

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

IN RE: ERROL and FLORENCE¹

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BSEA #16-03447/16-03449

SALEM PUBLIC SCHOOLS

RULING ON MOTION FOR SUMMARY JUDGMENT

This matter comes before the BSEA on the Motion of the Salem Public Schools for Summary Judgment. The Students filed hearing request on October 28, 2015 seeking a finding that Salem has failed to provide the transportation necessary for them to benefit from the special education outlined in their accepted IEPs. Salem contends that its responsibility to provide that related service is limited under Massachusetts law to transportation within the geographic boundaries of Salem.

ISSUE

The presenting issue is whether Salem Public Schools is obligated to provide transportation to its in-district special education programs at times when the Students are living at their mother's house in Beverly, Massachusetts?

FACTS

The pertinent facts are not in dispute and may be briefly summarized:

1. Florence and Errol are siblings.
2. Florence is four years old. She has a diagnosis of Autism Spectrum Disorder. She attends Salem's integrated preschool five days a week including during the summer. On Mondays,

¹ "Florence" and "Errol" are pseudonyms assigned by the Hearing Officer to protect the privacy of the Students in documents available to the public.

Tuesdays, Wednesdays and Thursdays Florence attends school from 8:30 am until 2:30 pm. On Fridays Florence attends school from 8:30 am until 11:00 am. The Parents accepted the 2015-2016 IEP developed by Salem for Florence on June 19, 2015.

3. Errol is five years old. He has a diagnosis of Autism Spectrum Disorder. He attends an integrated kindergarten in Salem five days a week from 7:30 am until 3:30 pm including summers. The Parents accepted the 2015-2016 IEP developed by Salem for Errol on June 19, 2015.

4. Until May 2015 both parents lived in Salem. In May 2015 the Parents separated. The mother moved to Beverly. The father continues to reside in Salem.

5. The Parents have joint physical and legal custody of both children. The children split their time with their parents equally each week. They live with their father in Salem 3.5 days per week and with their mother in Beverly 3.5 days per week. They follow a well-established schedule which includes school mornings and afternoons.

6. The children are, and always have been, enrolled in the Salem Public Schools.

7. The Transportation Services section of Florence's IEP acknowledges that she requires modified transportation as a result of her disabilities.

8. The Transportation Services section of Errol's IEP acknowledges that he requires modified transportation as a result of his disabilities.

9. Throughout the 2015-2016 school year Salem has provided special transportation for Florence and Errol to and from the father's residence in Salem. Salem has not provided special transportation to Florence and Errol to or from the mother's residence in Beverly on the school days the children live with their mother.

10. The mother has incurred expenses for substitute transportation for the children between her Beverly residence and their in-district special education program in Salem.

LEGAL FRAMEWORK

A. Summary Judgment

Summary Judgment is an appropriate vehicle for resolving disputes under the IDEA and M.G.L. c. 71B when there are no genuine issues of material fact in dispute and application of the governing law to those facts determines the prevailing party. 801 CMR 1.01 (7) (b); *Westborough Public Schools*, 17 MSER 317 (2011). Here, as the Parties agree on the pertinent facts, and proper application of the law will resolve the issue presented for decision by the parties, entry of summary judgment is appropriate.

B. Massachusetts Special Education Regulations

The Massachusetts special education statute, M.G.L. 71B, and its implementing regulations, 603 CMR 28.00 *et seq.* govern resolution of this dispute. Several regulatory sections are pertinent. The section concerning the scope of a school district's responsibility for its resident students provides:

(1) **General Provisions.** School districts shall be programmatically and financially responsible for eligible students based on residency and enrollment.

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

(a) When students live with their parents(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 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.

603 CMR 28.10

This regulation clarifies that the school district in which a student lives and is enrolled is responsible for all aspects of that student's special education program and for conforming its actions in fulfilling that responsibility to the entire governing regulatory set.

One of the responsibilities school districts in Massachusetts shoulder in fulfilling their statutory special education duties is transportation. The transportation regulations provide, in pertinent part:

The Team shall determine whether the student requires transportation because of his or her disability in order to benefit from special education.

(b) **Special transportation.** If the Team determines that the student's disability requires transportation or specialized transportation arrangements in order to benefit from special education, the Team shall note on the student's IEP that the student requires special transportation. In such circumstances, transportation is a related service.

1. The Team shall determine necessary modifications, special equipment, assistance, need for qualified attendants on vehicles, and any particular precautions required by the student and shall document such determinations in the student's IEP. If specialized arrangements can be provided on regular transportation vehicles, the school district shall make such arrangements.

2. If special transportation is noted on the student's IEP, the student is entitled to receive transportation services to any program provided by the public school and in which the student participates.

3. If special transportation is noted on the student's IEP and the student is enrolled by his or her parents in a private school and receiving services under 603 CMR 28.03 (1)(e), the school district's obligation to provide transportation shall be limited to transportation within the geographic boundaries of the school district.

(c) In no event shall a school district allow transportation considerations to influence, modify, or determine the educational program required by any student in need of special education. 603 CMR 28.05.

DISCUSSION

Here there is no dispute about the facts. Florence and Errol are residents of Salem and enrolled in its public school system. They are also residents of Beverly, but they are not enrolled in the Beverly Public Schools. They each have IEPs developed by Salem. Their IEPs provide for placement in Salem's special education programs. Their IEPs note that they require special transportation as a result of their disabilities. Their IEPs were accepted by the Parents. Their IEPs have been implemented throughout the 2015-2016 school year with the single exception of the related service of transportation. Salem refused to pick up or deliver the students to their mother's residence in Beverly on the days the children lived with their mother. The mother has, as a result of Salem's refusal to provide transportation to the students on days they lived at the mother's house, incurred expenses for alternate transportation and monitoring in order to ensure they benefitted from their IEPs.

Salem argues that there is no provision in the special education requirements that would require Salem to provide transportation to its resident students outside the geographic boundaries of Salem. It argues that it is not obligated to accommodate the personal housing choices of the parents of its properly enrolled students. It argues that it would be inequitable and potentially discriminatory to require it to provide out-of-district transportation to students with disabilities and not to those without disabilities. Finally it adopts the "slippery slope" argument: if required to provide transportation to students living part-time with a parent in adjacent Beverly would it be similarly required when another student lives part-time in Boston or Lenox?

Salem's arguments are interesting but not dispositive. There is nothing in the special education regulations that would, on these facts, excuse Salem from its obligation to provide transportation as a service related both to the students' disabilities and to the full implementation of their accepted IEPs. On the contrary, the applicable regulatory language, requiring a school district in which a resident, eligible student is enrolled to ensure all aspects of the protections of M.G.L. c.71D and the IDEA, is unequivocal. There has been no showing of ambiguity in the language, or of conflicting language in another relevant regulatory section, that

might require a more flexible construction of 603 CMR 28.10(2)(a)1.² Similarly there has been no showing that the applicable regulatory language is contrary to any provision of, or to the intent of, M.G.L.c.71B. The fact that strict application of the regulation in this matter may work a hardship on the district is not a sufficient reason to ignore its plain meaning. The district's remedy, if one is warranted, lies elsewhere.

Further, from a regulatory point of view, providing door-to-door transportation for Florence and Errol is not an accommodation to a parental housing choice. With that related service Salem is implementing the Students' IEPs as written, as accepted, and as necessary for them to benefit from the services to which they are entitled. Salem is thus properly discharging its obligation to resident, enrolled students as required by 603 CMR 28.10 (1). Substituting the specific for the generic in the applicable regulatory language aids understanding of the applicability of the provision: Florence and Errol each require in-district placement to implement their respective IEPs. They each live with both of their parents during the school year. The parents live in two different Massachusetts school districts. Florence and Errol are properly enrolled in Salem. Salem is responsible for fulfilling the requirements of 603 CMR 28.00. See: 603 CMR 28.10(2)(a)1 *infra*; See also: *Sutton Public Schools*, BSEA 1601445, Jan 21, 2016.

Salem's other arguments are equally unpersuasive. The argument that providing the transportation necessary to implement Florence's and Errol's IEPs somehow discriminates against similarly situated regular education students is both speculative and not within the BSEA's jurisdiction. Salem's argument that a BSEA ruling requiring it to fully implement the Students' accepted IEPs, and to otherwise conform its actions to M.G.L. 71B's implementing regulations, would devastate the school budget and lead to unreasonably lengthy and costly transportation services for other special education students is similarly not founded in the facts currently before me. 603 CMR 28.28.05 (c). Finally, it is not necessary to reach Salem's argument that the BSEA lacks jurisdiction to order a change in Salem's transportation route. I am not doing so. This Ruling does not dictate how Salem will ensure that Errol and Florence arrive at school and participate in their special education programs, only that it must do so.

Therefore, I find that Salem erred in declining to implement the transportation provisions of the Students' IEPs on the days the Students were living with their mother in Beverly. As the Students are residents of and enrolled in Salem, and the Students attend an in-district special education program pursuant to accepted IEPs, Salem is responsible for implementing all aspects of their IEPs and for ensuring the availability of all services, including transportation, necessary for them to participate in and benefit from their special education. Salem failed to provide a free appropriate public education to the Students during the time and to the extent the mother incurred out of pocket expenses associated with providing substitute transportation to enable the Students to attend their special education program.³

² The only transportation-related regulatory reference to "geographic boundaries" of a school district appears at 603 CMR 28.05(5)(b)(3). This provision applies specifically to special education students placed in private schools at private expense, not to the situation presented here.

³ While 603 CMR 28.07 (6) provides a useful starting point to consider the Parents' valid reimbursement claim, the school district is required by the IDEA and M.G.L. c. 71B to assure that all necessary special education services are

ORDER

Having found that the district's responsibility for providing special transportation necessary to implement the Students' in-district IEPs includes school days on which the Students live with their mother in the adjoining town, Salem's Motion for Summary Judgment in its favor is DENIED. Instead, Summary Judgment is entered for the Parents. Salem shall reimburse the Parents for all out-of-pocket expenses they incurred to arrange substitute transportation for the children on the days Salem should have, but did not, transport the children in accordance with their accepted IEPs.

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By the Hearing Officer

Lindsay Byrne
Dated April 8, 2016

provided to its eligible students at no cost to the Parents. *Agawam Public Schools*, 19 MSER 121 (2013); *Barnstable Public Schools*, 21 MSER 18 (2015).