

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

In re: Yakov<sup>1</sup>

BSEA # 2205881

**RULING ON LYNN PUBLIC SCHOOLS' MOTION TO JOIN THE DEPARTMENT OF  
CHILDREN AND FAMILIES**

This matter comes before the Hearing Officer on Parent's *Motion to Join the Department of Children and Families (Motion)* in a matter pending before the Bureau of Special Education Appeals (BSEA). Parent initially filed her *Motion* on February 9, 2022. On February 23, 2022, following a Pre-Hearing Conference in which Counsel for the Department of Children and Families (DCF, or the Department) participated (though the Department had not been joined), DCF requested that I stay my ruling on Parent's *Motion* to permit Parent, Lynn Public Schools (Lynn, LPS, or the District), and DCF to explore options and otherwise work together toward resolution. Parent and Lynn assented, and all three entities agreed that any responses to Parent's *Motion* would be due by close of business on April 29, 2022. Responses were filed in mid-April due to the Hearing Officer's limited availability.<sup>2</sup>

For the reasons below, Parent's *Motion* is hereby ALLOWED.

**PROCEDURAL HISTORY**

On January 20, 2022, Parent filed a *Hearing Request* for an Accelerated Hearing against Lynn, asserting that Yakov's health and safety would be endangered by delay and his current special education services are sufficiently inadequate that harm to him is likely. According to Parent, Yakov has a long history of psychiatric hospitalizations and screenings, despite Parent's best efforts to work with community-based mental health providers, and Parent has been requesting a residential educational placement since December 2020. Most recently, Yakov was psychiatrically hospitalized for suicidal and homicidal ideation in September and December 2021, with his last discharge on January 10, 2022. Parent requested that the BSEA find that Lynn's most recent Individualized Education Program (IEP), and its corresponding placement in an in-district substantially separate classroom, is not reasonably calculated to provide Yakov with a free appropriate public education (FAPE) in the least restrictive environment (LRE), and order LPS to place Yakov in a residential school.<sup>3</sup> An Accelerated Hearing was scheduled for February 22, 2022.

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<sup>1</sup> Yakov is a pseudonym chosen by the Hearing Officer to protect the student's identity in public documents.

<sup>2</sup> The undersigned Hearing Officer was seated on a grand jury the first week in April.

<sup>3</sup> Parent also requested a finding that Lynn Public Schools violated procedural protections by failing to reconvene the Team within ten days after receipt of an independent evaluation report on October 6, 2021, and an order that Lynn compensate Yakov for the time he has spent, or will spend, without appropriate educational services.

On February 4, 2022, Lynn filed its *Response* to Parent's *Hearing Request*. Lynn asserted that its most recently proposed IEP, including placement in a substantially separate classroom, provides Yakov with a FAPE, and that to the extent the BSEA may determine that Yakov requires a residential placement, such placement is not for educational purposes and, as such, is not the District's responsibility. Moreover, the District has offered additional home-based supports for Yakov, but Parent has not allowed Lynn's providers into the home because of her own medical needs. Lynn also indicated that DCF, which is currently providing services to Yakov, should be joined, and that the Department of Developmental Services (DDS) would also be an appropriate party given its long-standing involvement with the family. Finally, Lynn questioned whether the matter met standards for accelerated status.

On February 9, 2022, Parent requested that the matter be removed from the accelerated track and the Hearing was re-scheduled, by agreement, for March 7, 11, 14, and 15, 2022. On the same date, Parent filed her *Motion*, asserting that DCF is a necessary party because of its open clinical case and involvement with Yakov and his family, in light of Lynn's contention that to the extent Yakov requires an out-of-home placement, it is not for educational reasons.

The parties participated in a Pre-Hearing Conference on February 15, 2022. Gretchen Timmel of MGH's Lurie Center for Autism also participated, as did Counsel for DCF, the latter without waiving any potential objections to joinder, particularly as she had not yet received Parent's *Motion*. On February 23, 2022, Counsel for DCF requested that any ruling regarding joinder be stayed to permit her to ascertain her client's position and to permit the Department to explore potential resolution with Lynn and Parent. On the same date, the parties agreed to such a stay and requested that the Hearing be postponed to May 31 and June 1, 2, and 3, 2022. During a conference call shortly thereafter, the parties agreed that any responses to Parent's *Motion to Join* would be due by the close of business on April 29, 2022.

On April 14, 2022, DCF filed an *Opposition to Motion to Join Department of Children and Families (Opposition)*. According to DCF, although the Department has an open clinical case with Yakov and his mother, it does not have care or custody of Yakov and, as such, there is no legally cognizable relationship between DCF and Yakov that would serve as a basis for an order compelling the Department to provide any services to him.

On April 15, 2022, Lynn filed a letter in support of Parent's *Motion*, noting that to the extent the BSEA might determine that Yakov requires residential placement, such placement would be for non-educational reasons (i.e., Parent's health condition, which prevents the family from accessing home services), and should be provided by DCF, given the Department's current involvement with the family.

As no party has requested a hearing on the *Motion*, and as neither testimony nor oral argument would advance the Hearing Officer's understanding of the issues involved, this Ruling is being issued without a hearing pursuant to *BSEA Hearing Rule VII(D)*.

## RELEVANT FACTUAL BACKGROUND

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

1. Yakov is 15 years old and lives with his mother in Lynn, Massachusetts. He was diagnosed with autism spectrum disorder (ASD) before the age of three and received early intervention for his speech delays. Yakov is currently in ninth grade at Lynn Classical High School. He has been eligible for DDS services for over eight years. DCF has had an open case as a result of a 51A filing for Yakov since December 2020.
2. From Pre-K through the beginning of the 2021-2022 school year, when he switched to a different substantially separate program, Yakov attended COACH, a substantially separate program for LPS students with ASD. Yakov's ASD diagnosis affects his verbal, nonverbal communication and social interactions, and he often engages in repetitive activities and stereotyped movements. Yakov has reported bullying in school, particularly on the school bus.
3. Yakov was first hospitalized psychiatrically in November 2017, while in elementary school. Around that time, he was diagnosed with Post-Traumatic Stress Disorder (PTSD).<sup>4</sup> Between 2017 and 2019, he had 9 psychiatric screenings in emergency rooms.
4. Over the years, Parent has obtained in-home therapy and/or wraparound services for Yakov through the Children's Behavioral Health Initiative (CBHI), South Bay Mental Health, Lahey Behavioral Health (Lahey), Family Continuity Services, and Children's Friend and Family Services. Parent has also engaged with several types of community and home-based supports through DDS and is working with a community-based Applied Behavioral Analysis program.
5. In March 2019, Parent partially rejected LPS' proposed IEP for Yakov, raising concerns about bullying and rejecting the omission of therapeutic components, direct ABA instruction, and behavioral consultation. She accepted placement in a substantially separate middle school classroom.
6. When schools closed in the spring of 2020 due to the COVID-19 pandemic, Parent began working with both in-home therapy (IHT) services through Lahey and Fidelity House, through a DDS Intensive Flexible Family Support Program (IFFS) contract, with the goal of keeping Yakov in a familiar environment rather than a residential program. IHT providers noted that Yakov can be impulsive,

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<sup>4</sup> Although the Requested Relief section of Parent's *Hearing Request* refers to Intermittent Explosive Disorder, the origin of this diagnosis is unclear.

struggles with sleep, and had been resistant to showering, and that his mother reported a history of violent and aggressive behaviors. Parent then engaged CBHI wraparound services. Records from these providers, which include Parent reports of rageful, aggressive behavior, indicate a history of OCD-type behaviors.

7. School staff have not witnessed Yakov's aggression, nor have they heard him engage in threatening or concerning statements about himself or others. As Parent has historically raised concerns about Yakov's behavior at home, Lynn has proposed to conduct home assessments and provide home services and parent training for Yakov and his mother, but Parent has rejected these offers for multiple years.
8. During remote learning through the end of the 2019-2020 school year and until about February 2021, Yaakov struggled academically.
9. In October 2020, DDS contracted with an educational advocate for the family. Around this time, several transitions occurred with respect to in-home and wraparound service providers. Parent brought Yakov to the emergency room in early October for psychiatric triage/screening following multiple behavioral episodes in the home the previous night that included knocking over furniture and throwing things at his mother; he had been unable to process these incidents with his in-home therapist, though he did report that he gets triggered by his mother's voice. He was sent home from screening; the same thing happened later that month, as he did not meet inpatient level of care when he was first seen at the emergency room.
10. On October 28, 2020, Yakov was involuntarily hospitalized through Section 12. At this time, he was agitated, expressing active homicidal ideation toward mother, had difficulty engaging in safety planning, and reported that he was getting angry at his mother whenever he saw or heard her. When he was discharged on November 13, 2020, the discharge summary noted that he would likely need a 24-hour support care setting due to his perpetual cycle of decompensating at home.
11. In December 2020, Yakov underwent a neurodevelopmental evaluation with Dr. Nicole Morrero, Psy.D. at MassGeneral for Children, at the request of his CBHI team, due to concerns regarding increased dysregulation and aggression in the home. The Multi-Disciplinary Evaluation Center (MDEC) Report indicated that Yakov met the criteria for ASD, Level 2; that his social challenges and tendency to become dysregulated easily impaired his functioning significantly; and that he was unsafe in the home (as was his mother) because he was easily triggered by simple requests from his mother and resorted to aggression as he was unable to regulate his emotions. Dr. Marrero recommended a residential therapeutic living

environment and suggested that without residential treatment, Yakov would likely be hospitalized periodically, which would be detrimental to his development.

12. Around this time, Parent's educational advocate informed LPS that Yakov was having difficulty generalizing skills from the classroom to the home and community. She requested a meeting to discuss residential placement.
13. Also in December 2020, Lynn filed a 51A report with DCF due to Yakov's struggles with remote education. DCF substantiated the 51A and opened a clinical case with the family, which remains open to this day.
14. In January 2021, Yakov's IHT closed out services and recommended ABA instead.
15. Multiple providers of home-based services, including a DDS children's service coordinator, attended Yakov's annual review meeting on January 13, 2021. The Team proposed continued placement in the COACH program and an extended evaluation at a private day school to gather more information about Yakov's needs; he continued to struggle with remote learning, and LPS remained fully remote. Lynn then mailed consent forms to Parent for permission to send packets to several programs. The Team also proposed behavioral consults to both staff and Parent. Parent rejected continued placement at LPS and rejected a parent consult because she felt home services in the past had not yielded results or progress.
16. A week later, Parent informed the District that she was opting out of all offered home services Lynn had offered for multiple reasons. She is Yakov's sole caretaker, has been diagnosed with COPD, and has been told by her medical providers that COVID would be very dangerous for her. She stated that she did not want people in her home. Moreover, she believed that past home services with multiple providers had not resulted in progress, and that Yakov needed another level of services. On January 27, 2021, Parent consented to referral packets for an extended evaluation, and on February 8, 2021, she provided the Team with the MDEC Report. The Team agreed to review that Report at the same time it discussed the results from the extended evaluation.
17. Between February and May 2021, additional transitions occurred with Yakov's community-based in-home service providers. In June 2021, he began working with an ABA therapist through a community-based provider, Positive Behavior Supports.
18. In the meantime, no program had been identified that had accepted Yakov, had availability for a timely extended evaluation, and was acceptable to Parent.

Following mediation with the BSEA, the District and Parent agreed to independent testing and observation by Ms. Timmel. The evaluation was conducted in April 2021, and the observation in July 2021 during Yakov's Extended School Year programming. Lynn then hired Ms. Timmel to remain involved with Yakov's educational program and consult with his Team members.

19. Yakov began the 2021-2022 school year at Lynn Classical High School, and he struggled to attend. His program was changed from COACH to TLC, a substantially separate program with a high staff to student ratio. TLC has no more than 15 students for core academics, and students are integrated for electives in the general education setting with about 30 students per class. Yakov shares a paraprofessional with one other student.
20. Around the beginning of the school year, Parent noticed increased anxiety and had to call Mobile Crisis on September 20, 26, and 27, 2021 due to unsafe behaviors in the home as well as homicidal and suicidal threats. Yakov was admitted to the Epstein Center Child Psychiatry Unit after the third occasion.
21. Ms. Timmel attended Yakov's Team meeting on September 27, 2021, at which time she had not completed her written report. She stressed concerns regarding his safety in the home and community and his inability to generalize skills, but stated that she believed Lynn's program was appropriate for Yakov. Ms. Timmel recommended home services for Yakov and expressed a preference for those services being provided by the District rather than another agency. She also recommended an extended evaluation in a residential setting, in light of safety concerns and Parent's medical condition. Lynn rejected that option and proposed a re-entry plan with the School Adjustment Counselor and BCBA going to the family's apartment (but not inside) to assist Yakov in boarding the bus in the mornings. Parent accepted that plan but rejected a home assessment and additional services. Ms. Timmel planned to conduct an additional observation of Yakov when he was back in school before completing her written evaluation.
22. Yakov's treatment team at Epstein reported that Yakov was displaying OCD behaviors, perseverating on school (particularly its size), and struggling with ADLs, especially around using the bathroom. He was discharged from Epstein on October 21, 2021.
23. Shortly thereafter, Lynn's BCBA and School Adjustment Counselor worked with Yakov at his home, getting him on the bus, through an incentive plan. After a few weeks, these supports ended.
24. In November, Yakov continued to have behavioral challenges at home; Parent called Mobile Crisis when he threatened to kill himself or run away. In December,

Parent called Mobile Crisis on multiple occasions, and once Yakov called himself. He was psychiatrically screened at an emergency department on December 14, discharged December 16, and admitted to the hospital via a Section 12 on December 20, 2021. He remained hospitalized through January 10, 2022.

25. DCF informed Parent that a new social worker would take over the case and discussed with her options such as filing a Child Requiring Assistance case in Juvenile Court. Department representatives attended a hospital meeting on January 6, 2022 and reported that the Department would not support any out-of-home placement until in-home services had been exhausted. Parent agreed to the DCF worker's plan to make another CBHI referral but reminded DCF that she had already engaged with these services. According to LPS, Parent has not permitted DCF to deliver the in-home services it has offered, including a clinical team going into the home.
26. Yakov's Team convened to discuss Ms. Timmel's report on or about January 14, 2022, though Ms. Timmel had provided it earlier. Ms. Timmel indicated that it was difficult to reach a cohesive conclusion regarding Yakov's educational programming, as his needs in all settings had to be met, and his safety and emotional well being had to be prioritized. She did recommend a smaller, highly structured exposure to learning both academically and with respect to daily living, direct services in the therapeutic arena, and placement in learning and living environments that contain a therapeutic milieu.
27. During the January 14, 2022 Team meeting, Lynn again rejected Parent's request for a residential placement or residential extended evaluation. The District proposed an in-home assessment by the May Institute, to which Parent agreed, but Parent and Ms. Timmel asked for an assessment in a residential educational setting as well. Lynn proposed continued placement in the TLC Program at Classical High School and discussed ways in which the May Institute could work with Parent and Yakov following the assessment.
28. To date, Parent's voice appears to be a trigger for Yakov, and despite her learning and using techniques with in-home service providers, Yakov continues to escalate to the point of aggression.
29. Parent filed for Hearing on January 20, 2022; on the same date, Yakov's psychiatrist wrote a letter requesting that his recent absences be excused due to his unstable mental health condition.
30. At Yakov's Annual Review meeting, which convened on January 24, 2022, the Team formally proposed that the May Center conduct the home assessment and that home services be implemented immediately, 10 hours per week, subject to

change based on May Center recommendations. The District also proposed support for Yakov in the community to promote generalization of skills.

31. Following this meeting, Parent declined a re-entry meeting, notified Lynn that Yakov would not be returning to school, and submitted a Physician's Affidavit for Home/Hospital Tutoring.
32. Although DCF has maintained an open clinical case with Yakov and his mother since December 2020, the Department does not have care or custody of him. The current DCF social worker has attended treatment planning meetings for Yakov during inpatient psychiatric hospitalizations and attended his most recent Team meeting.

### LEGAL STANDARDS

The BSEA has jurisdiction to resolve “differences of opinion among school districts, private schools, parents, and state agencies.”<sup>5</sup> The outcome of Parent’s *Motion to Join the Department of Children and Families* is governed by the BSEA rules for joinder. 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.<sup>6</sup> The relief the BSEA may order state agencies to provide is limited by Mass. Gen. Laws ch. 71B, § 3, which states:

“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,

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<sup>5</sup> M.G.L. c 71B, § 2A; see 603 CMR 28.08(3) (corresponding regulations).

<sup>6</sup> See M.G.L. c 71B, §§ 2A, 3; 603 CMR 28.08(3).



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.”<sup>7</sup>

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.<sup>8</sup> If I find that joinder is appropriate under these criteria, I must then decide whether joinder is consistent with DCF’s rules, regulations, and policies.

## ANALYSIS

After a hearing on the underlying case, I may find that Lynn’s proposed IEP, placing Yakov in the substantially separate TLC program, is reasonably calculated to provide him with a FAPE, or that he requires a residential placement for educational reasons. Alternatively, however, I may find that Yakov requires other home services to access his education, or that he requires a residential component to his placement in order to access FAPE. It appears, therefore, that the first part of the analysis weighs in favor of joinder. But the analysis may not stop here, as 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.<sup>9</sup> It may not, however, provide a placement for a child who is not in its care or custody, voluntarily or otherwise.<sup>10</sup> 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.<sup>11</sup> In this case, DCF does not have care or custody of Yakov; as such, unless that were to change, I could not order the Department to place him residentially. DCF has, however, determined that Yakov is an appropriate candidate for its services and, in fact, maintains an open clinical case involving the family. As such, should I find, after a hearing, that Yakov does not require residential placement for educational reasons, but that he requires additional home-based services to access his education, I may well find that these services are within DCF’s purview and that providing them is consistent with the Department’s rules and regulations.

As I cannot rule out this possibility at this early stage in the proceedings, joinder of DCF is appropriate. DCF may have an interest in the matter, and because I may not be able to fashion

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<sup>7</sup> M.G.L. c 71B, § 3; see 603 CMR 28.08(3).

<sup>8</sup> See BSEA *Hearing Rule I(J)*.

<sup>9</sup> 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.”)

<sup>10</sup> *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). See *In Re Westford Public Schools and Ugo*, BSEA #1607899 (Reichbach 2016).

<sup>11</sup> See 110 CMR 4.04-4.06.

the complete relief needed to support Yakov's needs, or otherwise enter an appropriate judgment after a hearing in the Department's absence, the risk of prejudice to the present parties in the absence of joinder is great. Moreover, joining DCF would foster administrative efficiency. Finally, where DCF has an open clinical case involving a child the Department has found appropriate for services, joinder for purposes other than residential placement is not inconsistent with DCF's rules, regulations, or policies.

### CONCLUSION

For the reasons above, DCF is a necessary party in this matter.

### **ORDER**

- 1) Parent's *Motion to Join the Department of Children and Families* is hereby ALLOWED.
- 3) The Hearing will take place via Zoom on May 31 and June 1, 2, and 3, 2022, beginning at 10:00 AM each day. Exhibits and witness lists are due May 24, 2022, with a copy to the Court Reporter.

By the Hearing Officer:

/s/ Amy M. Reichbach

Dated: May 19, 2022