

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

**IN RE: Tim<sup>1</sup>**

**BSEA#1302754**

**RULING ON MOTIONS FOR SUMMARY JUDGMENT**

This ruling is rendered pursuant to M.G.L. Chapters 30A and 71B; and 603 CMR 28.10(9); and the regulations promulgated under these statutes.

**INTRODUCTION**

This is a dispute of a Local Education Agency (LEA) Assignment. The Masconomet Regional School District (MRSD) brings this appeal against the Massachusetts Department of Elementary and Secondary Education (MDESE) and the Danvers Public Schools (DPS). Both MRSD and DPS have filed Motions for Summary Judgment.

**BACKGROUND/UNDISPUTED FACTS**

Tim is a student with special education needs who currently attends the Landmark School (Landmark), a MDESE approved private day school for students with learning disabilities.

Tim's parents are divorced. Mother lives in Danvers. Father lives in Boxford, a town within MRSD. Parents share legal custody. Tim resides with both parents. However, at all times relevant to this proceeding, Tim has been enrolled in DPS, the school district of his mother's residence. In October of 2011, Parents rejected DPS' proposed Individual Education Program (IEP) for Tim which would have continued his placement in an in-district, partial inclusion program. Parents notified DPS of their intent to unilaterally place Tim at Landmark and to seek public funding for said placement. DPS rejected Parents' request for public funding for Tim's placement at Landmark. Tim began attending Landmark, at private expense, on November 28, 2011.

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<sup>1</sup> Tim is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in publicly available documents.

Parents filed a hearing request at the BSEA seeking a determination that DPS' proposed IEP/in-district program was not reasonably calculated to provide Tim with a free and appropriate public education (FAPE) and that the out of district program at Landmark where they had unilaterally placed him was an appropriate program. Parents sought reimbursement for the cost to send Tim to Landmark for the 2011-2012 school year and for prospective placement at Landmark for the 2012-2013 school year. DPS proposed an IEP for Tim for the 2012-2013 school year which again provided for an in-district placement within DPS. DPS also filed a Motion to Join MRSD to the BSEA hearing, given that Father resided within the MRSD. This motion was opposed by MRSD and was withdrawn by DPS. On July 25, 2012 in BSEA # 12-7316, Hearing Officer William Crane issued a decision finding that the IEPs proposed by DPS for both the 2011-2012 and 2012-2013 school years were not reasonably calculated to provide Tim with FAPE, and that placement at Landmark did satisfy the standard. The Hearing Officer ordered DPS to place Tim prospectively at Landmark for the 2012-2013 school year and to reimburse Parents for tuition and transportation costs incurred for the 2011-2012 school year.

After the issuance of this BSEA decision, DPS sought to have MDESE assign responsibility to both DPS and MRSD. On August 14, 2012 MDESE assigned shared responsibility to DPS and MRSD. On September 27, 2012 MRSD sought clarification from MDESE. On October 1, 2012 DPS responded to MRSD's request, supporting MDESE's joint LEA assignment. On October 2, 2012 MRSD responded to the DPS response. On October 12, 2012 MRSD filed this LEA Assignment Hearing Request with the BSEA. On October 31, 2012 MDESE issued its Final Assignment of School District Responsibility, again finding both DPS and MRSD jointly responsible for Tim's out of district placement at Landmark for both the 2011-2012 and 2012-2013 school years. After several pre-hearing conference calls, MRSD and DPS agreed to file cross motions for summary judgment.

## **ISSUE**

Is MDESE's LEA Assignment and assignment of joint programmatic and financial responsibility to DPS and MRSD for both the 2011-2012 and 2012-2013 school years correct, or is DPS solely responsible for Tim's Landmark placement for the 2011-2012 school year?

## **STATEMENT OF POSITIONS**

MRSD's position is that it does not contest its shared responsibility for Tim's placement for the 2012-2013 school year at Landmark beginning on October 9, 2012, due to the fact that DPS developed an IEP on that date which provided for an out of district placement for Tim at Landmark. MRSD contests shared responsibility for Tim's placement at Landmark from the date of his unilateral placement by Parents on November 28, 2011 until October 9, 2012 because

until October 9, 2012 DPS had never proposed an IEP calling for an out of district placement for Tim, but had only proposed in-district placements. MSRD contends that the pertinent regulation governing LEA Assignments in this situation, 603 CMR 28.10(2)(a)(1) and (2), supports its position, as does BSEA#11-9766, In re: Lincoln-Sudbury 17 MSER 370 (2011).

DPS' position is that MDESE correctly assigned school district responsibility jointly to DPS and MRSD for both the 2011-2012 and 2012-2013 school years because: 1) Mother lives in Danvers, Father lives in Boxford and Tim has been living with both Parents during the 2011-2012 and 2012-2013 school years; 2) The BSEA has determined that DPS' in-district IEPs for both the 2011-2012 and 2012-2013 school years were not reasonably calculated to provide Tim FAPE and ordered an out of district placement for Tim at Landmark for both school years; and 3) 603 CMR 28.10(2)(a)(2) provides for shared responsibility when a Student requires an out of district placement.

MDESE's position is that its Assignment of LEA Responsibility assigning joint programmatic and fiscal responsibility to both DPS and MRSD effective November 28, 2011 for the remainder of the 2011-2012 school year and all of the 2012-2013 school year is correct pursuant to 603 CMR 28.10 and Hearing Officer Crane's Decision in BSEA# 12-7316 (18 MSER 284 (2012)).

## **RULING**

Based upon the written documentation submitted by the parties, the legal arguments advanced by the parties, and a review of the applicable law, I conclude that MDESE correctly applied the pertinent regulation and case law in its determination that DPS and MRSD are jointly programmatically and financially responsible for Tim's out of district special education placement at Landmark from November 28, 2011 until the end of the 2011-2012 school year and for all of the 2012-2013 school year. Accordingly MRSD's Motion for Summary Judgment is **DENIED** and Summary Judgment is entered in favor of DPS and MDESE.

My analysis follows.

603 CMR 28.10(2) provides as follows:

2) **School district responsibility based on student residence.** The school district where the student resides shall have both programmatic and financial responsibility under the following circumstances:

(a) When students live with their parent(s) or legal guardian.

1. When a student who requires an in-district placement to implement his or her IEP lives with both of his or her parents during the school year, irrespective of school

vacation periods, and the parents live in two different Massachusetts school districts, the school district where the student is enrolled shall be responsible for fulfilling the requirements of 603 CMR 28.00 .

2. When a student who requires an out-of-district placement to implement his or her IEP lives with both of his or her parents during the school year, irrespective of school vacation periods, and the parents live in two different Massachusetts school districts, the school districts where the parents reside shall be equally responsible for fulfilling the requirements of 603 CMR 28.00. Emphasis added.

The above-cited regulation distinguishes between school district responsibility in the situation where a student requires an in-district program (603 CMR 28.10(2)(a)(1)), as opposed to an out of district placement (603 CMR 28.10(2)(a)(2)). Even when a student lives with both parents in two different school districts, the district where the student is enrolled has sole responsibility for providing an in-district program. It is only when a student requires an out of district placement that that both school districts (where the student resides) must share responsibility for the placement.

MRSD argues that during the 2011-2012 school year Tim was enrolled in DPS under an in-district IEP and at no time during the 2011-2012 school year and not until October 9, 2012, did DPS develop or propose an IEP which required Tim to be placed in an out of district placement. Therefore, MRSD contends that pursuant to 603 CMR 28.10(2)(a)(1), only the school district where Tim was enrolled-DPS- is responsible for his placement at Landmark. MRSD contends that Parents' unilateral placement of Tim at Landmark during the 2011-2012 school year and the subsequent BSEA decision ordering DPS to reimburse Parents for the cost of said placement are irrelevant to the analysis under 603 CMR 28.10(2)(a)(1) and (2). In support of its position, MRSD cites BSEA#11-9766-In re: Lincoln-Sudbury 17 MSER 370 (2011) in which Hearing Officer Figueroa found that where Student's last agreed upon IEP/stay-put IEP called for an in-district placement, the unilateral placement by parents is irrelevant in ascertaining the responsible school district, and that the last accepted in-district IEP controlled which school district was responsible.

I concur with both MRSD in this case and Hearing Officer Figueroa in Lincoln-Sudbury that Parents' unilateral action in placing a student in an out of district placement is irrelevant to LEA responsibility. I most definitely do **not** concur with MRSD that Hearing Officer Crane's BSEA Decision #12-7316 18 MSER 284 (2012) finding DPS' 2011-12 and 2012-13 IEPs to be inappropriate and ordering DPS to fund Tim's Landmark placement from the point of Parents' unilateral placement (November 2011) for the rest of that school year and for the entire 2012-2013 school to be irrelevant to my analysis regarding school district responsibility. Nor does Hearing Officer Figueroa's analysis in Lincoln-Sudbury support MRSD's position in this case. In Lincoln-Sudbury the parties (Lincoln-Sudbury and Lexington) requested that the LEA Assignment Appeal (BSEA#11-9766) be decided in advance of the actual hearing on the merits

of BSEA #11-8881 regarding Parents' unilateral placement of the student in an out of district placement. Therefore, in Lincoln-Sudbury the Hearing Officer had only the existing in-district IEP developed by Lincoln-Sudbury and no BSEA Decision holding that such in-district IEP was or was not appropriate. Indeed, Hearing Officer Figueroa's first words under her Conclusions of Law are as follows:

I feel it necessary to note at the outset that were the instant LEA assignment appeal to have been decided within the context of the hearing on the merits in BSEA#11-8881 a very different outcome may have ensued. That is, the regulation(s) governing school district responsibility in the case of an IEP or BSEA decision calling for a residential placement differs significantly from that of regulations governing LEA responsibility when an in-district IEP is in effect.

However, based upon the Parties' request that the LEA assignment appeal be decided in advance of the hearing on the merits in BSEA#11-8881, I turn to my analysis and determination based on the facts of this case as they currently exist. 17 MSER 370 at 372. Emphasis added.

Thus, while MRSD may contend that a BSEA Decision is irrelevant to the analysis under 603 CMR 28.10(2)(a)(1) and (2), Hearing Officer Figueroa clearly did not so find in Lincoln-Sudbury. Based upon the above-cited excerpt she clearly articulated that the outcome of her LEA Assignment Appeal would have been affected if a BSEA Decision had issued a ruling for an out of district placement.

A BSEA Decision sometimes results in a school district's in-district IEP being found inappropriate. When necessary, the BSEA can order the school district to fund an out of district placement either prospectively, retroactively, or both. In such situations the BSEA Decision either explicitly or implicitly is ruling that because the school district's in-district IEP did not appropriately implement the student's IEP (603 CMR 28.10(2)(a)(1)), an out of district placement is required to implement the student's IEP.(603 CMR 28.10(2)(a)(2)). When a school district's IEP has been found inappropriate, the BSEA Decision clearly supercedes and supplants the IEP written by the school district

In the instant situation, the BSEA Decision ruled that Tim required an out of district as of the date he was unilaterally placed at Landmark by Parents. Therefore, pursuant to 603 CMR 28.10(2)(a)(2) both DPS and MRSD are jointly financially and programmatically responsible for Tim's out of district placement because the BSEA Decision nullified DPS' inappropriate in-district IEPs and supplanted them with an Order for Landmark for both school years. I conclude that the determining factor in terms of LEA responsibility under 603 CMR 28.10(2) is the actual placement—in-district under (a)(1) or out of district under (a)(2)—whether it was determined by a IEP or supplemented by a BSEA Decision.

**ORDER**

- 1) MSRD's Motion For Summary Judgment is **DENIED**.
- 2) Summary Judgment Is Entered For DPS and MDESE.

By the Hearing Officer

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Dated: January 22, 2013