

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

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In Re: Worcester Public Schools

& Massachusetts Department of Elementary &

BSEA #1404967

Secondary Education &

Medway Public Schools

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**RULING**

This matter involves a challenge to the assignment made by the Department of Elementary of Secondary Education (hereinafter “DESE”) of fiscal and programmatic responsibility for a special education Student to the Worcester Public Schools. Worcester Public Schools (hereinafter “Worcester”) claims that Medway Public Schools (hereinafter “Medway”) should share responsibility for the Student. In its Response Medway asserts as a threshold issue that the Hearing Request filed by Worcester is untimely. The BSEA construes that Response as a Motion to Dismiss Worcester’s appeal pursuant to 801 CMR 1.01 (7)(g)(3).

**LEGAL STANDARD**

A Motion to Dismiss may be granted if the party requesting the hearing fails to state a claim for which relief is available through the BSEA. 801 CMR 1.01 (7) (g) (3); BSEA Hearing Rules XVII (B) (4). See also F.R.C. P. Rule 12 (b) (6) and M.R.C.P. Rule 12 (b) (6). In considering whether dismissal is warranted a hearing officer must accept all factual allegations set forth in the non-moving petitioner’s hearing request as true. If those facts, proved at a hearing, would entitle the non-moving party to any form of relief from the BSEA, then dismissal for failure to state a claim is not appropriate. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Ocasio-Hernandez v. Fortunato-Burset*, 640 F.3d. I (1<sup>st</sup> Cir. 2011); *In Re : Norwell Public Schools*, 18 MSER 364 (2012).

## FACTUAL BACKGROUND<sup>1</sup>

The Parties agree on the facts pertinent to resolution of this Motion:

1. Beginning May 29, 2013 the Student was hospitalized. At that time the Student's mother lived in Marlborough, MA. The Student's father lived in Medway, Ma. (Hearing Request)
2. On July 26, 2013 DESE issued an Assignment of School District Responsibility indicating that Marlborough was fiscally and programmatically responsible for the Student's education. (Hearing Request Ex. 2)
3. The Student's mother moved to Milford in August 2013.
4. On September 13, 2013 DESE issued an Amended Assignment of School District Responsibility finding that Milford was programmatically and fiscally responsible for the Student's education. (Hearing Request Ex 3)
5. The Student's mother moved to Worcester in September 2013.
6. On September 23, 2013 the Massachusetts Department of Children and Families (hereinafter "DCF") placed the Student in an out-of-state residential special education program. DCF requested that DESE clarify the school district responsible for the Student's education.
7. On November 4, 2013 DESE issued a second Amended Assignment of School District Responsibility assigning sole fiscal and programmatic responsibility for the Student to Worcester. (Hearing Request, Ex. 1)
8. On November 20, 2013 Kathleen Desmarais, Assistant Special Education Director for Worcester Public Schools, sent an email to Lisa Hanafin, LEA Assignment Coordinator at DESE, requesting an Amended Assignment of School District Responsibility. Ms. Desmarais asserted that responsibility should be shared between the residence of the father, Medway, and the residence of the mother, Worcester. (Hearing Request, Ex. 4)
9. DESE responded to Worcester's request by return email dated November 27, 2013. Ms. Hanafin wrote: "in Response to this email... The assignment dated November 4, 2013 still stands." (Hearing Request Ex. 4)
10. On January 16, 2014 Worcester filed a Request for Hearing at the BSEA pursuant to 603 CMR 28.10(9) challenging DESE's assignment to it of sole responsibility for the Student. (Hearing Request)

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<sup>1</sup> This Ruling is limited to consideration of the timeliness of Worcester's appeal. Contextual facts are set out to aid comprehension of the background of the matter and may be subject to challenge and/or revision in later proceedings.

## REGULATORY FRAMEWORK

DESE's school district assignment regulations appear at 603 CMR 28.10. Among the regulations is the following:

- (9) Appeal of Assignment of School District Responsibility. The assigned district may appeal the Department's assignment of responsibility to the Bureau of Special Education Appeals, subject to the following procedures:
- (a) A district may appeal the assignment of school district responsibility within 60 days of the most recent notification of assignment. (603 CMR 28.10(9)). (emphasis added)

Medway asserts that the "most recent notification of assignment" subject to appeal to the BSEA is embodied in the second Amended Assignment of School District Responsibility issued by DESE on November 4, 2013. Medway argues that the subsequent email exchange between Worcester and DESE concerning the assignment did not result in the "notification of assignment" contemplated by 603 CMR 28.10 (9) (a) because no change was made to the November 4, 2013 assignment to Worcester. Since Worcester filed a Hearing Request seeking review of that November 4, 2013 notification of assignment on January 16, 2014, more than the 60 days permitted by the applicable regulation, Medway contends Worcester's request must be dismissed as untimely.

Worcester argues, on the other hand, that it correctly followed 603 CMR 28.10 (8), the regulation that permits districts to seek clarification, review and amendment of DESE assignments whenever new circumstances arise or new information is developed. That Section provides:

A school district may seek a review of the Department's assignment under the procedures of 603 CMR 28.10(8) at any time that the district has information that was not available to the Department at the time the assignment was made. The Department will review the information presented and will confirm or change the assignment of school district responsibility, and notify the districts of this decision under 603 CMR 28.10(8)(d). 603 CMR 28.10(8)(f). (emphasis added)

Worcester points out that both its November 20, 2013 request for reconsideration of the November 4, 2013 assignment and the Response by DESE on November 27, 2013 were in writing, as required by the applicable regulation which does not otherwise address the necessary form of "notification".<sup>2</sup> There has been no subsequent DESE communication or action concerning this matter. As the November 27, 2013 email confirmed DESE's assignment of responsibility to Worcester as permitted by 603 CMR 2.10(8)(f), Worcester argues that it may be fairly characterized as the "most recent" DESE "notification". Therefore the date from which the 60 day appeal period begins to run is November 27, 2013.

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<sup>2</sup> The Parties acknowledge that the required "notification" may be in any form, including email, so long as it is in writing. *In Re: Fall River*, 11 MSER 171 (2005).

The DESE agrees with Worcester's position. In its brief on the issue of timeliness DESE writes:

As a matter of policy and best practice, the Department has always included within the scope of the "most recent notification of assignment" from 603 CMR 28.10 (9), amended or affirmed assignments following a request for reconsideration of LEA Assignment and the Department has always broadly construed the terms "new information" from 603 CMR 28.10 (8) (f). (emphasis added)...

The Department's interpretation, above, promotes efficiency, preserves resources, and preserves the Department's authority in the LEA assignment process as intended by the regulations....

Excluding the Department's resolution of requests for reconsideration from the scope of the "most recent notification of assignment" diminishes the Department's capacity to clarify LEA responsibility, slows down the assignment process, and wastes resources by incentivizing unnecessary litigation.

## CONCLUSION

There is no certain definition of "most recent notification" as used in 603 CMR 28.10 (9) (a). Therefore I must look to the whole of the regulatory set, and common sense, to determine what meaning is both procedurally consistent with, and advances the substantive purpose of, the LEA assignment regulations. *In Re: Fall River Public Schools*, 11 MSER 171 (2005). In that effort DESE's interpretation of its own regulations carries significant weight as a state agency's interpretation of its own regulations is entitled to deference so long as it is reasonable, consistent with its statutory grant of authority and its mission, and is applied uniformly. *Zoning Board of Appeals of Amesbury v. Housing Appeals Comm.*, 457 Mass. 748, 761 (2010); *Goldberg v. Board of Health of Granby*, 444 Mass. 627,634 (2005). See also: *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Rivas v. Chelsea Housing Authority*, 464 Mass. 329 (2013). Here DESE takes the position that the email correspondence between Worcester and DESE concerning the November 4, 2013 Amended Assignment constituted a proper request for reconsideration, and that DESE's November 27, 2013 confirmation of the November 4, 2013 Assignment was the "most recent notification" triggering the 60 day appeal period. It further argues that its interpretation and its uniform application of the reconsideration and notification sections of the LEA assignment regulations promote consistent, timely, efficient and fair decisions in complex, fluid residency matters.

Medway did not produce any information to indicate, nor did it argue, that the DESE's practice of accepting post-assignment email requests for reconsideration from affected school districts, and of subsequently issuing email confirmations of those assignments, is somehow contrary to its statutory grant of authority, inconsistent with implementation of its regulations in general, or unreasonable as executed in this matter specifically.

Therefore, after careful consideration of the applicable regulations, precedents in administrative law, and the arguments of counsel for all parties, and with particular reliance on the arguments of DESE concerning its own practice, procedure and regulatory interpretation, I find that the "most recent notification" from DESE's LEA assignment division concerning this

matter was dated November 27, 2013. I further find Worcester's January 16, 2014 Hearing Request was filed within the 60 day appeal period set out at 603 CMR 28.10 (9), and therefore that its challenge to the DESE's assignment of responsibility for this Student is timely.

As the Party requesting the Hearing, Worcester, has stated a claim over which the BSEA has jurisdiction and for which, if its claims are proved, there is relief available through the BSEA appeals process, dismissal is not appropriate.

ORDER

The Motion of the Medway Public Schools to Dismiss the Hearing Request filed by the Worcester Public Schools is DENIED.

By the Hearing Officer

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Lindsay Byrne  
Dated: May 14, 2014