COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Student & Lincoln-Sudbury Regional School District

v. BSEA #1905403

Boston Public Schools

RULING ON MOTION FOR SUMMARY JUDGMENT

The instant case requires a determination of which school district is programmatically and/or fiscally responsible for Student's day placement at the LABBB Collaborative: Lincoln-Sudbury Regional School District (LSRSD), in which Student was enrolled under the METCO program, or the Boston Public Schools (Boston or BPS), which is Student's district of residence. After a Team determination that Student, who had been attending Lincoln-Sudbury High School, needed an out-of-district placement, LSRSD issued an IEP and placement page calling for the LABBB placement. BPS objected to funding the LABBB placement on the grounds that it had offered Student an appropriate in-district placement at the McKinley School in Boston. Student and LSRSD now seek funding from BPS for the LABBB placement. The parties have filed cross-motions for summary judgment.

PROCEDURAL HISTORY

On December 24, 2018, Student's Guardian (Guardian) and LSRSD (collectively, "Moving Parties") jointly filed a request for hearing with the BSEA in which they alleged that BPS was refusing to fund Student's proposed placement at the LABBB Collaborative despite a fully-accepted IEP and placement page issued by LSRSD, and that as a result, Student's agreed-upon and duly accepted IEP and placement could not be implemented. The Moving Parties alleged that LSRSD had fully complied with regulations requiring that BPS be given notice of, and an opportunity to participate in, the Team process, that BPS had, in fact, participated in that process, and, therefore, that BPS was programmatically and fiscally responsible for Student's placement at LABBB. The Moving Parties requested that the hearing be expedited on the grounds that Student lacked an

available educational placement due to BPS' refusal to fund the LABBB placement.

On December 26, 2018, BPS filed a *Response and Counterclaim* alleging that, pursuant to regulations applicable to METCO students, BPS was not responsible for funding the LABBB program because it had offered an appropriate in-district placement at the McKinley School. Additionally, BPS opposed to a grant of expedited status to this matter on the grounds that Student had a placement available at the McKinley School or, if the Moving Parties disputed the appropriateness of the McKinley placement, Student had the right to remain at her former METCO placement at Lincoln-Sudbury ("L-S") High School until the dispute was resolved.

On the same date, December 26, 2018, the Moving Parties filed a *Motion for Summary Judgment* in which they asserted that there were no issues of material fact, and that as a matter of law, BPS was required to fully implement Student's accepted IEP by funding her placement at LABBB as well as her transportation. Also on December 26, 2018, the BSEA denied the request for expedited status and issued a Notice of Hearing which assigned a hearing date of January 28, 2019.

On December 28, 2018, the Moving Parties filed an *Amended Motion for Summary Judgment* in which they added a request for a determination that the McKinley School program offered by BPS was an out-of-district placement rather than an "in-district" option that the Team was required to consider according to pertinent regulations.

A conference call was held on December 31, 2018, during which the parties discussed the issues raised in the *Motion for Summary Judgment* as well as the identification of Student's "stay put" placement. On January 2, 2019, I issued an *Order as to Stay Put* in which I determined that "Student's placement pending appeal in this matter is the LABBB Collaborative program housed in Lexington High School as prescribed by the IEP issued by LSRSD and accepted by the Student's Guardian on December 20, 2018." The *Order* stated that LSRSD was responsible for funding the costs of that placement, including transportation, "unless or until relieved of that responsibility by a *Ruling* on the pending *Motion for Summary Judgment* or by a decision after an evidentiary hearing." Additionally, the *Order* stated that such a *Ruling* or *Decision* could determine that Boston "was or is responsible for some or all of the costs of the LABBB placement and may order Boston to reimburse LSRSD for such costs." Finally, the *Order* directed LSRSD to arrange for Student to begin attending the LABBB program by January 7, 2019.

On January 7, 2019, BPS filed an *Opposition* to the Moving Parties' *Amended Motion for Summary Judgment,* asserting that contrary to the Moving Parties' position, there exist disputed issues of material fact that must be

resolved at an evidentiary hearing. On January 9, 2019, LSRSD filed a *Second Motion for Summary Judgment and Reply to Boston Public Schools' Opposition to the Amended Motion for Summary Judgment,* addressing issues raised in Boston's *Opposition.*

LEGAL FRAMEWORK

Summary judgment is available at the BSEA if "there is no genuine issue of fact relating to all or part of a claim or defense and [the moving party] is entitled to prevail as a matter of law…" 801 CMR 1.01(7)(h). In determining whether to grant summary judgment, BSEA hearing officers are guided by Rule 56(a) of the Federal Rules of Civil Procedure, which provides that summary judgment shall be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id*.

The BSEA is also guided by Rule 56(a) of the Massachusetts Rules of Civil Procedure, which provides that summary judgment may be granted only if the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id*. See also *Rulings on Motions for Summary* Judgment in: *Zelda v. Bridgewater-Raynham Public Schools and Bristol County Agricultural School*, BSEA No. 06-0356 (Byrne, 2006); *In Re Westwood Public Schools,* BSEA No. 10-1162 (Figueroa, 2010); *In Re: Mike v. Boston Public Schools*, BSEA No. 10-2417 (Oliver, 2010); *In Re Bridgewater-Raynham Public Schools*, BSEA No. 1303762 (Figueroa, 2013). Facts are considered "in the light most favorable to… the non-moving party." *Xiaoyan Tang v. Citizens Bank, N.A.,* 821 F. 3d 206 (1st Cir. 2016), quoting *Perez-Cordero v. Wal-Mart P.R. Inc.,* 656 F. 3d 19, 20 (1st Cir. 2011).

"An issue is 'genuine' if it can 'be resolved in favor of either party,' and a fact is 'material if it 'has the potential of affecting the outcome of the case.'" *Tang, supra*, quoting *Perez-Cordero*, *supra* at 25, and *Calero-Cezero v. U.S. Dept. of Justice*, 355 F.3d 6, 19 (1st Cir. 2004). The moving party has the initial burden of producing evidence that there is no dispute of material fact. Once the moving party has done so, the burden then shifts to the party opposing summary judgment to establish, via affidavits or other documents, specific facts showing that there is a "genuine issue for trial." *Celotex Corp. v. Catrell*, 477 U.S. 242, 248-50 (1986); *Anderson v. Liberty Lobby*, *Inc*. 477 U.S. 242, 249 (1986); *Kathleen Burns v. Johnson*, 2016 WL 3675157 (July 2016).

The pertinent substantive law in this case is found in Massachusetts special education regulations governing, first, general procedures in all situations where a child may need an out-of-district educational placement and, second, application of those procedures to special education students who attend so-called "program schools," defined at 603 CMR 28.02 to include "the school in

which the student is enrolled according to the provisions of…MGL c. 76, §12A (METCO)…"

The generally-applicable regulations are found at 603 CMR 28.06(2)(e) and outline the requisite procedure whenever a Team is considering an out-of-district placement for a student, regardless of whether the student is enrolled in a program school, as follows:

> (e) Placement Meeting. Upon developing the IEP, if the needs of the student and the services identified by the Team are complex, and the Team is considering an initial placement out-of-district…the school district may schedule a separate Team meeting to determine placement…
> 1. Any other school district that may be financially or programmatically responsible for the student shall be invited to participate in the placement meeting and shall receive notice of such meeting at least five school days prior to the meeting…
> 2. Prior to the placement meeting, the school district and parent shall investigate in-district and out-of-district placement options in light of the student's needs and identified services required.
> 3. At the placement meeting, the district and the parent shall report on the investigation of in-district and out-of-district options in light of the student's needs and identified services required.
> 4. At the placement meeting, the district and the parent shall report on the investigation of in-district and out of district options. If an in-district program can provide the services on the IEP, such program shall be identified at the placement meeting and provided by the district; if not, the placement Team shall identify an out-of-district placement.
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> *Id.*

Additional regulations, found at 603 CMR 28.10(6), prescribe the protocol for situations where a student who is enrolled in a program school such as METCO may need an out of district placement to receive a FAPE, and allocate responsibility between the program school and the child's district of residence, as follows:

> (6) Program Schools: A program school shall have programmatic and financial responsibility for enrolled students, subject only to specific finance provisions of any pertinent state law…Specific provisions for program schools are as follows:

> (a) For…schools attended under MGL c. 76, §12A (METCO), when the Team determines that the student may need an out-of-district placement, the Team shall conclude the meeting pursuant to 603 CMR 28.06(2)(e) without identifying a specific placement type, and shall notify the school district where the student resides within two school days.
> 1. Upon a determination as in 603 CMR 28.10(6)(a), the program school shall schedule another meeting to determine placement, and shall invite representatives of the school district where the student resides to participate as a member of the placement team pursuant to 603 CMR 28.06(3).
> 2. The Team meeting convened by the program school shall first consider if the school district where the student resides has an in-district program that could provide the services recommended by the Team, and if so, the program school shall arrange with the school district where the student resides to deliver such services or develop an appropriate in-district program at the program school for the student.
> 3. If the placement Team, in accordance with the procedures of 603 CMR 28.06(2)(e), determines that the student requires an out-of-district program to provide the services identified on the student's IEP, then the placement proposed to the parent shall be an out-of-district day or residential school, depending on the needs of the student. Upon parental acceptance of the proposed IEP and…placement, programmatic and financial responsibility shall return to the school district where the student resides. The school district where the student resides shall implement the placement determination of the Team consistent with the requirements of 603 CMR 28.06(3).

603 CMR 28.10(6).

UNDISPUTED FACTS

The following facts are not in dispute, and are derived from the hearing request, response, and accompanying documents, as well as all documents and memoranda submitted with the pending *Motion* and *Amended Motion for Summary Judgment* of Guardian and LSRSD, *Opposition* filed by BPS, and *Second Motion for* Summary Judgment and Reply filed by LSRSD.

1. At all relevant times, Student is and has been eligible for special education and related services, pursuant to the Individuals with Disabilities Education Act, (IDEA), 20 USC §1400 *et seq.*, and the Massachusetts special education statute, MGL c. 71B.

2. Student and her Guardian are residents of Boston. Student has been enrolled continuously in the METCO program since first grade. She attended the Sudbury Public Schools until September 2017, when she entered ninth grade at L-S High School, which is operated by the LSRSD. At all relevant times, pursuant to 603 CMR 28.10, BPS has been Student's "district of residence" and LSRSD has been her "program school."

3. On or about June 15, 2018, at the end of Student's freshman year at L-S High School, the Team recommended an extended evaluation of Student to assess emergent and increasing emotional concerns that were interfering with Student's ability to learn. LSRSD, Guardian, and Student all agreed with this recommendation.

4. In accordance with this Team recommendation, Student participated in an extended evaluation at the Dearborn STEP program between approximately September 11, 2018 and November 16, 2018.

5. On November 15, 2018, LSRSD convened a Team meeting to consider the results of the STEP evaluation. The Team discussed the possibility that Student would need a day placement. A representative from BPS, Catherine Morrissey-Bickerton, attended the meeting. Additionally, Christina Stella, Program Director for the McKinley Schools in Boston, attended by telephone and provided detailed information concerning two placement options available in Boston: McKinley South End and McKinley Academy.

6. On November 15, 2018, the same date as the Team meeting, LSRSD issued an N-1 form that provided, in part, that "[t]he Team is recommending a therapeutic day program for [Student]." The N-1 form extended Student's stay at STEP "until a formal placement is identified," but no later than December 21, 2018, and stated that "through this time, [Student] will be visiting McKinley, Granite, and Dearborn Academy." Accompanying the N-1 form was a placement page calling for Student's continued placement at STEP until December 21, 2018. Guardian consented to the extension of Student's time at STEP on November 15, 2018.

7. On November 27, 2018, LSRSD issued a proposed IEP covering the period from November 15, 2018 to December 21, 2018, which is the additional time period that Student was to remain at Dearborn STEP. The placement page called for placement in an unidentified private day school.[1]

[1] A copy of this proposed IEP appears in the documentary record for the first time as an attachment to the *Second Motion for Summary Judgment/Reply* of LSRSD.

8. At some time following the meeting of November 15, 2018, LSRSD issued referral packets to McKinley, Dearborn Academy, Colebrook High School (operated by CASE Collaborative), Granite Academy, and LABBB Collaborative. Student and Guardian visited McKinley, Dearborn and LABBB Collaborative.

9. On an unspecified date, LSRSD's Out of District Coordinator, Dennis Tromblay, contacted BPS representative Catherine Morrissey-Bickerton via an email to "schedule a follow up meeting for [Student]." The email stated, "as you know, [Student] and [Guardian] have had an opportunity to visit and tour the different therapeutic programs we have sent referrals to," and went on to propose a meeting for December 20, 2018.

10. Ms. Morrissey-Bickerton replied that she would participate in the meeting but stated that "if packets were in fact sent to out of district placements, this was over Boston's objection and in violation of 603 CMR 28.10(6)."

11. LSRSD's counsel, Mary Ellen Sowyrda, responded to Ms. Morrissey Bickerton by stating, in essence, that the Team would review the placements under consideration (including McKinley), that LSRSD was not aware of any regulatory prohibition on considering placements other than the placement proposed by BPS, and that LSRSD expected that BPS would "immediately comply with its 603 CMR 28.10(6) programmatic and fiscal obligations, even if Boston seeks to challenge the placement determined by the team."

12. On December 13, 2018, LSRSD issued a Meeting Invitation scheduling a Team meeting for December 20, 2018 to "[r]eview recently developed IEP and discuss placement." Catherine Morrissey-Bickerton was included in the list of invitees.

13. In an email dated December 18, 2018, Student's attorney notified LSRSD counsel that after considering available placements, including McKinley, Student and Guardian believed that the LABBB Collaborative program at Lexington High School would "best meet the goals of her IEP and prepare her for transition out of high school" in the least restrictive environment.

14. On December 20, 2018, LSRSD conducted the Team meeting referred to in Paragraph 12, above. Ms. Morrissey-Bickerton attended by telephone. Also in attendance were Guardian, Student, Student's attorney, representatives of LSRSD and its counsel, and staff from Dearborn STEP. LSRSD presented Guardian with a proposed IEP and placement page for the LABBB Collaborative, covering the period from December 20, 2018 to December 20, 2019.[2] The Guardian accepted the proposed IEP and placement on the same

[2] The "Narrative Description of School District Proposal" section of the N-1 form for this IEP, dated December 20, 2018, stated "The N-1 letter will be completed as a follow-up to the meeting once

day, December 20, 2018. The BPS representative indicated that Boston would only consider the McKinley placement.

15. On December 24, 2018, Guardian and LSRSD filed a hearing request in this matter, seeking an order to BPS to fund the LABBB placement.

16. On information and belief, pursuant to the *Order as to Stay Put* referred to above, Student has been attending the LABBB Collaborative program at Lexington High School, with LSRSD funding both the tuition and transportation costs, since approximately January 7, 2019.

ISSUE PRESENTED

The issue to be decided here is whether there is no dispute of material fact to the effect that LSRSD followed all procedures required by pertinent regulations upon determining that Student required an out-of-district placement such that, as a matter of law, BPS is fiscally responsible for all costs of Student's placement at the LABBB Collaborative program at Lexington High School.

POSITIONS OF THE PARTIES

Position of Guardian and LSRSD

Undisputed facts establish that BPS participated in the Team process that led to Student's placement at the LABBB Collaborative in full compliance with applicable regulations. Moreover, while the pertinent regulations require LSRSD to consider "in-district" options offered by BPS as the school district of residence, the McKinley School is, in fact, an out-of-district program operated by BPS, not an "in-district option" described by the regulations. Further, even assuming *arguendo* that the McKinley School is an "in-district" program, the Team was only required to consider it, and it did so. The Team was not required to adopt the McKinley placement and was not precluded from either considering additional possible placements or from writing an IEP for a placement other than the McKinley School. Finally, the LABBB Collaborative is capable of implementing Student's IEP and constitutes a less restrictive environment than the proposed placement at the McKinley School.

Position of BPS

There are disputed material facts in this matter, including whether LSRSD followed all of its procedural obligations pursuant to 603 CMR 28.10(6)(a) in developing an IEP to place Student at the LABBB Collaborative as well as whether the LABBB placement is the least restrictive environment in which Student can receive FAPE.

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the draft IEP has been proposed by the district."

DISCUSSION

Based on my review of the parties' submissions, I conclude that there is at least one major issue of material fact in this matter, namely, whether LSRSD sufficiently included BPS in the process of developing Student's post-evaluation IEP and placement to satisfy the requirements of 603 CMR 28.10(6)(a). This issue encompasses additional subsidiary factual disputes, including but not limited to the parties' divergent views of whether LSRSD issued an IEP after the Team meeting of November 15, 2018 and before the placement meeting of December 20, 2018, as required by 603 CMR 28.06(2)(e).

In its *Opposition to the Amended Motion for Summary Judgment*, BPS argues that LSRSD did not develop such an IEP until the day of the placement meeting of December 20, 2018 when LSRSD presented BPS with an IEP and placement page for the first time. BPS argues that in so doing, LSRSD deprived it of an opportunity to discuss Student's placement in the context of her IEP goals and objectives, deprived it of an opportunity to present BPS placement options in addition to the McKinley School, and in so doing, violated the provisions of 603 CMR 28.06(2)(e). In its *Second Motion for Summary Judgment/Reply*, LSRSD responded that contrary to BPS' assertions it had, in fact, issued an IEP after the Team meeting of November 15, 2018, and attached a copy of an unsigned IEP dated November 27, 2018. This purported IEP, which is not signed by the Guardian, covers the period from November 15 to December 21, 2018, however, and appears to apply only to the Team's agreement to extend Student's stay at Dearborn STEP for that time interval.

Clearly there is a dispute of fact as to the meaning and import of this document. An evidentiary hearing is required to determine whether, for example, another document exists that is, in fact, a proposed IEP for the period after final termination of the STEP placement on December 21, 2018 and whether such proposed IEP was properly furnished to all parties in advance of the placement meeting of December 20, 2018. The disputed fact is material. If LSRSD did not issue an IEP prior to the December 20, 2018 Team meeting, it may have deprived BPS of legally sufficient opportunity to participate in the Team process. Moreover, if proven, such a fact would lend credence to BPS' claim that LSRSD predetermined Student's placement outside of the Team process.

On the other hand, if there exists evidence of ongoing communication between LSRSD and BPS about the elements of a proposed IEP and placement for Student between the meetings of November 15 and December 20, 2018, such evidence might mitigate against a finding that BPS was shut out of the Team's deliberations. Moreover, if there is evidence that LSRSD, independent of Guardian and Student, investigated the ability of the McKinley program to meet Student's needs, such evidence would support a conclusion that the McKinley

program was "considered" as required by the regulations. These are complex factual issues requiring an evidentiary hearing.[3]

ORDER

For the reasons stated above, the Parents' *Motion for Summary Judgment* is DENIED. In compliance with federal requirements to establish hearing dates, the date of March 14, 2019 is reserved for hearing. The BSEA program coordinator will schedule a conference call with the parties and Hearing Officer to further define the issues for hearing and to make adjustments in the hearing date if necessary.

By the Hearing Officer,

Dated: February 7, 2019

Sara Berman

[3] An additional, but less significant issue concerns the status of the McKinley Schools as an "in-district" program or an "out-of-district" program as defined in 603 CMR 28.02. This distinction does not appear to be outcome-determinative in this matter, but even assuming *arguendo* that the "in district" or "out of district" status of the McKinley School is material, it can only be determined from evidence presented at a hearing.