JANUARY 21, 2016

COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

BUREAU OF SPECIAL EDUCATION APPEALS

DECISION

IN RE: SUTTON PUBLIC SCHOOLS & WORCESTER PUBLIC SCHOOLS & DESE

BSEA #1601445

BEFORE

SARA BERMAN

HEARING OFFICER

DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS

ALISIA ST. FLORIAN, ATTORNEY FOR SUTTON PUBLIC SCHOOLS

PAIGE TOBIN, ATTORNEY FOR WORCESTER PUBLIC SCHOOLS

JOSH VARON, ATTORNEY FOR DESE

COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Sutton Public Schools v.
Dept. of Elementary and Secondary Education and **BSEA No. 1601445**
Worcester Public Schools

DECISION BASED ON WRITTEN SUBMISSIONS

This Decision is issued pursuant to M.G.L. c. 71B ("Chapter 766"), the Massachusetts Administrative Procedures Act, M.G.L. c. 30A, and regulations promulgated under those statutes. At the request of the moving party, the Sutton Public Schools ("Sutton"), and with the agreement of all parties, this Decision is issued on the basis of written submissions, without a hearing, pursuant to Rule XII of the *Hearing Rules for Special Education Appeals*. The subject of this Decision is the appeal by Sutton of the Department of Elementary and Secondary Education's (DESE's) assignment to Sutton of responsibility for Student's residential educational placement.

PROCEDURAL HISTORY

This case involves the determination of whether DESE's determination that Sutton is solely programmatically and fiscally responsible for the residential educational placement of a child ("Student") is correct, or whether DESE should have assigned full or shared responsibility to the Worcester Public Schools ("Worcester").

On August 13, 2015 Sutton filed a timely appeal of an Assignment of School District Responsibility (Assignment) issued by DESE on July 30, 2015. This Assignment had designated Sutton as the Local Education Authority (LEA) with fiscal and programmatic responsibility for the Student's residential educational placement. On August 19, 2015 counsel for DESE entered an appearance on behalf of the agency. On August 24, 2015, Worcester requested postponement of the original hearing date of September 1, 2015. This request was granted. On August 25, 2015, Worcester filed its *Response* to Sutton's hearing request. A conference call was held on September 22, 2015 with all parties and the hearing officer during which the parties agreed to a issuance of a decision without a hearing pursuant to Rule XII of the BSEA *Hearing Rules* and agreed to submit all additional documentation by October 9, 2015.

In an Order dated October 1, 2015 the Hearing Officer memorialized the agreements reached during the conference call. This Order also notified the parties that by agreeing to a decision without a hearing, they had waived the right to present witness

testimony, cross-examine adverse witnesses, and have the Hearing Officer determine the credibility of witnesses.

In addition to the initial hearing request by Sutton and Response by Worcester referred to above, the parties have filed the following documents for consideration:

- Department of Elementary and Secondary Education's Position Statement, filed on October 8, 2015;
- Worcester Public Schools' Supplemental Answer to Sutton's LEA Appeal, also filed on October 8, 2015;
- Sutton Public Schools' Supplemental Motion to Its Appeal of LEA Assignment for Student [ ], filed on October 9, 2015;
- Department of Elementary and Secondary Education's Supplemental Position Statement, filed October 15, 2015;
- Worcester's Response to Sutton's Supplemental Motion, filed October 16, 2015.[1]
- Responses of Worcester and Sutton to Hearing Officer's request for position statements on the effect of "move in" law on this dispute, received November 17, 2015.[2]

The official record of this hearing consists of the submissions listed above, which include multiple attachments.

ISSUE

The sole issue here, as also stated in the Order of September 22, 2015, is the following: whether the Department of Elementary and Secondary Education (DESE) correctly assigned programmatic and fiscal responsibility for the Student to Sutton or whether DESE should have assigned such responsibility to the Worcester Public Schools or alternatively should have determined that Sutton and Worcester share responsibility for Student's educational placement.

SUMMARY OF THE EVIDENCE

1. Student is a child with disabilities. His eligibility for special education and related services is not in dispute. Since October 20, 2014 Student has been enrolled in a DESE-approved residential educational program located in Milford, MA pursuant to an IEP written by the Worcester Public Schools.

[1]Worcester and DESE requested leave to file the supplemental documentation after the deadline of October 9, 2015. The Hearing Officer granted these requests over Sutton's objection and extended the deadline for all filings to October 22, 2015. The BSEA received no additional filings, and the record closed on October 22, 2015.

[2]In an Order dated November 4, 2015 the Hearing Officer notified the parties that the record would be held open for submission of memoranda on the effect of the "Move In Law", M.G.L. c. 71B, §5, on this matter.

2. From October 11, 2011 to his residential placement on October 20, 2014, Student lived exclusively with his mother ("Mother") in Worcester.

3. Student's father ("Father") and Mother are separated. Father has lived in Worcester, apart from Mother, since 2012. Student has not lived with or had overnight visits with Father since 2011, approximately three years prior to residential placement. Student has had no overnight visits with Father from the date he started his residential placement until at least July 2015.

4. On November 1, 2014, shortly after Student's placement, Mother moved to Sutton. Mother has continued to live in Sutton from that time forward. Student has a room in Mother's home in Sutton. As of July 2014 Student may have had monthly visits with Mother. The documentary record does not indicate whether any of these visits to Mother were overnight. Father has continued to live in Worcester. Father has visited Student at the residential placement but Student has not visited Father in his home.

5. Pursuant to the "Move-In Law," M.G.L. c. 71B§5, Worcester funded Student's residential placement from the time he enrolled in that placement to and including June 30, 2015.

6. In June 2015 Worcester requested clarification of school district responsibility for Student's placement from DESE. In a letter dated July 30, 2015 DESE assigned LEA responsibility for Student's special education placement to Sutton. The assignment letter from DESE stated that the applicable regulations are 603 CMR 28.10(3)(b) which assigns programmatic and fiscal responsibility for a residential educational placement to the district where the child's parent(s) or guardian(s) reside and 603 CMR 10.03(8)(c)(5) which assigns such responsibility to the LEA where the child actually resided immediately before entering residential school in cases where separated or divorced parents live in two different districts but the child actually resides with only one of them. DESE's letter further stated that Student resided solely with Mother prior to placement; therefore, Sutton as Mother's current district of residence, is the responsible LEA.

7. Sutton appealed this assignment of responsibility on August 13, 2015.

POSITIONS OF THE PARTIES

The parties' positions turn on interpretation of the relationship between two regulations: 603 CMR 28.10(3)(b) which assigns programmatic and fiscal responsibility for a student in residential school to the school district(s) where the parents or legal guardian(s) reside, and 603 CMR 28.10(8)(c)(5), which sets forth criteria to be used by DESE to assign LEA responsibility for residential special educational placements for certain children with parents who live in two different school districts. The relevant portion of the former regulation, 603 CMR 28.10(3), states the following:

(3) **School district responsibility based on residence of parent(s) or legal guardian.** The school district where the parent(s) or legal guardian resides shall have both programmatic and financial responsibility under the following circumstances:
(a) [ ]
(b) When a student whose IEP requires an out of district placement lives and receives special education services at a special education residential school.
(c) [ ]

(Emphasis in original)

The second regulation at issue, 603 CMR 28.10(8), lists the criteria to be used by DESE when assigning school district responsibility for certain children whose residential status may be disputed or unclear. The portion of the regulation cited by DESE in its original notification 603 CMR 28.10(8)(c)(5) states the following:

> 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)[3] 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…

(*Id.*)

The parties do not dispute that (1) Student "actually resided" exclusively with Mother in Worcester immediately prior to entering residential placement; (2) Father has lived in Worcester at a known address for all relevant times; (3) Student has not lived with Father since approximately 2011; (4) Mother moved from Worcester to Sutton approximately twelve days after Student's residential placement and now resides in Sutton at a known address; (5) Student has never enrolled in or attended the Sutton Public Schools.

Position of Sutton Public Schools

Sutton argues that in designating Sutton as the responsible LEA, DESE has misinterpreted 603 CMR 28.10(8)(c)(5). According to Sutton, the plain meaning of this regulation is that "because [Student] is receiving services at a special education residential school and lived with one parent prior to attending the residential placement, it is the school district where [Student] resided with that parent which is fiscally and programmatically responsible." Sutton's Hearing Request at p. 2 (emphasis in original).

[3] 603 CMR 28.10(3) and (4) lists several different out-of-home living situations including a residential special education school where a child has been placed pursuant to an IEP. 603 CMR 28.10(3)(b)

In other words, LEA responsibility "attached" to Worcester because Student lived there with Mother just prior to placement. Mother's post-placement move to Sutton did not make Sutton the responsible LEA. Sutton elaborates on this position in its Supplemental Motion to its Appeal of LEA Assignment, in which it argues that the use of the past tense, "resided" in 603 CMR 28.10(8)(c)(5) means that the regulation applies only to the district in which the student lived with a parent immediately before placement, and not to any post-placement residence of the parent. Finally, Sutton argues that even if it bears some responsibility for Student's placement, Worcester shares in that responsibility because Father still lives in Worcester.

With respect to the Move-In Law, Sutton states that if applicable, this provision would result in shared responsibility between Worcester and Sutton. DESE did not apply the Move-In Law in its analysis, relying purely on interpretations of 28.10(3)(b) and of 603 CMR 28.10(8)(c)(5), which Sutton maintains are incorrect for the reasons stated above.

Positions of DESE and Worcester Public Schools

DESE and Worcester take the position that 603 CMR 28.10(3)(b) dictates that programmatic and fiscal responsibility for students in residential schools lies with the LEA in which the parents reside. Where—as in the present case—a student has lived solely with one parent prior to placement, the district in which the student lived with that parent is the responsible LEA. If that parent moves while the child is in residential placement, the parent's new district of residence is the responsible LEA, even if the student has never lived in that community.

DESE and Worcester assert that this interpretation is consistent with the general principle, articulated in relevant case law, that a child's residence or domicile for school attendance purposes is that of his or her parent(s) or guardian(s) with physical custody of the child. Additionally, both DESE and Worcester note that a recent BSEA decision upheld DESE's interpretation of 603 CMR 28.10(8)(c)(5) in a case with facts which these parties consider to be similar to those in the instant case. *In Re Worcester Public Schools v. DESE and Medway Public* Schools, BSEA No. 1404967, 20 MSER 176 (Byrne, 2014). DESE and Worcester argue that there is no regulatory basis for joint responsibility by Worcester, since Student resided solely with Mother for several years prior to placement.

In its final submission filed on November 17, 2015 Worcester reports that pursuant to the Move-in Law, Worcester actually funded Student's placement through June 30, 2015. After that date, Worcester maintains that Sutton became solely responsible for Student's placement based on the regulations cited above.

DESE filed no further submissions.

DISCUSSION

In Massachusetts, every school age child—with or without disabilities-- has the right to attend public school in the town where he or she resides. MGL c. 76 §5. For children with disabilities, MGL c. 71B §3 charges each district with the responsibility of

identifying, evaluating, and providing special education services to eligible children "residing therein." *Id.*

In its landmark decision in *George H. & Irene L. Walker Home for Children v. Town of Franklin*, 416 Mass. 291, 296 (1993) the Supreme Judicial Court defined "residence" as "domicile," or "home." The SJC further defined a person's "home" as

> the place where a person dwells and which is the center of his domestic, social and civil life. A person can have only one domicil. [sic] The domicil or residence, of a minor child generally is the same as the domicil of the person who has physical custody of the child. *Id*.

The SJC explicitly recognized that notwithstanding this general principle, the residence of a child is "not so obviously self-defining when considerations such as split families, guardianships, children living with foster parents relatives or friends, and institutionalized children enter the picture." *Id.* To ensure that all eligible children have a school district responsible for their education, the SJC endorsed the authority of DESE (then the Department of Education) to promulgate regulations to assign responsibility for education of special education students who live in situations other than with two parents who live together.

Pursuant to this authority, Massachusetts special education regulations at 603 CMR 28.10 (1) through (9) define school district programmatic and financial responsibility for eligible students in a variety of living situations and circumstances. Section 28.10 (1), entitled "General Provisions," recites the underlying principle of the entire regulation, which is that "[s]chool districts shall be programmatically and financially responsible for eligible students based on residency and enrollment." 603 CMR 28.10(1).

The subsequent sections, 603 CMR 28.10(2) and 28.10(3) elaborate on the general principle stated in 28.10(1). Thus, 28.10(2) dictates that the residence of the student determines the responsible school district when the student lives with parent(s) or guardian(s). 603 CMR 28.10(2)(a).

When the student lives with both parents and the parents live in two different school districts, 28.10(2)(a) further defines the student's residence as the district of enrollment when the student attends an in-district program. §28.10(2)(a)(1). On the other hand, when the student attends an out-of-district program, the districts where both parents reside are equally responsible for the student's special education services. 603 CMR 28.10(2)(a)(2). In effect, this regulation deems the student's residence to be that of

both parents in situations where the student actually lives with both parents during the school year.[4]

The next section, 603 CMR 28.10(3) provides that the school district where the parents or legal guardians reside is financially and programmatically responsible under a variety of scenarios where the student is housed apart from his or her parent(s) (other than in a DCF foster home), including, in pertinent part, "[w]hen a student whose IEP requires an out of district placement lives and receives special education services at a special education residential school." 603 CMR 28.10(3)(b). This is Student's circumstance; Student's IEP requires an out of district placement in a residential special education school.

In the instant case, Sutton requested DESE to clarify school district responsibility pursuant to 603 CMR 28.10(8), which authorizes the Department to "assign a school district" to be responsible for students in "living situations described in 603 CMR 28.10(3) or (4)" which includes students who—like the student here--are placed in special education residential schools pursuant to an IEP. Sec. 28.10(3)(b).

The regulation cited above, 603 CMR 28.10(8) is inapplicable in the instant case because it is intended to authorize DESE to assign a responsible school district in situations where a child's or parent's residency might be unclear or disputed. The regulation provides the following:

> **(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 school district to be responsible for students in living situations described in 603 CMR 28.10(3) or (4)
>
> 1. who are in the care or custody of a state agency and have no parent…residing in Massachusetts; or
>
> 2. when the residence or residential history of the student's parent(s) or legal guardian is in dispute; or
>
> 3. when the student has a legal guardian…appointed on a limited basis, or

[4] If a student divides his or her time between two parents in two different districts, he or she would have the right to enroll in either district, but obviously must choose one district or the other in order to attend an in-district program. The regulation assigns sole responsibility to the district of enrollment in that situation. On the other hand, if the student attends an out of district placement, the regulation assigns responsibility to the student's residence. If parents live in two different districts, and the student lives with both parents during the school year, the student's residence is the two districts where the parents reside.

4. *when a student has not yet been determined…eligible and/or is* not yet receiving services, or
5. when a student is in the care or custody or a state agency and is hospitalized and…the student will not return to the residence held prior to hospitalization.

DESE's authority to assign a responsible LEA under this section is restricted to the five circumstances quoted above. In each of the listed situations, the residency of the child—already complicated by an out of home placement—is further confounded by additional factors that make it difficult to identify the residence or domicile of the parent(s). If and only if child falls into one of the listed categories is DESE authorized to clarify or assign an LEA using the criteria listed in 603 CMR 28.10.8(c). If a child's situation is not among those listed, then there is no need for DESE to apply the criteria in 603 CMR 28.10(8)(c).

None of the factors listed in 603 CMR 28.10(8)(a) is present in this case. Student has two Parents living in Massachusetts. Student lived exclusively with one Parent (Mother) from 2011 until his residential placement in October 2014. He is not in the care or custody of a state agency. Both Parents have known and undisputed residences and residential histories. Student has no legal guardian other than Parents, his eligibility for special education is established, and he is not a child in the care of a state agency who has been hospitalized. Thus, Student is not among the class of students listed in 603 CMR 28.10(8)(a)(1) through (4) for whom DESE must apply the criteria set forth in 603 CMR 28.10(8)(c).

Because 603 CMR 28.10(8) is inapplicable to Student's situation, the relevant provision is 603 CMR 28.10(3)(b) which assigns programmatic and financial responsibility to the district where the parent resides. Since the only parent with whom Student actually resided from 2011 forward is Mother, it is Mother's community of residence that is responsible for Student's placement. Student and Mother were residents of Worcester when the IEP calling for Student's residential placement was issued in October 2014. Thus, under 603 CMR 28.10(3)(b)Worcester bore the initial responsibility for Student's placement because Student lived in Worcester with Mother until his placement in October 2014. Mother moved to Sutton in November 2014. Under the provisions of the "move-in law," MGL c. 71B §7, Worcester continued to be financially responsible for Student's placement for the remainder of the fiscal year in which the placement began (FY 2015), that is, through June 30, 2015.

Beginning on July 1, 2015 fiscal responsibility shifted to the community of Mother's residence—Sutton-- pursuant to MGL c. 71B§5 and 603 CMR 28.10(3)(b). Responsibility for Student's special education lies with the district of residence of Mother who was the only parent with whom Student lived prior to his residential placement. Contrary to Sutton's contention, Worcester does not share that responsibility with Sutton even though Father continues to reside in Worcester. The only regulatory provision for apportioning the cost of an out of district placement between two districts is 603 CMR 28.10(2)(b), which is predicated on a child's living with both parents during the school

year. That regulation does not apply here because Student actually resided exclusively with Mother, and did not live with Father at all for the three years before his placement.

As stated by DESE in its memorandum, this interpretation of the regulations is consistent with prior BSEA decisions upholding assignment of responsibility to two school districts only when both parents living in those districts shared caretaking responsibility during the school year. *In Re Hamilton-Wenham R.S.D. & Ipswich Public Schools & DESE,* BSEA No. 07-7201, 49 IDELR 58 (Crane, 2007). Further, the BSEA has upheld DESE determinations denying shared district responsibility when a student spent "100% of his school-related preparation" time with his mother, even though he lived with his father on alternate weekends. *In re: DESE, Westborough Public Schools, Middleborough Public Schools,* BSEA Nos. 12-0437/12-0551 and 11-7865, 17 MSER 316, 317-318 (Byrne, 2011)

As Hearing Officer Byrne further pointed out in *In re Worcester Public Schools, et al., supra,* "Massachusetts law anticipates the possibility that responsibility for a child's educational services may fall to a district where he has never resided because his domicile remains with his parents or legal guardian." 20 MSER at 179. That is the case here. Student's domicile remains with Mother as the only Parent with whom he has lived since 2011 and immediately prior to his residential placement. At this time, Mother's (and, therefore, Student's), domicile is Sutton, which (aside from the provisions of the "Move In Law" prior to July 1, 2015) remains solely responsible for Student's placement.

The BSEA must affirm DESE's interpretation of its own regulations unless such interpretation is "inconsistent with the plain language of the regulation or otherwise arbitrary or unreasonable." *Moslyn v. Dept. of Environmental Protection,* 83 Mass. App. Ct. 788, 794 (2013), *Salem v. Bureau of Special Education Appeals*, 444 Mass. 476, 481 (2005), quoted in *In Re: Worcester, et al.,* 20 MSER at 178. That is not the case here. Moreover, DESE's application of the relevant regulations to reach the result in this case is consistent with its approach in previous cases with similar fact patterns and should be upheld. *Id*.

CONCLUSION AND ORDER

Based on the foregoing, the determination of DESE that Sutton is solely responsible for Student's residential placement is UPHELD.

By the Hearing Officer,

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Sara Berman
Dated: January 21, 2016