

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In re: Northborough Public Schools **BSEA #1609179**
v. Marlborough Public Schools
& the Massachusetts Department of Elementary and Secondary Education

DECISION

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 agreed to have Marlborough's MTD be decided solely on the written arguments and the exhibits submitted. On July 12, 2016 the Hearing Officer **DENIED** Marlborough's MTD. (See Ruling on Marlborough Public Schools' Motion to Dismiss Northborough Public Schools' Appeal.) On an August 9, 2016 conference call, the parties agreed to a schedule for submission of written briefs to support their respective positions on the merits of this appeal. Marlborough and DESE submitted briefs on August 24, 2016 and Northborough submitted a rebuttal brief on September 1, 2016. A telephonic motion session was held on September 15, 2016 with each side orally arguing its position.

STATEMENT OF THE FACTS¹

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

¹ 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. No new exhibits have been submitted by any of the parties. Therefore, only one (1) specified exhibit number will be referenced for any exhibit cited in this DECISION.

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 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 (NPSO-6), 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, 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, pursuant to 603 CMR 28.10(8)(f), 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.

ISSUE

Pursuant to 603 CMR 28.10(3)(b) and 603 CMR 28.10(8)(c)(5) whether Northborough and Marlborough are jointly responsible for Student’s residential education program or whether Marlborough is solely responsible for such residential placement.

STATEMENT OF POSITIONS

DESE’s position is that its Assignment of Shared Responsibility, assigning shared fiscal and programmatic responsibility to both Marlborough and Northborough for Student’s residential educational placement, is consistent with applicable laws and regulations. DESE argues that neither exception to 603 CMR 28.10 (8)(c)(5) (cited in **STATEMENT OF FACTS** – Paragraph 7) applies to this case because this case: 1) does not involve a student who lived with one parent prior to being placed in a residential school; or 2) does not involve a situation in which one parent has sole physical custody. DESE argues that the 1st exception to 603 CMR 28.10 (8)(c)(5) does not apply because Student lived with both parents prior to his residential placement. DESE determined that the one night per week visitation Student spent with Mother

constituted residence rather than visitation. Similarly DESE contends that “primary” physical custody does not equate with “sole” physical custody; that the word primary is not synonymous with the word sole and necessarily signifies something other than sole; therefore the 2nd exception to 603 CMR 28.10(8)(c)(5) does not apply. DESE’s brief cites no cases in support of its position.

Marlborough’s position is that it supports DESE’S assignment of joint fiscal and programmatic responsibility to Marlborough and Northborough. Marlborough argues that DESE’s interpretation of its own regulation should be given deference with Northborough bearing the burden of proof in demonstrating the incorrectness of DESE’s LEA Assignment. Marlborough argues that it was reasonable for DESE to determine joint responsibility because Student was sleeping at Mother’s home (1 night per week) during the school week, getting ready for school at Mother’s home and possibly doing homework at Mother’s home; therefore Student was “residing” in Mother’s home prior to his residential school enrollment. Marlborough also argues that DESE’s determination was reasonable because Father did not have sole physical custody of Student.

Northborough’s position is that pursuant to 603 CMR 28.10(3)(b) and the exceptions set forth in 603 CMR 28.10(8)(c)(5), Student’s residential placement responsibility, both programmatically and fiscally, rests solely with Marlborough. Northborough argues that immediately prior to his residential placement, Student’s Father had physical custody of Student and Student resided with his Father in Marlborough. Northborough argues that while only one of the two exceptions specified in 603 CMR 28.10(8)(c)(5) is necessary, both exceptions are met in this case. Northborough contends that DESE’s and Marlborough’s argument that primary physical custody indicates something less than sole physical custody is erroneous because primary physical custody, as that term is used by the Probate Court, is equivalent to sole physical custody. Northborough further contends that a right of visitation by Mother does not equate to residency. Northborough also argues that DESE has inconsistently and arbitrarily applied its regulations to assign shared responsibility to Northborough.

FINDINGS AND CONCLUSIONS

Based upon the exhibits submitted, the briefs filed by the parties, the oral arguments advanced by the parties on September 15, 2016, and a review of the applicable law, I conclude that DESE erred in assigning shared fiscal and programmatic responsibility to Marlborough and Northborough. I conclude that full programmatic and fiscal responsibility resides with Marlborough.

My analysis follows.

Pursuant to M.G.L.c. 71B § 3, every city, town and school district is responsible for providing the special education program of any child with a disability “residing therein.” The determination of programmatic and financial responsibility for a child with special needs thus turns on the child’s residence.

“The domicile, or residence, of a minor child generally is the same as the domicile of the parent who has physical custody of the child.” *George H. & Irene L. Walker Home for Children, Inc. v. Franklin*, 416 Mass 291, 295 (1993). (Emphasis added) Where parental physical custody is not readily apparent, a child’s residence is determined by ascertaining where the child actually lives, that is, identifying the center of the child’s domestic, social and civil life. *Id.* Determination of a child’s residence, or where he “actually lives,” is highly individualized and fact dependent, taking into account the location where the child sleeps, gets ready for school, does homework, participates in community activities and attends family events. See In re Amesbury Public Schools, BSEA #1406933, citing *Walker, supra*.

Pursuant to M.G.L. Chapter 208 – Divorce, Section 31 – Custody of Children, only two types of physical custody are defined:

“Shared physical custody”, a child shall have periods of residing with and being under the supervision of each parent; provided, however, that physical custody shall be shared by the parents in such a way as to assure a child frequent and continued contact with both parents.

“Sole physical custody”, a child shall reside with and be under the supervision of one parent, subject to reasonable visitation by the other parent, unless the court determines that such visitation would not be in the best interest of the child. (Emphasis added)

While DESE contends that sole physical custody does not equate with primary physical custody, and that primary custody is not synonymous with sole physical custody and necessarily signifies something other than sole physical custody, M.G.L. c. 208 s. 31 does not make any such distinction.

By definition, when “sole physical custody” is awarded, “a child shall reside with and be under the supervision of one parent, subject to reasonable visitation by the other parent.” M.G.L.c. 208 s. 31. On the other hand, “shared physical custody” is defined as an arrangement by which “a child shall have periods of residing with and being under the supervision of each parent; provided, however, that physical custody shall be shared by the parents in such a way as to assure a child’s frequent and continued contact with both parents.” *Id.*

The critical distinction between the two types of statutorily-recognized custody is that, when “sole physical custody” is awarded to one parent, the non-custodial parent’s contact with the child is provided through “reasonable visitation” but not alternating periods of “residence” as occurs when “shared physical custody” is granted. In other words, if DESE’s interpretation of “primary physical custody” to one parent is found to be an acceptable definition of an arrangement under which custody is actually shared between both parents, it would then be illogical for the probate court to also award visitation rights to one of the parents, who, by DESE’s interpretation, already had custody. Logically, if a court intended for the child to live with both parents, it would use the term which is statutorily provided for such an arrangement, that is, “shared physical custody.”

In fact, the terms “sole” and “primary” physical custody are used interchangeably by Massachusetts courts to describe a situation in which a child resides exclusively with one parent

and visits with the non-custodial parent. See *Cesso v. Cesso*, 2011 Mass. App. Unpub. LEXIS 917 (2011) (in a header within the decision, court characterizes award as “primary/sole physical custody to wife”); *Rosenwasser v. Rosenwasser*, 89 Mass. Appt. Ct.577 (2016) (court references award of “primary physical custody” to father, and then later in decision describes the same custody arrangement without any distinction as “sole physical custody”); *Hunter v. Rose*, 463 Mass 488 (2012) (decision interchangeably uses terms “sole” and “primary” physical custody to describe judge’s custody award to one parent). See also *K.A. and T.R.*, 86 Mass. App. Ct. 554, 561, n. 15 (2014), noting that “if a shared physical custody arrangement does not work,” the alternative would be assignment of one parent as “the primary custodian”.

Based upon the statutory language of M.G.L.c. 208 s. 31 regarding only two custodial categories, sole physical custody and shared physical custody, I find that this case clearly falls into the category of sole physical custody rather than joint/shared physical custody. Based upon the specific facts here presented, Father clearly had physical custody, and Mother, visitation rights 1 day / night per week.

Indeed, I note that the 2010 Court Judgement (NPSO-9) modified Mother’s visitation from the 2009 Temporary Court Order (NPSO-4) from a weekend day / night (Saturday – Sunday) to a weekday / weeknight (Thursday – Friday) and reduced her total visitation time with Student from 29 hours to 17½ hours per week. I further note that this time reduction was not simply owing to school-related schedule demands.²

Based upon *Walker v. Franklin*, *supra*, the statutory definitions of custody, the Probate Court’s utilization of the terms sole custody and primary custody interchangeably, and the facts of this case, I am simply unable to find that one overnight visit per week with Mother for 17½ hours (less than ¾ of one day per week) constitutes residing with her. Based upon the Court Judgment, Father clearly was granted primary physical custody and Mother was granted visitation. With due deference to DESE’s interpretation of its regulation I conclude that in the instant case Father has physical custody of Student, and Student resides with his father while Mother has rights of visitation.³

While there are no other BSEA LEA Assignment cases directly on point, several cases provide useful guidance. In *Marlborough v. DESE and Falmouth*, 15 MSER 381 (2010) Student resided in Marlborough with Mother who had primary physical custody while Father resided in Falmouth and had visitation. DESE found Marlborough solely responsible and said

² The Court Judgment specifies that Mother shall pick up Student at school on Thursday, and if there is no school on Thursday at Father’s home at 2:30p.m. until Friday when Mother shall deliver Student to school, and if there is no school return Student to Father’s home at 8:00a.m. Also the Court Order provides no visitation for Mother on weekends. (NPSO-9). (Emphasis added)

³ I note that Student has been in a residential placement since November 2011 funded by Marlborough yet Marlborough did not seek an LEA Assignment until April 2015 on 3½ years later. I further note that a Marlborough Motion to Join Northborough to a BSEA Hearing brought by Parents against Marlborough was denied by the BSEA Hearing Officer (see NPSO 3, 10; BSEA #11-6273). Finally I note that at no time since Student has been enrolled in Marlborough has Northborough been invited to participate in any team meetings or otherwise been involved in any decision making related to Student (S-10 para 15).

determination was upheld by the BSEA. Similarly, in *Westborough v. DESE and Middleborough* 17 MSER 316 (2012) DESE found Westborough solely responsible, and said finding was upheld by the BSEA, where the fact that Student regularly visited Father pursuant to a court approved parenting plan did not impact the fact that Mother was the primary parent and that her residence was considered to be the child's home. See also *Amesbury v. DESE and Bedford* 20 MSER 218 (2014). Thus, there have certainly been occasions when DESE has found primary physical custody sufficient to order sole responsibility to only one school district.

In *Lincoln-Sudbury v. DESE and Lexington* 18 MSER 108 (2012) Student's Mother resided in Lincoln while Father resided in Lexington. Mother had sole legal custody. Student spent 4 days / nights during the school week and alternating weekends with Mother. Student spent 1 day / night during the school week and alternating weekends with Father. DESE found Lincoln-Sudbury solely responsible based upon sole legal custody and Student residing with Mother and this finding was upheld by the BSEA. I note that in *Lincoln-Sudbury* Student spent more time with the non-custodial parent (one day / night during the school week plus alternating weekends) than in the instant case (17½ hours during the school week and no weekends) but here DESE held both Marlborough and Northborough responsible. Given that sole and primary custody are equivalent in the eyes of the Probate Court, and primary custody is sometimes sufficient for DESE, such disparate and inequitable results should not occur.

In summary, based upon the law cited above and the facts of this case, I conclude that Student resided with Father in Marlborough prior to going into residential care. I further find that the Court Judgment plainly gave physical custody to Father who resided in Marlborough with Student while giving Mother, who resided in Northborough, rights of visitation. I conclude that such visitation rights with Mother (17½ hours per week) do not constitute residing with Mother. And, while only one of the two exceptions specified in 603 CMR 28.10(8)(c)(5) needs to be met to find Marlborough fully responsible for Student, I conclude that here, both exceptions were in fact met.

ORDER

Full programmatic and fiscal responsibility for Student resides with Marlborough.

By the Hearing Officer,

Raymond Oliver

Dated: October 6, 2016