**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Foxborough Public Schools v. Norwood Public Schools and the Department of Elementary and Secondary Education**

**BSEA #:2510624**

**RULING ON**

 **DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION’S**

**MOTION TO DISMISS**

**AND**

**NORWOOD PUBLIC SCHOOLS' MOTION TO DISMISS**

This matter comes before the Hearing Officer on two similar motions. Specifically, on April 7, 2025, the Department of Elementary and Secondary Education (DESE) filed the *Department of Elementary and Secondary Education’s Motion to Dismiss* (*DESE’s Motion*) in which it asserts that the Hearing Officer should dismiss Foxborough Public Schools’ (Foxborough) Hearing Request[[1]](#footnote-1) because the claims alleged are premature and involve questions of residency, enrollment, and homelessness, which, in the instant case, are not related to the Student’s access to a free appropriate public education (FAPE) or special education services. DESE argues that Foxborough’s Hearing Request

“does not contain allegations that the Student is not receiving a FAPE or any of the special education services to which the Student is entitled. Furthermore, the Hearing Request seeks relief that would involve the application of DESE’s special education regulations at 603 CMR 28.10 as to assignment of local educational agency (LEA) responsibility, but …, [Parent] has not enrolled the Student in Foxborough and Foxborough has not requested an LEA assignment from DESE that the [Bureau of Special Education Appeals ("BSEA")] can review under 603 CMR 28.10(9).”(*DESE’s* *Motion*)

Also on April 7, 2025, Norwood Public Schools (Norwood) filed *Norwood Public Schools’ Motion to Dismiss* (*Norwood’s Motion*) on the grounds that Foxborough's request is premature because the BSEA “does not have jurisdiction over the matter and therefore, Foxborough has failed to state a claim upon which relief may be granted by the Bureau at this juncture” (*Norwood’s Motion*) (together with *DESE’s Motion*, the *Motions*).

On April 11, 2025, Foxborough filed the *Foxborough Public Schools' Opposition to Norwood Public Schools' and the Department of Elementary and Secondary Education's Motions to Dismiss*.

None of the parties has requested a hearing on the *Motions*. Because neither testimony nor oral argument would advance the Hearing Officer’s understanding of the issues involved, this Ruling is issued without hearing, pursuant to *Bureau of Special Education Appeals Hearing Rule* VII(D).

For the reasons set forth below, the *Motions* are ALLOWED.

**PROCEDURAL HISTORY AND RELEVANT FACTS:**

In this Ruling, I take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in [Foxborough’s] favor” as I am required to do.[[2]](#footnote-2) These facts are subject to revision in future rulings.

1. Student is a sixteen (16) year old 10th grade student attending the South Shore Educational Collaborative ("SSEC") in Hingham, Massachusetts, which he has been attending since November 2024 where she was placed by Norwood.
2. Student resided in Norwood with her Mother and was enrolled in the Norwood Public Schools from on or about September 9, 2013, until on or about February 3, 2025.
3. From at least September 1, 2018, through February 3, 2025, Student resided at [] in Norwood, Massachusetts.
4. In or around late January 2025, the Massachusetts Department of Children and Families ("DCF") assisted in transitioning Student out of her Norwood residence with Mother to stay with Father at [] in Foxborough, Massachusetts. Student is not in DCF custody.
5. Father has resided at a hotel in Foxborough, Massachusetts since on or about November 2021 (“the Hotel”). Father's mail is sent to a relative's residence, [], Plainville, MA 02762.
6. In or around early February 2025, Father presented SSEC with a letter from a DCF social worker stating that Student was staying with her father at the Hotel.
7. On or about February 13, 2025, Student's Mother executed a Caregiver Authorization Affidavit pursuant to Massachusetts General Laws Chapter 201F, authorizing Father to exercise concurrently the rights and responsibilities that Mother possessed relative to Student’s health care and education.
8. On or about February 14, 2025, Norwood informed Foxborough that Student was residing at the Hotel.
9. On February 26, 2025, Norwood filed an LEA Assignment Application with DESE claiming that Student resided at the Hotel.
10. On or about March 4, 2025, Norwood provided Father with a Determination of Housing Letter asserting that Norwood did not consider Student to be homeless.
11. Father has not appealed the determination that he and Student are not homeless.
12. On March 12, 2025, DESE closed Foxborough’s LEA Assignment file without making an LEA assignment, because, although a homelessness determination had been made, the enrollment issue was still pending.
13. During this time, Father attempted to enroll the Student in Foxborough but was unable to provide proof of residency documentation in accordance with Foxborough policies.
14. On March 21, 2025, Foxborough filed a due process complaint against Norwood and DESE seeking a determination that Student had become "homeless" within the meaning of the McKinney-Vento Homeless Assistance Act when the Student began staying with her father at the Hotel, and that the Student's last known residence was in Norwood. As such, Norwood, as Student's "district of origin" pursuant to relevant statutes, continued to bear programmatic and fiscal responsibility for Student. Foxborough also sought a determination that DESE erred in failing to issue a Local Education Agency ("LEA") Assignment.
15. On March 25, 2025, Norwood informed Foxborough that effective March 28, 2025, it would refuse to continue to transport Student to SSEC.
16. On April 3, 2025, Foxborough enrolled Student as a "homeless" student and has been transporting her to and from SSEC since that date.
17. On April 3, 2025, Foxborough filed an LEA Assignment Application with DESE. To date, Foxborough has not received any communication from DESE regarding the application.

**LEGAL STANDARDS AND DISCUSSION:**

1. *Motion to Dismiss*

Hearing Officers are bound by the *BSEA Hearing Rules for Special Education Appeals* (*Hearing* *Rules*) and the Standard Adjudicatory Rules of ~~Adjudicatory~~ Practice and Procedure, 80 CMR 1.01. Pursuant to Rule XVII A and B of the *Hearing Rules* and 801 CMR 1.01(7)(g)(3), a hearing officer may allow a motion to dismiss if the party requesting the hearing fails to state a claim upon which relief can be granted. These rules are analogous to Rule 12(b)(6) of the Federal Rules of Civil Procedure. As such, hearing officers have generally used the same standards as the courts in deciding motions to dismiss for failure to state a claim. To survive a motion to dismiss, there must exist “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.”[[3]](#footnote-3) The hearing officer must take as true “the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff’s favor.”[[4]](#footnote-4) These “[f]actual allegations must be enough to raise a right to relief above the speculative level.”[[5]](#footnote-5)

1. *LEA Assignments*

Pursuant to 603 CMR 28.08(3)(d), a school district may request a hearing to appeal the Department's assignment of school district responsibility under 603 CMR 28.10, according to the procedures in 603 CMR 28.10(9), which states as follows:

(9) **Appeal of Assignment of School District Responsibility.** The assigned district may appeal the Department's assignment of responsibility to the Bureau of Special Education Appeals, subject to the following procedures:

(a) A district may appeal the assignment of school district responsibility within 60 days of the most recent notification of assignment….

The instant case is governed by two strands of legal analysis: federal and state law governing school district responsibility based on residency and the statutory and regulatory rights of homeless students.

* 1. Federal and State Special Education Law Regarding LEA Responsibility Based on Residency

As a condition of receiving federal funding, the IDEA requires states to make a free, appropriate public education available to "all children with disabilities residing in the state between the ages of 3 and 21, inclusive…."[[6]](#footnote-6) Further, states must ensure that each local education agency provides for the "education of children with disabilities within its jurisdiction."[[7]](#footnote-7) The U.S. Department of Education, Office of Special Education Programs (OSEP) has interpreted the statute to mean that it is the "residence [of the child] that creates the duty…" under the IDEA, not the location of the child or school," and has further stated that "a child is a resident of the State which (1) their parent or guardian is a resident of; or (2) the child is a ward of."[[8]](#footnote-8)

On the other hand, the IDEA does not dictate how to determine whether a child, parent, or guardian is or is not a "resident" of a state or school district. Rather, the IDEA leaves to the states "the assignment and allocation of financial responsibility for special education cost," the definition of "residency," and the choice as to whether to provide FAPE to children who may not be considered "residents" under state law in addition to those whose residency is not an issue.[[9]](#footnote-9)

Massachusetts law assigns responsibility for special education services to the city, town, or school district where the student resides.[[10]](#footnote-10) For special education purposes, in many, if not most circumstances, the residence of one or both parents determines student residence.  However, 603 CMR 28.10 addresses many other complex, though commonly occurring, living situations. Pursuant to these regulations, the Department of Elementary and Secondary Education (DESE) may assign a city, town, or school district to be responsible for a student's special education where, as here, Parents do not share a residence, and as the District alleges, Student is homeless. The applicable state regulation, 603 CMR 28.10(5) provides as follows:

(5) **Responsibility for Homeless Students and Students in Foster Care.**

1. Nothing in 603 CMR 28.00 shall limit the educational rights of homeless students and parents afforded under the McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431 et seq. (McKinney-Vento). The following provisions apply to these students.
	* 1. Homeless students shall be entitled to either continue to attend their school of origin, as defined by McKinney-Vento, or attend school in the city or town where they temporarily reside. To the extent feasible, homeless students should remain in their school of origin unless doing so is contrary to the wishes of such student's parent(s) or legal guardian or state agency with care or custody of the student.
		2. The school district(s) that was programmatically and financially responsible prior to the student becoming homeless shall remain programmatically and financially responsible for a homeless student until the parent(s) or legal guardian or state agency with care or custody of the student chooses to enroll the student in the school district where the shelter or temporary residence is located. When a student whose IEP requires in-district services is enrolled in the school district where the student is temporarily residing, then that school district shall become programmatically and financially responsible upon enrollment. When a student whose IEP requires out-of-district services is enrolled in the school district where the student is temporarily residing, then that school district shall become programmatically responsible upon enrollment and the school district(s) that was financially responsible prior to the student becoming homeless shall remain financially responsible until the student is no longer homeless.
	1. Rights of Homeless Special Education Students

Under the provisions of McKinney-Vento, 42 USC §11431, *et seq*., homeless public school students, including students who are eligible for or receiving special education, are entitled to elect to continue attending school in the district where they attended before becoming homeless or to attend in the school district where they are temporarily living.

DESE has adopted Section 725(2) of McKinney-Vento regarding the definition of homeless children and youth.[[11]](#footnote-11) Homeless children and youths are defined as individuals who lack a fixed, regular, and adequate nighttime residence. It includes, in part, children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; or are abandoned in hospitals. [[12]](#footnote-12) There is “no time limit on homelessness….Families/students are considered homeless until they have acquired fixed, regular and adequate housing.”[[13]](#footnote-13)

In order to ensure the prompt resolution of disputes, DESE has established a McKinney-Vento Dispute Resolution Process.[[14]](#footnote-14) The process begins when a district denies the continued enrollment or right to enroll a homeless student in the school selected by the parent, guardian or unaccompanied homeless youth. The homeless education liaison must provide notice of the denialto the parent on the day of the denial using the form prescribed by DESE. If a dispute arises between the district and parent, guardian or unaccompanied homeless youth, the homeless education liaison must ensure that
the student is immediately enrolled in the school in which enrollment is sought pending a final resolution of the dispute, including all available appeals. Following receipt of the district’s denial of the parent’s appeal, the Commissioner or the Commissioner’s Designee must promptly issue a decision, usually in five to ten school days. The decision of the Commissioner or the Commissioner’s Designee is final.

*3. Discussion:*

Here, DESE argues that Foxborough’s Hearing Request is

“a request for the BSEA to substitute its judgment about the Student’s enrollment for that of the Student and her family. Such an outcome extends far beyond the BSEA’s jurisdiction and is attenuated from a question about FAPE.

If students are homeless, their parents have the right to choose between enrollment in the school of origin, or the school district in the town where families are sheltered. To seek BSEA review of the special education responsibility for the Student, Foxborough should have immediately enrolled the Student. Foxborough then should have submitted a request for LEA assignment to DESE. Based on the facts presented to DESE, including any evidence of homelessness, DESE would determine the regulation that applies to the facts and could assign responsibility accordingly. As necessary, the parties could seek BSEA review of DESE’s LEA assignment. Upon enrollment of the Student, this process would still be available to the Petitioner.”

Similarly, Norwood argues that “Foxborough's Hearing Request is premature because the BSEA is not the appropriate forum to resolve a dispute as to whether a parent or student meets the criteria for homelessness, nor has an LEA Assignment been determined by DESE in this matter.”

I find persuasive DESE’s and Norwood’s arguments that the matter has been brought to the BSEA prematurely. Disregarding DESE’s requirement that school districts “immediately enroll homeless students in school to provide educational stability …,”[[15]](#footnote-15) and despite its belief that Student was, in fact, homeless, Foxborough failed to enroll Student until April 7, 2025, due to missing documentation.. As DESE had closed the initial LEA Assignment Application and has yet to issue an LEA Assignment based on Foxborough’s renewed April 7, 2025 Application,, even if I view all facts in favor of Foxborough and draw any inferences from said facts in its favor, I cannot find that I have the authority to issue the relief sought by Foxborough; specifically, 603 CMR 28.08(3)(d) allows BSEA involvement only following DESE’s assignment of school district responsibility. As none has yet been made, BSEA involvement is premature.

**ORDER:**

*DESE’s Motion* is ALLOWED. *Norwood’s Motion* is ALLOWED. Foxborough’s Hearing Request is hereby DISMISSED without prejudice.

So Ordered by the Hearing Officer:

/s/ Alina Kantor Nir

Hearing Officer: Alina Kantor Nir

Date: April 15, 2025

COMMONWEALTH OF MASSACHUSETTS

BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL

# Effect of BSEA Decision, Dismissal with Prejudice and Allowance of Motion for Summary Judgment

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Similarly, a Ruling Dismissing a Matter with Prejudice and a Ruling Allowing a Motion for Summary Judgment are final agency actions. If a ruling orders Dismissal with Prejudice of some, but not all claims in the hearing request, or if a ruling orders Summary Judgment with respect to some but not all claims, the ruling of Dismissal with Prejudice or Summary Judgment is final with respect to those claims only.

Accordingly~~,~~ the Bureau cannot permit motions to reconsider or to re-open either a Bureau decision or the Rulings set forth above once they have issued. They are final subject only to judicial (court) review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. This means that the decision must be implemented immediately even if the other party files an appeal in court, and implementation cannot be delayed while the appeal is being decided. Rather, a party seeking to stay—that is, delay implementation of-- the decision of the Bureau must request and obtain such stay from the court having jurisdiction over the party’s appeal.

Under the provisions of 20 U.S.C. s. 1415(j), “unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement,” while a judicial appeal of the Bureau decision is pending, unless the child is seeking initial admission to a public school, in which case “with the consent of the parents, the child shall be placed in the public school program.”

Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child’s placement while judicial proceedings are pending must ask the court having jurisdiction over the appeal to grant a preliminary injunction ordering such a change in placement. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

# Compliance

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau of Special Education Appeals contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

# Rights of Appeal

Any party aggrieved by a final agency action by the Bureau of Special Education Appeals may file a complaint in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

# Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster GroveSchool District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th. Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.

1. Foxborough’s March 21, 2025 due process complaint against Norwood and DESE seeks a determination by the BSEA that Student had become "homeless" within the meaning of the McKinney-Vento Homeless Assistance Act when the Student began staying with her father at the Hotel, and that the Student's last known residence was in Norwood. As such, Norwood, as Student's "district of origin" pursuant to relevant statutes, continued to bear programmatic and fiscal responsibility for Student. Foxborough also seeks a determination that DESE erred in failing to issue a Local Education Agency ("LEA") Assignment. [↑](#footnote-ref-1)
2. *Blank v. Chelmsford Ob/Gyn, P.C.*, 420 Mass. 404, 407 (1995). [↑](#footnote-ref-2)
3. *Iannocchino v. Ford Motor Co.,* 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). [↑](#footnote-ref-3)
4. *Blank v. Chelmsford Ob/Gyn, P.C*., 420 Mass. 404, 407 (1995). [↑](#footnote-ref-4)
5. *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). [↑](#footnote-ref-5)
6. 20 USC §1412(a)(1)(A). [↑](#footnote-ref-6)
7. 20 USC §1413(a)(1). [↑](#footnote-ref-7)
8. *Letter to McAllister*, (OSEP), 21 IDELR 81 (June 9, 1994).  [↑](#footnote-ref-8)
9. *Manchester Sch. Dist. v. Crisman*, 306 F.3d 1, 10 (1st Cir. 2002). [↑](#footnote-ref-9)
10. G.L. c. 71B §1; 603 CMR 28.02(8) and 603 CMR 28.10. [↑](#footnote-ref-10)
11. *DESE McKinney-Vento Homeless Education Assistance – Advisories* (rev. April 2018) which may be found at <https://www.doe.mass.edu/sfs/mv/> [↑](#footnote-ref-11)
12. 42 USC 11434a. [↑](#footnote-ref-12)
13. *DESE Guidance on Fixed, Regular, and Adequate Housing: Identifying Family and Youth Homelessness* which may be found at https://www.doe.mass.edu/sfs/mv/housing-guidance.html [↑](#footnote-ref-13)
14. *DESE McKinney-Vento Homeless Education Assistance – Advisories* (rev. April 2018). [↑](#footnote-ref-14)
15. *DESE McKinney-Vento Homeless Education Assistance – Advisories.* [↑](#footnote-ref-15)