

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

In Re: Student & Waltham Public Schools

BSEA #2208477

**RULING ON WALTHAM PUBLIC SCHOOLS' MOTION TO JOIN BELMONT
PUBLIC SCHOOLS**

This matter comes before the Hearing Officer on the Waltham Public Schools' (Waltham) *Motion to Join Belmont Public Schools (Motion)*, filed with the BSEA on May 5, 2022. Waltham seeks joinder of the Belmont Public Schools (Belmont) as a necessary party pursuant to Rule I(J) of the Bureau of Special Education Appeals (BSEA) *Hearing Rules for Special Education Appeals (Hearing Rules)*. Specifically, Waltham submits that under the provisions of 603 CMR 28.10(2)(a)(2), should Parents prevail with their request for an out-of-district day placement of Student, then both Waltham and Belmont would equally share programmatic and fiscal responsibility for said placement, and thus, complete relief cannot be granted in this matter in the absence of Belmont. Waltham submits that Student's Mother resides in Waltham, Student's Father resides in Belmont, and Student divides his time between the households of both Mother and Father, who are divorced but share legal and physical custody. As such, Waltham seeks joinder of Belmont as a necessary party.

On May 19¹, 2022, Belmont filed its *Objection to Waltham Public Schools' Motion to Join Belmont Public Schools (Objection)* arguing that 603 CMR 28.10(2)(a)(2) is inapplicable here as Student does not actually reside with Father in Belmont. Rather, Father advised Belmont that Student lives with Mother in Waltham and only "occasionally" stays with Father in Belmont².

Thereafter, on May 24, 2022, Waltham supplemented its position by filing a copy of a portion of the 2017 divorce and custody agreement between the Parents as Exhibit E to the *Motion*.

¹ On May 6, 2022, Belmont initially responded to the *Motion* challenging it as incomplete due to Waltham's failing to provide Belmont with various pleadings, pursuant to the provisions of *BSEA Standing Order 20-02*. Thereafter, on May 6, 2022 Waltham filed *Supplemental Exhibits C and D* to its *Motion*. On May 11, 2022, Belmont again responded asserting the *Motion* remained incomplete and non-compliant with *BSEA Standing Order 20-02* due to allegedly additional missing pleadings that Waltham had failed to provide to Belmont. Thereafter, on May 11, 2022, the parties communicated further and confirmed no other pleadings were missing, but the confusion was caused by a typographical edit on the *Hearing Request* form filed by Counsel for the Student and his Mother. The parties also agreed that Belmont would file its *Objection*, if any, by May 19, 2022. Although May 19, 2022 was more than seven (7) calendar days from May 11, 2022, I find such longer time to be warranted. *Hearing Rules VI(C)*.

² Additionally, Belmont questioned whether Father is a party to this matter (due to the *Hearing Request* referring to "Parents" although the cover letter filing the *Hearing Request* noted this was being filed on behalf of "the student and the student's mother" in this matter). If Father is not a party, Belmont contended, a procedural issue would be raised by joining Belmont. However, on May 25, 2022, at the request of the Hearing Officer, Counsel for Parents confirmed he represents both Mother and Father in this matter.

On May 25, 2022, at the request of the Hearing Officer, the parties also participated in a telephonic Motion Hearing. During this Motion Hearing, Parents confirmed that they were not taking any position on the *Motion*. Waltham maintained its request for joinder of Belmont and Belmont maintained its objection. The parties were provided with the opportunity to supplement their respective positions by submission of further documents or affidavits through the close of business on May 26, 2022. No further documents were submitted.

For the reasons articulated below, the District's *Motion* is **ALLOWED**, and Belmont is joined as a necessary party in this matter.

FACTS

The following facts are not in dispute and are taken as true for the purposes of this *Ruling*, only. These facts may be subject to revision in subsequent proceedings.

1. Student is 10 years old, currently attending the fourth grade at Fitzgerald Elementary School in Waltham, Massachusetts, where he is placed in the LINC program, pursuant to an IEP. Student presents with Specific Learning Disabilities in the areas of reading, writing and math. The LINC program is described as a "partial inclusion language-based program" that provides a "... systemic, multi-sensory approach to reading, written expression, and mathematics in a small group setting with opportunities for practice and review of students' skills at a modified pace outside of the general education setting." Student's eligibility for special education and related services, and his disability category are not at issue in this matter. (*Hearing Request; Response to the Hearing Request (Response)*).
2. At all times relevant to these proceedings, Student's Mother and Father have been divorced. Student's Mother lives in Waltham, and Student's Father lives in Belmont. (*Hearing Request*).
3. Parents share legal custody of Student and his sibling. Their 2017 custody agreement also provides that the Parents shall have,

"shared and equal (50-50) physical custody of both children[, h]owever for residency purposes only, the children shall reside with the [Mother and t]he parties intend to co-parent and that would normally be 60 – 40 ([Mother/Father]) during the school year and (and because the [Father] is a school teacher) 50 – 50 when school is not in session." (*Hearing Request; Motion, Exhibit E*).
4. According to Belmont, its Assistant Director contacted Father, and was advised that Student resides with Mother in Waltham and only "occasionally" stays with Father in Belmont. Father does not consider Student to reside or live with him in Belmont. (*Objection*).
5. According to Parents, Mother advised her attorneys that Student spends every other weekend and two nights per week (which vary between Tuesday and Wednesday or Wednesday and Thursday, depending on Mother's work schedule) at Father's house. Additionally, as Father

is a schoolteacher, Student spends more time with Father during school vacation weeks and the summer break.

6. At all times relevant to these proceedings, Student has been enrolled in the Waltham Public Schools. Student has never been enrolled in the Belmont Public Schools or attended school in Belmont. (*Motion; Objection*).
7. Student's current IEP dated 11/16/2021 to 11/16/2022 calls for Student to be placed in a partial inclusion program (the LINCS program) at Fitzgerald Elementary School in Waltham. Parent fully accepted this IEP as developed and consented to the placement on December 20, 2021. (*Hearing Request; Response*).
8. The previous IEP, dated 8/31/2021 to 11/24/2021, as revised through June 1, 2021, also provided for Student to be placed in a partial inclusion program (the LINCS program) at Fitzgerald Elementary School. This revised IEP was fully accepted, and the proposed placement was consented to on June 10, 2021. (*Hearing Request; Response*).
9. In March 2022, Cathy Mason, M.Ed. conducted an independent educational evaluation of Student, including an observation of Student in the LINCS program on March 2, 2022. Ms. Mason concluded that the LINCS program was not appropriate for Student, instead recommending that he be placed in a "full-time, language-based program delivered in small classes with language-based instruction integrated throughout the curriculum." (*Hearing Request*).
10. Parents filed their *Hearing Request* on March 24, 2022, requesting, among other relief, that Student be placed at Landmark School for the 2022-2023 school year. (*Hearing Request; Response*).
11. Waltham maintains that the proposed services and placement are appropriate and provide Student with a free appropriate public education (FAPE). (*Response*).

LEGAL STANDARD

Rule I(J) of the *Hearing Rules* states that,

"Upon written request of a party, a Hearing Officer may allow for the joinder of a party in cases where complete relief cannot be granted among those who are already parties, or if the party being joined has an interest relating to the subject matter of the case and is so situated that the case cannot be disposed of in its absence. Factors considered in determination of joinder are: the risk of prejudice to the present parties in the absence of the proposed party; the range of alternatives for fashioning relief; the inadequacy of a judgement entered in the proposed party's absence; and the existence of an alternative forum to resolve the dispute."

To properly analyze a joinder request of another school district in which one of the custodial parents of the student resides, I must also consider the legal requirements establishing school district responsibility³. Generally, school district programmatic and fiscal responsibility for special education students who attend in-district educational programs and reside with one or both custodial parents, regardless of whether or not the custodial parents live in the same community, is based on both residency and enrollment⁴. However,

“[w]hen a student who requires an out-of-district placement to implement his or her IEP lives with both of his or her parents during the school year, irrespective of school vacation periods, and the parents live in two different Massachusetts school districts, the school districts where the parents reside shall be equally responsible for fulfilling the requirements of 603 CMR 28.00⁵.”

With these statutory and procedural requirements in mind, I turn to consider Waltham’s *Motion*.

APPLICATION OF LEGAL STANDARD

Here, Waltham is requesting joinder of another school district, Belmont, in a matter concerning a dispute over whether Student requires an out-of-district language-based day program to receive FAPE, or whether the currently proposed IEP satisfies the FAPE standard. While Waltham disputes the need for Student to be educated in an out-of-district day program, it submits that if Parents were to prevail at Hearing, then, because Student resides with both Father in Belmont and Mother in Waltham during school weeks, Belmont would share programmatic and fiscal responsibility for this out-of-district placement pursuant to 603 CMR 28.10(2)(a)(2).

Although Belmont disputes the factual allegations as to the amount of time Student is residing with Father during the school week, it agrees that if Student is actually living equally with his Father during the school weeks, it would be legally obligated to share responsibility for any out-of-district day placement with Waltham that Student may be determined to need, after a Hearing on the merits. Belmont relies upon the conversation of its Assistant Director with Father, to the effect that Student only “occasionally” stays with him during the school week. Additionally, Belmont relies on the language of the Parents’ divorce and custody agreement that states that “for residency purposes only, the children shall reside with the [Mother]”. If no other facts were alleged to the contrary, this type of an arrangement would seem to weigh against joinder of Belmont. However, Parents, through Mother, have advised that Student actually spends every

³ 603 CMR 28.10.

⁴ 603 CMR 28.10(2)(a)(1).

⁵ 603 CMR 28.10(2)(a)(2); see *George H. and Irene L. Walker Home for Children, Inc. v. Franklin*, 416 Mass. 291, 297 (1993), holding “... the assignment of fiscal responsibility [by DESE] is limited to the question of determining where a child resides” (internal citation omitted); *Administrative Assistance Advisory SPED 2018-3, Appendix B, Summary of Assignment of School District Responsibility Under 603 CMR 28.10 – General Provisions*, advising, “responsibility is shared between two districts if the student has an out-of-district placement *and* parents reside in two different districts *and* the student actually resides with both parents. Responsibility is *not* shared if student is with one parent only on weekends or during school vacation periods – this is not evidence of actually residing with one parent.” (Emphasis in original, internal citation omitted).

other weekend and two school nights each week with Father during the school year; a division of time that would support joinder of Belmont⁶. Although, Belmont was given an opportunity to supplement its position with additional documentation or Affidavit information, it did not do so.

At this juncture, I place greater weight on Parents' explanation, provided by Mother through Parents' counsel, as to Student's current residency arrangement with Father and Mother during the school year, than on the reported conversation between Belmont's Assistant Director and Father. However, I recognize that none of the information currently before me on this issue was made under oath. Thus, should further sworn testimony during the Hearing prove to elicit a living arrangement different from that described by Mother through counsel in the instant proceeding, I will reconsider my position on joinder of Belmont.

All the factors to be considered for joinder support joinder of Belmont now, subject to reconsideration, rather than later after a further hearing on the merits. Joining Belmont in this matter mitigates the risk of prejudice to the present parties and ensures that the full range of alternatives for fashioning relief is available so that an adequate judgement may be entered. Assuming my conclusion as to Student's residency does not change after a hearing on the merits, if I were to conclude that Student requires an out-of-district day placement in order to receive a FAPE, if Belmont were not a party, I would be unable to order full relief under the law for programmatic and fiscal responsibility for that placement. Belmont's party status at this time provides options for relief which would not otherwise be available in its absence. At present, credible information pertaining to Student's living arrangement supports joinder of Belmont. Joining Belmont at this stage provides Belmont an opportunity to be fully involved in the hearing on the merits, including, but not limited to, vetting Student's current living arrangement with Father.

Thus, Waltham's *Motion* is hereby **ALLOWED**, and Belmont is ordered to be joined as a party to this matter, subject to reconsideration as set forth in this Ruling.

Accordingly, the above-referenced matter will proceed with the Parents, Waltham and Belmont, as follows:

1. The Hearing will take place on June 10, 14 and 15, at the Bureau of Special Education Appeals, 14 Summer Street, 4th Floor, Malden, MA 02148. It will begin at 10:00 a.m.
2. The Parties will participate in a further Conference Call on June 1, 2022, at 8:00 a.m. The Parties are instructed to call the following phone number: 1-877-820-7831 at that time and enter the following passcode when prompted: 721959#.
3. Exhibits and witness lists are due by the close of the business day on June 3, 2022.

The parties are reminded that all requests for postponement must be in writing and specify the reasons for requesting the postponement and the length of the postponement desired/agreed upon. Should the parties reach a settlement agreement prior to the Hearing, the moving party shall submit a written withdrawal of the hearing request. Failure to appear at the Hearing may result in dismissal of the matter with or without prejudice.

⁶ See *Walker Home for Children, Inc.*, 416 Mass at 296.

All requests for a stenographer must be made in writing.

So Ordered by the Hearing Officer

/s/ Marguerite M. Mitchell

Marguerite M. Mitchell

Dated: May 27, 2022