

D.M., on behalf of minor, B.N.,

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE :
TOWNSHIP OF EWING, MERCER :
COUNTY, :

DECISION

RESPONDENT. :

SYNOPSIS

Petitioner, B.N.’s aunt, challenged the Board’s determination to remove B.N. from its schools because her mother was not domiciled in the District and she did not meet the criteria for admitting an “affidavit student.”

The ALJ concluded that B.N.’s mother was not domiciled in the District, and that B.N. did not meet the “affidavit student” criteria and, thus, was not entitled to attend the Board’s schools. The ALJ ordered reimbursement of tuition by petitioner.

The Commissioner reversed the ALJ, determining that the ALJ improperly analyzed the matter under the affidavit student provision of the statute, rather than the domicile provisions. Because B.N.’s aunt obtained legal guardianship of her by court order, and is domiciled in the District, B.N. is legally entitled to a free education in the Board’s District.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

March 13, 2002

OAL DKT. NO. EDU 6113-01
AGENCY DKT. NO. EDU 252-7/00

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions were submitted in accordance with *N.J.A.C. 1:1-18.4*.

In her exceptions, petitioner underscores that, contrary to the Administrative Law Judge’s (ALJ) ruling, it is her understanding that the custody order signed by Judge Grall of the Superior Court is “considered to be permanent and binding in a Court of Law, until one of the two parties make[s] changes to the agreement or the child turns 18 years old.” (Petitioner’s Exceptions at 1) Additionally, with respect to the amount of tuition determined due and owing, petitioner asserts that the Board never produced, as the ALJ requested, the basis for its calculations. Moreover, petitioner adds that she did not produce any financial documentation, since she was not requested to do so, and she also “assumed custody papers would suffice.” (*Ibid.*) Finally, petitioner reiterates that B.N. “periodically” spends time with her mother and, therefore, conclusions should not be drawn as to her living arrangements based on merely 25

days of observation. (*Id.* at 2) Petitioner affirms, “I do provide financial support for [B.] as my tax records will indicate, and she does reside in my home at 90 King Ave.” (*Ibid.*)

Upon careful and independent review of the record in this matter, the Commissioner determines to set aside the recommended decision of the ALJ. In so doing, the Commissioner initially finds that the ALJ applied the incorrect statute to arrive at his conclusion, on page four of the Initial Decision, that petitioner did not meet her burden of proving that B.N. was entitled to a free education. Petitioner’s claim in her Petition of Appeal filed on July 18, 2000 clearly attests, “[a]s of 7-18-00 I’ve permanent [sic] custody. Custody of [B.] allows me to have her enrolled as my child.” (Petition of Appeal) Indeed, there is nothing in the petition or accompanying documents to suggest that petitioner’s allegation before the Commissioner was that she satisfied the requirements of the “affidavit student” statute and that B.N. should be permitted to attend school pursuant to *N.J.S.A.* 18A:38-1b(1). Therefore, petitioner’s claim should have been analyzed under *N.J.S.A.* 18A:38-1a, and its implementing regulations, *N.J.A.C.* 6A:28-2.4(a)1.

A student is considered domiciled within the district “when he or she is living with a parent or legal guardian whose permanent home is located within the district.***” *N.J.A.C.* 6A:28-2.4(a)1i. Thus, the critical issues before the Commissioner are whether petitioner is B.N.’s “legal guardian” within the intendment of the statute and its operative regulations,¹ and whether B.N. is living with her legal guardian.

Although the Judge’s Order, entered upon consent of the parties, is designated an “Order of Temporary Custody,” on its face, the Order does not expire on a particular date but, instead, provides that the care and custody of B.N. is committed to D.M. until further order of the

¹ There is no dispute that petitioner is properly domiciled in the District.

Court. (Exhibit J-1) Therefore, the Commissioner finds that petitioner is B.N.'s "legal guardian" within the intendment of the statute and regulations.²

In addition, petitioner avers that B.N. lives in her home in Ewing, but acknowledges that her niece periodically visits and stays with her mother, who maintains a small bedroom for B.N. in her apartment. (Initial Decision at 3) There is no finding by the ALJ that petitioner's testimony in this regard was not credible. Petitioner's position is consistent with the custody order that provides for "liberal [and] reasonable" visitation, "as agreed between the parties." (Exhibit J-1)

Accordingly, the Commissioner finds that B.N. is entitled to a free education in the District pursuant to *N.J.S.A.* 18A:38-1a and *N.J.A.C.* 6A:28-2.4(a)1i. The Board is ordered to continue to admit her to its schools as long as there is no change in circumstances that would alter her entitlement.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: 3/11/02

Date of Mailing: 3/13/02

² In this connection, the Commissioner does not concur with the ALJ's discussion on page four of the Initial Decision with respect to the "statutory purpose" of the Order of Temporary Custody. Indeed, the public policy statement cited by the ALJ clearly concerns custody orders *as between parents* who are living separately, as it stresses that their minor children are to be assured "frequent and continuing contact with both parents after the parents have separated or dissolved their marriage***." *N.J.S.A.* 9:2-4.

³ This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.