**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re**: **Student & District K Public Schools BSEA #2405155**

RULING ON DISTRICT K PUBLIC SCHOOLS’

MOTION TO JOIN NORTH ANDOVER PUBLIC SCHOOLS

This matter comes before the Hearing Officer on the *Public Schools of District K’s Motion to Join*, filed with the BSEA on December 20, 2023. District K Public Schools (District K) seeks joinder of the North Andover Public Schools (North Andover) as a necessary party pursuant to *Rule I(J)* of the Bureau of Special Education Appeals (BSEA) *Hearing Rules for Special Education Appeals* *(Hearing Rules)[[1]](#footnote-1)*. District K submits that Student’s Mother resides in District K, Student’s Father resides in North Andover, and both parents are Student’s permanent legal co-guardians, having been jointly appointed on August 9, 2023. Therefore, District K submits that, under the provisions of 603 CMR 28.10(3)(b)[[2]](#footnote-2), should Parents prevail with their request for an out-of-district residential placement of Student, then both District K and North Andover would equally share responsibility for said placement, and thus, complete relief cannot be granted in this matter in the absence of North Andover. As such, District K seeks joinder of North Andover as a necessary party.

On January 16, 2024[[3]](#footnote-3), Parents filed a *Response* *to Public Schools of District K’s Motion to Join (North Andover)* (Parents’ First Response), then opposing the joinder request. Attached to the *Parents’ First Response* were an Affidavit from Mother; an Affidavit from Father; Parents’ divorce Judgement and Separation Agreement; the *Decree and Order of Appointment of Guardian for an Incapacitated Person*; the *Letters of Guardianship for an Incapacitated Person* appointing Mother and Father as permanent legal co-guardians of Student effective August 9, 2023; and Father’s current lease for his apartment in North Andover that runs through June 2025.

On January 17, 2024, North Andover filed its *Opposition to the Public Schools of District K’s Motion to Join North Andover Public Schools and Response to the Parents’ Request for Hearing* (North Andover’s Opposition) also opposing joinder. North Andover argues that it has no relevant information to provide at a Hearing in this matter with regard to Student, as it has never participated in any Team meetings, nor been involved in any placement decisions for Student. Thus, under *Rule I(J)*, it contends that complete relief may be granted among those who are already parties, and the matter is not situated in such a way that it cannot be disposed of in North Andover’s absence. North Andover further suggests that should an out-of-district placement be found to be necessary for Student after a hearing on the merits, it will comply with any determination by the Department of Elementary and Secondary Education (DESE) as to its programmatic and/or fiscal responsibility for Student at that time, pursuant to 603 CMR 28.10.

On January 17, 2024, District K filed a *Response to the Oppositions* (District K’s Response). In it, District K clarified that its request was submitted under the provisions of 603 CMR 28.10(3), entitled “school district responsibility based on residence of parent(s) or legal guardian”, rather than 603 CMR 28.10(2), entitled “school district responsibility based on student residence”, given that Parents are Student’s permanent legal co-guardians, as evidence by the attachments to *Parents’ First Response*. District K also relied upon a recent BSEA decision involving North Andover, wherein Hearing Officer Berman concluded that the Belmont Public Schools became fiscally responsible for the residential placement of an adult student upon the appointment of a legal guardian who resided in Belmont[[4]](#footnote-4).

Finally, on January 18, 2024, Parents filed an *Updated Response to Public Schools of District K’s Motion to Join (North Andover)* (Parents’ Second Response), advising that after reviewing *District K’s Response*, they no longer opposed joinder, and agreed that under the provisions of 603 CMR 28.10(3)(b), joinder of North Andover was appropriate.

FACTS

The following facts are not in dispute and are taken as true for the purposes of this *Ruling*, only. These facts may be subject to revision in subsequent proceedings.

1. Student is 18 years old, currently attending the Bridge program, under a partially rejected IEP. Bridge is a substantially separate program that supports students ages 18-22 “with developmental disabilities, including autism spectrum disorder, who require highly structured individualized transition services”. (*Hearing Request*).
2. At all relevant times, Parents have been divorced. Student has resided with his mother in District K. Father currently resides in North Andover. (*Hearing Request; Parents’ First Response*).
3. Student has received special education services since the age of 3 for intellectual impairments and health impairments as a result of his diagnosis of Rett Syndrome, global development delay, moderate intellectual disability, autism spectrum disorder, sleep difficulties, a communication disorder, and ADHD. His eligibility for special education is not in dispute. (*Hearing Request*; *District K’s Response to Hearing Request*).
4. Student has attended substantially separate programs for students with autism spectrum disorder and related profiles and educational needs within the District K Public Schools, for all of his education. At all times relevant to these proceedings, Student has been enrolled in the District K Public Schools. Student has never been enrolled in the North Andover Public Schools nor has he attended school in North Andover. (*Hearing Request*; *North Andover’s Opposition*).
5. Prior to attending the Bridge Program, Student attended the RISE program at District K High School. During his time at RISE, while Student was often happy and compliant with attendance, his struggles at home and in the community reportedly increased. Parents communicated with District K frequently about these struggles, and a Home Assessment was conducted by a District K BCBA in September 2021 (virtually) and again in September and October 2023. Home services were proposed in his IEP, but for various reasons these were often not provided. As such, there is a substantial amount of compensatory home service hours that District K acknowledges is owed to Student over the years. (*Hearing Request*; *District K’s Response to Hearing Request*).
6. On August 9, 2023, Parents were appointed as permanent legal co-guardians for Student with authority to make all decisions for him, including educational decisions. (*Hearing Request; Parents’ First Response*).
7. In the fall of 2023, Student underwent an independent neuropsychological evaluation performed by Dr. Jeffrey Drayer, Ph.D. Dr. Drayer also observed Student at the Bridge Program. Dr. Drayer prepared a written report describing the results of his testing and his observations as well as his findings, conclusions and recommendations. Of note, Dr. Drayer recommended Student,

… warrants a therapeutic residential school specifically designed to meet the needs of students with intellectual disabilities and autism. I endorse his placement in a specialized, residential-school program for students with intellectual disabilities and autism, for it will provide him with: 1) a highly structured environment; 2) a low student-teacher ratio; 3) an individually tailored curriculum; 4) individualized programming with full Applied Behavioral Analysis (ABA) across the curriculum; 5) experienced school staff trained in educating students with intellectual disabilities and autism; 6) intensive targeting of the social, communication, adaptive living, and functional academic skills that he so critically needs at this time; 7) an appropriate, generated, and integrated sensory diet, which [Student] responds well to; and 8) a well-matched peer group of others with moderate intellectual disabilities and autism. [Student] also requires a specialized school program that will explicitly develop and execute appropriate transitional planning, including daily living skills and vocational skills to maximize his independence as an adult. (*Hearing Request*; *District K’s Response to Hearing Request*).

1. The first time Parents formally requested a residential placement for Student was in their July 7, 2023 partial rejection of the IEP proposed for the period of November 2022 through November 2023, as revised in January 2023, and May 2023. Parents again requested a residential placement for Student at the annual review meeting in November 2023, wherein Dr. Drayer’s independent evaluation was reviewed by the Team. However, District K disagreed with this request during that meeting, as it felt it could meet all Dr. Drayer’s specific recommendations for Student within the in-district program it was proposing. (*Hearing Request*; District K’s *Response to Hearing Request*).
2. District K’s most recent IEP, developed at the November 5, 2023, Team meeting, proposes to educate Student at the Bridge Program in tandem with an extended day program consisting of 4 hours per week of extended school day programming and two hours per week of home services “to address the family request to have some generalization of the skills learned during extended day in the home”. Specialized instruction is proposed to support goals in the areas of life skills, functional communication, functional fine/gross motor, daily living/self-help and vocational skills. (*District K’s Response to Hearing Request*).
3. Parents filed their *Hearing Request* on December 4, 2023, requesting, among other relief, that Student be placed “in an appropriate residential school”. (*Hearing Request*).
4. District K maintains that Student does not require a residential setting and is making effective progress in its program. (*District K’s* *Response to Hearing Request*).

# **LEGAL STANDARD**

Rule I(J) of the *Hearing Rules* states that,

Upon written request of a party, a Hearing Officer may allow for the joinder of a party in cases where complete relief cannot be granted among those who are already parties, or if the party being joined has an interest relating to the subject matter of the case and is so situated that the case cannot be disposed of in its absence. Factors considered in determination of joinder are: the risk of prejudice to the present parties in the absence of the proposed party; the range of alternatives for fashioning relief; the inadequacy of a judgement entered in the proposed party’s absence; and the existence of an alternative forum to resolve the dispute.

To properly analyze a request to join a school district in which one of the legal co-guardians of an adult student resides, I must also consider the legal requirements establishing school district responsibility[[5]](#footnote-5). Generally, school district programmatic and fiscal responsibility for special education students who attend *in-district* educational programs and live with their legal guardian(s), is based on both residency and enrollment[[6]](#footnote-6). However, for adult students under the legal guardianship of another person(s),

the school district where the … legal guardian[s] reside[] shall have both programmatic and financial responsibility … when a student whose IEP requires an *out of district* placement lives and receives special education services at a special education residential school pursuant to a placement by an IEP Team[[7]](#footnote-7) (emphasis added).

Further, in certain circumstances, for students in a living situation covered by 603 CMR 28.10(3), a school district may request, or the Department of Elementary and Secondary Education (DESE) may, on its own, assign, school district responsibility[[8]](#footnote-8). Such assignment, if disputed, can be appealed to the BSEA to determine the “assigned school district and the effective date of such assignment”[[9]](#footnote-9).

I next turn to consider District K’s *Motion* in the context of these statutory and regulatory requirements*.*

# **APPLICATION OF LEGAL STANDARD**

Here, District K is requesting joinder of another school district, North Andover, in a matter concerning a dispute over whether Student requires an out-of-district therapeutic residential school, or whether the currently proposed IEP satisfies the FAPE standard. While District K disputes the need for Student to be educated in such an out-of-district residential program, it submits that if Parents were to prevail at Hearing, then, because Student’s permanent legal co-guardians reside in two separate school districts, (i.e., Father in North Andover, and Mother in District K), North Andover would share responsibility for this out-of-district placement pursuant to 603 CMR 28.10(3)(b).

Although North Andover disputes that it has any relevant knowledge or information about Student that it could provide during a Hearing, it does not challenge the status of Father as Student’s co-legal guardian, nor that he resides in North Andover. However, the standard for joinder is not whether the party to be joined could provide relevant information, but rather is whether the “case cannot be disposed of in its absence”, considering “the risk of prejudice to the present parties in the absence of the proposed party; the range of alternatives for fashioning relief; the inadequacy of a judgement entered in the proposed party’s absence; and the existence of an alternative forum to resolve the dispute”[[10]](#footnote-10).

In the instant case, the factors to be considered for joinder support joinder of North Andover now, rather than, as North Andover contends in its *Opposition*, allowing DESE to assign responsibility at a later date. Joining North Andover in this matter mitigates the risk of prejudice to the present parties and ensures that the full range of alternatives for fashioning relief is available so that an adequate judgement may be entered. If I were to conclude after a hearing on the merits that Student requires an out-of-district therapeutic residential placement in order to receive a FAPE, and North Andover were not a party, I would be unable to order full relief under the law for programmatic and fiscal responsibility for that placement. North Andover’s party status at this time provides options for relief which would not otherwise be available in its absence.

Additionally, there is no dispute as to Father’s residence in North Andover[[11]](#footnote-11). Thus, contrary to North Andover’s argument, none of the factors that allows for DESE to determine residency applies to the underlying situation[[12]](#footnote-12), and this hearing is, therefore, the only forum available to resolve North Andover’s educational responsibility over Student. Joinder of North Andover at this time is the necessary way to ensure that all potentially responsible parties are established and involved in providing Student with a FAPE, as FAPE is ultimately to be determined.

Thus, District K’s *Motion* is hereby **ALLOWED,** and North Andover is ordered to be joined as a party to this matter.

Accordingly, the above-referenced matter will proceed with the Parents, District K and North Andover, as follows:

1. The Hearing will take place on February 27, 29 and March 1, 2024, at the Bureau of Special Education Appeals, 14 Summer Street, 4th Floor, Malden, MA 02148. It will begin at 10:00 a.m.
2. The parties will participate in a further Conference Call on February 14, 2024, at 9:00 a.m. The parties are instructed to call the following phone number: 1-857-327-9245 at that time and enter the following passcode when prompted: 133 966 91#.
3. Exhibits and witness lists are due by the close of the business day on February 20, 2024.

The parties are reminded that all requests for postponement must be in writing and specify the reasons for requesting the postponement and the length of the postponement desired/agreed upon. Should the parties reach a settlement agreement prior to the Hearing, the moving party shall submit a written withdrawal of the hearing request. Failure to appear at the Hearing may result in dismissal of the matter with or without prejudice.

**All requests for a stenographer must be made in writing.**

So Ordered by the Hearing Officer

/s/ Marguerite M. Mitchell

Marguerite M. Mitchell

Dated: January 26, 2024

1. The *Motion* references *Rule I(F)* but discusses the provisions in *Rule I(J)*, thus, I consider the reference to contain a typographical error and analyze the *Motion* under the provisions of *Rule I(J)*. [↑](#footnote-ref-1)
2. The *Motion* originally referenced 603 CMR 28.10(6)(3). No such regulation exists, moreover, 603 CMR 28.10(6) relates to “program schools”. This does not apply to Student as he is currently enrolled in District K Public Schools, an educational entity that is not within the definition of “program school”. 603 CMR 28.02(17). Subsequently, as described below, District K also advised it sought joinder under the provisions of 603 CMR 28.10(3)(b). This *Ruling* analyzes the joinder request under that regulatory provision. [↑](#footnote-ref-2)
3. By virtue of my *Rulings* of December 22, 2023, and January 12, 2024, the deadline to file responses to the *Motion* was extended through January 16, 2024. [↑](#footnote-ref-3)
4. *In Re: North Andover Public Schools v. DESE and Bedford Public Schools*, BSEA #2400238 (Berman, 2023). Hearing Officer Berman further determined that the “move-in law” (MGL c. 71B §5) applied to this situation such that North Andover retained fiscal responsibility until the end of the fiscal year after which the guardianship appointment was made. [↑](#footnote-ref-4)
5. 603 CMR 28.10. [↑](#footnote-ref-5)
6. 603 CMR 28.10(2)(a)(1). [↑](#footnote-ref-6)
7. 603 CMR 28.10(3)(b); see *In Re: North Andover Public Schools*, BSEA #2400238 (Berman, 2023) (concluding that Bedford Public Schools where the adult student’s legal guardian resided, became the responsible district “immediately after such appointment” as legal guardian (subject to offset via the Move-In Law, discussed *supra*)). [↑](#footnote-ref-7)
8. 603 CMR 28.10(8)(c). The circumstances are,

   If the child has been voluntarily surrendered for adoption or freed for adoption by the Probate Court or the Juvenile Court, the school district(s) where the parent(s) lived at the time that the child was surrendered or freed for adoption or when parental rights were terminated shall be responsible.

   If the student is in the care or custody of a state agency and such state agency has obtained a legal guardianship for the student when the student has turned 18 years old, the school district(s) where the parent(s) lived at the time the court granted the request for guardianship shall be responsible.

   If the parents' rights have been terminated and the Probate Court or the Juvenile Court has appointed a legal guardian for a minor student, the school district where the legal guardian resides shall be responsible.

   If the legal guardian is an agency or organization or the legal guardian has been appointed on a limited basis such as a guardian ad litem, or a guardian appointed solely to monitor medications or finances, the school district where the parent(s) lives or last lived shall be responsible.

   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.

   If the student's parent(s) or legal guardian resides in an institutional setting in Massachusetts, including, but not limited to, a correctional facility, a hospital, a nursing home or hospice, or a mental health facility, a halfway house, a pre-release center or a treatment facility, the school district where the parent(s) or legal guardian lived prior to entering the institutional setting shall be responsible.

   If the student's parent(s) or legal guardian does not reside in Massachusetts, and the parent's or legal guardian's whereabouts are unknown, the school district of the last known Massachusetts residence of the student's parent(s) or legal guardian who lived in Massachusetts shall be responsible. [↑](#footnote-ref-8)
9. 603 CMR 28.10(9)(f); see 603 CMR 28.10(9). [↑](#footnote-ref-9)
10. *Hearing Rule 1(J)*. [↑](#footnote-ref-10)
11. Pursuant to Father’s *Affidavit* attached to *Parents’ First Response*, he signed a two-year lease for his current apartment through June 2025, which is well after this matter will be concluded. [↑](#footnote-ref-11)
12. 603 CMR 28.10(8)(c). Even if one of those factors were to arise in the future, thereby authorizing DESE to determine school district responsibility for Student’s education after the Hearing on the merits is concluded, there remains the legal right to appeal such a determination to the BSEA. 603 CMR 28.10(9). Such a process would result in the parties finding themselves right where they presently are. Thus, including North Andover at this juncture also promotes administrative efficiency and resource conservation. [↑](#footnote-ref-12)