

# COMMONWEALTH OF MASSACHUSETTS

## Division of Administrative Law Appeals

### Bureau of Special Education Appeals

In re: Northborough Public Schools  
v. Marlborough Public Schools  
& the Massachusetts Department of Elementary and Secondary Education

BSEA #1609179

#### **RULINGS ON MARLBOROUGH PUBLIC SCHOOLS' MOTION TO DIMISS NORTHBOROUGH PUBLIC SCHOOLS' APPEAL**

#### **PROCEDURAL BACKGROUND**

On May 6, 2016 Northborough Public Schools (Northborough) filed a Request for Hearing to appeal a Massachusetts Department of Elementary and Secondary Education (DESE) LEA Assignment which assigned shared responsibility for the cost of Student's residential educational placement between Northborough and Marlborough Public Schools (Marlborough). On May 20, 2016 Marlborough submitted its Response to Northborough's Hearing Request which included, in effect, a Motion to Dismiss (MTD) Northborough's Appeal as untimely. Interpreting Marlborough's Response as a MTD, Northborough filed an Opposition to Marlborough's MTD (Opposition) on May 27, 2016. Marlborough filed a Response to Northborough's Opposition (MPS Response to NPS' Opposition) on June 9, 2016. Northborough filed a Rebuttal to MPS' Response to NPS' Opposition on June 17, 2016 (NPS Rebuttal). Pursuant to a pre-hearing conference call with the Hearing Officer, the parties have agreed to have Marlborough's MTD be decided solely on the written arguments and the exhibits<sup>1</sup> submitted.

#### **STATEMENT OF THE FACTS RELEVANT TO MARLBOROUGH'S MTD**

1. On or about April 16, 2015, acting upon a request from Marlborough, (See Northborough Opposition – Exhibit 1 hereafter NPSO-1), the DESE issued an Assignment of School District Responsibility assigning shared programmatic and financial responsibility for Student's placement at the May Center between Marlborough and Northborough. NPSO-2.
2. In support of its decision, DESE relied solely on 603 CMR 28(10)(3)(b), which provides “when a student whose IEP requires an out of district placement lives and receives special

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<sup>1</sup> A number of exhibits were attached and referenced in Northborough's BSEA Appeal of LEA Assignment, Marlborough's Response/MTD, Northborough's Opposition to Marlborough's MTD, and MPS' Response to NPS' Opposition. Many of the exhibits are duplicative but have different numbers. Therefore, only one (1) specified exhibit number will be referenced for any exhibit cited in this RULING.

education services at a special education school... (t)he school district where the parent(s) or legal guardians resides shall have both programmatic and financial responsibility.” NPSO-2.

3. Following receipt of DESE’s assignment, Northborough’s Director of Special Education, Barbara Goodman, engaged in several conversations with DESE’s LEA Assignment Coordinator on the subject of the student’s residence and the parents’ custody rights. These conversations occurred because it became apparent to Ms. Goodman that DESE was unaware of a July 22, 2009 court order (the “2009 court order”) which was not referenced in either Marlborough’s request for clarification of assignment or the DESE assignment letter. NPSO-3.

4. Since the 2009 court order (NPSO-4) was not referenced in the DESE assignment letter, on September 30, 2015, Northborough, through counsel, provided DESE with a copy of the July 22, 2009 order and requested a reassignment of school district responsibility to Marlborough. NPSO-5.

5. On October 14, 2015, DESE’s LEA Assignment Coordinator responded to Northborough’s request for reassignment by email, disclosing to Northborough for the first time that the 2009 order had been revised on November 26, 2010 (the “2010 court order”). NPSO-6.

6. DESE did not provide a copy of the 2010 court order to Northborough in its email response. NPSO-6.

7. In its email response, DESE revised the basis for its LEA assignment, now citing 603 CMR 28.10(8)(c)(5) which provides:

If the student’s parents live in two different school districts, such school districts shall be jointly responsible for fulfilling the requirements of 603 CMR 28.00 *except* if the student actually resided with either parent immediately prior to going into a living situation described in 603 CMR 28.10(3) or (4) or the parents are divorced or separated and one parent has sole physical custody, then the school district where the student resided with the parent or the school district of the parent who has sole physical custody shall be responsible and shall remain responsible in the event the student goes into the care or custody of a state agency.

8. According to DESE’s email response, the 2010 court order was relevant to its assignment decision because it granted “rights of visitation” to Mother one day each week, and because the student’s father was awarded “primary” physical custody and not “sole” physical custody. NPSO-6.

9. Based upon the 2010 court order and relying, for the first time, on 603 CMR 28.10(8)(c)(5), DESE stated that its LEA assignment of shared responsibility between Marlborough and Northborough “will stand.” NPSO-6.

10. On November 17, 2015, Northborough requested DESE to provide a copy of the 2010 court order, referencing confusion as to whether the order “refers simply to the mother’s right of visitation or whether it modifies the custody arrangement.” NPSO-7.

11. In response to counsel's request, DESE forwarded a copy of the 2010 court order to Northborough's counsel on December 11, 2015. NPSO-8.
12. The 2010 court order is in the form of a Stipulation for Judgment of Modification (the "Judgment") of the parents' underlying divorce decree allowed by the Worcester Probate and Family Court on November 26, 2010. NPSO-9.
13. The Judgment awarded "primary physical custody" of Student to Father, with joint legal custody to both parents. NPSO-9.
14. The Judgment further granted Mother "rights of visitation with [Student] each week from Thursday when the Mother shall pick the child up from school... until Friday when the Mother shall deliver the child to school." NPSO-9.
15. On January 12, 2016 pursuant to 603 CMR 28.10(8)(f), after researching and considering the effect of "visitation" rights granted in the 2010 court order on LEA assignments, Northborough requested DESE to review its assignment based upon the newly-disclosed information contained in the Judgment. NPSO-10.
16. DESE agreed to review its LEA assignment and subsequently, on April 8, 2016, advised Northborough that it "stands by" its previous shared assignment because the "overnight with the mother during the school week meets the existing criteria to show that the student lived with both parents prior to moving to a residential placement at the May Center." NPSO-11.
17. On May 4, 2016, Northborough filed an appeal of the LEA assignment with the BSEA.

## **STATEMENT OF POSITIONS**

Marlborough's position in its MTD is that Northborough's BSEA Appeal of DESE's LEA assignment is untimely and therefore the BSEA lacks jurisdiction to hear the Appeal. Marlborough contends that pursuant to 603 CMR 28.10(9)(a), Northborough was required to file this BSEA Appeal within 60 days of the most recent notification of LEA assignment. Marlborough contends that such notification occurred on April 15, 2015 since, pursuant to 603 CMR 28.10(8)(f), Northborough failed to provide any further information that was not available to DESE at the time DESE made the LEA Assignment on April 15, 2015. In the alternative Marlborough argues in its MTD, Northborough should have filed 60 days from October 14, 2015 when it was first put on notice of the most recent court order concerning Student.

In its Response to Northborough's Opposition to its MTD, Marlborough again argues that Northborough should have appealed 60 days from the October 14, 2015 date cited above or, at most 60 days from December 11, 2015 when Northborough first received a copy of the 2010 court order relied on by DESE in its October 14, 2015 e-mail to Northborough.

Northborough's position is that it acted properly and in a timely manner to request DESE to reconsider its LEA Assignment and then, when DESE affirmed its position, acted in a timely manner to request a BSEA Appeal. Northborough contends that it initially received the most recent 2010 court order concerning Student from DESE on December 11, 2015; on January 12,

2016, pursuant to 603 CMR 28.10(8)(f), requested DESE to review its LEA Assignment based upon the newly discovered information contained in that 2010 court order and Northborough's legal arguments; and on April 8, 2016 DESE affirmed its LEA Assignment of April 16, 2015. Northborough then timely filed its BSEA Appeal on May 6, 2016. (See Northborough's Opposition to Marlborough's MTD.)

DESE has taken no position regarding Marlborough's MTD as no written arguments have been filed either way.

## **RULING**

Based upon a review of all of written exhibits submitted, the written arguments submitted, and a review of the applicable law, I conclude that Marlborough's MTD must be **DENIED**.

My analysis follows.

DESE's April 16, 2015 LEA Assignment of School Responsibility to Marlborough and Northborough (Statement of Facts Paragraph 1 hereafter SOF ¶1) relied solely on 603 CMR.10(3)(b) cited in SOF ¶2). There is no mention of DESE relying on either the 2009 court order (SOF ¶4) or the 2010 court order (SOF ¶9). Not until October 4, 2010, after Northborough had sought reassignment based upon the 2009 court order on September 30, 2010, did DESE: 1) disclose to Northborough via e-mail that the 2009 court order had been revised by a 2010 court order; and 2) revise its basis for the LEA Assignment to 603 CMR 28.10(8)(c)(f). (See SOF ¶s 4, 5, 6, 7). In its October 14, 2015 e-mail there is no mention of when DESE became aware of either the 2009 or 2010 court orders (See SOF ¶s 5, 6, 7, 8, 9). Not until December 11, 2015 did DESE send Northborough a copy of the 2010 court order, this only after Northborough formally requested it on November 17, 2015 (SOF ¶s 10, 11). On December 11, 2015, for the first time, Northborough had the 2010 court order which DESE relied upon in its October 14, 2015 e-mail to Northborough and which revised DESE's basis for its LEA Assignment. (See SOF ¶s 5, 6, 7, 8, 9). On January 12, 2016, based upon the 2010 court order and Northborough's legal arguments supporting its position, Northborough requested DESE to review its LEA Assignment (SOF ¶ 15). DESE did review its LEA Assignment and affirmed its position (SOF ¶ 16). Northborough filed its BSEA Appeal on May 4, 2016 (SOF ¶ 17).

I find that if DESE had based its initial April 16, 2015 LEA Assignment on a court order it would have cited said court order. I further find that if DESE had such a court order it would not have cited 603 CMR (10)(3)(6) but rather 603 CMR 10(8)(c)(5). Therefore, April 15, 2015 clearly could not be the controlling date for the 60 day BSEA appeal period for Northborough as argued by Marlborough.

While Northborough became aware of the 2010 court order on October 14, 2015 from DESE, it did not receive a copy of said court order until December 11, 2015 from DESE. Therefore, October 14, 2015 certainly could not be the date controlling the 60 day BSEA appeal period for Northborough as argued by Marlborough.

On December 11, 2015 Northborough had, for the first time, the operative document which caused DESE to change its regulatory rationale for its LEA assignment. December 11, 2015 is the first date Northborough had a basis to request DESE to review its LEA Assignment based upon DESE's changed regulatory rationale. Northborough requested review on January 12, 2016, DESE accepted review, and on April 8, 2016 re-affirmed its position. Therefore, the date of April 8, 2016 is the operative date for the commencement of the 60 day BSEA appeal period. Northborough filed its BSEA appeal on May 6, 2016. I conclude that Northborough's LEA Assignment Appeal to the BSEA was clearly timely, and that the BSEA certainly has jurisdiction to hear said appeal.

Marlborough argues that Northborough could only seek review of DESE's LEA Assignment "at any time the district has information that was not available to the department at the time the assignment was made" pursuant to 603 CMR (10)(8)(f). Marlborough argues that DESE had all information utilized by Northborough in its request for DESE review by October 15, 2015 or December 11, 2015. However, DESE did not dismiss Northborough's request for review. DESE reviewed the information and legal arguments presented and "confirmed or changed the assignment of school district responsibility," pursuant to 603 CMR(10)(8)(f) on April 8, 2016. Such action reset the 60 day BSEA Appeal period to begin on April 8, 2016.

Finally, I find that 603 CMR(10)(8)(f), by its very terms, presumes that the appealing district (Northborough) is submitting the new information it is supplying to DESE. Since Northborough never received the information until December 11, 2015, it had every right to consider such information, and with such information and its legal arguments, to seek DESE review prior to appealing to the BSEA. It is a fundamental tenet of due process that any evidence relied upon by DESE in rendering an adverse decision to Northborough must have been known to Northborough in advance of said decision.

## **ORDER**

Marlborough's MTD is **DENIED**.

By the Hearing Officer,

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Raymond Oliver

Dated: July 12, 2016