

EDU #8770-95  
C # 112-96  
SB # 32-96  
C # 68-97R  
SB # 26-97

J.B., on behalf of her grandchild, R.H., :  
PETITIONER-RESPONDENT, :  
V. : STATE BOARD OF EDUCATION  
BOARD OF EDUCATION OF THE TOWN- : DECISION  
SHIP OF OCEAN, MONMOUTH COUNTY, :  
RESPONDENT-APPELLANT. :  
\_\_\_\_\_ :

Decided by the Commissioner of Education, March 25, 1996

Decision on motion by the State Board of Education, October 2, 1996

Remanded by the State Board of Education, December 4, 1996

Decision on remand by the Commissioner of Education, February 11, 1997

For the Petitioner-Respondent, Klausner & Hunter (Stephen B. Hunter, Esq.,  
of Counsel)

For the Respondent-Appellant, Kramer, Kramer & Kilgallen (Honora O'Brien  
Kilgallen, Esq., of Counsel)

For the amicus curiae New Jersey School Boards Association, Donna M.  
Kaye, Esq.

This case commenced in August 1995 when J.B. (hereinafter "petitioner") filed a petition of appeal with the Commissioner of Education challenging the determination of the Board of Education of the Township of Ocean (hereinafter "Board") that her

grandson, R.H., who was living with her within the district, was not entitled to a free public education in the district's schools.

On February 6, 1996, following a hearing, an Administrative Law Judge ("ALJ") concluded that petitioner had failed to establish that R.H.'s parents were not capable of supporting or providing care for him due to a family or economic hardship, as required by N.J.S.A. 18A:38-1(b)(1).<sup>1</sup> The ALJ stressed that "the only reason enunciated by petitioner for R.H. not living with his parents is because of family discord and because R.H. is much happier living with his grandmother." Initial Decision, slip op. at 10. The ALJ concluded that "this is not a legally sufficient reason for providing a free public education to a nonresident under the...statutory provisions." Id. Accordingly, the ALJ recommended dismissing the petition and directing petitioner to pay tuition to the Board for R.H.'s attendance in the District's schools.

On March 25, 1996, the Commissioner rejected the ALJ's recommended decision. The Commissioner agreed with the ALJ that petitioner had established that R.H. was being kept in her home and supported by her gratis and that petitioner had

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<sup>1</sup> N.J.S.A. 18A:38-1 provides, in pertinent part:

- Public schools shall be free to the following persons over five and under 20 years of age:
- a. Any person who is domiciled within the school district;
  - b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements....

assumed all personal obligations for R.H. with regard to school requirements. However, in contrast to the ALJ, the Commissioner found that “[t]he unique and compelling circumstances present in this matter...rise to the level of constituting family hardship sufficient to meet the standard of the pertinent statute.” Commissioner’s Decision, slip op. at 15. Accordingly, he concluded that “petitioner has demonstrated that R.H.’s parents are not capable of providing care for him due to family hardship, thereby establishing R.H.’s entitlement to a free public education in the School District of the Township of Ocean.” Id. at 15-16. The Board filed an appeal from that decision to the State Board.

In a decision dated December 4, 1996, we remanded this matter to the Commissioner, explaining that:

The express language of N.J.S.A. 18A:38-1(b) requires more than simply a finding of family hardship in order for a child kept in the home of another person domiciled within the district to be entitled to a free public education in that district. Rather, the hardship must be of such nature that the parents or guardian are not capable of supporting the child or providing care as a result of that hardship. The Commissioner found that the circumstances herein “[rose] to the level of constituting family hardship sufficient to meet the standard of the pertinent statute,” Commissioner’s decision, slip op. at 15, but only indicated that R.H.’s parents were not capable of providing care to him as a result of that hardship in conclusory fashion in the last line of his decision. Consequently, it is unclear to us whether the Commissioner applied the proper standard in determining this matter.

State Board’s decision, slip op. at 3-4.

Thus, our decision stressed that N.J.S.A. 18A:38-1(b) provides a two-part test for establishing hardship. Under the statute, there must not only be a “family or economic hardship,” but the child’s parent or guardian must also be “incapable of

supporting or providing care for the child due to [that] hardship.” It is also evident from the express language of the statute that neither the hardship nor the resultant incapability of the parent or guardian to provide care need be financial in nature.

As a result, we found it necessary to remand this matter to the Commissioner for a determination under the specific standard set forth in N.J.S.A. 18A:38-1(b) of whether R.H. was entitled to a free public education in Ocean Township, as well as for an articulation of his reasons for any rejection or modification of the ALJ’s recommendation in conformity with the requirements of N.J.A.C. 1:1-18.6(b). Under the circumstances, we also directed that, in order to avoid any unnecessary disruption to R.H., he could continue to attend public school in Ocean Township free of charge pending a final determination on remand by the Commissioner.

On February 11, 1997, the Commissioner issued a decision on remand in which he reaffirmed his previous determination that R.H. was entitled to a free public education in Ocean Township. The Commissioner, in reliance upon the testimony as summarized by the ALJ,<sup>2</sup> found that “the mere fact that the family strife in this matter has continued, despite an apparent recognition of the serious and detrimental effects of such conflict on R.H., suggests that R.H.’s parents, sadly, are incapable of meeting his emotional, social and developmental needs.” Commissioner’s Decision on Remand, slip op. at 2-3. The Commissioner did not conduct additional hearings or reopen the record for purposes of this decision.

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<sup>2</sup> We note that the parties did not provide the Commissioner or the State Board with a copy of the transcript from the hearing held in the Office of Administrative Law in this matter until August 28, when the Board sent a copy to us after the deadline for filing exceptions to the report of our Legal Committee.

The Board has filed the instant appeal to the State Board from the decision of the Commissioner on remand.

After a careful review of the record, we again remand this matter to the Commissioner.

We reiterate that N.J.S.A. 18A:38-1(b)(1) provides, inter alia, that a child kept in the home of another person domiciled within the district is entitled to a free public education in that district if the parent or guardian of the child “is not capable of supporting or providing care for the child due to a family or economic hardship.” That language was added to the statute by L.1993, c. 380, § 1, effective January 11, 1994.

In this case, we are hesitant to conclude solely on the basis of the record before us, which did not include a copy of the transcript of the hearing held in the Office of Administrative Law,<sup>3</sup> that petitioner has demonstrated R.H.’s entitlement to a free public education in Ocean Township. However, we were also unable to determine on the basis of this record whether petitioner was provided with an adequate opportunity to demonstrate such entitlement under the proper legal standard, i.e., that R.H.’s parents are not currently capable of supporting him or providing care due to the existence of a family or economic hardship. We stress in that regard that the Commissioner did not conduct additional hearings prior to rendering his decision on remand, relying solely on the ALJ’s summary of the testimony in rejecting the ALJ’s legal conclusion.

Under these circumstances, and taking into consideration the fact that the 1994 amendment to N.J.S.A. 18A:38-1(b) significantly modified the statutory standard, we are compelled to remand this matter to the Commissioner for further proceedings in

order to ensure that petitioner is provided with a sufficient opportunity to demonstrate R.H.'s entitlement to a free public education in the schools of Ocean Township under the express standard set forth in N.J.S.A. 18A:38-1(b).<sup>4</sup> We emphasize that in order to satisfy that standard, the family or economic hardship must be real and demonstrable, evincing a current incapability on the part of R.H.'s parents to support him or provide care as the result of that hardship.

As in our previous decision, we direct that R.H. may continue to attend public school in Ocean Township free of charge pending a final determination by the Commissioner on the instant remand.

We do not retain jurisdiction.

Attorney exceptions are noted.

September 3, 1997

Date of mailing \_\_\_\_\_

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<sup>3</sup> See n.2, supra.

<sup>4</sup> We note, in response to exceptions filed by the Board to the report of our Legal Committee, that there is nothing in our decision that would preclude the Commissioner from reviewing the transcript of the hearing held in the Office of Administrative Law, which is now part of the record in this matter. See n.2, supra.