

**COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS**

Worcester Public Schools v.
Fitchburg Public Schools &
the Department of Elementary and Secondary Education

BSEA #1709036

DECISION

This decision is issued pursuant to M.G.L. c. 71B, 30A, and the regulations promulgated under said statutes.

By agreement of the parties, this matter was decided on the documents without an evidentiary hearing pursuant to BSEA Hearing Rule 11A.

The official record consists of Worcester Public Schools' (Worcester's) Appeal of LEA Assignment Hearing Request, The Department of Elementary and Secondary Education's (DESE's) Updated Assignment of School District Responsibility, Worcester's Position Statement Regarding the Appeal of the Updated Assignment of School District Responsibility, Fitchburg Public Schools' (Fitchburg's) Memorandum of Law in Opposition to Worcester Public Schools' Appeal of Updated Assignment of School District Responsibility, and DESE's letter to the Hearing Officer dated April 18, 2018. All Parties' submissions were received by the BSEA on or before the established deadline of September 10, 2018 and the record closed at that time.

ISSUE

Worcester challenges DESE's Updated LEA Assignment and determination that it is solely fiscally responsible for Student's educational placement.

SUMMARY OF THE EVIDENCE

1. DESE issued an Updated Assignment of School District Responsibility on April 7, 2017. DESE found as follows:
 - Student has been placed by DCF at the Germaine Lawrence group home in Arlington, MA as of 9/29/2016.
 - Student's mother's parental rights were terminated on April 13, 2012. She lived in Fitchburg, Massachusetts at that time.
 - Father's current whereabouts are unknown. His last known address was in Worcester, Massachusetts. DCF reported that Father's last contact at that address was on or around 2015.

- Student has an IEP (which is Student’s initial IEP) written by the Arlington Public Schools identifying a separate private out-of-district day school placement with a location to be determined.
 - Student last attended Arlington High School from October 2016 through December 2016. She has been receiving tutoring services at the group home.
 - DESE determined that the applicable regulation is 603 CMR 28.10(4)(b) which states *the school district where the parent(s) or legal guardian resides shall have financial responsibility and the school district where the student resides shall have programmatic responsibility when a student is in ..a group home..(b)..the school district where the parent(s) or legal guardian resides shall pay the tuition costs for the student’s IEP program directly to the out of district school, and such other payments as may be required to other individuals or entities that provide services required by the student’s IEP.*
 - DESE further found that pursuant to 603 CMR 28.10(8)(c)(7) *if the student’s parent(s) ...whereabouts are unknown...the school district of the last known Massachusetts residence of the student’s parent(s) ...shall be responsible.*
 - DESE assigned programmatic responsibility to Arlington, where the student resides and fiscal responsibility to Worcester. It stated that student’s mother’s last residence is not implicated because her rights were terminated several years before the student’s father’s whereabouts became unknown. Therefore, DESE reasoned, under 28.10(8)(c)(7), “we look to the residence of the last known parent.”
2. On April 24, 2017, Worcester appealed DESE’s determination to the BSEA and argued that Fitchburg, Mother’s last known address prior to the termination of her parental rights, should share financial responsibility.
 3. Worcester requested postponements of the BSEA hearing in order to conduct discovery and to hire a private investigator to determine where Student’s father lived during the time period relevant to DESE’s determination.
 4. On or around February 5, 2018, Worcester submitted its request for Clarification of School District Assignment to DESE. Along with DESE’s required forms, it submitted recent IEPs and related documentation and an affidavit of a private investigator who was hired by Worcester to investigate the whereabouts of Student’s father. The Affidavit stated the following:
 - He was hired by Worcester on or about December 7, 2017.
 - He investigated the whereabouts of Student’s father “through both public access and limited access database searches, direct interviews and physical surveillance.”

- “Based on information and belief, during part of calendar year 2013, [father] resided at [address] in Gardner, MA.”
 - “Based on information and belief, from August 2013 to December 2014, [father] resided at [address] in Gardner, MA.”
 - “Based on information and belief, during part of 2015, [father] resided at [address] in Athol, MA.”
 - “Based on information and belief, [father] is currently residing with [name] in Fitchburg, MA.”
 - “Based on information and belief, [father] has never resided at [address] in Worcester, MA.”
 - The affidavit was signed under the pains and penalties of perjury on February 2, 2018
5. On February 8, 2018, DESE issued LEA Assignment Alerts to Fitchburg and Athol Public Schools indicating that it had received a request for assignment which indicated that the aforementioned districts may be programmatically or fiscally responsible. The Assignment Alert provided the districts with a list of the facts provided by Worcester and requested that each district forward any additional information to DESE.
6. Counsel for Athol responded by letter dated February 13, 2018 and requested an extension until February 2, 2018 to file its response. On February 22, 2018, Athol’s counsel submitted a response to the LEA Assignment Alert. It submitted an Affidavit from the Administrative Assistant to the director of Pupil Services at Athol-Royalston Regional School District. The Affidavit stated the following:
- [Student] informed her Athol Middle School guidance counselor that after her mother’s parental rights were terminated, she lived with her stepfather in Worcester, MA.
 - Student attended middle school in Worcester until DCF removed her from her stepfather’s home in 2014.
 - In August 2014 Student began living with a foster parent in Athol, MA.
 - From August 2014 until June 2015 Student attended Athol-Royalston Middle School.
 - She attended Athol-Royalston High School from August 2015 until October 21, 2016.
 - In or around September 2016 Student was placed at a group home in Arlington, Massachusetts. Arlington wrote an IEP for Student providing for an out of district private day school beginning in December 2016.
 - Athol-Royalston was never invited to any Team meetings regarding the placement or informed of the placement until it received the LEA Assignment Alert.
 - The Athol-Royalston School District Resource Officer spoke to the Fitchburg Police Department and informed the affiant Student’s father

had lived at a particular Fitchburg address since December 2017 and lived at another address in Fitchburg prior to that date.

- The affiant unsuccessfully attempted to contact Student's father. The Athol Police told the affiant that the Fitchburg Police Department told them that Student's father's listed telephone number had been disconnected. (Athol's Exhibit A)

7. Athol-Royalston also submitted an Affidavit of the Director of Pupil Services for the Athol-Royalston Regional School District. She stated as follows:

- Prior to August 2014 Student lived with her stepfather in Worcester.
- In or around August 2014, Student began living with a foster parent in Athol, MA.
- When Student attended the Athol-Royalston Regional School District from 2014 through 2016, she was not receiving special education services or services under a 504 plan. There had been no request for an eligibility determination.
- In or around September 2016 Student was placed at a group home in Arlington and was placed at an out of district private day school placement in December 2016.
- Athol-Royalston School District was never invited to any Team meetings regarding Student's placement and was not informed of the placement until it received the LEA Assignment Alert.

8. On April 16, 2018, counsel for DESE sent a letter to the Hearing Officer updating her regarding the status of the Updated Assignment of School District Responsibility. He indicated that DESE had determined that the new information supplied by Worcester did not change the outcome of the assignment issued on April 7, 2017. He noted the following:

- Because Student's mother's parental rights were terminated in 2012, the issue in the case involves the whereabouts of Student's father at the time when Student was first found to be eligible for special education services, in February of 2017.
- At the time Student was found to be eligible, Student's father lived at an address in Worcester (between October 2015 and January 2016.) The information regarding Student's father's address was provided to DESE by an email from an education coordinator from the Massachusetts Department of children and Families.
- On that basis, DESE assigned fiscal responsibility to Worcester for Student's special education services.
- In its new request for clarification of LEA assignment Worcester provided incomplete and unverified information about Student's father's whereabouts.
- Worcester provided an affidavit from an investigator who affirmed "[b]ased on information and belief, [Student's Father] is currently

residing with [name] in Fitchburg, MA” and [b]ased on information and belief, [Student’s Father] has never resided at [address] in Worcester.”

- Worcester’s request for clarification did not include any additional documents or evidence to support the investigator’s findings.
- In response to an LEA Assignment Alert DESE sent to Athol, it received a letter from Athol stating that Student’s father “is believed to currently reside in Fitchburg” and, speculating that Student’s father may have moved to Fitchburg prior to December 2016.
- Like Worcester’s request for clarification, Athol’s response did not supply any specific dates in support of the allegation that Student’s father had moved.
- DESE cannot base its assignment on “information and belief” or the type of speculation supplied in Worcester’s request for clarification or Athol’s letter to DESE.
- Given the limited availability of reliable evidence in this case, and the absence of input from Fitchburg, DESE cannot determine whether the claims about Student’s father’s whereabouts from Worcester and Athol are groundless or incorrect. However, without more than an allegation that Student’s father likely moved in with his girlfriend in Fitchburg at an unknown time, there is not a sufficient basis upon which DESE can update a previously issued assignment.
- Absent additional detail and some supporting evidence, DESE cannot amend its prior assignment nor issue a new assignment that transfers financial responsibility.
- To be impartial, fair, and accurate, DESE must affirm its prior assignment. “To do otherwise would likely increase, rather than diminish the confusion as to father’s whereabouts and would undoubtedly perpetuate the pendency of this appeal.”

FINDINGS AND CONCLUSIONS

Worcester seeks to overturn DESE’s determination that it is fiscally responsible for Student’s education because it was the place of Student’s father’s last known address. It argues that Mother’s last known address should also be considered despite the fact that her parental rights were terminated before Student was deemed eligible for special education services. It argues that Fitchburg, Student’s mother’s place of residence before her parental rights were terminated, should be jointly fiscally responsible for Student’s special education services. Further, it points to Worcester’s recent investigation concerning Student’s father’s residence and the Affidavit of the professional investigator which concluded that Student’s father had never lived at the Worcester address relied upon by DESE and subsequently lived in Gardner, Athol and most recently in Fitchburg. As discussed below, Worcester’s argument is not persuasive.

In making its Updated Assignment of School District Responsibility, DESE relied upon 603 CMR 28.10(4)(b), which states in relevant part,

The school district where the parent(s) or legal guardian resides shall have financial responsibility and the school district where the student resides shall have programmatic responsibility when a student is in a living situation other than that described in 603 CMR 28.10(2) or (3) including but not limited to a relative's home that is not funded by the Department of Social Services, a foster home funded by the Department of Social Services that is located outside of Massachusetts, or a group home, a residence or crisis or respite facility funded or supervised by a state agency.

(b) When such a student is served in an out-of-district program, the school district where the parent(s) or legal guardian resides shall pay the tuition costs for the student's IEP program directly to the out-of-district school, and such other payments as may be required to other individuals or entities that provide services required by the student's IEP.

DESE also relied on 603 CMR 28.10(8)(c)(7), which reads,

If the student's parent(s) or legal guardian does not reside in Massachusetts, and the parent's or legal guardian's whereabouts are unknown, the school district of the last known Massachusetts residence of the student's parent(s) or legal guardian who lived in Massachusetts shall be responsible.

Worcester's argument that Mother's last known residence should have also been taken into account when making the LEA Assignment is unpersuasive. It argues that DESE should have applied 603 CMR 28.10(8)(c)(1) which reads

If the child has been voluntarily surrendered for adoption or freed for adoption by the Probate Court or the Juvenile Court, the school district(s) where the parent(s) lived at the time that the child was surrendered or freed for adoption or when parental rights were terminated shall be responsible.

The regulation is not applicable to the current situation however, as Student was not voluntarily surrendered or freed for adoption. Only Student's mother's parental rights were terminated. Father's parental rights remained intact and thus this regulation is inapplicable. In fact, Mother's parental rights were terminated in April 2012, approximately four and one half years before Student was even found to be eligible for special education and thus, there would be no reason for looking to Student's mother's residence.

Lastly, Worcester argues that the additional information it submitted with its February 5, 2018 Request for Clarification of School District Assignment and the Affidavits submitted by Athol show that Student's Father's residence is currently Fitchburg. Therefore, it argues, Fitchburg should be fiscally responsible for Student's special education services. However, I find, as DESE found, that the aforementioned evidence is unreliable and therefore does not impact DESE's determination.

The Affidavit submitted by Worcester's private investigator is not reliable for a number of reasons. Aside from the fact that the unique spelling of Student's father's name is incorrect in the investigator's Affidavit, virtually every statement that he makes is "[b]ased upon information and belief." He states that he utilized public and limited access database searches, but does not provide any documentation of his searches. He states that he utilized "direct interviews," but does not identify the interviewees or what information he obtained from his interviewees. He states that he conducted "physical surveillance," but does not describe what he observed, when he observed it, or what information he gleaned from his observations. His affidavit does not contain any evidence of the kind that would be relied upon in an evidentiary hearing and I am unable to rely upon it in any manner.

The Affidavits submitted by Athol-Royalston contain more detail, but are similarly unreliable. The administrative assistant to the Director of Pupil Services' Affidavit states that after the Athol-Royalston Schools' Resource Officer spoke with the Fitchburg Police Department, she was informed by the Resource Officer that Student's father lives in Fitchburg. There is no affidavit from the School Resource Officer with respect to his/her purported conversation with the Fitchburg Police Department, nor is there an Affidavit from the Fitchburg officer who allegedly provided this information to the Resource Officer. There is only hearsay evidence that is not sufficiently reliable to be utilized by the undersigned.

Having reviewed all of the information that DESE had available when it upheld the April 7, 2017 Updated LEA Assignment in its April 16, 2018 letter to the Hearing Officer, and having determined that Worcester has not submitted any reliable evidence which would provide a basis for overturning DESE's assignment, I affirm its determination that Worcester is fiscally responsible for Student's special education services.

ORDER

DESE's determination that Worcester is fiscally responsible for Student is upheld.

By the Hearing Officer,

Catherine M. Putney-Yaceshyn

Dated: October 31, 2018