

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

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IN RE: TALIB<sup>1</sup>

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BSEA #1707631

THE EAST LONGMEADOW PUBLIC SCHOOLS

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DECISION

This decision is issued pursuant to M.G.L. c.71B and 30A, 20 U.S.C. §1401 *et seq.* and 20 U.S.C. §794 and the regulations promulgated under those statutes. The Parents requested an expedited hearing in this matter on March 17, 2017 asserting that East Longmeadow had precipitously terminated Talib's special education program without cause, sufficient notice or due process. Expedited status was granted pursuant to BSEA Rule II C (b) (iii). East Longmeadow readmitted the Student on March 20, 2017 whereupon he resumed participation in his special education program. A Hearing was held on March 31, 2017 at the State Office Building in Springfield, MA. The official record of the Hearing consists of three exhibits submitted by the Parents marked P-1 through P-3, exhibits submitted by the School marked S-1 through S-13 and approximately 4 hours of recorded oral testimony. The Parents' request that the Hearing record remain open until April 7, 2017 for submission of written closing arguments was granted. Closing arguments were received on April 10, 2017 and the record closed on that date.

ISSUE

Whether; on March 7, 2017, East Longmeadow properly terminated Talib's participation in the special education program he was then attending on the basis of lack of residency in the school district?

SUMMARY OF THE FACTS

1. Talib is a seven year old first grade student with autism. Talib has, since first receiving targeted services for his disability, participated in early intervention and special education programs in East Longmeadow. The 2016-2017 IEP developed by East Longmeadow in May,

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<sup>1</sup> "Talib" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Family in documents available to the public. Similarly, derivative pseudonyms are used throughout the Decision when referring to Talib's family members.

2016, and accepted by his mother in October 2016, calls for Talib to receive special education services in a partial inclusion program. Talib has been attending the East Longmeadow program regularly and making effective progress. (Ms. T.; S-1; S-2)

2. Talib's parents have never been married. Immediately after Talib's birth in 2009, Mr. T. signed "Voluntary Acknowledgment of Parentage". Mr. T. is a lifelong resident of East Longmeadow. (Mr. T., P-2)

3. Talib, his mother and father lived together in the home of his paternal grandparents in East Longmeadow from the time of his birth until Talib was three years old. In 2014 Talib's parents ended their domestic partnership and Ms. T. returned to her family home in Springfield. (Ms. T.; Mr. T.)

4. There is no evidence of any court order, nor any written agreement, concerning custody, financial support or parenting/guardianship for Talib.

5. Mr. T. complies with a Department of Revenue Order for child support payments to Ms. T. (Mr. T.)

6. Ms. T. has lived continuously in Springfield since 2014. She testified that when she and Talib's father separated, Talib's father and paternal grandparents agreed that Talib would live in the paternal grandparents' East Longmeadow home from Sunday night through Thursday and that Talib would live in her home in Springfield on Fridays and Saturdays. According to Ms. T. this arrangement accommodated Talib's needs for safety and stability as well as her employment schedule. She testified that she and the paternal grandparents easily share the child care duties and that Talib participates in all paternal family holidays and celebrations, whenever they occur. Ms. T. stated that she will sometimes take Talib for dinners, events and overnights to her Springfield home to accommodate paternal family needs or just because she wants to see her son. Most recently, Ms. T. testified, she has been spending more time with Talib as his paternal grandmother is receiving medical treatment for a serious illness and temporarily needs extra help. (Ms. T.)

7. Mr. T. testified that Talib has lived with him in his parents' East Longmeadow home since birth. Mr. T. stated that Talib "visits" his mother in Springfield, but that Talib's "primary residence" is East Longmeadow. (Mr. T.; P-1)

8. Ms. T. is solely responsible for Talib's education. She attends all Team meetings, parent-teacher conferences, and school events. She signs all IEPs, required school forms and home-school communications. In school communications, Ms. T. always lists her residence as Springfield and Talib's residence as East Longmeadow. Mr. T. does not participate in any way in Talib's education. (Ms. T; Mr. T.; S-1; S-10; S-11; S-12)

9. In January 2017 the East Longmeadow Town Clerk received an anonymous letter claiming that Talib was not a resident of East Longmeadow and was therefore illegally attending the district's schools. (S-6)

10. In February 2017, the East Longmeadow Town Manager received an anonymous letter complaining, among other items, that Talib was not a resident of East Longmeadow and was therefore illegally attending the district's schools. (S-6)

11. Renee Lodi, an assistant principal in East Longmeadow, testified that she is responsible for residency investigations in East Longmeadow. In an undated note Ms. Lodi wrote that East Longmeadow had received multiple reports that Talib was dropped at his grandparents' East Longmeadow home by a courtesy van belonging to the local healthcare center employing Talib's mother. Ms. Lodi testified that although she verified Ms. T.'s Springfield address she did not speak to anyone in Talib's family about Talib's residence and did not attempt to determine where Talib slept at night. (Lodi; S-4)

12. In February 2017 East Longmeadow hired Talbot Investigations to conduct a residency investigation. Mr. Talbot, a licensed private investigator, conducted covert surveillance of Ms. T.'s residence in February and March 2017. Based on 15 contacts between February 3 and March 2, 2017, Mr. Talbot determined that Ms. T. lived in Springfield. He observed Talib enter or exit the Springfield residence with Ms. T. on 6 of those occasions. Two times, February 15 to February 16, a Wednesday night, and March 1 to March 2, also a Wednesday night, Talib entered Ms. T.'s residence in the afternoon and exited the following morning. Mr. Talbot concluded that Talib had remained overnight in Springfield presumably sleeping there. . Mr. Talbot therefore reported to East Longmeadow that Talib lived with his mother in Springfield and was not a resident of East Longmeadow.

Mr. Talbot testified that he did not observe any pick-ups or drop-offs by Ms. T. at Mr. T.'s residence in East Longmeadow. He did not observe Talib entering or exiting an East Longmeadow school bus. He did not observe a courtesy van at Ms. T.'s Springfield residence. He did not determine whether, when Talib entered Ms. T.'s residence with her in the afternoon, Talib returned later in the evening to sleep in East Longmeadow. Mr. Talbot did not conduct a full school week of surveillance. He did not interview any neighbors in Springfield or East Longmeadow. He did not speak directly with any family member. (Talbot; S-3)

13. Relying on the results of the investigations conducted by Mr. Talbot and Ms. Lodi the Superintendent of East Longmeadow Public Schools, Gordon Smith, determined that Talib was not a resident of East Longmeadow and was therefore not entitled to attend East Longmeadow Public Schools. Dr. Smith notified Ms. T. of his conclusions by letter dated March 7, 2017. The letter stated that Talib's last day of school in East Longmeadow would be Friday March 10, 2017. Ms. T. received the letter on March 9, 2017. (Smith; Ms. T.; S-7) 15.

14. Mr. T. filed a BSEA Hearing Request on Friday March 17, 2017. On Monday, March 20, 2017 the Special Education Director, Joanne Welch, notified Mr. T. and Ms. T., that Talib could return to his special education program in East Longmeadow immediately, pending the outcome of the BSEA Hearing. (S-8; S-9; Welch)

15. At the Hearing, two neighbors, each with properties overlooking Mr. T.'s residence, testified that Talib did not live with his father's family. Each stated that Talib was brought to the residence each school morning by Ms. T. in a small black car and entered the East Longmeadow school bus from the property. One said drop off occurred at 7:45 a.m., the other said it occurred at 8:30-8-35 a.m.. They also testified that Talib was picked up by the small black car each evening. One witness said pick up occurred regularly at 3:45 p.m., one witness said pickup occurred regularly at 5:00 p.m.. Both said there was lot of car and truck activity at the paternal family's house at all hours of the day and night. (Neighbors K and W. See also S-6).

16. Talib returned to school on March 21, 2017. He missed five school days. There is no evidence of any significant educational harm or regression as a result of this interruption in his special education programming.

### LEGAL FRAMEWORK

Responsibility for developing, delivering and funding education programs for all Massachusetts students is based on residence and enrollment. 603 CMR 28.10 (1). A school district is responsible for providing the special education program of any child with a disability who "resides" within its jurisdiction. M.G.L. c 71B §3. The Supreme Judicial Court has noted that though a child's residence is "generally the same as the domicile of the parent who has physical custody of the child" other factors may be important in determining the "actual residence" of any student. *Walker Home for Children v. Franklin*, 416 mass. 291 295 (1993). The court instructed that "Home is the place where a person dwells and which is the center of his domestic, social and civil life." *Walker. Id.* See also: *City of Salem v. BSEA*, 444 Mass. 476 (2005). The shorthand used in many residence determinations is: where does the student sleep? *Sutton, Worcester and DESE*, 22 MSER 4 (2016); *Westborough, DESE and Middleborough*, 17 MSER 316 (2011); *Hamilton-Wenham*, 13 MSER 358 (2007). See also: DESE Administrative Advisory 2006-4.

As authorized by the M.G.L. c 71B §3, the DESE developed regulations to address concerns about determining residence for students with disabilities. 603 CMR 28.10. When a student resides solely with one parent, or both parents who live together in one school district, determining residence is easy. That district is responsible for all components of the student's education. Where the actual residence of the student is unclear, however, determination of the appropriate applicable regulation is highly fact dependent.

Based on the undisputed facts and the positions of the parties, the regulatory sections potentially at play in this matter are:

A.)

603 CMR 28.10 (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.

B.)

603 CMR 2810 (4) Shared school district responsibility. The school district where the parent(s) or legal guardian resides shall have financial responsibility and the school district where the student resides shall have programmatic responsibility when a student [is living in] a relative's home that is not funded by the Department of Social Services....

(a) When such a student is served in an in-district program, the school district where the student lives shall provide such services and may bill and shall receive payment for the special education costs (using the procedures of 603 CMR 10.07 to calculate such costs, including transportation expenses where applicable) from the school district where the parent(s) or legal guardian resides....

(c) In all cases where financial and programmatic responsibility are shared, the school district where the student resides shall invite the school district where the parent(s) or legal guardian resides to participate as a member of the student's Team, provided that such participation shall no limit the student's right to timely evaluation and placement in accordance with 603 CMR 28.00.

C.)

603 CMR 28.10(1)(d). Any school district deemed responsible for a student under 603 CMR 28.10 shall continue responsibility for such student until another school district is deemed responsible under 603 CMR 28.10.  
603 CMR 28.10 (1)

When a district has difficulty determining a student's "actual" or "legal" residence for enrollment and or service purposes the DESE provides a mechanism for assistance: the LEA assignment process outlined in 603 CMR 2.10 (8). This is the first step in resolving disputes or ambiguities about the proper allocations of responsibilities for providing special education programs to eligible students in Massachusetts.

(8) Department Assignment of School District Responsibility.

(a) The Department may assign or a school district or agency may request the Department's assistance in assigning a city, town, or a school district to be responsible for student's in living situations described in 603 CMR 28.10 (3) or (4)

2. When the residence or residential history of the student's parent (s) or legal guardians is in dispute....

(b) provided that a request to the DESE for assignment of residence not limit the student's right to evaluation, services, or placement in accordance with applicable special education regulations.

## FINDINGS AND CONCLUSIONS

This matter originally came before the BSEA on the Parents' request for an expedited determination of the propriety of the School's termination of the Student's program without timely due process and without adherence to special education regulations concerning change of placement. See e.g. 603 CMR 28.10(1)(d); 603 CMR 28.09(12)(b). The School properly returned the Student to his special education program on the business day immediately following the date the Parents filed their BSEA appeal. The Student remains in his East Longmeadow special education program on a "stay put" basis pending the outcome of this due process proceeding. Thus this matter no longer warrants expedited status.

Before turning to the limited issue presented to the BSEA for resolution I note that there is no dispute that Talib is a student with special learning needs and thus entitled to the protections of 20 U.S.C. 1401 *et seq.* and MGL c. 71B. Nor do the Parties allege that the special education program Talib attends in East Longmeadow is inadequate or inappropriate for him. The dispute here, in April 2017, is which political subdivision is responsible for ensuring Talib's continued access to the free appropriate public education to which he is entitled. Most of the facts pertinent to answering that question were established long before this hearing: Talib's mother lives in Springfield; Talib's father lives in East Longmeadow; Talib's parents are not married; there is no formal custody or parenting plan in place; Talib's parents cooperate to ensure that he spends time with both parents; Talib has been exclusively and continuously enrolled in the East Longmeadow Public Schools. As the parents share parenting and the parents live in two different school districts, determining which one, Springfield or East Longmeadow, is responsible for Talib's education requires a finding that "the center of (Talib's) domestic, social and civil life" is in one community or the other. *Walker Home for Children v. Franklin*, 416 Mass. 291, 295 (1993). See also 603 CMR 28.10(2)(a)(1).

East Longmeadow argues that another Massachusetts statute, MGL c. 209C Section 10(b), provides a ready analytical solution.

Prior to or in the absence of an adjudication or voluntary acknowledgement of paternity, the mother shall have custody of a child born out of wedlock. In the absence of an order or judgment of a probate and family court relative to custody, the mother shall continue to have custody of a child after an adjudication of paternity or a voluntary acknowledgement of parentage. MGL c.209C Section 10(b).

East Longmeadow asserts that, as a child's residence generally follows that of the parent with custody and Talib's mother has "custody" under a plain reading of this statute, Talib resides with her in Springfield. As a student cannot have two domiciles, Talib's domicile is therefore Springfield, not East Longmeadow.

I am not persuaded that application of MGL 209C Section 10(b) is outcome determinative in this case. That statutory section is part of a set directed at the probate court for use in deliberations about the custodial best interests of the child. While potentially helpful in some circumstances, it is doubtful that it is binding on residence determinations made pursuant to MGL c. 71B Section 3. Instead, MGL 209C Section 10(b) creates a presumption of primary or sole maternal custody which can be defeated by facts to the contrary. The facts relevant to residency do not always align with the facts relevant to custody. As *Walker, supra*, directs schools to look beyond traditional family law principles to determine where a student "actually lives", the custodial presumption dissolves.<sup>2</sup>

On the other hand, the DESE's residency regulations state:

School districts shall be programmatically and financially responsible for eligible students based on residency and enrollment.  
603 CMR 28.10(1) (emphasis added). See also: 603 CMR 28.10(2)(a)(1).

That regulation creates an alternate presumption applicable to this matter: that Talib lives in the school district where one of his parents indisputably lives, where both of his parents say he lives, and where he has been continuously enrolled since starting public school. To defeat that presumption East Longmeadow must offer credible facts indicating actual residence elsewhere. East Longmeadow has not done that here. The testimony of the father's East Longmeadow neighbors lacked traditional indicia of reliability. (Paragraph 14. And *cf.* S- 6) The report and testimony of the private investigator did not adequately address the fundamental question: where does the student typically sleep during the school year? First, the circumstantial evidence that Talib stayed overnight with his mother on 2 occasions during the school week over the course of a month does not, in itself, establish residency in Springfield where there is contradictory evidence that he "typically" lives at his paternal family's house in East Longmeadow during the school week. Furthermore, the mother's explanation that, during the winter 2017, she was "helping out more" due to the grandmother's illness was not rebutted in any way. Therefore, the investigator's conclusion that Talib "lives" in Springfield is not reasonably supportable and is accorded little weight. (Paragraphs 12). Singly, and in combination, the School's proffered evidence was insufficient to overcome the claim of a resident parent with informal shared parenting responsibility, that his son lives primarily with him and his paternal grandparents in East Longmeadow.

Should East Longmeadow come into possession of credible information that Talib's living arrangement has changed, that he is sleeping regularly and continuously at his mother's

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<sup>2 2</sup> Nor am I persuaded by the School's argument that the father's lack of involvement in Talib's school life correlates with a lack of residency in the school district. There is no fundamental connection between residency and school involvement and no requirement in 603 CMR 28.10 that such involvement be demonstrated.

residence in Springfield during the school week and that he is absent from his father's house during the school year as more than a temporary accommodation to his grandmother's health issues, it may bring that information to DESE pursuant to 603 CMR 28.10(8)(a)(2). As Talib's circumstances may also implicate 603 CMR 28.10(4) DESE should be permitted in the first instance to determine residence consistent with historical interpretation and application of its regulations in similar factual contexts. East Longmeadow should also afford the parents an opportunity to review, explain and/or challenge any new information. Equally as important, the School ought to make a referral to a potential successor school district, if known, to minimize any disruption to the Student's special education program. 603 CMR 28.10(1)(d). See *e.g.* 603 CMR 28.09(12)(6).

### ORDER

East Longmeadow did not show, by a preponderance of the credible and pertinent evidence, that Talib is not currently a resident of East Longmeadow. The preponderance of evidence places the center of Talib's domestic and civil life in East Longmeadow. Therefore East Longmeadow improperly terminated Talib's participation in his special education program based on lack of residence beginning March 13, 2017. East Longmeadow subsequently properly reinstated Talib in the in-district program on March 20, 2017.

By the Hearing Officer

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Lindsay Byrne  
Dated: April 18, 2017