#406-15 (OAL Decision: Not yet available online)

H.F., ON BEHALF OF MINOR CHILD, D.F.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioner in this matter disputed the February 2015 decision of the Interim Executive County Superintendent for Bergen County (ECS) that minor child D.F. is not a "homeless child" pursuant to *N.J.A.C.* 6A:17-1.1 *et seq.* and the McKinney-Vento Homeless Education Assistance Act (McKinney-Vento Act). Petitioner's minor child, D.F., is currently enrolled in the respondent Board's school district, but attends school in an out-of-district placement pursuant to his individualized education program (IEP). The ECS also determined that H.F. and D.F. are currently domiciled in the Borough of Cliffside Park, and D.F. is consequently entitled to a free public education from the Cliffside Park Public School District. Respondent Teaneck Board of Education filed a motion for summary decision.

The ALJ found that the residency decision that the petitioner sought to appeal was rendered by the ECS at the request of H.F., and the respondent Board was not a party to the ECS's decision. The ALJ concluded that there is no factual basis for petitioner's alleged claims against the respondent Board; accordingly the ALJ granted respondent's motion for summary decision, and dismissed the petition.

Upon full review and consideration of the record and the ALJ's Initial Decision, the Commissioner determined to remand this matter to the OAL for further proceedings to determine the threshold issue of whether D.F. is a "homeless" child under applicable federal and state law. In reaching this determination, the Commissioner found, *inter alia*, that: the ALJ's decision to grant the respondent's motion for summary decision and dismiss the petition was premature; a dismissal of the case at this juncture would unjustly short-circuit the petitioner's right to appeal the ECS's determination pursuant to *N.J.C.A.* 6A:17-2.7; the respondent Board is – at the least – an interested, if not indispensible, party to this action, as D.F. continues to be enrolled in respondent's school district; and respondent's motion to consolidate this action with a related matter – *Board of Education of the Township of Teaneck, Bergen County v. Board of Education of the Borough of Cliffside Park, Bergen County and H.F., on behalf of minor child, D.F.*, OAL Dkt. No. EDU 9966-15 – indicates Teaneck recognized that an outright dismissal of this petition could be problematic. Accordingly, the Commissioner denied respondent's motion for summary decision, granted respondent's motion in the alternative to consolidate EDU 7964-15 with EDU 9966-15, and remanded the matter to the OAL for further proceedings, including rendering the requisite findings of fact to facilitate a determination of whether D.F. is a homeless child under applicable statutes and regulations.

December 14, 2015

OAL DKT. NO. EDU 7964-15
AGENCY DKT. NO. 79-4/15

H.F., ON BEHALF OF MINOR CHILD, D.F.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions. For the reasons stated herein, the Commissioner is constrained to remand the matter to the OAL for further proceedings in order to determine whether D.F. is a "homeless child" under applicable federal and state law.

In this action, petitioner disputes the February 3, 2015 decision of the Interim Executive County Superintendent (ECS), who concluded: 1) minor child D.F. is not a"homeless child" pursuant to *N.J.A.C.* 6A:17-1.1 *et seq.* and the McKinney-Vento Homeless Education Assistance Act (McKinney-Vento Act), 42 *U.S.C.* §§ 11431 *et seq.*; and, therefore 2) D.F. is not entitled to a continuation of his education in respondent's (Teaneck) district.[1] Petitioner contends that D.F. does meet the definition of a "homeless child" and, therefore, should be permitted to continue his education in Teaneck.[2]

[1] The ECS further determined that H.F. and D.F. are presently domiciled in the Borough of Cliffside Park.

[2] D.F. is presently enrolled in the Teaneck School District, but attends school at an out-of-district placement pursuant to his individualized education program (IEP). According to the record, Teaneck has historically provided transportation for D.F., and covered the tuition costs associated with his out-of-district placement. The present controversy arose when, upon learning that H.F. and D.F. were allegedly residing in Cliffside Park, Teaneck engaged in discussions with Cliffside Park and the ECS in an attempt to identify D.F.'s present school district of residence. Ultimately, on January

Parents or guardians are entitled to appeal an ECS determination regarding a child's homeless status to the Commissioner. Pursuant to *N.J.A.C.* 6A:17-2.7(a), "If a dispute remains between the parent and the involved school district(s)" following the ECS's determination as to a child's homeless status, "the parent…may appeal to the Commissioner for determination" under *N.J.A.C.* 6A:3.

Generally, children in New Jersey are entitled to attend public school – free of charge – at the school district within which they are domiciled, known as the school district of residence. *N.J.S.A.* 18A:38-1a; *N.J.A.C.* 6A:22-1.1 *et seq.* An unemancipated child's domicile is determined by that of his or her parent, custodian or guardian. *N.J.A.C.* 6A:22-3.1(a)1; *P.B.K. v. Board of Education of the Borough of Tenafly*, 343 *N.J. Super.* 419, 426-27 (App. Div. 2001). When it is alleged that a child's parent, custodian or guardian lacks a domicile, however, determining the child's district of residence – and where that child may attend public school free of charge – requires a different analysis. Under those circumstances, a fact-specific inquiry must be made to determine if the child meets the legal definition of a "homeless child."

Homelessness determinations in this context are dictated by both federal and state law, and further influenced by state regulations. Under the McKinney-Vento Act, 42 *U.S.C.* §§ 11431 *et seq.*, homeless children are defined as "individuals who lack a fixed, regular and adequate nighttime residence," examples of whom include children sharing housing with other people due to loss of their own housing, economic hardship, or a similar reason; children living in motels, hotels, trailer parks or campgrounds due to lack of other accommodations; children living in emergency or transitional shelters; and children living in cars, parks, or other public spaces. Similarly, under state law, a "homeless child" is a child who lacks a fixed, regular and adequate residence pursuant

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20, 2015, petitioner himself requested a determination from the ECS as to D.F.'s homeless status pursuant to *N.J.A.C.* 6A:17-2.7(a).

to *N.J.S.A.* 18A:7B-12 and *N.J.A.C.* 6A:17-2.2. The corresponding state regulations, which substantially reiterate the illustrative examples contained in the McKinney-Vento Act, provide additional guidance for the fact-finder:

> *N.J.A.C.* 6A:17-2.2 Determination of homeless status
>
> (a) A district board of education shall determine that a child is homeless for purposes of this subchapter when he or she resides in any of the following:
>
> 1. A publicly or privately operated shelter designed to provide temporary living accommodations, including:
>
> i. Hotels or motels;
> ii. Congregate shelters, including domestic violence and runaway shelters;
> iii. Transitional housing; and
> iv. Homes for adolescent mothers;
>
> 2. A public or private place not designated for or ordinarily used as a regular sleeping accommodation, including:
>
> i. Cars or other vehicles including mobile homes;
> ii. Tents or other temporary shelters;
> iii. Parks;
> iv. Abandoned buildings;
> v. Bus or train stations; or
> vi. Temporary shelters provided to migrant workers and their children on farm sites;
>
> 3. The residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own;
>
> 4. Substandard housing; or
>
> 5. Any temporary location wherein children and youth are awaiting foster care placement.

Thus, any homelessness determination is, necessarily, fact-sensitive and case-specific. The Commissioner has recognized that "an evaluation of 'homelessness' cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality. The reasons for the children's homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant." *M. O'K. v. Board of Education of the Borough of Cresskill, Bergen County*, OAL Dkt. No. EDU 14830-13, Commissioner Decision No. 325-14, issued August 12, 2014, at 3.

If a child is deemed homeless, then that child's school district of residence[3] is defined by law as the school district in which the child's parent or guardian resided *prior* to becoming homeless; it may or may not coincide with the school district in which the child currently resides. *N.J.S.A.* 18A:7B-12c; *N.J.A.C.* 6A:17-1.2. Identifying a homeless child's school district of residence is crucial, for it is the district of residence which is responsible for deciding where the homeless child should be enrolled – upon assessment of the child's best interests and the parent's wishes, with due attention given to continuity of the child's educational program. *N.J.A.C.* 6A:17-2.5. The homeless child's school district of residence is also responsible for payment of tuition, pursuant to *N.J.S.A.* 18A:38-19, if the child attends school in a different district, and the child's transportation. *N.J.A.C.* 6A:17-2.3. But, before any disputes concerning enrollment or tuition can be addressed, the threshold determination as to whether the child meets the definition of a "homeless child" must be made – based upon a comprehensive, fact-specific examination of the family's circumstances. *See, e.g., Board of Education of the Town of Hammonton, Atlantic County v. Board of Education of the City of Gloucester, Camden County*, OAL Dkt. No. EDU 18573-13, Commissioner Decision No. 311-14, issued July 31, 2014, at 4.

Following this petition's transmittal to the OAL, Teaneck filed a Motion for Summary Decision, arguing that it was not a properly named party and that "petitioner's appeal should be directed to the County Superintendent, who made the decision[.]" (Teaneck's Motion, at 2) Teaneck further explained that the only involvement it had with the ECS's determination was "the provision of documents relevant to the matter." (Teaneck's Motion, at 2) In the alternative, Teaneck requested consolidation of this action, pursuant to *N.J.A.C.* 1:1-17.1, with a related matter it filed seeking tuition reimbursement and other relief captioned *Board of Education of the*

[3] The McKinney-Vento Act utilizes the term "school district of origin" when referring to a homeless child's school district of residence.

Township of Teaneck, Bergen County v. Board of Education of the Borough of Cliffside Park, Bergen County and H.F., on behalf of minor child, D.F., OAL Dkt. No. EDU 9966-15. Teaneck asserted that both actions involve common questions of fact and law as well as common parties and noted "the disposition of both claims touch upon the validity" of the ECS's homelessness determination. (Teaneck's Motion at 7)

Ultimately, the Administrative Law Judge (ALJ) granted Teaneck's Motion for Summary Decision, finding that Teaneck "was not a party to the Interim County Superintendent's decision" and concluding "there is no factual basis for petitioner's alleged claims against respondent relating to the Interim County Superintendent's determination as to petitioner's residency and asserted homeless status." (Initial Decision at 3) The ALJ did not address the consolidation of this matter with EDU 9966-15.

Upon careful review of the record and the parties' submissions, the Commissioner finds that the ALJ's decision to grant Teaneck's Motion for Summary Decision and dismiss the petition was premature, and must be rejected. A Motion for Summary Decision is appropriate where "the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5. There is nothing in the present record to indicate that there are no genuine issues of material fact in dispute. More specifically, no findings of fact – disputed or undisputed – were made by the ALJ in connection with D.F.'s alleged homeless status, and no stipulations of fact were presented; instead, the Initial Decision merely recites the matter's procedural history and summarizes the ECS's determination, which is challenged by petitioner. A determination as to whether D.F. meets the legal definition of a "homeless child" can only be made upon a thorough examination of the family's past and present living arrangements and attendant

circumstances – which, absent a joint stipulation from the parties, may require an evidentiary hearing with testimony and documentary evidence. Thus, the granting of Teaneck's Motion for Summary Decision was premature.

Although Teaneck argues that dismissal of the petition is appropriate due to petitioner's failure to state a claim against the district, a dismissal at this juncture would unjustly short-circuit petitioner's right to appeal the ECS's determination to the Commissioner pursuant to *N.J.A.C.* 6A:17-2.7.[4] Teaneck is – at least – an interested party to this action (if not an indispensable party), as D.F. continues to be enrolled in that district. Furthermore, Teaneck's potential right to tuition reimbursement from Cliffside Park (a claim which Teaneck raised in the related, pending petition) – and its potential responsibility to continue providing D.F. with a free public education – will be directly affected by the Commissioner's final determination as to whether D.F. is considered homeless under the law. By moving in the alternative for consolidation of this action with EDU 9966-15, Teaneck apparently recognized that outright dismissal of this petition could be problematic from a procedural perspective.

In summary, D.F.'s homeless status is a threshold question that must be resolved by the Commissioner – through adoption or rejection of the ECS's determination – before the Commissioner can then decide whether D.F. may continue to be enrolled in the Teaneck School District, and further establish which district is responsible for the cost of D.F.'s education. Based upon the present record – which does not contain any findings of fact as to H.F. and D.F.'s past or present residences, domiciles and/or temporary living arrangements – the Commissioner is unable to determine whether D.F. meets the legal definition of a "homeless child." Absent the requisite findings of fact, the Commissioner is constrained to remand the matter to the OAL for further

[4] While it might have been permissible for petitioner to name the ECS as a respondent in this matter, nothing in the controlling statute or regulations requires petitioner to do so.

proceedings. In addition, for the reasons advanced by Teaneck in its Motion, the Commissioner finds this matter should be consolidated with EDU 9966-15 pursuant to the standards delineated in *N.J.A.C.* 1:1-17.3.[5]

Accordingly, Teaneck's Motion for Summary Decision is denied; Teaneck's Motion in the Alternative to Consolidate EDU 7964-15 and EDU 9966-15 is granted, and this matter is remanded to the OAL for further proceedings – including rendering of the requisite findings of fact – which will facilitate a determination as to whether D.F. is a "homeless child" under applicable federal law, state law and regulations cited herein. Said determination will then allow for subsequent disposition of the claims raised within EDU 9966-15, and resolution of this controversy in its entirety.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: December 14, 2015

Date of Mailing: December 15, 2015

[5] *N.J.A.C.* 1:1-17.3 provides: "In ruling upon a motion to consolidate, the judge shall consider: 1) the identity of parties in each of the matters; 2) the nature of all the questions of fact and law respectively involved; 3) to the extent that common questions of fact and law are involved the saving in time, expense, duplication and inconsistency which will be realized from hearing the matters together and whether such issues can be thoroughly, competently, and fully tried and adjudicated together with and as a constituent part of all other issues in the two cases; 4) to the extent that dissimilar questions of fact or law are present, the danger of confusion, delay or undue prejudice to any party; 5) the advisability generally of disposing of all aspects of the controversy in a single proceeding; and 6) other matters appropriate to a prompt and fair resolution of the issues, including whether a case still pending in an agency is contested or is ripe to be declared contested." All factors weigh in favor of consolidating the two matters at issue here.

[6] Final determinations of the Commissioner may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), in accordance with applicable court rules.