order stating that KIPP deprived Sergio of a free, appropriate public education (FAPE) and continues to do so until his reinstatement at TIDES; and findings in support of and an Order for education and related services to compensate for that deprivation. On September 25, 2019, the Bureau of Special Education Appeals (BSEA) denied accelerated status and issued a Notice scheduling the Hearing for October 29, 2019.

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

² Parent also filed a *Motion to Dismiss* so much of KIPP's *Hearing Request* as sought a Ruling regarding a prospective placement for Sergio at KIPP Lynn Middle School for the 2020-2021 school year, presumably through an Individualized Education Program (IEP) that had not yet been developed. KIPP's *Amended Cross-Request for Hearing* did not seek such a Ruling, rendering moot Parent's *Motion to Dismiss*. To the extent KIPP's *Second Amended Cross-Request for Hearing*, filed on November 27, 2019, seeks a Ruling regarding an IEP that was proposed on or about November 12, 2019, no motions have been filed as of yet.

³ Except where noted, the information in this section is drawn from the parties' pleadings and is subject to revision in further proceedings.

Also on September 25, 2019, KIPP filed a *Cross-Request for Hearing and Response to Parent's Hearing Request*. KIPP filed its request against Parent, Lynn Public Schools (LPS), and the Department of Elementary and Secondary Education (DESE) seeking clarification of the rights and obligations of the parties and a prospective placement for Sergio for the 2020-2021 school year (fifth grade) at KIPP' Academy Lynn's middle school substantially separate therapeutic program (SSTP).

According to KIPP, Sergio, who is currently in fourth grade and is eligible for special education due to an emotional disability, has been enrolled in KIPP Academy Lynn since kindergarten.⁴ In second grade he had struggled behaviorally, and KIPP came to believe he needed an SSTP. Because KIPP did not have an SSTP available for students before the fifth grade, it reached out to LPS to discuss options. When Lynn's former special education director was unresponsive, KIPP's former special education director consulted with the DESE Charter Schools Office about how to proceed. Lacking specific guidance, KIPP met with the family, consulted with MPS, and proposed a placement in Marblehead's SSTP program, TIDES. DESE was informed about this placement, and Sergio successfully attended TIDES throughout the 2018-2019 school year. In May 2019, however, DESE explained to KIPP that the charter school was not permitted to contract with school districts other than the school district of residence. DESE agreed to provide a waiver for the 2018-2019 school year, given the confusion over the regulations and how to proceed without the cooperation of the school district of residence, but informed KIPP that no such waiver would be forthcoming for the following school year. In June 2019, KIPP convened a Team meeting with the family and Lynn's new special education director. The TEAM proposed an SSTP within LPS for the 2019-2020 school year. On July 23, 2019, Parent rejected the proposed placement and asserted her right to stay-put to TIDES. Marblehead informed the family that it could not accept Sergio without a contract from KIPP; KIPP informed the family that it could not contract with MPS absent a waiver from DESE; and Lynn informed the family that in its view, Sergio could not assert stay-put to a particular public school program when the same services were available in another public school program in his district of residence. Sergio began to miss school. Given the urgency of the situation, DESE granted a waiver for the 2019-2020 school year and informed KIPP of such on September 16, 2019. KIPP offered compensatory services for the period of time during which Sergio was out of school, though it asserts that the LPS program was both appropriate and available. The Hearing on this matter was scheduled for October 16, 2019.

On October 1, 2019, KIPP requested postponement of the hearings and indicated that as Sergio had returned to TIDES and would remain there pending the outcome of the hearings, pursuant to the waiver granted by DESE, no emergency hearing was necessary. On October 8, 2019, KIPP filed a *Motion to Consolidate* the two *Hearing Requests*. During a Conference Call that took place on October 10, 2019, all parties assented to consolidation and requested that the postponement be for a period of three months to allow them to work together toward both resolution and clarity of some of the issues raised.

On October 7, 2019, Parent filed a *Motion for Summary Judgment* with regard to KIPP's *Cross-Request for Hearing*.⁵ She argued that KIPP is Sergio's program school, which has, and

⁴ According to Parent, Sergio enrolled in KIPP Academy-Lynn (KIPP) at the beginning of first grade.

⁵ Parent also filed the *Motion to Dismiss for Failure to State a Claim*, discussed in Note 2, above.

has had at all relevant times, programmatic and financial responsibility for Sergio. Furthermore, she asserted, because Sergio's Team determined that he required an SSTP, and never determined that he required placement in a private day or residential school, 603 CMR § 28.10(6)(a)⁶ does not apply to him. For this reason, KIPP is not, and was not, required to work with Lynn to meet Sergio's education related needs, and no law or regulation prevents KIPP from contracting with TIDES to do so. As such, she contends, she is entitled to summary judgment.

Also on October 7, 2019, LPS filed its response KIPP's *Cross-Request for Hearing*. Lynn argued that if Sergio's Team believed the school district of residence could meet his needs, KIPP had improperly bypassed the mandate to either create in-district programming at the charter school or propose in-district programming at Lynn, or some combination of the two. LPS asserted that the least restrictive environment mandate requires that students be educated in their neighborhood school/community to the maximum extent appropriate, and objected to Parent's assertion that KIPP could contract with TIDES, as it had done. As to the 2019-2020 school year, Lynn contended, it had met with Sergio's Team on June 17, 2019 and offered an SSTP, the TASC program within LPS's Callahan Elementary School, with services similar to those he was receiving at TIDES. According to Lynn, LPS can implement Sergio's last-accepted IEP at TASC, and TASC should therefore be considered Sergio's stay-put program and placement. Lynn agreed with Parent that KIPP remains financially and programmatically responsible for Sergio.

Following a Conference Call that took place on October 10, 2019, the Hearing was scheduled for January 7-10, 2020, and an Order issued delineating timelines for responses to pending motions.

On October 11, 2019, KIPP filed an *Amended Response* to Parent's *Hearing Request* and an *Amended Cross-Request for Hearing*. In its *First Amended Cross-Request for Hearing (Amended Hearing Request)*, KIPP noted that it is seeking clarification of the rights and obligations of the parties (specifically, KIPP, Lynn, DESE, and Parent), and a finding that KIPP's proposed IEP for Sergio (dated September 18, 2018 to September 18, 2019), as amended, and placement in the TASC Program at Callahan Elementary School within LPS, is appropriate and provides Sergio with a FAPE. KIPP clarified that it was not, at the time, seeking findings beyond this time period, though KIPP anticipated filing a further amendment regarding the remainder of the 2019-2020 school year and the beginning of the 2020-2021 school year, following a Team meeting that would take place in November.

On October 17, 2019, KIPP filed its *Response* to Parent's *Motion*, arguing that the *Motion* is conclusory, ignores basic principles of administrative law, fails to address the argument that the TIDES placement was unavailable at the beginning of the 2019-2020 school year, and is rendered partially moot by KIPP's *Amended Hearing Request*. Specifically, KIPP contended that Parent cannot assert stay-put to a program for which a charter school must apply for annual waivers, particularly when DESE has instructed the charter school that, according to its interpretation of the relevant laws and regulations, such placement is illegal. As a state agency, DESE has the authority to interpret laws and regulations so long as the laws and regulations are ambiguous as written and the interpretation is not arbitrary and capricious. KIPP also asserted

⁶ See discussion of 28 CMR § 28.10(6)(a) at II(A)(i), below.

that Parent’s interpretation of relevant special education regulations as allowing for any public school program to be considered “in-district” for any other public school, including a charter school, is contrary to common sense because it could require program schools to pay indefinitely for students to attend other public schools, including those outside their district of residence. Because the definition of “in-district” is ambiguous, KIPP reasoned, DESE’s interpretation of “in-district placement” as meaning a placement in either the charter school or the school district of residence should control, and KIPP was entitled to rely on that interpretation. Should the BSEA find otherwise, KIPP would seek a finding that “in-district” should be defined to mean a placement within the program school. Finally, as TIDES was essentially “unavailable” at the beginning of the school year because DESE had instructed KIPP not to place Sergio there, KIPP’s suggestion that stay-put could be effectuated at the Callahan’s TASC program, which offers the same services and supports, was appropriate.⁷

On October 18, 2019, Lynn filed a *Partial Opposition to Parent’s Motion for Summary Judgment*. Lynn did not object to Parent’s request that the BSEA find that KIPP is programmatically and fiscally responsible for Sergio’s special education programming as a matter of law, but opposed the remainder of Parent’s *Motion for Summary Judgment*. According to Lynn, genuine issues of material fact are in dispute regarding the application of 603 CMR § 28.10(6)(a) to this matter and whether KIPP was required to contract with Lynn for Sergio’s services. Moreover, Lynn asserted that by focusing narrowly on one regulation, Parent failed “to recognize the complex legal obligations and myriad of factual questions that are either in dispute or underdeveloped in the record regarding” Sergio’s Team’s placement determinations. Lynn took no position as to Parent’s *Motion to Dismiss*.

On October 21, 2019, DESE filed its *Response to KIPP’s Hearing Request* and a *Motion to Dismiss for Failure to State a Claim Upon Which the BSEA Can Grant Relief*. DESE took no position as to Parent’s motions, argued that certain claims of KIPP’s were either unripe or moot, and asserted that because no party had identified any violations of laws or claims for relief in which it has an interest, or for which it may be responsible, there is no justification for the Department’s continued participation in the matter. On the same date, Parent filed her *Response to KIPP’s Amended Hearing Request*.

On October 25, 2019, KIPP filed its *Opposition to DESE’s Motion to Dismiss*. KIPP agreed with DESE that the compensatory services issue is moot, and noted that it would not oppose a finding by the Hearing Officer that the stay-put issue is moot given that Sergio had returned to the TIDES program.⁸ According to KIPP, however, DESE must remain a party to this proceeding because KIPP relied on DESE’s interpretation of its regulations (and communication to KIPP, based on that interpretation, that KIPP could not legally place Sergio at TIDES) to determine that TIDES was unavailable to Sergio, and that TIDES, therefore, could not be his stay-put placement. For this reason, DESE has an interest in the matter. Moreover, should the BSEA order that Sergio be placed in TIDES beyond the expiration of DESE’s most recent waiver (at the end of the current school year), compliance with the BSEA’s Order would require violation of DESE’s instructions, such that complete relief could not be granted in the Department’s absence.

⁷ KIPP also argued that the amendment to its *Hearing Request* rendered moot Parent’s *Motion to Dismiss*.

⁸ KIPP noted that given Parent’s request for relief, it could not rely on a finding that stay-put is moot.

On October 28, 2019, Parent filed an *Opposition* to DESE's *Motion to Dismiss*. She contended that DESE should not be dismissed from the matter because it is not clear that KIPP is prepared to meet its legal obligations absent DESE's participation, and because the facts suggest that DESE does have an interest in alleged violations of law or claims for relief, despite its assertion otherwise.

On December 4, 2019, the parties participated in a Pre-Hearing Conference. Lynn participated by phone, with the permission of the Hearing Officer.

B. FACTUAL BACKGROUND

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

1. KIPP is a Commonwealth Charter School.
2. Sergio enrolled at KIPP in either kindergarten or first grade, in September 2016.
3. KIPP evaluated Sergio in June 2017 and identified him as eligible to receive specialized instruction and related services as a student with an emotional impairment.
4. During the spring of 2018, KIPP reached out to Lynn about the possibility of setting up an IEP meeting and the possibility of placing a student within LPS.⁹
5. Following an extended evaluation, in June 2018, Sergio's Team determined that he required an SSTP for the 2018-2019 school year in order to receive a FAPE.
6. Because KIPP did not have a school-based SSTP for third graders, KIPP contracted with Marblehead.
7. Sergio's last-accepted IEP places him in a substantially separate classroom at TIDES, Marblehead.

II. DISCUSSION

DESE's *Motion to Dismiss* and Parent's *Motion for Summary Judgment* require examination of the same questions of substantive law. I begin with that law, then discuss each motion in turn.

A. CHARTER SCHOOLS AND OUT OF DISTRICT PLACEMENTS

At the core of Parent's *Hearing Request* and KIPP's *Amended Cross-Request for Hearing* is one question: what are the options, and obligations, of a charter school once it determines that it cannot serve a student within its walls, but does not determine that the student requires an out-

⁹ KIPP and Lynn differ as to the nature and content of these communications, as well as the degree to which Lynn's previous Director of Special Education was responsive to KIPP's outreach.

of-district placement? The parties cite to various regulations related to this subject. The Department of Elementary and Secondary Education also issued a relevant guidance.

i. *Regulations*

603 CMR 28.02 defines several terms relevant to the present dispute, as follows:

An “approved private special education school or approved program” is “a private day or residential school, within or outside Massachusetts, that has applied to, and received approval from, the Department according to the requirements specified in 603 CMR 28.09.”¹⁰

An “approved public special education school” is “a program operated by a public school or an educational collaborative providing full day or residential special education services to eligible students in a facility serving primarily students with disabilities.”¹¹

A “district or school district,” includes “any other Massachusetts public school established by statute, certificate, or charter, acting through its governing board or director.” School districts have programmatic and financial responsibility in accordance with the procedures of 603 CMR 28.10.¹²

An “in-district program” is “a special education program operated in a public school building or other facility that provides educational services to students of comparable age, with and without disabilities.”¹³

An “out-of-district program” is “a special education program located in a building or facility outside of the general educational environment that provides educational services primarily to students with disabilities.” It is defined to include all programs approved under 603 CMR 28.09, whether operated by a private organization or individual, a public school district, or a collaborative.

A “program school” is the school in which a student is enrolled according to various provisions, including M.G.L. c. 71, § 89 (charter schools).

Pursuant to 603 CMR 28.10(6), a “program school shall have programmatic and financial responsibility for enrolled students, subject only to specific finance provisions of any pertinent state law related to the program school.” The provisions potentially applicable in the present matter outline a particular course of action to be followed by charter schools contemplating a possible out-of-district placement for a student. Specifically, when a Team determines that a

¹⁰ 603 CMR 28.02(1).

¹¹ 603 CMR 28.02(2).

¹² 603 CMR 28.02(8).

¹³ 603 CMR 28.02(10).

student attending a charter school may need an out-of-district placement, the Team “shall conclude the meeting pursuant to 603 CMR 28.06(2)(e) without identifying a specific placement type, and shall notify the school district where the student resides within two days.” Following such a determination, the program school is directed to invite representatives of the school district where the student resides (school district of residence, or SDOR) to participate in another meeting to determine placement. The Team is directed to consider, first, whether the SDOR has an in-district program that could provide the services recommended by the Team. If so, the program school must arrange with the SDOR to deliver such services or develop an appropriate in-district program at the charter school. If, on the other hand, the Team determines that the student requires an out-of-district program to provide the services identified in the IEP, the Team is directed to propose to the parent an out-of-district or in-district day or residential school, depending on the student’s needs. Upon parental acceptance of the proposed IEP and placement, programmatic and financial responsibility returns to the SDOR, which then implements the Team’s placement decision.

ii. *DESE’s Technical Assistance Advisory SPED 2014-5*

This DESE advisory, entitled “Charter School Responsibilities for Students with Disabilities Who May Need an Out-of-District Program,” (the Advisory) is designed to provide guidance to charter schools on this process. Although the Advisory explains that an “out-of-district program” may be operated by a public school district, it notes that “a specialized or substantially separate program operated within a school district building that serves students with and without disabilities is not considered an out-of-district program.” It lists three types of out-of-district special education programs: approved public day schools, approved private day programs, and approved private residential programs. The Advisory defines “in-district program” as “a special education program operated in a public school district building or other facility that provides educational services to students of comparable ages, with and without disabilities.”

Furthermore, the Advisory encourages charter schools and parents “to think creatively to address the students’ (*sic*) needs within the charter school, and make every effort to keep the student in the least restrictive environment.” DESE recognizes that in some circumstances a charter school may have difficulty meeting the needs of a student with a disability. The Advisory continues:

Ideally, with good collaboration, the SDOR could be invited to join the charter school in seeking to problem solve how to best serve the student in the charter school environment. If the student then cannot be well-served despite clear and multiple documented efforts to find the right mix of services for the student, then both parties will be knowledgeable about the efforts that have been made. In any case, if the charter school IEP determines that the student may require an out-of-

district program, then there are specific requirements that must be met in order to offer an out-of-district program...

Specifically, once a charter school IEP Team determines that a student may need an out-of-district placement, the Team must conclude the Team meeting without identifying a specific placement. Then the Team must, within two days, schedule another meeting to consider placement, inviting the SDOR to send a representative to participate in the placement meeting.¹⁴

The Advisory contemplates out-of-district placement as a last resort; “[p]arents are not encouraged to investigate out-of-district programs unless in-district services are highly unlikely to meet the needs of the student.” Prior to the placement meeting prescribed by the regulation, the charter school and the parent(s) are required to think creatively as they consider whether there are any other means of serving the student at the charter school. The parent and charter school representatives are instructed to discuss the parent visiting an SDOR (with the cooperation of the SDOR) existing in-district option if they believe it may meet the student’s needs and is available (emphasis added).¹⁵ Parents and charter schools are permitted to consider and investigate “what options may be available in out-of-district programs in the area that would be able to provide the services on the student’s IEP” if the SDOR has indicated prior to the meeting that no existing in-district programs are currently available within the SDOR.

Furthermore, the Advisory *requires* that the placement Team propose an in-district program to the parent, if the SDOR has an in-district program able to provide the services recommended by the IEP Team, either alone or as a supplement to services available at the charter school. Among other options, the charter school is permitted to “[j]oin, form, or purchase services from educational collaboratives or other partners to provide or support the provision of some or all of the services described in the IEP,” though the Advisory contemplates that these services will be delivered either in the charter school itself, through a program located in the SDOR, or a combination of both. When the placement Team proposes in-district programming and the student remains enrolled in the charter school, the charter school retains programmatic and financial responsibility for the student and has “full discretion over where it will propose to deliver any in-district programming.” The charter school is not required to contract with the SDOR for service delivery.

“If the placement Team, including the SDOR, agrees that the student cannot be served in-district, then the placement Team *shall* determine that the student requires an out-of-district placement” (emphasis added). An out-of-district placement, in this context, is defined as an approved public or private day or residential school that serves only students with disabilities. The Advisory

¹⁴ The school district of residence (SDOR) must be given at least five school days’ notice of the placement meeting, which must be held within ten school days following the IEP meeting at which the potential need for an out-of-district program was initially determined. *Technical Assistance Advisory SPED 2014-5*.

¹⁵ As another example of the cooperation the Advisory encourages between charter schools and SDORs, “[p]arents and charter schools are encouraged to share information with the SDOR so they may appropriately identify placement options.”

clarifies that “a program is not ‘out-of-district’ simply because it is not offered within the charter school.” A charter school Team is prohibited from acting independently to offer an out-of-district placement unless the SDOR declines to attend the placement meeting. Moreover, an SDOR “may not simply refuse to agree to an out-of-district placement. At a minimum, the SDOR must offer an appropriate in-district program in the SDOR that is available to the student upon acceptance of the placement by the parent.”

The Advisory does not contemplate a situation in which an SDOR declines to attend a placement meeting and fails to offer an appropriate in-district program in the SDOR.

iii. *Open Questions*

To decide the motions before me, I must determine whether TIDES is an out-of-district program, an in-district program, or neither, for purposes of these regulations, and whether TIDES is an approved public special education school. This determination will assist me in deciding whether 603 CMR 28.10(6), or some other provision, prescribes a process to be followed by a program school that has determined it does not presently possess the capacity to provide the components of an IEP it has developed for an enrolled student.

To the extent I determine that 603 CMR 28.10(6) does apply to the present matter, I must also determine whether KIPP initiated, or attempted to initiate, the process under this regulation. Such a determination requires examination of the content and manner of KIPP’s communications with Lynn. If KIPP did, in fact, initiate that process or attempt to do so, I must consider whether Lynn refused to participate in the Team meeting that the regulation requires, as such refusal could circumscribe the Team’s ability to comply with the Advisory’s directive to parents and charter schools to investigate other options only in the event that available in-district services are highly unlikely to meet the student’s needs. If I find that LPS did refuse to participate and, in so doing, deprived the Team of the ability to fully consider whether the SDOR has an in-district program that could meet Sergio’s needs, an appropriate consequence may be a finding that Lynn effectively, albeit unintentionally, transferred programmatic and financial responsibility back to itself.

B. MOTION TO DISMISS

i. *Standard for Ruling on Motion to Dismiss*

Although generally a motion to dismiss may be granted if the party requesting the hearing fails to state a claim upon which relief may be granted through the BSEA, 801 CMR 1.01(7)(g)(3) and BSEA Hearing Rule XVII(B)(4), in this case DESE has filed a motion to dismiss itself from the proceedings, which requires an assessment of whether DESE is properly before the BSEA as a party in this matter at this time. For this reason, although KIPP initially

filed its hearing request against Parent, LPS, and DESE, the outcome will be governed by the rule for joinder of additional parties. The BSEA’s joinder rule, set forth in Rule I(J) of the *Hearing Rules for Special Education Appeals*, provides as follows:

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.

This mechanism can be used by parties to join state agencies that the BSEA may determine must provide services to a student in a matter before it. 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, of any other state agency or program, in addition to the program and related services to be provided by the school committee.”¹⁶

As such, to determine whether DESE should remain a party in the present case, I must determine – taking into account the factors above – whether complete relief may be granted among the other 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.¹⁷ If the answer to this question is yes, I must consider whether joinder of that agency is in accordance with the agency’s rules, regulations, and policies.¹⁸

ii. *Application*

In this matter, KIPP does not contend that DESE may be responsible for providing direct services to Sergio. KIPP does, however, assert that in DESE’s absence, KIPP could face a situation where it must violate either DESE’s directive or a BSEA decision. Moreover, to the extent KIPP might be found liable for compensatory services due to Sergio’s inability to return to TIDES at the beginning of the 2019-2020 school year, the charter school argues that DESE bears responsibility due to its prohibition on KIPP’s funding of Sergio’s placement there.

¹⁶ M.G.L. c 71B, § 3; see 603 CMR 28.08(3) (corresponding regulations).

¹⁷ BSEA *Hearing Rule I(J)*.

¹⁸ M.G.L. c. 71B, § 3.

In its *Motion to Dismiss*, DESE asserted that no party had identified any violations of laws or claims for relief in which it has an interest, or for which it may be responsible. However, it offered no rules, regulations, or policies with which its joinder would conflict. As explained above, KIPP has in fact argued that DESE may be responsible, at least in part, for its failure to continue Sergio's placement at TIDES during the pendency of the dispute over the IEP KIPP had proposed. At this early stage in the case, I cannot say that KIPP bears no risk of prejudice in the absence of DESE.

DESE's *Motion to Dismiss* is DENIED without prejudice.

C. MOTION FOR SUMMARY JUDGMENT

i. *Standard for a Motion for Summary Judgment*

Pursuant to 801 CMR 1.01(7)(h), a rule of administrative practice modeled after Rule 56 of both the Massachusetts and Federal Rules of Civil Procedure,¹⁹ Summary Decision may be granted when there is “no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law.” “By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.”²⁰ This means that “only disputes over facts that might affect the outcome of the [case] under the governing law would prevent summary judgment.”²¹ Moreover, in determining whether a genuine issue of material fact exists, the fact-finder must view the entire record “in the light most flattering” to the party opposing summary judgment and “indulg[e] all reasonable inferences in that party's favor.”²²

In response to a Motion for Summary Decision, the adverse party “must set forth specific facts showing that there is a genuine issue for trial.”²³ To survive this Motion and proceed to hearing, the adverse party must show that there is “sufficient evidence” in his favor that the fact finder could decide for him.²⁴ “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”²⁵

¹⁹ Federal Rule of Civil Procedure (FRCP) 56 authorizes the entry of summary judgment whenever it appears that “there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”

²⁰ *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-48 (1986).

²¹ *Id.* at 248.

²² See *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 581 (1st Cir. 1994); see *Galloway v. United States*, 319 U.S. 372, 395 (1943).

²³ *Anderson*, 477 U.S. at 250.

²⁴ *Id.* at 249.

²⁵ *Id.* at 249-50.

Parent argues that there is no genuine issue of material fact in dispute and that she is, therefore, entitled to judgment as a matter of law on two issues: (1) that KIPP is programmatically and financially responsible for Sergio under G.L. c. 71, § 89 because he is enrolled there, and he has not been enrolled in or determined to require a private day or residential school; and (2) that 603 CMR § 28.10(6)(a) does not apply, such that KIPP was not required to work with with LPS, because Sergio’s Team determined that he required an SSTP, not an out-of-district program.

ii. *Application*

As set forth above, resolution of Parent’s motion requires resolution of the questions outlined in Section I(A)(i). Specifically, I must determine – among other things²⁶ – whether 603 CMR § 28.10(6) (or any other law or regulation) applies where a charter school determines it cannot serve one of its students within its walls, but has not determined that he needs an out-of-district program; whether 603 CMR § 28.10(6) (or any other law or regulation) applies specifically to KIPP’s placement of Sergio in TIDES; and whether, under the facts of this case, programmatic and financial responsibility for Sergio remains with KIPP.

To grant Parent’s *Motion for Summary Judgment*, I must – viewing it in the light most favorable to KIPP (and, in part, Lynn), as the party opposing summary decision – find that there is no genuine issue of material fact as to these questions.²⁷ Though multiple parties make persuasive arguments regarding the governing law, no party has supplied me with relevant factual information. Even if I were to decide that 603 CMR § 28.10(6) does not apply where a charter school proposes an in-district program outside of the SDOR, to grant summary judgment I would have to find that TIDES is an in-district program. Although I know that Sergio was placed at TIDES by KIPP and that TIDES is a program within MPS, Parent has supplied me with no facts regarding TIDES that could support a determination that TIDES is an in-district program. As such, Parent has failed to establish that there is no genuine issue of material fact. Therefore I need not continue the analysis.

CONCLUSION

Upon consideration of KIPP Academy Lynn’s *First Amended Cross-Request for Hearing*, the Department of Elementary and Secondary Education’s *Motion to Dismiss*, KIPP’s and Parent’s *Objection* thereto, and the arguments of all parties, I find that DESE has not established that it is not a necessary party. DESE’s *Motion to Dismiss* is hereby DENIED.

Upon consideration of Parent’s *Motion for Summary Judgment*, KIPP’s and Lynn Public Schools’ *Objections* thereto, and the arguments of all parties, I find that Parent has failed to

²⁶ Other issues to be resolved are outlined in the Order below.

²⁷ See *Galloway*, 319 U.S. at 395; *Maldonado-Denis*, 23 F.3d at 581.

establish that there is no genuine issue of material fact and that she is, consequently, entitled to judgment as a matter of law. Parent's *Motion for Summary Judgment* is hereby DENIED.

ORDER

The matter will proceed as follows.

1. The Hearing will take place January 7-10, 2020 at the BSEA, 14 Summer St., 4th Floor, Malden. It will begin at 10:00 AM each day. The issues for hearing are as follows:
 - (a) Whether KIPP properly placed Sergio at TIDES because nothing prohibits such placement;
 - (b) Whether DESE properly granted a waiver for KIPP's placement of Sergio at TIDES, because one was necessary;
 - (c) Whether Sergio's placement at TIDES may properly be continued, even absent a DESE waiver;
 - (d) Whether, at some point, programmatic and financial responsibility for Sergio transferred from KIPP to Lynn;
 - (e) Whether KIPP, Lynn, DESE, Parent, or some combination of these parties is responsible for the days of school Sergio missed at the beginning of the 2019-2020 school year and if so, how to compensate for the loss of education;
 - (f) Whether the IEP proposed by KIPP for the period from November 13, 2019 to November 12, 2020, placing Sergio in the TASC Program at Callahan Elementary School in Lynn during the 2019-2020 school year (through 8/1/20) and at KIPP during so much of the 2020-2021 school year as falls within the IEP period (8/2/20 to 11/12/20)²⁸, is reasonably calculated to provide him with a FAPE, and if not, whether it may be modified such that it does provide him with a FAPE;
 - (g) Whether TIDES, or TASC, is Sergio's "stay-put" placement.
2. Witness lists and exhibits are due by close of business on December 27, 2019.²⁹

By the Hearing Officer:

²⁸ See KIPP's *Second Amended Hearing Request*.

²⁹ Should the parties wish to extend the deadline for documents to December 31, 2019, they may do so by agreement among themselves.

Amy M. Reichbach
Dated: December 26, 2019