LEGAL ISSUES RELATED TO THE START OF THE SCHOOL YEAR: RESIDENCY & HOME SCHOOLERS

With the beginning of the school year, it is a good time to review some basic considerations about 1) Student residency giving rise to a right to attend school and, 2) The process for reviewing applications for Home Schooling.

These notes are intended to be helpful in identifying some rules or factors to be considered but, as each case is different, the precise facts should be reviewed by School District Counsel. This memorandum does not constitute legal advice.

I RIGHT TO ATTEND SCHOOL TIED TO RESIDENCY OF STUDENT

A. M.G.L. c.76 §5 establishes a right to attend school based on where the student resides. The law states:

> *Every person shall have a right to attend the public schools of the town where he actually resides, subject to the following section. No school committee is required to enroll a person who does not actually reside in the town unless said enrollment is authorized by law or by the school committee. Any person who violates or assists in the violation of this provision may be required to remit full restitution to the town of the improperly-attended public schools. No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, religion, national origin or sexual orientation.*

Sometimes educators and parents confuse the practical concept of residency for purposes of school attendance with the more legalistic principle of residence for purposes of establishing a domicile, which may lead the establishment of rights such as voting or receipt of financial assistance. The law allows a student to attend the schools of a community "where he actually resides." A residence or domicile is a place or location where an individual is physically present and where he intends to make his or her home for some time. A child generally cannot establish his or her own residency. The child's residency is generally "the same as the domicile of the parent who has physical custody." No matter how much a parent may wish to establish a particular city or town as a domicile, parental intent does not control the final determination. See, Teel v. Hamilton-Wenham School District, 13 Mass. App. Ct. 345, 349 (1982). (Town boundary lines pass through a home; residency for purposes of attending school in part determined by where in house student slept.) Often the decision on residency is made based simply on where a child spends most nights of the week.

The rules are generally applicable for Special Education Students, but regulatory complexities require consideration before residency is established for programmatic or financial responsibility where students are attending residential schools or are in the custody of a state agency. In such cases our court has observed that the students cannot be assigned as "residents"

of a community where they do not live. See G.H. Walker & I.L. Walker Home for Children, Inc. v. Town of Franklin, 416 Mass 291 (1993). The following discussion of recent cases is intended to help clarify the process for admitting students based on residency.

B. Case Law

1. Regular Education Students

Lydia D., et al v. Thomas W. Payzant, Suffolk Superior Court Civil Action No. 035847, 2004 WL 1147450, May 20, 2004

In December of 2003 the City of Boston excluded two pupils from Boston Latin School on the grounds that they did not reside in Boston. The students had enrolled as 7th graders in September of that year after taking the entrance examination as non-resident students. Their invitation to enroll was conditioned on the establishment of residency in the City of Boston by the end of July 2003. They satisfied the initial requirements for establishing residency.

Boston later became concerned that the students had not either established or maintained a residence in the city and initiated school department proceedings to bar attendance. The students then brought an action in Suffolk County Superior Court in December seeking a preliminary injunction barring BPS from excluding them pending a decision on the merits. The preliminary injunction in favor of the students entered, and the matter was scheduled for a final hearing on May 12, 2004.

A different judge later determined that Boston had relied on substantial evidence in concluding that the students were not residents, but that BPS had not provided sufficient notice to their parents prior to making the exclusion decision.

a. Where do the students reside?

Both students submitted affidavits identifying a current Boston address and acknowledged that, if they were found not to have established a residence in Boston they could be excluded. Although the students were unrelated, one student was renting a room from the other student at an address on Commonwealth Avenue. When BPS made telephone contact with that address the father of one child answered and indicated that the mother of the other child was not present. Administrators immediately called the mother of the other child at a number listed on a contact sheet. The number was an Arlington, Massachusetts telephone number. Administrators had also received an anonymous letter identifying these two students and a third student as non-residents.

In early December of 2003 administrators in Boston advised the parents that the students would not be permitted to continue attending Boston Latin School, notwithstanding that the Arlington parents had that day finalized the purchase of a condominium unit in Boston. The parents advised the chief operating officer of the Boston Public Schools of their recent purchase. They admitted they owned real estate in Arlington, and that they had rented a room on

Commonwealth Avenue in Boston where the child and her mother stayed. Utility bills provided by the parents indicated that less than the expected amount of electricity was being consumed at the condominium premises. Other information available to Boston included an affidavit of residency giving a BPS address, a Verizon telephone bill and an electric bill. According to the chief operating officer, he believed that the recently purchased condominium was not being occupied in any significant way.

The second student also maintained that he was living in Boston with another family. His parents would go back and forth between the Boston address and a home in Lincoln. Staff members at Boston Latin School determined that the student listed a Lincoln phone number on his cell phone under the heading of "home." Additionally, the student submitted a check for a fieldtrip payment which contained a Lincoln address and the names of both of his parents. Based on this evidence, Boston concluded that neither student was a resident and therefore not entitled to attend Boston Latin School.

b. Superior Court proceedings – Certiorari and Residence Analysis

The Superior Court judge hearing the motion for a preliminary injunction in December, and the second judge, later entering a final decision and order, observed that the parents had filed an action based on Chapter 249, Section 4, the Massachusetts statute authorizing challenges to otherwise final and un-reviewable governmental decisions. The action is referred to as a Petition for Certiorari. In a certiorari action, courts do not conduct de novo reviews of facts. Courts are confined to examining the record of the proceedings below, correcting errors of law by tribunals not otherwise subject to review, and affirming administrative decisions where there is substantial evidence to do so.

The court concluded that there was substantial factual evidence to support Boston's decision. The existence of substantial evidence means that reasonable people could differ on an evaluation of the evidence, or inferences to be drawn there from. The decision Boston, made, was however, supported by substantial evidence.

In this instance, the parents attempted to introduce additional information in the court proceedings which was not available to BPS when the initial decision was made in December of 2003. Because of the limited nature of a certiorari action the court refused to allow the parents to introduce additional information. Having explained the limited nature of its review in a certiorari proceedings, the court next considered the law of residency and responded to procedural due process claims raised by the parents.

The court concluded that both students had maintained ties to their communities of origin, Arlington and Lincoln, such that those communities continued to be the center of their domestic, social, and civil life. Using the logician's device of establishing the essence of a thing by defining or identifying that which it is not, the Superior Court observed that the record lacked any information, such as a change in driver's license, new addresses for car registration, car insurance, voter registration, employment or bank records, which would support the inference that an adult had actually changed a residence. Additionally, and although not dispositive of the issue, the family's lack of any participation in civic, religious, cultural or social organizations,

and the absence of a connection with healthcare providers or participation in an extra-curricular activities, gave rise to an inference that residency or domicile was not Boston.

c. Due Process

The parents must have been reeling from the conclusion that they could not submit additional evidence and that the court agreed substantial evidence existed to support BPS's determination.

Boston lost the war, however, when the court determined that BPS had deprived the students of due process prior to excluding them. Boston argued that, as the students were not residents, they were not entitled to due process prior to exclusion proceedings. The court observed that that conclusion "makes the procedure turn on the outcome," i.e. the ultimate question whether they were residents. As the Superior Court observed, the entitlement to procedural due process protections "depends on the nature of the interest at stake, not the merits of the contest." The interest in the case, of course, was an entitlement under state law to attend school. That interest triggers due process protections.

Minimal due process requires provision of oral or written notice of the charges, an explanation of the evidence the authorities have, and an opportunity to present the student's side of the story. The Superior Court extracted these principles from Goss v. Lopez, 419 U.S. 565 (1975), the famous due process case involving discipline of school pupils. As the Superior Court noted, the students were not without recourse as they could always attend schools of a town where they actually reside. The Court acknowledged that Boston's interest was "avoiding the burden of educating students not actually residing" in the city. Relying on an Illinois decision reviewing due process requirements and residency determinations, the Superior Court determined that the parents were entitled to notice of the allegation that the students were not residents, some prior explanation for the basis of the allegation, and an opportunity to present their side of the story. In this case, both sets of parents were notified of the BPS decision after administrators spoke with the pupils, and shortly before it was implemented.

The court faulted Boston for not sharing with the parents certain information which they might have been able to explain or rebut. For example, the parents were not promptly advised about the cell phone identification of the Lincoln address as a home number, a conversation one administrator had with another father, and copies of the anonymous letters complaining that three non-resident students attended Boston Latin. As the parents did not receive notice of the basis of the allegations the court concluded that they did not receive due process. Accordingly, the court vacated the BPS decision to exclude the pupils and the matter was remanded to the department for further hearing. As the court pointed out, Boston was free to discharge the students from school if after further hearing in compliance with due process it finds that they were not actually residents of the city.

2. Special Education Students - Residency

City of Salem v. Bureau of Special Education Appeals
444 Mass. 476 (2005)

a. Background

This case revolves around a dispute between communities as to which community had programmatic and fiscal responsibility for a learning disabled student who resided in a private residential school.

The student's parents had divorced in 1993. At the time, the parents executed a stipulation agreeing that they would have joint legal custody of the student, but the father would have sole physical custody. In 1997 the parents voluntarily placed the student in DSS custody to secure an out-of- home placement for him. In 1999 DSS, with the parent's support, petitioned the court for an order placing the student back under its care, noting that his behavior had deteriorated in his out-of-home placement. The court granted the order and the child has been in DSS custody since.

The father lived at all relevant times in Georgetown. The mother, after the divorce, lived briefly in Beverly then in Salem after 1999. The student had been living in Georgetown and attending an out-of-district school, as called for by his IEP written for him by Georgetown. In 1999 DSS arranged for the student to live in a different out-of-district school in Lenox. DSS paid for the student's placement at both out-of-district schools.

b. Issues Presented

In July of 2000, the DSS social worker sought a determination from the department as to which school district was responsible for the child's placement. The department decided that Georgetown was solely "programmatically and fiscally responsible". That is, Georgetown was responsible for establishing and paying for a special education program for the student, evaluating his progress, monitoring the effectiveness of his placement and reevaluating his needs. When joined in BSEA proceedings, DOE took a different position. At hearing, DOE maintained that, under its regulations, the school districts where both parents resided (Salem and Georgetown) would share programmatic and fiscal responsibility. The BSEA agreed with the Department's finding. Salem appealed, arguing that the Department's regulations governing programmatic and fiscal responsibility contravene G.L. c. 71B, §§ 3 and 5.

c. Decision

The court first looked at the statutes and the regulations to see if they were in conflict with one another, noting that a regulation cannot be declared void unless its provisions "cannot

by any reasonable construction be interpreted in harmony with the legislative mandate". City Of Salem v. Bureau Of Special Education Appeals, 444 Mass. 476, 481 (2005). G.L. c. 71B, § 3 states in part that "…the school committee of every city, town or school district shall identify the school age children residing therein who have a disability…[and] provide or arrange for the provision of [a] special education program [for such children].). G.L. c. 71B, § 5 states in relevant part that "Any school committee which provides or arranges for the provision of special education pursuant to section three shall pay for such special education…". The pertinent DOE regulation is at 603 Code Mass. Regs., §10.07(1), which states: "Each school district shall pay for the special education and related services specified in the approved IEP for every student in need of special education for whom the district is assigned financial responsibility under 603 Code Mass. Regs. §28". That section states in part "The parent's school district shall have both programmatic and financial responsibility when…eligible students require an out-of-district placement and such students live and receive special education services at approved special education residential schools." Getting at the core of the issue, the term "parent's school district" for children in DSS custody is "the district(s) where the parent(s) are living or were last known to be living without regard to the parent's custody status." 603 Code Mass. Regs. §28.02.

In this case, the child had no custodial parent because he was in the custody of DSS. His residence could therefore not be based on the residence of his custodial parents, nor the municipality where he was physically located, since he resided in a private residential school which was not considered part of the municipality for this purpose.

The court found that the regulations developed by the department for such situations did not contravene the legislative intent of G.L. c. 71B, but rather that they were a logical way of addressing the problem of a student who had no custodial parents but still required *someone* to be responsible for the programmatic and fiscal elements of his education. The SJC therefore affirmed the lower court ruling that found Salem and Georgetown to be equally responsible programmatically and fiscally.

3. Practice Note

The cases are helpful for outlining some of the information which administrators may consider in making residency determinations. In addition to the usual suspects such as leases, purchase and sales agreements, tax bills, deeds, utility bills, electric bills, etc., the Superior Court in a non-precedent setting decision also observed that there are other indicia of intent to establish a student's domicile: an address on driver's license, car registration, car insurance, voter registration, employment or bank records. Additionally evidence of participation in civic, religious, cultural or social organizations, and even the establishment of a relationship with a new doctor, or participation in extra-curricular activities, might help the determination.

The Boston case also should be noted for the conclusion that administrators had not provided all relevant information to the parents prior to making a decision. Educators should lay all the cards on the table in a residency dispute. Provide parents with an opportunity to explain or rebut the information, and then make a decision. In a certiorari proceeding, the courts

typically will uphold administrative decisions even if there is another reasonable conclusion or group of inferences to be drawn from the evidence you consider.

II> OUTLINE OF STANDARDS APPLICABLE TO APPROVAL OF HOME EDUCATION PROGRAMS

In recent years school administrators have responded to an increasing number of requests for approval of home education programs. These materials are intended to discuss in a general way legal issues relating to home education, parental rights and responsibilities of school administrators' vis-à-vis proposed home education programs.

A. THE RIGHT TO EDUCATE STUDENTS AT HOME

Since 1925 the United States Supreme Court has rendered a number of decisions supporting parental rights to educate students in non-public schools or at home. See, e.g. Pierce v. Society of Sisters, 268 U.S. 510 (1925), (statute requiring public school education unconstitutional), Myer v. Nebraska, 262 U.S. 390 (1923) (Prohibition against teaching German in private school overturned) and Wisconsin v. Yoder, 406 U.S. 205 (1972). (Compulsory attendance laws not applicable to Amish students.) These cases exclude from the powers granted to a state or local school district the authority "to standardize its children by forcing them to accept instruction from public school teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with a high duty, to recognize and prepare him for additional obligations." Pierce, at 535.

Parental rights to direct their children's' education, however, are "not absolute but must be reconciled with the substantial state interest in the education of its citizenry." Care and Protection of Charles, 399 Mass. 324, 334 (1987).

The state's interest in educating its citizenry is not without limits. Compulsory education statutes, such as Mass. General Laws c. 76, sec. 1, have as their object only "that all children shall be educated, not that they shall be educated in any particular way", and if they are to be instructed outside of the public schools, that they do so in a manner approved in advance by the superintendent or the committee. See Commonwealth v. Roberts, 159 Mass. 372 (1893) (Interpreting a predecessor to the current statute); see also MGL c. 76, sec. 1, and Care and Protection of Charles, 399 Mass. 324 (1987); Commonwealth v. Renfro, 332 Mass. 492 (1955).

B. THE COMPULSORY ATTENDANCE LAW – CARE & PROTECTION OF CHARLES

The corollary to the rule that parents have a right to direct their children's education, is that school systems have the responsibility to ensure that the education is provided. To that end, the thoroughness and efficiency standards of Sec. 1 of c. 76 come into play.[1]

In the context of a Care and Protection proceeding brought pursuant to c. 119, a district argued that the compulsory attendance and those which followed requirements of c. 76 required the prior review and approval of a home education plan prior to the commencement of home instruction. See Care and Protection of Charles, supra. From that case, several rules concerning the review and approval of home education plans are now clear:

1. Approval for the home school program must be obtained in advance, i.e. prior to the removal of the children from the public school and prior to the commencement of the home schooling program. Id. at 337. See, also, Care and Protection of Ivan, 48 Mass. App. Ct. 87 (1999); app. rev. denied, (2000).

2. The Superintendent or the Committee shall provide the parents with an opportunity to explain their proposed plan or present witnesses on their behalf. A hearing during a school committee meeting would be sufficient. Charles at 337

3. The parents bear the responsibility of demonstrating that the home school proposal meets the requirements of G.L. c. 76, Sec. 1, in that the instruction will equal in thoroughness and efficiency, and in the progress made, that which is made available in the public schools. Relevant considerations include, for example:

    a) Teacher Certification and college degree cannot be required, but schools can inquire of parents' academic credentials;

    b) Students have access to textbooks, workbooks and other instructional aides appropriate to ensure breadth of curriculum/subjects;

    c) State mandates on time on learning, or rules on hours of Instruction must be met;

    d) Periodic standardized testing to ensure educational progress or progress reports and work samples may be utilized as option to standardized test.

    e) Home visits may not be necessary with appropriate testing procedures. (See discussion of Brunnelle, infra.)

4. If the parents' plan for home schooling is rejected, the Superintendent or the Committee must detail the reasons for their decisions.

[1] Chapter 76, sec. 1 states in relevant parts: Every child between the minimum and maximum ages established for school attendance by the Board of Education...shall, subject to sec. 15, attend a public day school in said town, or some other day school approved by the school committee, during the number of days required by the Board of Education in each school year unless...[the] child...is being otherwise instructed in a manner approved in advance by the superintendent or the committee.

5. If a home school proposal is rejected, the parents shall be given an opportunity to revise their proposal to remedy the inadequacies or correct deficiencies noted by the District.

6. In the event parents commence home schooling absent the School Committee's prior approval of a plan, the School Committee must demonstrate that the instruction outlined in the home school proposal fails to equal in thoroughness and efficiency that which is available in the public schools.

These procedures give to school officials a great degree of flexibility when examining the substance of a home education program. They are designed simply to ensure that the process of review and approval is fair, and that unreasonable burdens are not placed on parents who wish to educate children at home. Approval must not be conditioned on elements which are not essential to the government's limited interest in providing education to all students.

C. HOME VISITS CAN NOT BE MANDATED-BRUNNELLE VS. LYNN PUBLIC SCHOOLS, 428 Mass. 512 (1998)

In Brunnelle and a companion case, school officials were satisfied that a proposed home school plan sufficiently addressed teacher qualifications, curriculum, instructional materials, the amount of time to be devoted to instruction, and student assessment or evaluation. As a matter of school policy, however, the Lynn Public Schools also required that home schoolers be periodically observed at home to evaluate the instructional process and to verify that the instructional plan is implemented as authorized by the school committee. The parents in the Lynn case objected to the home observations and evaluations. Parents argued that these requirements violated the provisions of Chapter 76, Section 1 and provisions of the Massachusetts Constitution.

Justice John Greaney, since retired, authored an opinion in which all seven Justices of the Supreme Judicial Court joined. He proceeded to reiterate that portion of the Charles decision which stated that "approval of a home school proposal must not be conditioned on requirements that are not *essential* to the State interest in ensuring that all children shall be educated." Charles, at 337 (emphasis in original). Further, the compulsory education component of Chapter 76, Section 1 may be enforced via the exercise of *reasonable* educational requirements similar to those required for public and private schools" Id. at 337 (emphasis in original). Greaney then acknowledged that Charles had "left unresolved whether home visits could be required in this type of case". Brunnelle, at 515.

Where parents satisfy other relevant criteria such as those outlined in Care and Protection of Charles, "a home visit is not presumptively essential to protection of the State interest in seeing that children may receive an education, and therefore, such visits may not be required as a condition to approval of the … [parents] plans." Id. at 515.

Many educators have grappled with the question whether they should impose site visitation requirements on home schoolers. The Brunnelle case answers the question left open in Care and Protection of Charles by relieving school officials of the burden of determining whether

to make home visits when they are otherwise satisfied with the home education. The court has clearly indicated that there are other means to assess student progress and teaching methods. Those means may include periodic standardized testing, periodic reports on students' progress, portfolio assessment, and reports which review subjects, areas, and materials that have been covered and those items of the course of study which are intended to be covered during a subsequent reporting period.

Brunnelle does not rule out the possibility of all home visits. As noted, the case expressly leaves open the question whether a home visit is appropriate if a child is not making satisfactory progress or if a cluster of students from different families are being educated together in one home "or if other circumstances make such a requirement essential". While the permissible basis for such visits has been narrowed, it is clear that there may still be certain circumstances where, if school officials are concerned about a lack of satisfactory progress or a cluster of students meeting together, a home visit may be warranted. The opinion offered no guidance as to what constitutes "satisfactory progress". This deliberate omission should serve as warning that no hard and fast rules apply to this determination. There is no Ariadne to serve as guide out of the litigation labyrinth. Please review circumstances carefully with local counsel prior to making any judgments as to whether a particular case warrants a home visit. These cases are contentious, extremely time consuming and costly.

D. ANCILLARY ISSUES--PARTICIPATION IN SCHOOL ACTIVITIES BY HOME SCHOOLERS, ETC.

Many parents educating students at home or in Charter Schools request that their children be allowed to participate in school sponsored extracurricular events or activities. We are not aware of any statutory or case law requiring such action on the part of school districts. At the same time, there is no bar to the practice

Extracurricular and athletic programs are operated by public schools for students enrolled in the public schools. Home educated students are not enrolled in the public school system of the city, town or district in which they reside and have, in fact, expressly sought permission to withdraw from the public school program. The MIAA has adopted a regulation, however, authorizing participation by home schooled students in interscholastic athletics if certain conditions are met. Please refer inquiries to the MIAA.

Many schools have decided to allow home schoolers participation in extracurricular activities if their participation does not deprive an enrolled pupil of an opportunity to participate. There are no hard and fast rules on this point, so districts should give some thought to factors they believe are relevant before determining whether to allow or ban participation by home schoolers in athletic or extracurricular activities.