

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
SPECIAL EDUCATION APPEALS**

Student v. Newton Public Schools

BSEA # 1907771

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC § 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC § 794), the state special education law (MGL ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

PROCEDURAL HISTORY

Parent¹ filed a request for hearing on March 1, 2019. The hearing was scheduled for April 1, 2019. Parent requested a postponement of the Hearing which was allowed and by mutual agreement, the Hearing was scheduled for June 24, 2019. On May 28, 2019, Parent filed a Motion for Summary Judgment and Newton filed an Opposition to the Motion. The Motion was denied on June 12, 2019. The Hearing was held on June 24, 2019 at the Bureau of Special Education Appeals. The Parties' request to postpone the closing of the record in order to submit written closing arguments by July 16, 2019 was allowed. After a conference call on July 16, 2016 the Parties requested an extension of the deadline to file their closing arguments until August 23, 2019 because they had not yet received the Hearing transcript. This request was allowed. The Parties submitted their closing arguments on August 23, 2019 and the record closed on that date.

Those present for all or part of the hearing were:

Father

Joseph Green, Esq.

Guo-Ping Shi

Juan Du

John Panica

Melissa Gamble

Sarah Orlov

Jill Murray

Valerie Rae Johnston

Catherine Putney-Yaceshyn

Father's attorney

Property owner, Newton address

Property owner, Newton address

Newton police officer

Department Head for Special Education, Newton South High School

Student Services, Newton Public Schools

Attorney, Newton Public Schools

Court Reporter

Hearing Officer

¹ The Hearing Request was filed by Father. Father and Mother are married and share custody, but the Hearing Request was filed only by Father. Mother did not participate in any part of the process.

The official record of this hearing consists of Parent’s exhibits marked P-1 through P-18 and Newton’s exhibits marked S-1 through S-7, and approximately two and one half hours of recorded oral testimony.

ISSUE

Whether Newton Public Schools is the LEA (local education agency) responsible for providing Student with special education services.²

SUMMARY OF THE EVIDENCE

1. Parents are married and have owned a home in Milford, Connecticut, (“Milford”) since September 1995. Both of their names are on the mortgage of their home and Father “believes” that his name is on the deed as well. (Father)
2. The student (hereinafter, “Student”) is seventeen years old and has lived full-time with her parents in their Milford home from the time that she was adopted in August 2003 until July 2017 when her parents unilaterally placed her as a residential student at the Chamberlain School (hereinafter, Chamberlain) in Middleborough, Massachusetts. Prior to being unilaterally placed at Chamberlain, Student attended the Milford Public Schools from Kindergarten through and including her freshman year of high school. (Father)
3. Father has worked for a software company in Massachusetts since April 2010. The company was initially located in Concord and moved to Waltham five or six years ago. Until recently he commuted from his Connecticut home and stayed at the Courtyard motel in Waltham on the nights prior to days he worked in the Waltham office. He worked from his Connecticut home when he was not in the Waltham office. He spent thirty to fifty percent of his time in Waltham each month. (P-8) His employer covered the costs of his travel and lodging. Sometime in 2018³, Father’s manager began talking to him about working full-time in the Waltham office. One of the reasons was that his employer had been paying his hotel, meal, and travel expenses and that “was becoming more of an issue.”⁴ Sometime prior to the summer of 2018, Father agreed to increase the number of hours he spent in the Waltham office⁵. (Father)

² In addition to disputing Student’s residency, Newton also took the position that Student’s Connecticut IEP was invalid because it was not drafted in accordance with the IDEA’s requirements. The Parties agreed to bifurcate the issues for Hearing, and therefore, this Decision does not address any alleged irregularities in the Milford IEP process, but only the issue of Student’s residency.

³ Father’s testimony with respect to the exact date that he spoke to his employer and the date he decided to spend more time in the Waltham office was inconsistent. (Father)

⁴ Additionally, the company did not typically allow employees to telecommute, but made an exception for him, which caused issues with other employees. (Father)

⁵ Father was very evasive about the date that he agreed to spend more hours in the Waltham office. On page 49 of the transcript he stated that he agreed to spend more time in Waltham during the first half of 2018 and prior to the summer. On page 54 of the transcript he testified that he did not recall when he decided to pursue a residence in Massachusetts. (Father)

4. On May 29, 2018, Student's Connecticut PPT (Planning and Placement) Team⁶ convened for an annual review. (S-4) The Team included Father, Mother, Parents' attorney, a school administrator, a school psychologist, a guidance counselor, an assistant principal, a school attorney, and the acting special education director. The Team denied Parents' request to support Student's residential placement and proposed an in-district therapeutic day program. The next projected PPT meeting date was listed as May 29, 2019. (S-4)
5. On July 31, 2018, Father, Mother, and an administrator of the Milford Public Schools, Eric Paradis, met and revised Student's IEP to change her recommended placement from the in-district therapeutic program to an approved therapeutic residential school setting for the 2018-2019 school year. The PPT document states that the determination was based upon review of records (though no records were attached) and parental input. A Milford representative signed a document entitled Agreement to Change an Individualized Education Program Without Convening A Planning and Placement Team meeting on July 31, 2018. Father signed the document on August 31, 2018. (S-4, S-5)
6. Sometime on or after the July 31, 2018 meeting in which the Milford special education administrator changed Student's IEP placement from an in-district substantially separate therapeutic placement to a residential therapeutic placement, Parents and Milford, Connecticut entered into a confidential settlement agreement. Father testified that he was not at liberty to divulge the terms of the agreement. He further stated that he could not recall whether he had told anybody from the Milford Public Schools that he intended to rent a room in a home in Massachusetts. (Father)
7. On August 1, 2018, Father signed a lease for a property in Newton, Massachusetts for the term of August 1, 2018 through August 31, 2019.⁷ Although the landlord typically does not give his tenants leases, Father asked for one, so the landlord provided one to him⁸. (Father) The lease states the property is a single family home and that the total rent per month is \$1,000.00. (S-1) At the time of the Hearing there was one other adult male renting a room from Mr. Shi. He did not have a lease. Mr. Shi explained that he and his wife places ads to find tenants to rent their rooms. The rentals are short term and they generally do not have written leases. (Shi)
8. Father's lease was for one bedroom in the Newton house.⁹ There are other bedrooms available in the home that he can rent when his daughter sleeps there¹⁰. Father pays \$50.00 per night when his daughter spends the night. He has paid the landlord less than \$500.00 in extra rent since he has been staying in Newton. The longest number of successive nights Student spent at the house was two. Father has access to the kitchen and

⁶ I take administrative notice that what is referred to as a PPT meeting in Connecticut is referred to as an IEP Team meeting in Massachusetts.

⁷ Father did not begin staying at the Newton property on August 1, 2018. (Father)

⁸ Father is the only tenant who has a written lease. (Shi)

⁹ Contrast property owner, Mr. Shi's testimony with Father's statement in his May 23, 2019 Affidavit in which he states that he rents two bedrooms in the Newton premises. (P-1) Father again asserted that he has two bedrooms in the Newton house during his April 4, 2019 Hearing with Newton. (P-17)

¹⁰ Father's bedroom and a second bedroom he sometimes rents for Student were rented furnished by the landlords. (Father)

there is a refrigerator separate from the landlords' where he can keep his own food. Father sleeps in the Newton house most weekdays. Most weekends Father is not at the Newton property. He is not there during holidays. His wife has never stayed at the Newton property. (Shi)

9. Prior to signing the lease for the Massachusetts property, Father did a Google search to determine "what constitutes state residency?" He testified that he sought to obtain Massachusetts residency at the suggestion of his accountant. A website he consulted indicated that he would need a driver's license. Thus, he procured a Massachusetts driver's license on October 11, 2018. (P-4) He purchased a new car and registered and insured it in Massachusetts. He provided his employer with his Newton address. He registered to vote in Massachusetts.
10. On or around September 12, 2018, Claire Lombard, Registrar, Newton South High School, responded to an email from Father and provided a list of items he could submit to support his claim of residency in Newton. The list included a current IEP; identification of the Connecticut LEA; any evaluations of Student; a notarized statement from each parent addressing separation; notarized letters from the parents regarding custody; two utilities in Father's name; and a lease signed by him¹¹.
11. Father provided Newton a notarized statement¹² dated October 19, 2018, stating that his daughter is a residential student and that his Newton address will be her primary residence when she is not in school. He further states that his wife is unable to care for Student due to health issues and will continue to live in Connecticut. (P-3) His wife signed a similar document on the same date, but her statement does not mention any inability to care for Student due to a health condition. (P-3)
12. Sometime in late October 2018, Melissa Gamble, Department Head for Special Education at Newton South High School, became aware that a student from Connecticut had begun the registration process in September. Newton was awaiting receipt of paperwork for the registration packet. Claire Lombard made a registration appointment. By the end of October Ms. Gamble had received an IEP from 2016, an IEP from 2017, and an amendment from July 31, 2018. Ms. Gamble asked Father for the May 2018 IEP and he stated that he was told the July 31 amendment replaced the May 2018 IEP. Ms. Gamble was able to procure the May 2018 IEP from the Milford Public Schools.
13. There was a registration meeting on or about November 5, 2018 with Dan Rubin, guidance counselor, Ms. Gamble, Father, and his advocate, Sumner Saitz. Ms. Gamble reviewed the May 2018 IEP proposing a substantially separate program. She was confused by the amendment which was for a residential placement, but incorporated the IEP providing for a substantially separate day program. She asked Father if there had been some kind of agreement with Milford Public schools with respect to the IEP and he said he did not know of any agreement. (Gamble)

¹¹ The letter indicates Father had previously submitted a lease that had not been signed by him. (P-13)

¹² The statement was notarized by a notary public from Milford, Connecticut. (Panica)

14. On February 25, 2019, Officer John Panica visited the Newton address as part of a residency investigation he was conducting on Newton's behalf. On this date, Chamberlain School was on vacation. (S-7) Officer Panica testified that the homeowner allowed him access to the residence so that he could confirm that Student lived there. The homeowner directed him to a bedroom where he stated Student was living. The door was open¹³. He observed what appeared to be a spare bedroom. There were no pictures or clothes or anything that would suggest a younger female lived there. Officer Panica asked to see Father's room which was locked, but the homeowner had a key. He observed that this room looked like another spare bedroom. There were no pictures or personal items other than a small computer or laptop that would lead him to believe that somebody other than the homeowners were living there. (Panica)
15. Father testified that Student keeps most of her possessions from her childhood in her bedroom in the family's Connecticut home. Most of her other things are in her room at the Chamberlain School in Middleboro. When she travels to Newton she packs her clothes in a suitcase which she brings from Chamberlain. (Father)
16. Because Student was coming from out of state, Ms. Gamble decided to propose testing as permitted under the special education regulations. She developed a consent form to allow Newton Public Schools to do its own testing. However, after Officer Panica did his residency check it was determined that Student was not a resident of Newton and they did not complete the testing. (Gamble)
17. Candice Beennan, Vice-Principal, Newton South High School, sent a letter to Father at his Connecticut address dated March 11, 2019. She stated that Student had been enrolled as a student by Newton South High School staff on November 5, 2018, based upon information he had provided to Newton. Further she stated that Newton obtained information that questioned whether he and his child were residing in Newton and thus, the school resource officer conducted a residency investigation. The letter explained that Officer John Panica visited the Newton address on February 25, 2019, while the Chamberlain School (which Student attended) was on vacation and spoke to the homeowner. Officer Panica was shown the 2 rooms which the owners represented were rented by Father. There were no clothes or other items in either room which were consistent with a child of Student's age, or a female of any age. The rooms were "void of any personal items, pictures, etc." what would show you or your child actually physically reside at this address. The owners of the residence were not able to provide a physical description of Student or Father's vehicle. Ms. Beeman notified Father that Student would no longer be enrolled in Newton Public Schools, effective March 15, 2019, because their investigation revealed that Student does not and has not resided in the City of Newton. (P-16)
18. Newton convened a meeting on April 4, 2019, to address Father's appeal of Newton's decision to un-enroll Student. The meeting was attended by Father, his attorney, Joseph Green, Eva Thompson, Assistant Superintendent for Elementary Education, Ellison Levit,

¹³ Contrast this statement with Father's affidavit which states that he rents two rooms and keeps them locked. (Father)

Director of English Language Learning, Jill Murray, Assistant City Solicitor, and Toby Romer, Assistant Superintendent for Secondary Education. During the meeting, Father answered his attorney's questions about his residency and his daughter's living situation. Father's attorney provided written information regarding Massachusetts special education regulations. In an April 11, 2019 letter to Joseph Green, Mr. Romer informed him that Newton's Administrative Team affirmed the decision to unenroll Student from the Newton Public Schools. (S-7)

19. Father testified that most weeks he leaves his office at around 3:00 p.m. on Tuesdays and returns to Connecticut. He works from home on Wednesday during the day and goes to Newton on Wednesday nights. He typically works in the Waltham office on Monday, Tuesday, Thursday, and Friday. When he returns to Connecticut he sometimes goes to medical appointments for his wife and sometimes sees his own doctors. He does not have any doctors in the Newton area¹⁴, but continues to see doctors in Connecticut. His dentist is in Connecticut. On the date of the Hearing (June 24, 2019) Father stated that he had been in Newton tending to job requirements for the end of the quarter for all of the previous week. Student was staying in Connecticut with Mother where Mother was responsible for her care¹⁵. (Father)
20. Father testified that when he first began staying in Newton he joined the Lifetime Fitness gym and worked with a trainer twice per week. He sometimes attended a yoga class on another day of the week. At the end of May he put a freeze on his gym account because of financial hardship and no longer goes to the gym. He has attended church in Newton, but is not a member of Newton parish. He is a member of a parish in Connecticut and he attends church about half of the time that he is in Connecticut. Student attends church in Connecticut with her parents when they go. As of June 24, 2019, Father maintained a Facebook page. The page listed his residence as Milford, Connecticut. Similarly, Father testified that he has ridden in the PanMass challenge in the past and would be doing so this year. The Milford Mirror, a local newspaper published in Milford, Connecticut wrote an article, entitled "Milford Man to Ride in Pan-Mass Challenge" in July 2018, noting his participation in the race. Father testified that the same article would "probably" be printed in the Milford Mirror this year. (Father)
21. Student's therapy dog lives at the family's Connecticut home because therapy dogs are not allowed at the Chamberlain School. (Father)

FINDINGS AND CONCLUSION:

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 Supreme Judicial Court has determined that it is the residence of the *student* that determines the responsible entity. See *Walker v. Franklin*, 416 Mass 291 (1993). In the *Walker* case, the court

¹⁴ He has been to a chiropractor in Newton. (Father)

¹⁵ Earlier in his testimony, Father stated that Mother was not able to care for Student because of Mother's health issues. (Father)

specifically rejected the district's suggestion that the students at issue "resid[ed]" in the municipalities in which their residential special education schools were located. The court stated that "A municipality is not relieved of its responsibility for a special needs student because that student participates in a special education program in a residential setting elsewhere. As long as the child's parent lives in the municipality that evaluated and referred the child to the residential school for a special education program, the child's residence or domicile remains unchanged." *Id.* As noted in *Boston v. Board of Educ.*, 392 Mass. 788, 792-293 (1984), A person's domicile is usually the place where he has his home. [Restatement (Second) of Conflict of Laws § 11 comment a (1971).] 'Home is the place where a person dwells and which is the center of his domestic, social and civil life,' *Id.* at § 12." *Dane v. Registrars of Voters of Concord*, 374 Mass. 152, 161-162 (1978). *Hershkoff v. Registrars of Voters of Worcester*, 366 Mass. 570, 576 (1974) A person can have only one domicile, *Dane v. Registrars of Voters of Concord*, *supra* at 161. 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. *Gil v. Servizio*, 375 Mass. 186, 189 (1978) See *Teel v. Hamilton-Wenham Regional Sch. Dist.*, 13 Mass.App.Ct. 345, 348-349 (1982) To establish domicile, a person must live in a particular location, with the intention to remain, and to abandon his/her prior domicile. *Hershkoff v. Registrars of Voters of Worcester*, *supra* at 570. (1974)

Parent argues that pursuant to 603 CMR 28.10(3) the residence of the parent(s) or legal guardian determines LEA responsibility. There are multiple reasons to reject his argument. First, the BSEA has previously addressed the issue of the incongruity between c. 71B § 3 and 603 CMR 28.10(3) in *Marlborough Public Schools*, BSEA #10-1450, 15 MSER 381 (2009). In that case, the Hearing Officer found that 603 CMR 28.10(3) conflicts with the holding in *Walker* and with M.G.L. c. 71B. The Hearing Officer stated, "To the extent that a reading of the Department's residency regulations would suggest that assignments of responsibility for special education programming should be based on parental residence rather than student residence that reading must yield to both M.G.L. c. 71B and the *Walker* holding which direct that education is the responsibility of the town in which the student resides." *Marlborough Public Schools*, BSEA #10-1450, 15 MSER 381 (2009).

Secondly, Father and Mother are married and as such, there is no custody agreement between them. Father has not articulated any reason why his purported Newton residence would carry any more bearing on the determination of Student's domicile than that of his wife. Even if I were to find that Father is a resident of Newton, there is no reason why his hypothetical residence in Newton would negate Mother's ongoing and continual residence in Milford, Connecticut, the district that evaluated Student and wrote her IEP. As a practical matter, Father's living arrangement has changed very little between the time the Milford Team proposed Student's IEP and the date of the BSEA Hearing. Prior to August 2018 Father worked for a Massachusetts company and spent 30-50% of his time working in Waltham and staying in a Waltham motel and the remainder of his time working from his Connecticut home. (Father) After August 2018, Father rented a room in Newton where he stayed for part of the work week and continued to divide his working time between his Waltham office and his Connecticut home. He continued to spend most of his weekends in Connecticut. (Father)

Having found that Student's residence is the relevant inquiry in determining school district responsibility, I review the evidence pertaining to Student's residency. It is undisputed that

Student lived in Milford, Connecticut from the time she was adopted in 2003 until Parents unilaterally placed her at the Chamberlain School in July 2017. The Milford Public Schools drafted all of Student's IEPs during that time period. Prior to attending the Chamberlain School, Student never lived anywhere besides Milford, Connecticut. The evidence further shows that Student did not have a dedicated room at the Newton address. There were bedrooms available for Father to rent when she stayed in Newton, but the rooms were available to other potential tenants when Student was not in Newton. Conversely, Parents maintained a bedroom filled with Student's possessions and wall decorations at her Milford, Connecticut home. Student did not keep any personal possessions at the Newton address, but brought a suitcase, out of which she lived, when she visited the Newton property. In fact, Student only slept at the Newton address ten or fewer times from August 1, 2018 through the Hearing date, June 24, 2019. The evidence shows that even on the few occasions that Student stayed at the Newton address, she spent very little time in Newton. When she went to Newton she spent time at Father's office, went on day trips to locations such as Salem and Boston, and to a water park resort in Fitchburg. She did not participate in any activities in Newton or belong to a church or any civic organizations. In contrast, Student spent holidays with her Parents at their Connecticut home. She had been enrolled in the Milford Public Schools at least until the Parents entered into a settlement agreement with Milford on July 31, 2019. Most notably, Student's Mother (who remained married to her father) and her therapy dog continue to reside in the Connecticut home.

Even if I had agreed with Father's argument that 28.10(3) applied in this case, Father has not met his burden of showing that he is a resident of Newton. In order to establish a new domicile, it is necessary to abandon one's prior domicile. The preponderance of credible evidence shows that Father has not abandoned his Connecticut domicile. He continues to return to his Connecticut almost every Tuesday night; most weekends; and on holidays. He continues to receive mail, other than items relating to his employment, at his Connecticut address. He continues to see doctors and a dentist in Connecticut. He continues to pay a mortgage for his Connecticut home. He maintains his possessions at his Connecticut home, as evidenced by Officer Panica's description of Father's Newton room as being void of personal possessions. Most importantly, his wife continues to live in Milford, Connecticut.

Although Father argues that he does not intend to return to Connecticut and intends to begin the process of cleaning out his Connecticut home to prepare it to go on the market some time in the future, he presented no evidence other than his own testimony to support his intention. I did not credit this testimony, as I found Father's testimony to be extraordinarily lacking in credibility. His testimony often contradicted statements he had made during the Newton residency hearing and in his own signed affidavit. He was often evasive, such as when he testified that he could not remember the May 2018 PPT meeting or the July 31, 2018 meeting between him, his wife, and a Milford administrator. When he was shown documentation from the May 2018 PPT meeting and asked whether he was present at the meeting at the Milford Public Schools he replied that the document indicated he was. When Newton's attorney asked whether he had a recollection of the meeting he stated, "I have no recollection of a lot of 2018." (Father, pg. 52) A few minutes later when he was asked about his recollection of being at the July 31 meeting he stated "Same answer as before...I don't recall specifics of 2018." He then stated that he does not have any medical condition that would impact his ability to remember things accurately. He strained credulity when he answered "I believe so" rather than answering in the affirmative, in

response to questions as basic as whether his name appeared on the deed to his Connecticut home or whether his name appears on the mortgage of his Connecticut home. Additionally, on page 35 of the Hearing Transcript, Father stated that Mother cannot take care of Student because she has multiple sclerosis. On page 86 of the Hearing Transcript which was recorded less than an hour after his prior statement, he stated that during the past several days Student, who was on school break, had been staying with Mother and Mother was taking care of her for the week. (Father)

Newton has requested a finding that Father pursued this action in bad faith. The evidence supports such a finding. Father filed the Hearing Request in this matter for the improper purpose of seeking an Order compelling Newton, a city in which Student does not reside, to fund the cost of her residential placement. He did so knowing that Milford, Connecticut had written Student's IEP Amendment changing her IEP placement from an in-district placement to a residential placement without convening a PPT meeting pursuant to a confidential settlement agreement he and his wife had signed with Milford, Connecticut. He continued to pursue funding from Newton after Officer Panica determined that neither Student nor he were residents of Newton. He continued to pursue this matter after Newton un-enrolled Student from Newton Public Schools based on its determination that Student was not a resident of Newton. He continued to pursue this matter through a BSEA Hearing, knowing that Student had spent fewer than ten nights sleeping in Newton and did not live in Newton. I am explicitly not making such a finding of bad faith with respect to Father's counsel, as there is nothing in the record to reflect bad faith on his part.

ORDER

Based upon the foregoing, I find that Student is not a resident of Newton. Therefore, Newton does not have any obligation to provide Student with special education services or to allow Student to enroll in the district.

Additionally, I find that Father pursued this Hearing in bad faith for the improper purpose of compelling Newton, a city in which Student has not and does not reside, to fund Student's residential placement which was the subject of a confidential settlement agreement between Parents and the Milford, Connecticut Public Schools.

By the Hearing Officer,

Catherine M. Putney-Yaceshyn

Dated: October 1, 2019