

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals
Bureau of Special Education Appeals

In Re: Student v.
Arlington Public Schools

BSEA # 2111926

Ruling on Arlington Public Schools' Motion to Join Dearborn Academy

On July 20, 2021, Arlington Public Schools (Arlington or District) filed a Motion to Join Dearborn Academy (Dearborn) as a necessary party to the above-referenced matter. Parents responded on July 22, 2021, opposing Arlington's Motion to Join Dearborn. On July 23, 2021, relying on the arguments advanced by Parents in their Opposition, Dearborn also opposed Joinder.

This Ruling is issued in consideration of the Parties' submissions, Parent's Hearing Request and Arlington's Response to the Hearing Request. I note that the facts appearing herein are considered true for the purpose of this Ruling only.

Facts:

1. Student is a fourteen-year-old resident of Arlington, Massachusetts who lives with her parents.
2. Student attended Arlington from Kindergarten to fifth grade. Student has received special education services pursuant to Section 504 plans and IEPs since the third grade.
3. Student carries a diagnosis of Autism Spectrum Disorder (Level I), Attention Deficit Hyperactivity Disorder (Combined Presentation), Generalized Anxiety Disorder, Separation Anxiety (by history), and Major Depressive Disorder (mild to moderate, recurrent). Student possesses intact intellectual abilities despite her underdeveloped social-emotional skills.
4. At the end of fifth grade, Parents rejected the proposed IEP and in-district placement offered by Arlington.
5. The Parties participated in Mediation and entered into a fully executed Mediation Agreement (Agreement) on May 30, 2018.
6. The Agreement settled all claims between the parties (up to the date of the Agreement) inclusive of all compensatory claims for all prior school years. It also included a waiver of prospective compensatory education services claims during the term of the Agreement.
7. Per the Agreement, Arlington agreed to fund Student's tuition at LABBB Collaborative or Dearborn at the OSD rate set by Massachusetts for the 2018-2019, 2019-2020 and 2020-2021 school years, and transportation would be provided by Parents.
8. The Agreement included language which stated that,

[t]he District is not responsible for any additional cost or programming beyond the terms of this Mediated Agreement. The Parents agree to hold the District harmless for all remaining services and costs...

9. Dearborn is a Massachusetts Department of Elementary and Secondary Education approved day school/placement.
10. Consistent with the terms of the Agreement, Arlington drafted an IEP calling for Student's placement at Dearborn and fully funded said placement for the 2018-2019, 2019-2020 and 2020-2021 school years.
11. Parents fully accepted the IEPs and Dearborn placements proposed by Arlington during the three years included in the Agreement.¹
12. The 2019-2020 and 2020-2021 IEPs included social/emotional, self-advocacy and mathematics goals and included the following services per the Service Delivery Grid:

Grid A: Coordination Services with Sp. Ed. Teacher, Clinician, Staff 1x30 minutes per month.

Grid C: 38 sessions 45 minutes each per week direct instruction with the special education teacher, clinician and staff; one, 45-minute session per week counseling services with the clinician.

13. Consistent with the applicable regulations, the contract between Arlington and Dearborn requires the latter to comply with all elements of Student's IEP.
14. On or about March 16, 2020 Dearborn suspended in-person educational services owing to the COVID-19 state health emergency.
15. Between March 16 and April 8, 2020, Dearborn did not implement Student's IEP instead providing limited access to school and check-ins.
16. From April 8, 2020, though the end of the school year in June 2020, Dearborn offered Student 3.5 hours of schoolwork through Google Classroom, inclusive of approximately one hour of direct instruction per day. According to Arlington, no synchronous opportunities to participate in classes with peers were offered. Starting on May 5, 2020, and continuing through the end of the school year, a once per week, small group, socialization opportunity was offered.
17. Arlington continued to fund full tuition for Student throughout this period.
18. Although prior to the COVID-19 pandemic Student's symptoms were present at concerning levels, her psychiatric challenges were exacerbated during the pandemic.
19. Student's progress report for the period ending in June 2020 notes difficulties engaging in remote learning and completing assignments. She did not make social emotional progress and instead regressed during this period.
20. During the 2020-2021 school year, Dearborn started the year with a hybrid model: four times per week half-day in person learning, and remote learning one full day,

¹ The 2019-2020 school year IEP was fully accepted on November 12, 2019, and the 2020-2021 school year IEP was accepted on December 1, 2020.

- plus four half-days weekly. The hybrid model continued through March 2021, after which the school returned to a full in-person model through the end of the school year.
21. Student's November 2020 and January 2021 progress reports note Student's continued struggles with remote learning and lack of progress toward the goals and objectives in her IEP.
 22. Once again, Arlington fully funded Student's tuition for the 2020-2021 school year.
 23. Arlington re-evaluated Student in the late winter/early spring of 2021, after which it convened Student's Team and proposed in-district placement in a substantially separate program for the 2021-2022 school year. The proposed IEP covering the period from April 13, 2021 through April 12, 2022 was rejected by Parents who requested funding for an out-of-district program.
 24. On May 24, 2021, Student was hospitalized for depression and suicidal ideation. Thereafter she was admitted to a CBAT and returned home after three days "because she was too nervous and dysregulated" and because of issues associated with her ASD and anxiety.
 25. Parents' Hearing Request seeks prospective out-of-district placement and equitable orders including compensatory education services.

Legal Standards:

Rule 1(J). of the *Hearing Rules for Special Education Appeals* (Hearing Rules) allows a Hearing Officer to join a party upon written request, in cases where: "complete relief cannot be granted among those who are already parties, or the person 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 their absence." In considering whether a party should be joined, several factors must be considered, to wit: "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 judgement entered in the proposed party's absence; and the existence of an alternative forum to resolve the issues." *Hearing Rules*, Rule 1(J).

In determining whether the criteria for joinder is met, a BSEA Hearing Officer must consider jurisdictional authority of the BSEA and the federal and state special education laws and regulations. 20 USC §1415(b)(6); M.G.L. c.71B §2A; 34 CFR 300.507(a)(1); 603 CMR 28.08 (3). In Massachusetts, the Hearing Officer must also consider Section 504 of the Rehabilitation Act of 1973.

603 CMR 28.08(3), which specifically delineates the BSEA's jurisdictional authority describing the types of controversies that may be entertained and the parties among whom those disputes may be heard, states that the BSEA may hear controversies involving "... the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities. A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR §§104-31-104-39." 603 CMR 28.08(3).

The jurisdictional authority of the BSEA to resolve special education related disputes consistent with G.L. c. 71B §2A may be exercised “among school districts, private schools, parents and state agencies.” 603 CMR 28.08(3). With this guidance I turn to the issue of joinder involving Dearborn.

Conclusion:

It is clear that in Massachusetts, the BSEA has jurisdictional authority to resolve disputes involving private schools directly responsible for implementation of a FAPE, pursuant to the IDEA, M.G.L. 71B and Section 504. Relying on said authority, Arlington seeks joinder of Dearborn, arguing that pursuant to contractual obligations between Dearborn and Arlington, Dearborn was responsible for the delivery of the program and services in Student’s IEP for the 2018-2019, 2019-2020 and 2020-2021 school years, during which Student allegedly failed to make progress and even regressed.

Arlington further relies on the terms of the May 2018 Mediation Agreement entered between the District and Parents which limits Arlington’s responsibility beyond covering the tuition for Dearborn during the three years stated in the Agreement. Arlington contends that Student is entitled to COVID-19 compensatory services from Dearborn due to the latter’s failure to fully implement Student’s IEP. Lastly, Arlington asserts the appropriateness of the in-district program and placement offered Student for the 2021-2022 school year.

Parents argued that the remedy they seek is prospective and involves rejection of Arlington’s proposed program for the 2021-2022 school year. Relying on 603 CMR 28.06(3)(b), Parents further assert that the duty to monitor out-of-district placements cannot be delegated. In their Opposition Parents explained that they seek compensatory education from Arlington for its “failure to provide placement in a separate day school for the 2021 extended school year” and failure to fund a private placement for the period from the beginning of the 2021-2022 school year through the date of issuance of a BSEA decision in Student’s favor.² Therefore, according to Parents, joinder of Dearborn is unnecessary.

Dearborn advanced no new arguments and instead relied on Parents’ arguments to oppose Arlington’s Motion.

Parents’ Hearing Request seeks issuance of “equitable orders, including for compensatory education and services” as well as “order all relief as required by the evidence presented at hearing”. While it is premature to ascertain the type and extent of compensatory services to which Student may be entitled, were the evidence to show that Dearborn is responsible for some form of compensatory services (including COVID-19 compensatory services) it would be impossible to issue adequate judgment in its absence resulting in potential prejudice to Arlington, Parents or both. Moreover, administrative expediency calls for all related issues to be heard simultaneously.

² No such distinction appears in Parents’ Hearing Request. The fourth remedy in the Hearing Request specifically states “issue equitable orders, including for compensatory education services”.

In light of the allegations raised by Arlington, and given that Parents seek compensatory services, and the potential that Student may be entitled to COVID-19 compensatory services, I find that complete relief cannot be granted in Dearborn's absence. Arlington is persuasive that proceeding to Hearing without Dearborn may result in prejudice to Arlington and Parents. Dearborn is a necessary party to resolution of this dispute. As such, Arlington's Motion to Join Dearborn is **GRANTED**. Dearborn is hereby joined as a Party to the above-referenced matter.

So Ordered by the Hearing Officer,

Rosa I. Figueroa

Dated: August 11, 2021