**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

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In Re: Student

&. BSEA #2005312
Sudbury Public Schools
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## RULING ON MOTION FOR SUMMARY JUDGMENT

In the instant case, the Sudbury Public Schools (Sudbury or SPS) requested a hearing before the Bureau of Special Education Appeals (BSEA) in response to the Parents' prior request for funding from SPS for an independent education evaluation (IEE) of Student. Sudbury has filed a *Motion for Summary Judgment,* alleging that after the hearing request was filed, Parents and Student moved out of the Sudbury school district; therefore, Sudbury has no further responsibility for providing FAPE to Student and is entitled to judgment in its favor as a matter of law. For reasons discussed below, Sudbury's *Motion* is DENIED.

## PROCEDURAL HISTORY

On December 9, 2019, SPS filed a request for hearing with the BSEA in which they sought a determination that Sudbury's special education evaluation of Student was comprehensive and appropriate and that Parents' request for an IEE was properly denied.

On December 3, 2019, Sudbury requested and was granted a postponement of the hearing until January 29, 2020 because of unavailability of counsel and SPS witnesses. On January 15, 2020, SPS requested a second postponement because the parties were attempting to resolve the matter. SPS also requested a pre-hearing conference with the hearing officer. With Parents' agreement, the hearing was postponed to March 10, 2020 and a pre-hearing conference took place on January 29, 2020.

The parties were unable to resolve their dispute during or after the pre-hearing conference. At the request of SPS, with Parents' assent, the matter was postponed for good cause until June 8, 2020 to allow time for discovery and for reasons related to the COVID-19 emergency. During March and April 2020, the parties engaged in discovery.

On May 11, 2020, Sudbury filed the *Motion for Summary Judgment* that is the subject of this *Ruling*, together with a supporting memorandum and exhibits. Parents filed their *Opposition* and accompanying exhibits on May 13, 2020. On May 14, 2020, Parents filed *Correction of Facts to Sudbury Public Schools' Response*[1] *to Parents' Response to the District's Motion for Summary Judgment* (hereafter, "*Parents' Correction of Facts*"). The parties discussed their respective positions during a conference call held on May 20, 2020.

## 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 informed 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*, 12 MSER 4 (Byrne, 2006); *In Re Westwood Public Schools,* 16 MSER 378 (Figueroa, 2010); *In Re: Mike v. Boston Public Schools*, 12 MSER 364 (Oliver, 2010); *In Re Bridgewater-Raynham Public Schools*, 19 MSER 17 (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).

[1] The reference to Sudbury's *Response to Parents' Response* appears to be a clerical error as the record contains no such document from Sudbury.

## UNDISPUTED FACTS

The following facts are not in dispute, and are derived from the hearing request, as well as the *Motion for Summary Judgment* and supporting memorandum, and attached Exhibit A, Parents' *Objection* thereto with Exhibits A through E and *Parents' Correction of Facts*.

1. Student is a child with disabilities who at all relevant times was and is eligible for special education services pursuant to the Individuals with Disabilities Education Act (IDEA)[2] and the Massachusetts special education statute.[3]

2. Beginning in approximately spring 2019 until approximately May 4, 2020, Student and Parents lived in a rented house in Sudbury, MA, and Student was enrolled in the Sudbury Public Schools.

3. In October 2019, while living in a rented home in Sudbury, Parents purchased a house in Westford, MA that they intended to renovate and occupy at a later date. They did not move from their Sudbury residence to the Westford house at the time of purchase and remained physically present in their Sudbury home until on or about May 4, 2020.

4. During the fall of 2019, SPS conducted a special education re-evaluation of Student.

5. On or about November 26, 2019, after a Team meeting, Parents requested that SPS fund an independent educational evaluation (IEE) of Student. SPS declined this request shortly thereafter.

6. On December 9, 2019, pursuant to applicable federal and state law, Sudbury filed the hearing request that is the subject of this *Motion*.

7. On or about May 4, 2020, Parents vacated the Sudbury residence and physically relocated to the property they owned in Westford.

8. On May 5, 2020, Parents sent an email to the Special Education Director for the Westford Public Schools in which they described themselves as a "homeschooling family" and sought "help in determining which district is our home district for the remainder of the school year and the summer extended year." The letter further stated that because of repairs being done on the family's Sudbury rental home, and unavailability of planned temporary lodging while the repairs were ongoing, they had "moved their family to this Westford location to live and school while continuing renovations throughout the Covid-19 school shutdown."

[2] 20 USC 1401, *et seq*.
[3] MGL c. 71B

6. On May 11, 2020, Sudbury filed the above-referenced *Motion for Summary Judgment* in which they allege that on or about May 4, 2020, Student and his family moved out of their home in Sudbury and relocated to Westford MA. Sudbury asserts that as a result, SPS is no longer responsible for providing Student with FAPE, and cannot be obligated to fund an IEE.

7. On May 13 and 14, 2020, respectively, Parents filed their *Opposition* to SPS *Motion*, as well as Parents' Correction of Facts in which they assert that they are homeless and, therefore, entitled to continued special education services from Sudbury pursuant to McKinney-Vento.

8. In email correspondence dated May 14, 2020, Sudbury's Director of Student Services, Stephanie Juriansz, stated that while SPS disagrees with Parents' claim that they are homeless, SPS would nonetheless continue to provide special education services to Student pursuant to McKinney-Vento, while they "seek an appeal from the state."

## DISPUTED FACTS

Parents assert that the circumstances of their relocation were such that Student qualifies as a homeless student pursuant to the Education for Homeless Children and Youth Program, 42 USC Sec. 11431 *et seq*. (hereafter, "McKinney-Vento Act," or "McKinney-Vento") Parents argue that as a result, SPS, as Student's "district of origin" under McKinney-Vento, continues to be obligated to provide Student with FAPE. Specifically, Parents allege the following:

a. On or about May 4, 2020, the family was required to vacate the rental property because the landlord planned to make repairs that could not be done while the family occupied the house. During the conference call held on May 21, 2020, Sudbury, through counsel, disputed this assertion.

b. Parents allege that because of the Covid-19 emergency, they were unable to secure temporary housing at a location that otherwise would have been available through Parents' employment. Lacking this otherwise-expected option, Parents and Student moved into the Westford house on May 4, 2020. Parents allege that this house was not "adequate fixed housing" pursuant to McKinney-Vento because it was under construction or renovation. On their first night in the home, a leaking toilet flooded the kitchen below. The family moved temporarily to a hotel because of the flooding and consequent electrical power shutoff in part of the house. Shortly thereafter, they returned to the Westford property which still lacks a functional kitchen. Parents allege that the family has returned to the

Sudbury house to use the bathtub. Sudbury disputes some or all of these allegations.

In sum, Sudbury disputes most of Parents' version of the above-listed events, as well as their claims to be homeless under McKinney-Vento, and asserts that the family has relocated to, and established residency in, Westford. Among other things, Sudbury alleges that Student reports living in his new home in Westford.

## DISCUSSION

Based on my review of the parties' submissions, I conclude that there is a dispute of material fact, namely, whether Student's recent physical relocation from Sudbury to Westford constitutes a change in residency such that Sudbury has no further responsibility for providing Student with FAPE, or whether the family meets the criteria to be considered "homeless" pursuant to McKinney-Vento. This dispute of fact can only be resolved through an evidentiary hearing, and as such, summary judgment is inappropriate. My reasoning follows

### Responsibility for Provision of FAPE is based on Residency; Effect of McKinney-Vento

It is axiomatic that a school district's responsibility for providing FAPE to an eligible student is based on residency and enrollment MGL c. 71B, Sec. 3;, 603 CMR 28.10(1). Each school district is responsible for providing special education programs for all eligible children who "reside" within that district. MGL c. 71B, Sec 3; *George and Irene Walker Home for Children v. Franklin*, 416 Mass 291. (1993); *City of Salem v. BSEA*, 444 Mass. 476 (2005). "The shorthand used in many residence determinations is: where does the student sleep?" *In Re: Talib & East Longmeadow Public Schools,* BSEA No. 1707631 (Byrne, April 2017) (internal citations omitted).

Where a student "sleeps" and/or "resides" is not always straightforward, and is highly fact-dependent. *Walker* at 295. For students who are, or who claim to be, homeless, the issue of residency, and assignment of school district responsibility for providing FAPE, is governed by the McKinney-Vento Act, referred to above. McKinney-Vento requires states, as a condition of receiving federal funds, to ensure that school districts provide educational services to homeless children and youth, who are defined as children who "lack a fixed, regular and adequate nighttime residence." 42 USC Sec. 11430(a)(2); 11432(g)(3). This definition includes children who are living in "motels, [or] hotels due to the lack of adequate alternative accommodations," or in "substandard housing."[4] *Id*.

[4] see also Massachusetts Department of Elementary and Secondary Education (DESE) *McKinney-Vento Homeless Assistance Advisories* (2019).

For children with disabilities who are experiencing homelessness, the IDEA incorporates relevant portions of McKinney-Vento by reference, and requires states to ensure that eligible children with disabilities are fully protected by McKinney-Vento. See, *e.g*., 20 USC Sec. 1412. What this means for eligible Massachusetts children is set forth in 603 CMR 28.10(5) as follows:

> 1. Homeless students shall be entitled to either continue to attend their school of origin, as defined by McKinney-Vento,[5] or attend school in the city or town where they temporarily reside. To the extent feasible, homeless students should remain in their school of origin unless doing so is contrary to the wishes of such student's parent(s) or legal guardian or state agency with care or custody of the student.
> 2. The school district(s) that was programmatically and financially responsible prior to the student becoming homeless shall remain programmatically and financially responsible for a homeless student until the parent(s) or legal guardian … chooses to enroll the student in the school district where the shelter or temporary residence is located. When a student whose IEP requires in-district services is enrolled in the school district where the student is temporarily residing, then that school district shall become programmatically and financially responsible upon enrollment…. *Id.*

In the instant case, Parents claim that their location in Westford is not a "fixed, adequate nighttime residence" due to leaking plumbing and lack of a functional kitchen; rather, it is a place which to which they relocated after they were required to leave their rental home in Sudbury because other temporary lodging was unavailable. If Parents establish that their housing situation fits the criteria for homelessness within the meaning of McKinney-Vento and the relevant DESE Advisories, then Sudbury, as Student's "school of origin," would continue to be responsible for providing Student with FAPE—which includes both special education evaluations and services—until Student either enrolls in another district (such as Westford) or the end of the 2019-20 school year.

On the other hand, if Parents do not meet the criteria for homelessness, or SPS is otherwise able to demonstrate that Parents are no longer residents of Sudbury, then Sudbury may not be responsible for funding an IEE pursuant to *In Re: Arnold and the Brockton and Weymouth Public Schools*.[6]

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[5] The "school of origin" is the school that the child attended before becoming homeless.

[6] I do not reach the issue here of whether this case is distinguishable from *Arnold* based on differences in the fact patterns in the two cases.

There is a genuine issue of material fact with respect to Parents' and Student's residency and homelessness status which cannot be resolved by an examination of the relevant documents, and must be addressed at an evidentiary hearing. The parties have scheduled a mediation for June 4, 2020. The parties are directed to report on June 5, 2020 whether or not they have reached resolution.

## CONCLUSION AND ORDER

For the reasons stated above, Sudbury Public Schools' Motion for Summary Judgment is DENIED.

By the Hearing Officer,

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Sara Berman
Dated: May 28, 2019