

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In Re: Student

&

Neighborhood House Charter School

BSEA #1909934

**RULING ON MOTION OF NEIGHBORHOOD HOUSE CHARTER SCHOOL TO JOIN
BOSTON PUBLIC SCHOOLS AS A NECESSARY PARTY¹**

On April 24, 2019, Parent filed a request for hearing with the Bureau of Special Education Appeals (BSEA) alleging that at relevant times, the IEP and services provided by the Neighborhood House Charter School (NHCS) had failed to provide Student with a free, appropriate public education (FAPE). Parent had unilaterally placed Student at the Learning Prep School (Learning Prep or LPS) in Newton, MA in August 2018, and, in her hearing request, sought an order from the BSEA directing NHCS to reimburse her for tuition and related costs of the Learning Prep placement for the 2018-2019 school year as well as to prospectively fund Student's placement LPS for the 2019-2020 school year. On May 1, 2019, NHCS filed a response to the Parent's hearing request as well as the instant *Motion to Join Boston Public Schools As a Party*. (*Motion*) On May 8, 2019 Boston Public Schools (Boston or School) filed an Opposition to the *Motion* of NHCS. Hearing dates have been established for August 20, 21 and 22, 2019.

Factual Background

The following factual assertions are taken from the parties' submissions and are deemed to be true for purposes of this *Ruling*. Student is an eleven-year-old resident of Boston who has never attended any public school operated by BPS.² Rather, Student has attended NHCS from the 2012-2013 school year, when she entered Kindergarten, until approximately August 2018, when she began attending LPS pursuant to a unilateral placement by Parent.

NHCS found Student eligible for special education services and provided her with an Individualized Education Program (IEP) during the 2015-2016 school year, when she was in second grade, calling for a full inclusion placement. Student continued to receive full inclusion services, with increasing pullouts for speech/language and reading

¹The Hearing Officer gratefully acknowledges the contributions of BSEA Intern Megan Resnik in researching and drafting this Ruling.

²Parent initially enrolled Student in BPS in January 2012, but Student never actually attended a BPS school, and Boston classified her as "inactive" shortly thereafter. Student has never attended a school operated by BPS. Rather, she has continuously attended NHCS until her unilateral placement at LPS.

services, through third grade. In August 2017, NHCS proposed an IEP with a partial inclusion placement for Student's fourth grade year (2017-2018). Parent partially rejected this IEP for omission of decoding objectives. In November 2017, NHCS conducted a three-year evaluation of Student, and proposed a new IEP covering the period from November 2017 to November 2018 which made certain changes to Student's services and returned her to a full-inclusion placement. Parent accepted additional counseling services, but rejected reductions and changes in other services.

In June 2018, the Student's Team met to discuss the rejected portions of the IEP issued in November 2017. A representative from Boston attended the meeting. On or about August 10, 2018, Parent notified NHCS that she intended to place the Student at Learning Prep for the upcoming 2018-2019 school year, and would seek reimbursement from NHCS. At the time of such notice, Parent had not yet received a proposed IEP or amendment from NHCS pursuant to the June 2018 Team meeting. On or about August 17, 2018, approximately one week after Parent informed NHCS of her intent to unilaterally place Student at Learning Prep., NHCS issued an IEP proposing a full-inclusion placement within NHCS for the 2018-2019 school year. On August 29, 2018, Parent rejected this IEP on the grounds that it did not propose a substantially separate language-based program. Student began attending LPS in August 2018. At some time in August 2018, Parent declined to enroll Student in BPS.

Positions of the Parties

Position of Neighborhood House Charter School (NHCS)

Citing 603 CMR 28.10(6), which states that "a program school³ shall have programmatic and financial responsibility for enrolled students," NHCS argues that programmatic and financial responsibility for Student automatically shifted to Boston as Student's district of residence when Parent unilaterally placed her at Learning Prep., thereby "unenrolling" her from NHCS.

Position of Boston Public Schools (BPS)

School districts are programmatically and financially responsible for eligible students based on residency and enrollment. Although Student is a Boston resident, she has not been actively enrolled in BPS since 2012 and has never attended a school operated by BPS; therefore, BPS has no programmatic or financial responsibility for Student's special education services.

Position of Parent

Parent takes no position on whether or not Boston should be joined as a party.

³A "program school" is defined by 603 CMR 28.02 as "the school in which the student is enrolled according to the provisions of MGL c. 71, §89 (charter schools); MGL c. 71, §94 (Commonwealth of Massachusetts virtual schools); MGL c. 74 (vocational schools); MGL c. 76 §12A (METCO), or MGL c. 76, §12B (school choice)...."

Legal Framework

Rule I.J. of the *Hearing Rules for Special Education Appeals (Hearing Rules)* allows a hearing officer to join a person or entity as a party to a special education appeal upon the written request of an existing party where: “complete relief cannot be granted among those who are already parties, or the person 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 their absence.” *Id.* This Rule lists the following factors to be considered in determining whether a person or entity should be joined: “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 judgment entered in the proposed party’s absence; and the existence of an alternative forum to resolve the issues.” *Hearing Rules*, Rule 1(J).

Whether these criteria are met in the instant case turns on whether Boston has actual or potential programmatic or fiscal responsibility for Student under statutory and regulatory provisions allocating responsibility for special education students enrolled in charter schools. The pertinent statute, MGL c. 71, § 89(s), establishes that a charter school in which an eligible child is enrolled is responsible for the child’s special education services unless the child is enrolled in, or is deemed by the IEP Team to need, a private day or residential school, as follows:

“Charter schools shall comply with the Chapters 71A and 71B; provided, however, that the fiscal responsibility of a special needs student currently enrolled in or determined to require a private day or residential school shall remain with the school district where the student resides. If a charter school expects that a special needs student currently enrolled in the charter school may be in need of...a private day or residential school, it shall convene an individual education plan team meeting for the student. Notice of the team meeting shall be provided to the...school district in which the child resides at least 5 days in advance. Personnel from the school district in which the child resides shall be allowed to participate in the team meeting concerning future placement of the child.” *Id.*

The corresponding regulation, 603 CMR 28.10(1) states, generally, that “[s]chool districts shall be programmatically and financially responsible for eligible students based on residency and enrollment.” With respect to program schools, including charter schools, the regulation provides that “a program school shall have programmatic and financial responsibility for *enrolled* students...” *Id.* (Emphasis supplied). Such responsibility does not terminate when the student is deemed to have “unenrolled;” rather, under 603 CMR 28.10(1)(d), “[a]ny school district deemed responsible for a student under 603 CMR 28.10 shall continue responsibility for such student until another school district is deemed responsible under 603 CMR 28.10.

The exception to this rule arises, as stated in the statute, when the charter school student “is currently enrolled in or is deemed to require an out-of-district placement.” MGL c. 71, §89(s), *supra*.⁴ The statute and corresponding regulations at 603 CMR 28.10(6)(a) provide that when a program school student’s IEP team determines that the student may need an out-of-district placement, “the Team shall conclude the meeting ... and notify the school district where the student resides...” 603 CMR 28.10(6)(a). The program school then must schedule a placement meeting, and invite members from the district of residence to participate.⁵ If the placement team concludes that an out-of-district placement is necessary, programmatic and financial responsibility returns to the school district of residence upon parental acceptance of the IEP and placement. 603 CMR 28.10(6)(a)(3).

Neither scenario is applicable here. First, with respect to enrollment, the parties’ submissions show that Student has never attended a BPS school, despite an initial enrollment in 2012 that became “inactive” shortly thereafter. Rather, Student has been continuously enrolled at NHCS from 2012 until her unilateral placement at LPS. Moreover, Parent refused to enroll Student in the BPS in August 2018.

Second, BPS did not acquire responsibility for Student as a result of her enrollment at LPS pursuant to 603 CMR 28.10(a)(6) because the Team has never suggested or prescribed an out-of-district placement for Student. On the contrary, the IEP Team has consistently maintained that NHCS could provide Student with FAPE, and Student’s most recently-rejected IEP called for a full-inclusion placement within NHCS. Thus, the procedures for shifting responsibility to BPS under 603 CMR 28.10(6)(a) are not applicable here.

Based on the foregoing, the criteria for joinder set forth in Rule I(J) have not been met, in that complete relief can be granted among the existing parties. The Motion of NHCS to join Boston Public Schools as a party in this matter is DENIED.

By the hearing officer

⁴ I do not interpret the statutory reference to children “currently enrolled” in a private special education school to apply to the instant case; rather, it would appear to refer to children who are enrolled in such schools at the time of initial enrollment in a charter school. Otherwise, there would be no need for the regulatory process for transferring responsibility to districts of residence set forth in 603 CMR 28.10(6)(a).

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The Team meeting for such a placement must “consider if the school district where the student resides has an in-district program that could provide the services recommended by the team...if the placement Team...determines that the student requires an out-of-district program to provide the services identified on the student’s IEP, then the proposed placement will be an out-of-district day or residential school, depending on the student’s needs.” 603 CMR 28.10(6)(a)(2-3). As per 603 CMR 28.06(2)(f), if the Team designates an out-of-district placement, the Team must state its basis for concluding that the education of the student in a less restrictive environment, with the use of supplementary aids and services, could not be achieved satisfactorily.

Sara Berman
June 14, 2019