

Education
CLIENT ADVISORY



ALERT

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STUDENT RESIDENCY ISSUES

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Introduction

In recent months, there have been several noteworthy developments involving student residency. Two of these developments are statutory, with the Legislature amending sections 5 and 6 of chapter 76, statutes which relate to student residency, while a third development is judicial, arising from a Superior Court case involving admission to Boston Latin School.

Residency issues are especially problematic for schools where parents claim to be residents of a town when the school has information or suspicion that contradicts this conclusion. For instance, parents have taken such actions as renting apartments for their children to assert residency, despite the fact that the children are not actually residing in the rented apartment. The problem becomes how to document or prove that the children are not actually residing in the town in question. Parents are becoming increasingly creative in terms of how they attempt to establish residency for their children, but there are now a few more tools that schools can use to help combat such fraud.

Changes made to Massachusetts General Laws ch. 76 § 5

As amended, effective September 17, 2004, Chapter 76, Section 5 now reads:

CHAPTER 76, SCHOOL ATTENDANCE, Section 5, Place of attendance; discrimination

Section 5. 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.¹

The changes that were made to Mass. Gen. Laws chapter 76, section 5, as shown above, will aid schools in determining a student's actual residence. Among these changes, is the following sentence: "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." What does this mean for schools? This sentence can be particularly useful when a student is claiming to reside in an apartment or at a friend's house in order to establish residency. Particular attention should be paid to the language "or assists in the violation of this provision", as those assisting the student in a false claim of residency can

¹ The underlined language in the statute is the language that was added by the September 17, 2004 amendment.

now themselves be penalized. When investigating residency of a student, a school can now inform those people who are assisting the student's claim that those who assist in defrauding the schools may be required to pay full restitution for the costs of that child's attendance. This can be quite a deterrent. In this way, schools may dissuade those who might otherwise assist the student in a false claim of residency.

The following sentence was also added to this section by the recent amendment: "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." This sentence affirms the school committee's authority concerning residency, but on its face does not seem to give a school committee any new tools to combat the problem of fraudulent claims of residency.

Changes made to Massachusetts General Laws ch. 76, § 6

As amended, effective September 17, 2004, Chapter 76, Section 6 now reads:

CHAPTER 76, SCHOOL ATTENDANCE, Section 6, Payment of tuition for non-resident children

If a child resides temporarily in a town other than the legal residence of his parent or guardian for the special purpose of their attending school, the child may attend school with the authorization of the school committee of said town, and the said town may recover tuition from the parent or guardian, unless under section twelve of chapter seventy-six, such tuition is payable by a town. Tuition payable by the parent or guardian shall, for the period of attendance, be computed at the regular rate established by the school committee for non-resident pupils, but in no case exceeding the average expense per pupil in such school for said period. The school committee of the town in which a child is temporarily residing for the special purpose of their attending school may waive all or part of the tuition charge for such child.²

As shown above, another change that was made to the residency statutes concerns M.G.L. ch. 76, section 6, although the change seems less significant than the second of the two new sentences (discussed above) that were added to section 5. The following italicized language was added to this section, "If a child resides temporarily in a town other than the legal residence of his parent or guardian for the special purpose of their attending school, *the child may attend school with the authorization of the school committee of said town*, and the said town may recover tuition from the parent or guardian, unless under section twelve of chapter seventy-six, such tuition is payable by a town." Arguably this language does little more than reinforce a right which a school committee already possessed: that is, the right to volitionally allow a child who is residing in town, apart from his or her parent(s), to attend school even though the child is residing in the town for no other purpose than attending school there. However, this language does stress that the expressed authorization of the school committee is required for such a child to attend school in that town. Even more importantly, the inclusion of this language in section 6, when combined with the changes that the Legislature has made in section 5, clearly exhibits a legislative intent to give school committees greater ability to ferret out fraud regarding residency, and it is likely that such legislation will translate into greater judicial recognition of school committee rights in this regard.

Boston Latin Residency Case

A Superior Court decision issued in July, 2004, Lydia D. v. Payzant, lays out guidelines as to what it is that schools may examine in order to determine whether a child actually resides in a particular town when a child's residency is in dispute. Although this is a trial court decision rather than an appellate decision, the publicity that it generated makes it noteworthy. The case involved Boston Latin School and two students whose parents were in the process of moving into Boston so that their children could attend Boston Latin School. The issue of residency came into dispute when the school received information that neither of the children were residing full-time in the apartments that their parents had

² The underlined language in the statute is the language that was added by the September 17, 2004 amendment, although there are some additional grammatical changes that were made to this section.

rented in order to establish residency in Boston while they were supposedly in the process of moving into Boston. These children essentially had dual residency, as the parents claimed the children lived in Boston while the parents still had homes outside of Boston.

Indicators of Residency

Judge Judith Fabricant examined the evidence and noted that the center of the students' domestic, social and civil lives, or where they were residents, was a factual question. She observed:

Notably absent from the record is any information indicating that any of the students' parents had taken any of the steps that an adult would normally take upon a change of domicil[e], such as changing the address on his or her driver's license, car registration, car insurance, voter registration, employment or bank records. Also absent is any information to indicate that the students or their parents had become involved in any civic, religious, cultural or social organization in Boston, that they had established relationships with health care providers in Boston, that they participated in any extracurricular activities in Boston, or that they adopted a practice of patronizing any shops or services in Boston. None of these things is required to establish residency, and some of them may be irrelevant to the particular circumstances of these individuals. But in light of the other evidence obtained by the Department, and the families's awareness that the students' residency was in issue, their failure to provide any information on these points supports the conclusion that the lives of these students and all of their parents continued to have their base at the family homes outside of Boston, just as they had before the students enrolled at Boston Latin School.

Therefore, based upon this decision, schools can look at such things as car registration, voter registration, employment or bank records and parents' relationships with organizations, health care providers or shops and services in a particular town in order to dispute residency.

Due Process

Equally important is Judge Fabricant's discussion concerning due process. Judge Fabricant noted that the school is free to examine the factual basis for a student's claims of residency, but it must do so by means of "fundamentally fair procedures." In terms of "what process is due", Judge Fabricant noted that due process requires, at a minimum "notice and an opportunity for hearing appropriate to the nature of the case." (citing Goss v. Lopez, 419 U.S. 565, 579 (1975)). She discussed the competing interests of the children in attending the Boston Latin School with the school's interests as follows:

Here, the students' interest is in avoiding an erroneous determination of non-residency with consequent exclusion from a school they are entitled to attend. That interest is a strong one, although it bears noting that deprivation of that interest does not deprive them of all public schooling, even temporarily; if they are determined not to reside in Boston, then they are entitled to immediate enrollment in the school district where they do reside. The Department's interest, on the other hand, is in avoiding the burden of educating students not actually residing in Boston, preserving limited places at Boston Latin School for Boston residents, and preserving the credibility of the residency requirement. Those interests are strong, and require that, as a general matter, the Department be permitted to act promptly when it has reason to believe that an enrolled student does not meet the residency requirement.

Judge Fabricant observed that the procedural standard established in Goss v. Lopez, 419 U.S. at 581-83, is appropriate to address these competing interests. "Under that standard, the students' parents were entitled to notice of the allegation that the students were not residents of Boston, some explanation of the basis for that allegation, and an opportunity to present their side." Judge Fabricant concluded that under the facts of the case, the students' due process rights had not

been protected because the students had not been given adequate information concerning the nature of the evidence the school was examining to determine residency.

From this case, it is clear that it is very important that schools document the evidence disputing a student's claim of residency, clearly present this evidence to the student, and give the student and parents an opportunity to explain the evidence prior to making any decision to exclude a student from school.

Summary of Residency Issues

In order to understand the rather complex issue of student residency, the following summary may be helpful. For residency purposes, there are three separate categories of students that a school may encounter (excluding students who are homeless, who will be discussed separately below):

1) If a student actually resides in the town in question, then the student is entitled to attend school in the town in question.

- M.G.L. ch. 76, § 5 provides, "Every person shall have a right to attend the public schools of the town where he actually resides. . ."
- Students who actually reside in the town in question include students who reside in the town with at least one of their parents and students whose parents have entrusted their care to someone else who lives in the town, including relatives or friends.
- Determining where a student resides is a factual issue, which is mainly determined by where the student sleeps at night and eats meals.
- If it is determined that a student does not reside in the town in question, the student is not entitled to attend school in the town.

2) If a student actually resides in the town in question, but is residing temporarily in a town other than the legal residence of his parent or guardian for the special purpose of attending school, the town may recover tuition from the parent or guardian.

- M.G.L. ch. 76, § 6 provides, "If a child resides temporarily in a town other than the legal residence of his parent or guardian for the special purpose of their attending school. . . said town may recover tuition from the parent or guardian . . . Tuition payable by the parent or guardian shall, for the period of attendance, be computed at the regular rate established by the school committee for non-resident pupils, but in no case exceeding the average expense per pupil in such school for said period. The school committee of the town in which a child is temporarily residing for the special purpose of their attending school may waive all or part of the tuition charge for such child."
- If the student's presence in the town is for reasons other than attending school (e.g., because of alleged inability to get along with their parents), it will be difficult to show that the student is only in the town for the special purpose of attending school.

3) If a student has dual residency, meaning that the student resides in the town in question at certain times, but resides in another town at other times, the center of the student's domestic, social and civil life is the student's residence. This is the area where the schools run into problems with fraudulent claims of residency, as explained above.

- If a student has dual residency and it can be established that the indicators of residency show that the student resides in another town the majority of the time, the student can be excluded from school.

- M.G.L. ch. 76, § 5 does not require an entire family to actually reside in a town in order for the child to attend the public schools in that town. The mere fact that a child’s family maintains an additional residence outside of the town in which the child is seeking admission is not substantial evidence that the child does not reside in the town in question.
- A student’s residence will be the place that is the center of the student’s domestic, social and civil life. Evidence that can be examined to make this determination includes, but is not limited to:
 - Where the student eats meals and sleeps at night
 - The address listed on the parents’ driver’s license, car registration, car insurance, voter registration, employment or bank records
 - Information indicating that the student or his/her parents are involved in extracurricular activities or in any civic, religious, cultural or social organizations in the town in question
 - Relationships with health care providers in the town in question
 - Information indicating that the student in question or his/her parents patronize shops or services in the town in question
- In situations where at least one parent has moved to the town in question, it becomes a question of fact as to where the student actually resides. In order to reside in the new town, a parent must not only be physically present in the town but must also intend to make that place his home for the particular time in question.
 - In addition to the factors mentioned above, a school may examine such factors as the following to show the “fact” of where a child or parent lives:
 - where the parent and child sleep at night
 - whether one parent is available at the residence during the day
 - where the parent is receiving mail
 - use of utilities at the residence in question
 - the address and phone number provided to the school
 - where siblings attend school
 - A school may examine such factors as the following to show the “intent” of making a particular place home:
 - plans to purchase a permanent home in the town in question
 - stated intent to make a residence in the town in question.
- Based on the new changes to M.G.L. ch. 76, § 5, as explained above, a school can now recover tuition from any person who assists a student with a fraudulent claim of residency.

Other Residency Issues—Homeless Students

According to the federal McKinney-Vento Homeless Education Assistance Act, schools are required to immediately enroll homeless students in school, even if they do not have the documents usually required for enrollment, such as school records, medical records or proof of residency. See McKinney-Vento Homeless Assistance Act, Massachusetts Department of Education Advisory 2002-2: Enrollment of Homeless Students and School Records. The McKinney –Vento Homeless Education Assistance Act mandates that:

- Homeless students have a right to either remain in their school of origin or to attend school where they are temporarily residing
- Students who choose to remain in their school of origin have the right to remain there until the end of the school year in which they get permanent housing

- Students who choose to enroll in school where they are temporarily residing must be enrolled immediately, even if they do not possess records usually required for enrollment
- If a homeless student arrives without records, the school district's designated Homeless Education Liaison must assist the family and contact the previously attended school system to obtain the required records.

Because homeless families and youths often do not bring the documents ordinarily required for school enrollment with them, the purpose of this requirement to immediately enroll homeless students in school is to provide educational stability and avoid separation from school for days or weeks while documents are located. See McKinney-Vento Homeless Assistance Act, Massachusetts Department of Education Advisory 2002-2: Enrollment of Homeless Students and School Records.

If you have any questions about the material presented in this advisory, please contact Attorney Jennifer Geosits or the attorney assigned to your account.

CROWN COLONY PLAZA
300 CROWN COLONY DRIVE
SUITE 410
P.O. BOX 9126
QUINCY, MA 02269-9126

WORLD TRADE CENTER EAST
TWO SEAPORT LANE
BOSTON, MA 02210

(617) 479-5000
information@mhtl.com
www.mhtl.com

ONE MONARCH PLACE
SUITE 1310R
SPRINGFIELD, MA 01144

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Murphy, Hesse, Toomey & Lehane, LLP
300 Crown Colony Drive
Quincy, MA 02169

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