

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

In re: Xili¹

BSEA # 2206000

**RULING ON THE DEPARTMENT OF CHILDREN AND FAMILIES' MOTION TO
FOR RECONSIDERATION OF PREVIOUS RULING JOINING THE DEPARTMENT**

This matter comes before the Hearing Officer on the Department of Children and Families' (DCF, or the Department) *Motion for Reconsideration* of my March 31, 2022 *Ruling on Lexington Public Schools' Motion Join the Department of Children and Families (Joinder Ruling)*. In that *Ruling*, I noted that DCF had not filed any document in response to the *Motion to Join the Department of Children and Families (Joinder Motion)*, which had been filed by Lexington Public Schools (Lexington or the District) on March 4, 2022, although Lexington properly served the agency. Based on the standards governing joinder and the facts and legal arguments presented by Lexington and Parents, I granted Lexington's *Joinder Motion* and joined DCF, in part because I found that although DCF no longer had custody of Xili, it was unclear whether the Department maintained an open case, whether DCF would find Xili appropriate for voluntary services, and/or whether the parties would consider a voluntary placement agreement.

On April 1, 2022, following the issuance of the *Joinder Ruling*, DCF, through Counsel, alerted me that the Department had, in fact, filed an *Opposition* to Lexington's *Joinder Motion* on March 23, 2022. Unfortunately, due to an inadvertent administrative error, I did not receive this *Opposition* and, consequently, issued my *Joinder Ruling* without DCF's input. The Department recognized that its *Opposition* had been filed outside of the seven calendar days provided by the BSEA *Hearing Rules for Special Education Appeals*,² in part because the Assistant General Counsel listed by Lexington on its *Joinder Motion* had since taken paternity leave. Because of the legal standards governing joinder, explained below more fully, I determined that the proper course of action would be to reconsider my *Joinder Ruling* and invited DCF to file a *Motion to Reconsider* offering its facts and legal argument against the Department's joinder.

On April 1, 2022, DCF did just that. In its *Motion for Reconsideration of Order to Join (Motion to Reconsider)* the Department explained that it currently has no ongoing relationship with Xili. According to the Department, the Child Requiring Assistance (CRA) petition had been dismissed by the Juvenile Court on March 4, 2022, DCF had determined that no further services were necessary, and the family had received a Case Closing Letter with an opportunity to request a fair hearing in the event it believed ongoing DCF involvement to be warranted or necessary. To date, no such request had been filed by the family with DCF.

¹ Xili is a pseudonym chosen by the Hearing Officer to protect the student's identity in public documents.

² See BSEA *Hearing Rule VI(C)* ("Any party may file written objections to the allowance of the motion and may request a hearing on the motion within seven (7) calendar days after a written motion is filed with the Hearing Officer and the opposing party, unless the Hearing Officer determines that a shorter or longer time is warranted").

DCF contends that in the absence of an existing legally cognizable relationship between DCF and Xili, the BSEA does not have the authority to compel services from the Department.³ First, the Department has no obligation to provide services to a child not in its care or custody.⁴ Second, although families may obtain voluntary services for a child not in DCF care or custody, such services require the agreement of Parents and DCF.⁵ Thus, an order by the BSEA for DCF to provide services to Xili at this time, when there is no such agreement and Parents have not indicated that they are seeking continued DCF involvement, would essentially require Xili to engage in DCF services, in violation of DCF's own regulations. For these reasons, any argument that the Department might bear some responsibility for services in the future is speculative. Furthermore, the BSEA cannot order DCF to provide services to a child who, like Xili, is not in its care or custody or the subject of a voluntary agreement, without violating its regulations. As such, DCF is not a necessary party. Therefore, DCF requests that my *Joinder Ruling* be reconsidered, and that DCF be dismissed as a party to this matter.

I held a Conference Call on April 8, 2022 with Counsel for Parents, the District, and the Department, during which the parties discussed the status of the matter and supplemented their written submissions on the issue of joinder of DCF with oral argument. Although Parents once again declined to take a position, they confirmed, through Counsel, that they are not currently seeking DCF placement or services for Xili.

Following the Conference Call, Lexington filed a written *Opposition to Motion to Reconsider* on April 13, 2022, arguing that DCF previously had physical custody of Xili, and that evidence presented at Hearing may suggest that Xili would benefit from DCF services. The District cited to prior BSEA rulings joining state agencies where such agencies might be determined to be responsible for the non-educational services portion of a residential placement sought by parents, or for other non-educational services that could be provided to a student to assist him in accessing a free appropriate public education (FAPE), and argued that joinder in the present matter would advance the interest of administrative efficiency.

The matter is currently scheduled for Hearing on July 11, 12, and 14, 2022, following two assented-to postponements for good cause pursuant to Parents' February 14 and April 15, 2022 requests, to gather additional information regarding Xili's needs and performance, and to permit the parties to continue working together toward resolution.

For the reasons set forth below, DCF'S *Motion to Reconsider* is hereby ALLOWED.

³ Cf. *Hearing Rule* I(J); G.L. c. 71B, §§ 2A, 3; 603 CMR 28.08(3).

⁴ Cf. M.G.L. c. 119, § 21 (defining as "custody" the power to, *inter alia*, "determine a child's place of abode, medical care and education" and defining "child requiring assistance"); 110 CMR 7.400 (providing for education services for children *in the Department's care or custody*" (emphasis added)); 110 CMR 4.10 (pertaining to voluntary placement agreements).

⁵ See 110 CMR 4.02 – 4.05 (requests and applications for services, responses, eligibility determinations), 4.10 – 4.11 (voluntary placement agreements).

RELEVANT FACTUAL BACKGROUND

The facts recited in my *Joinder Ruling* summarize the pleadings prior to DCF's *Motion to Reconsider* and need not be repeated here. The new information provided by DCF clarifies that the agency has no present involvement with Xili or his family, as the CRA was dismissed by the Juvenile Court on March 4, 2022, and DCF has since closed its clinical case. Although Parents have had the opportunity to appeal this closure and seek further services from DCF since that time, they continue to decline to do so.

LEGAL STANDARDS

As a preface to my discussion of standards governing joinder, I clarify that although DCF's filing is captioned a *Motion to Reconsider*, I do not apply the standards set forth in the Federal Rules of Civil Procedure 59 or 60 for motions to alter or amend judgments, as courts may do when they rule on such motions.⁶ In this case, I did not consider DCF's *Opposition* before issuing the initial *Joinder Ruling*, in part because of an administrative error committed by the BSEA. As such, it is not appropriate to utilize the strict standards applicable to motions for reconsideration, which are granted sparingly.⁷ Instead, I apply the same standards for joinder that I applied in my *Joinder Ruling*, this time taking into account the information provided by DCF.

The BSEA has jurisdiction to resolve "differences of opinion among school districts, private schools, parents, and state agencies."⁸ Pursuant to BSEA *Hearing Rule I(J)*:

"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."

Parties often use this rule to join a state agency (such as DCF) that the BSEA may determine is responsible for providing services to a student in a matter before it, if such services are necessary for the student to receive a FAPE in the least restrictive environment.⁹ However, the relief the BSEA may order state agencies to provide is limited by Mass. Gen. Laws ch. 71B, § 3, which states:

⁶ See *Villanueva-Mendez v. Nieves Vazquez*, 360 F.Supp.2d 320, 323 (D.P.R. 2005) (citations omitted).

⁷ See *id.* at 324 (citations omitted) (explaining that a motion to reconsider may be granted when the movant demonstrates "(1) the availability of new evidence not previously available, (2) an intervening change in controlling law, or (3) the need to correct a clear error of law or to prevent manifest injustice.")

⁸ M.G.L. c 71B, § 2A; see 603 CMR 28.08(3) (corresponding regulations).

⁹ See M.G.L. c 71B, §§ 2A, 3; 603 CMR 28.08(3).

“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, or any other state agency or program, in addition to the program and related services to be provided by the school committee.”¹⁰

Therefore, to decide whether DCF should be joined as a party in the instant matter, I must determine, upon consideration of the joinder factors, whether complete relief may be granted among those who are already parties, or if DCF 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,¹¹ provided such joinder is not contrary to the Department’s rules, regulations, and policies.¹²

ANALYSIS

After a hearing on the underlying case, I may find that Xili requires nothing more than an assessment in a therapeutic day program, as Lexington has proposed. Alternatively, I may find that he requires a residential therapeutic assessment for educational (as Parents contend) or non-educational (as Lexington asserts may be possible) purposes, or that he requires other home services to access his education. It appears, therefore, that the first part of the analysis weighs in favor of joinder. But I cannot order DCF to provide any services, residential or home-based, if to do so would contravene DCF’s own regulations.

Pursuant to its regulations, DCF may share the cost of a residential placement for a child under certain circumstances.¹³ It may not, however, provide a placement for a child who is not in its care or custody, voluntarily or otherwise.¹⁴ As DCF contends in its *Motion to Reconsider*, for a child to receive voluntary DCF services, up to and including placement, DCF must first determine that he is an appropriate candidate for its services.¹⁵ In the past, Xili was placed in DCF custody by the Juvenile Court through a CRA petition, but subsequently returned to his parents’ custody, and the CRA case was closed on March 4, 2022. As DCF’s clinical case is also closed, and Parents have indicated that they do not intend to seek further services for Xili from DCF, there is no current relationship between Xili and the Department. As such, even if I were to find that Xili requires a residential therapeutic assessment for non-educational reasons, or requires other home services to access his education that are not Lexington’s responsibility, I could not order DCF to provide any of it without violating the agency’s rules and regulations.

¹⁰ M.G.L. c 71B, § 3; see 603 CMR 28.08(3).

¹¹ See BSEA *Hearing Rule* I(J).

¹² See M.G.L. c 71B, § 3.

¹³ See 110 CMR 7.404(2) (“If a child’s IEP specifies that a private day school program . . . is necessary to meet the child’s special education needs and the Department determines that the child should be placed in community residential care for non-educational reasons, then the Department shall share the cost of the placement with the local educational agency.”)

¹⁴ *Cf.* M.G.L. c. 119, § 21 (defining as “custody” the power to, *inter alia*, “determine a child’s place of abode, medical care and education” and defining “child requiring assistance”); 110 CMR 7.400 (providing for education services for children *in the Department’s care or custody*” (emphasis added)); 110 CMR 4.10 (pertaining to voluntary placement agreements).

¹⁵ See 110 CMR 4.04-4.06.

CONCLUSION

For the reasons above, upon reconsideration, I have determined that DCF is not a necessary party and should not be joined in this matter.

ORDER

- 1) My previous *Ruling on Lexington's Motion to Join the Department of Children and Families* is hereby VACATED upon reconsideration. DCF is no longer a party to the matter.
- 2) A Virtual Pre-Hearing Conference will take place via Zoom at 10:00 AM on June 10, 2022. The parties are directed to send email addresses for all participants to the Hearing Officer by close of business on June 3, 2022.
- 3) The Hearing will take place via Zoom on July 11, 12, and 14, 2022, beginning at 10:00 AM each day. Exhibits and witness lists are due July 3, 2022, with a copy to the Court Reporter.

By the Hearing Officer:

/s/ Amy M. Reichbach

Dated: April 28, 2022