

**COMMONWEALTH OF MASSACHUSETTS**

**Division of Administrative Law Appeals**

**Bureau of Special Education Appeals**

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In Re: Amesbury Public Schools

BSEA #1406933

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**RULING ON AMESBURY MOTION FOR SUMMARY JUDGMENT**

This matter comes before the BSEA on Amesbury Public School’s (“Amesbury”) challenge to the assignment by the Department of Elementary and Secondary Education (“DESE”) of sole fiscal and programmatic responsibility for Student Q<sup>1</sup>. Amesbury asserts that it should share responsibility for Student Q.’s out-of-district placement with Bedford Public Schools (“Bedford”). Bedford and DESE join in Opposition to Amesbury’s position. The Parties agreed to submit this matter for resolution on a Motion for Summary Judgment.

**FACTUAL BACKGROUND**

The facts, taken only from Amesbury’s submissions to the DESE, are not in dispute:

1. Student Q., a minor, is eligible to receive special education services pursuant to the IDEA and M.G.L. c. 71 B.
2. Since March 2011 Student Q. has attended an out-of-district, substantially separate, public day school operated by the Greater Lawrence Educational Collaborative in Methuen through an IEP developed by Amesbury.
3. Student Q.’s parents are divorced. Student Q. has lived with her mother in Amesbury, MA. since March 2011. (A-4)
4. Student Q.’s father has lived in Bedford, MA. since at least July 2010. (A-4)
5. An undated, unsigned, uncertified document resembling a portion of a probate court parenting plan provides that the father will have parenting time with Student Q. on alternate weekends from Friday 7:00 pm to Sunday 7:00 pm. The document available for review does not explicitly address legal or physical custody of Student Q. (A-1)

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<sup>1</sup> “Student Q” is a pseudonym selected by the Hearing Officer to protect the privacy of the Student in documents available to the public.

6. Amesbury requested clarification of school district responsibility for Student Q. from DESE on December 6, 2013. (A-1)

7. On January 8, 2014 DESE issued an “Assignment of School District Responsibility” finding that Amesbury and Bedford should share programmatic and fiscal responsibility for Student Q.’s special education day placement pursuant to 603 CMR 28.10 (2) (a) (2) because “it is reported that the Student lives with both parents throughout the school year irrespective of school vacation periods.” The first finding on DESE Assignment provides: “Student is currently living with her mother in Amesbury, MA. and has been since March 2011.” (A-2)

8. On January 23, 2014 DESE issued a “Corrected Assignment of School Responsibility”. There is no evidence that either school district requested reconsideration of the previous assignment. The Corrected Assignment repeated its earlier finding that Student Q. “is currently living with her mother in Amesbury, MA. and has been since March 2011.” DESE concluded that the regulation applicable to the facts brought to its attention by Amesbury was 603 CMR 28.10 (2)(a), and assigned sole programmatic and fiscal responsibility for Student Q.’s special education placement to Amesbury. (A-3)

9. On March 24, 2014 Amesbury filed a Hearing Request with the BSEA seeking to overturn DESE’s corrected assignment.

## LEGAL FRAMEWORK

### a. Standard of Review

First, this matter is presented for Decision in the form of a Motion for Summary Judgment which is permissible under BSEA rules. *Westborough Public Schools*, 17 MSER 317 (2011); 801 CMR 1.01(7)(b). Entry of Summary Judgment is appropriate when there is no genuine issue of material fact relating to the claim and application of governing law clearly establishes the prevailing party. Summary Judgment functions as an alternate vehicle for resolving challenges to LEA Assignments, equivalent, though not identical, to the Decision on written submissions explicitly authorized by BSEA Rule XII. Here entry of Summary Judgment is appropriate as there are no facts in dispute and application of the correct law to those facts determines the prevailing party.

Second, in reviewing whether the DESE has properly applied the law on residence to the facts before it, the BSEA must give due deference to DESE’s interpretation of its own regulations and must uphold that interpretation “unless it is inconsistent with the plain language of the regulation or otherwise arbitrary or unreasonable.” *Moslyn v. Dep’t of Env’tl. Prot.*, 83 Mass App. Ct. 788, 794 (2013); *see also: Salem v. Bureau of Special Educ. Appeals*, 44 Mass. 476, 481 (2005) (an agency’s “construction of its own regulation... is one to which considerable deference is due.”). The party appealing the administrative decision bears the burden of

demonstrating the invalidity of the agency determination. *Coggins v. Mass. Parole Board*, 42 Mass. App. Ct. 584 (1997).

b. Residence

School districts are responsible for providing special education services to eligible school age residents. M.G.L.c. 71B §3; 603 CMR 28.20(1). The residence of a minor child is generally the same as the domicile of the parent who has physical custody of the child. *George H. & Irene L. Walker Home for Children, In. v. Franklin*, 416 Mass. 291, 295 (1993). Where parental physical custody is not readily apparent, or not applicable, a child's residence is determined by ascertaining where the child actually lives, that is, identifying the center of the child's domestic, social and civil life. *Walker, supra*, at 295. To that end DESE promulgated regulations which attempt to provide clarity and certainty to determinations of student residence.<sup>2</sup> See 603 CMR 28.10 *et seq.*

The regulatory language in dispute here is:

603 CMR 28.10(2)(a): **School district responsibility based on student resident.** The school district where the student resides shall have both programmatic and financial responsibility under the following circumstances:

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

And

603 CMR 28.10 (2)(a)(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.

## DISCUSSION

Both DESE regulations at issue here correctly place programmatic and fiscal responsibility for a student's special education placement on the school district in which the student lives. The critical factor in deciding which of the two sections to apply is not the phrase "when a student requires an out of district placement" which is, in this factual context, a "red herring." Determining which regulation applies requires first establishing where the student lives. 603 CMR 28.10(2)(a) applies when a student lives in one home with a parent(s). 603 CMR 28.10(2)(a)(2) applies when a student lives in two homes located in two different school districts with a parent in each home.

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<sup>2</sup> That they do so poorly has been noted in many previous BSEA decisions and has created a mini-industry of LEA assignment appeals.

Amesbury argues that DESE incorrectly applied 603 CMR 28.10(2)(a) to the facts when it issued its January 2014 Corrected Order. That regulation would be appropriate if Student Q. lived only with her mother in Amesbury. Instead, Amesbury asserts, Student Q. lives with both her parents and attends an out-of-district day placement. Those facts, Amesbury argues, require application of 603 CMR 28.10(2)(a)(2) providing for shared responsibility between the towns where the two parents live. Amesbury's argument would be persuasive if the Student were, in fact, living with both Parents. There was no evidence presented to the DESE, however, and none to the BSEA, that she does.

Amesbury's original submission to the DESE recites that Student Q.: "lives... with her mother". (A-1 p.1). Amesbury then lists the residence of Student Q.'s father. (A-1 p.3) There is no assertion that Student Q. "lives with" her father at his Bedford residence. Amesbury relies on an undated, unsigned, uncertified parenting agreement to show that Student Q. lives in Bedford with her father. (A-1 p.5-6) It does not.<sup>3</sup> Even if it were a reliable and current document, which it is not, the document by itself is insufficient to prove residence. *Walker, supra*, and its progeny, as well as the DESE residency regulations, require a determination of where the student "actually lives". That determination is highly individualized and fact dependent, taking in factors such as where the child sleeps, gets ready for school, does homework, participates in community activities, attends family, religious, cultural and civic events, etc. In this matter there is no evidence in the documents available to DESE when it made its LEA assignment, nor to the BSEA on Amesbury's challenge to that assignment, that would indicate that Student Q. is living, or has at any time lived, with her father. Therefore DESE's original LEA assignment applying 603 CMR 28.10(2)(a)(2) was incorrect. That regulatory section addresses allocation of responsibility between school districts when a student "lives with both of his or her parents...." Student Q. did not live with both of her parents.

DESE's Corrected Assignment, issued on January 23, 2014 applies the proper section of the residency regulations to the facts presented to it by Amesbury: 603 CMR 28.10(2)(a). (A-3) Consistent with M.G.L. c 71B §3 and *Walker, supra*, that section makes it plain that it is the student's residence that determines the school district responsible for her special education program when the student actually lives with her parent, as she does here. There being no evidence to the contrary, DESE's determination that Student Q. lives with her mother in Amesbury and, therefore, pursuant to 603 CMR 28.10(2)(a), that Amesbury is programmatically and fiscally responsible for her out-of-district special education program is confirmed.

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<sup>3</sup> At best, the language Amesbury relies upon in the "parenting agreement" could be read to cover a visitation arrangement.

ORDER

The Motion of the Amesbury Public Schools for Summary Judgment in its favor is DENIED. The Corrected LEA Assignment issued by the DESE on January 23, 2014 is confirmed.

By the Hearing Officer

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Dated: October 17, 2014  
Lindsay Byrne