EDU #6448-00
C # 266-00L
C # 178-01
C # 282-01
EDU #6113-01
C # 96-02
SB # 20-02

D.M., on behalf of minor, B.N.,	:	
PETITIONER-RESPONDENT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING,	:	
MERCER COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Assistant Commissioner of Education, August 21, 2000

Decided by the Commissioner of Education, June 6, 2001

Remanded by the Commissioner of Education, August 30, 2001

Decided by the Commissioner of Education, March 11, 2002

For the Respondent-Appellant, Jeffrey F. Belz, Esq.

For the Petitioner-Respondent, D.M., pro se

By letter dated March 22, 2000, the Board of Education of the Township of Ewing (hereinafter "Board" or "Ewing Board") notified L.N. that it had determined that her daughter, B.N., was living with her in Trenton and, as a result, could not attend the

Ewing public schools free of charge.[1] Thereafter, on March 31, 2000, D.M. (hereinafter "petitioner"), who is L.N.'s sister, filed an application with the Superior Court Chancery Division seeking custody of B.N. On June 12, 2000, the Board took action to disenroll B.N. from the district's schools, determining that she and her mother were not domiciled in Ewing. On July 18, 2000, the Chancery Division issued an Order of Temporary Custody to the petitioner with the consent of L.N. That Order provided for "liberal and reasonable" visitation "as agreed between the parties." Exhibit J-1, in evidence. On that same date, the petitioner filed a petition of appeal with the Commissioner of Education, contending that B.N. lived with her in Ewing and challenging the Board's determination that B.N. was not entitled to a free public education in the Ewing school district. The Board filed a counterclaim seeking tuition for the period of B.N.'s attendance in the district.[2]

On January 18, 2002, following a hearing, an Administrative Law Judge ("ALJ") recommended upholding the Board's determination and directing the petitioner to reimburse the Board for tuition in the amount of $7,837 for the period of B.N.'s ineligible attendance. The ALJ found as a fact that "B.N. resides with her mother in the City of Trenton." Initial Decision, slip op. at 5. Stressing that the petitioner had the burden of demonstrating that B.N. was entitled to a free public education in Ewing, the ALJ concluded that, although the petitioner had temporary custody of B.N., she was not

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[1] During the 1998-99 school year, the Board had conducted a residency investigation regarding B.N. In August 1999, L.N. submitted an affidavit to the Board in which she stated that she and her daughter were living in Ewing with her sister, D.M., the petitioner herein. When the Board subsequently received information in March 2000 that L.N. was not living in Ewing, it reopened its investigation.

[2] On June 6, 2001, the Commissioner dismissed the petitioner's claim as a result of her failure to appear at hearing. On August 30, 2001, the Commissioner reopened the matter, determining in the interest of fairness to return it to the Office of Administrative Law for further proceedings in light of the petitioner's assertion that she could not remember receiving notice of the hearing date and was unaware of that date.

B.N.'s guardian. In addition, the ALJ found no evidence that the petitioner was providing any support to B.N., pointing out that she had not filed a sworn statement with the Ewing Board, pursuant to N.J.S.A. 18A:38-1(b)(1), averring that she was supporting B.N. gratis, would assume all personal obligations for B.N. relative to school requirements and intended to keep and support B.N. gratuitously for longer than the school term.

On March 11, 2002, the Commissioner, who was not provided with a copy of the transcripts of the hearing held in the Office of Administrative Law, rejected the ALJ's finding of fact that B.N. was living in Trenton and the ALJ's conclusion that B.N. was not entitled to a free public education in Ewing. In so doing, the Commissioner found that the ALJ had applied the incorrect statutory provision, finding that the petitioner's claim should have been analyzed under N.J.S.A. 18A:38-1(a), which provides that public schools are free to any person domiciled within the school district, rather than under subsection (b)(1) of the statute, the affidavit provision. The Commissioner stressed that the critical issues were whether the petitioner was B.N.'s legal guardian within the intendment of the statute and whether B.N. was living with her in Ewing.

In concluding that B.N. was entitled to a free public education in Ewing, the Commissioner observed that although the custody order granted to the petitioner was designated an "Order of Temporary Custody," it was to remain in force until further order of the Court. The Commissioner also concluded that the petitioner was B.N.'s legal guardian within the intendment of the statute. The Commissioner observed that the ALJ had not made a specific finding that the petitioner's testimony that B.N. periodically visited and stayed with her mother in Trenton was "not credible." He then concluded

that the "[p]etitioner's position [was] consistent with the custody order that provides for 'liberal [and] reasonable' visitation, 'as agreed between the parties.'" Commissioner's Decision, slip op. at 11.

The Ewing Board filed the instant appeal to the State Board.

On September 18, 2002, the Legal Committee of the State Board issued its initial report in this matter, in which it recommended reversing the decision of the Commissioner. After reviewing the record, the Committee found no basis for disturbing the ALJ's factual finding that B.N. was residing with her mother in Trenton and concluded that the petitioner had not demonstrated that B.N. was entitled to a free public education in the Ewing school district. Both parties filed exceptions to that report.[3] In her exceptions, the petitioner reiterated that B.N. "does have a right to spend time with her natural mother" and explained that B.N.'s mother drops her off at the petitioner's home in the morning "because at that time in the morning school doors were not open yet, and she felt safer having the child ride the bus, than stand outside of the school."

After considering the exceptions filed by the petitioner, the Legal Committee issued a revised report on June 18, 2003 in order to provide further clarification of its recommendation to reverse the Commissioner's decision. The petitioner filed exceptions to that report.

After a thorough review of the record, we reverse the decision of the Commissioner and grant the Ewing Board's counterclaim seeking tuition for the period of B.N.'s ineligible attendance in the district.

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[3] We note that we did not consider the Board's exceptions filed in response to the initial report of our Legal Committee since they were not filed in a timely manner.

The law is clear that public schools are free to any person between the ages of five and 20 "who is domiciled within the school district," N.J.S.A. 18A:38-1(a), or "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," N.J.S.A. 18A:38-1(b)(1). "If the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child…the superintendent or administrative principal may apply to the board of education for the removal of the child." N.J.S.A. 18A:38-1(b)(2). "The parent or guardian…shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education…." Id.

In reviewing this matter, we are required to give due consideration to the fact that the ALJ had the opportunity to observe the witnesses, see Quinlan v. Bd. of Ed. of North Bergen Tp., 73 N.J. Super. 40, 50 (App. Div. 1962), and to give due regard to the ALJ's ability to judge the witnesses' credibility, Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988), and to "recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments," Whasun Lee v. Board of Education of the Township of Holmdel, Docket #A-5978-98T2 (App. Div. 2000), slip op. at 14 (subsequent history omitted). We reiterate, in addition, that the petitioner has the burden of establishing that B.N. is entitled to a free public education in the Ewing school district. N.J.S.A. 18A:38-1(b)(2).

The record before us[4] indicates that a surveillance investigation conducted by the Ewing school district between March 1, 2000 and January 4, 2001, Exhibit R-3, in evidence, revealed that L.N. was driving her daughter from her home in Trenton to the petitioner's home in Ewing in the morning, where she would then take the bus to school. This scenario continued even after the petitioner was awarded temporary custody of B.N. in July 2000. The petitioner does not dispute the findings of that report, but counters that the surveillance only covered 25 days of the year and that B.N. "has a right to have contact with her natural mother." Answer Brief, at 2.

Notwithstanding the "liberal and reasonable" visitation provided to B.N.'s mother in the custody order, the record before us is devoid of any evidence demonstrating that B.N. was actually living with the petitioner in Ewing. In fact, to the contrary, the record indicates that B.N. was living with her mother in Trenton.

Although the courts have dealt with custody orders primarily in the context of a marital dissolution, the case law is instructive. In Pascale v. Pascale, 140 N.J. 583 (1995), the New Jersey Supreme Court observed that the Appellate Division had recently defined "liberal visitation" as consisting of "alternate weekends, one night per week, and alternate major holidays, including holidays like Labor Day and extended school holidays." Id. at 597, citing McCown v. McCown, 277 N.J. Super 213 (App. Div. 1994). See also Wagner v. Wagner, 165 N.J. Super. 553 (App. Div. 1979) (liberal visitation included one day of every weekend and one weekend every three weeks); Bennett v. Bennett, 150 N.J. Super. 509 (App. Div. 1977) (liberal visitation rights

[4] Like the Commissioner, we were not provided with a copy of the transcripts from the hearing held in the Office of Administrative Law.

consisted of visits with the child every other weekend, a three-week summer vacation and various holiday visits).

The pattern observed by the district's investigator in this case is patently inconsistent with such an arrangement. The investigator, who conducted random surveillance over a period of ten months both prior and subsequent to the issuance of the custody order, saw B.N. leaving her mother's home and/or arriving with her mother at the petitioner's home every morning during the school year on which he was able to observe B.N.[5] In point of fact, on every morning on which the investigator was able to follow L.N. from her home in Trenton until she dropped off B.N.,[6] he saw B.N. exit her mother's car at the petitioner's home in Ewing, where she then took the bus to school. As emphasized by the ALJ, throughout the entire period of surveillance, which covered more than 20 days over the ten-month period, the investigator never observed B.N. beginning her school day at the petitioner's home. Initial Decision, slip op. at 3.

Even the most generous interpretation of "liberal and reasonable" visitation does not envision such a scenario. As previously indicated, the petitioner does not dispute the findings of the surveillance report, and she acknowledges in her exceptions that L.N. was driving B.N. to the petitioner's house before school on the mornings she was observed by the investigator. Even accepting the reason provided by the petitioner for such conduct, i.e., that school was not yet open at that hour, does not alter the fact that B.N. was never observed starting her day at the petitioner's home. In spite of the

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[5] There were five mornings on which the investigator was unable to locate B.N. It was subsequently learned that she had been absent from school or arrived late on four of those days.

[6] On several mornings, the investigator lost L.N.'s car after she had left her home with B.N. as a result of traffic or weather conditions.

opportunities provided to her, the petitioner has not offered anything, aside from the existence of the custody order, that would counter the Board's evidence and provide us with a basis for concluding that, in accordance with the terms of that order, B.N. is living with her in Ewing.[7]

Consequently, after reviewing the record and giving due consideration to the ALJ's unique position to make credibility determinations, we conclude that the petitioner has not met her burden of demonstrating by a preponderance of the credible evidence that B.N. was eligible for a free public education in the Ewing school district under the criteria set forth in either subsection (a) or (b)(1) of N.J.S.A. 18A:38-1 during the period covered by the record.[8] See N.J.A.C. 6A:28-2.4(a)(1)(i). We therefore reverse the decision of the Commissioner and grant the Ewing Board's counterclaim seeking tuition for the period of B.N.'s ineligible attendance.

In so doing, we find that the tuition due to the Board should not include the period between March 11, 2002, the date of the Commissioner's decision permitting B.N. to attend school in Ewing, and the date of our decision today reversing that determination. In this regard, we recognize that the Commissioner held that B.N. was entitled to a free

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[7] In exceptions filed in February 2002 with the Commissioner, the petitioner attached a copy of the first page of her federal tax return for 2001, in which she claimed B.N. as a dependent, in support of her position that B.N. lived with her. We stress initially that a tax return is not dispositive of domicile under N.J.S.A. 18A:38-1. See Board of Education of the Borough of Fort Lee v. Kintos, decided by the State Board of Education, April 13, 1994, aff'd with modif., Docket #A-4944-93T5 (App Div. 1995). This is particularly true in this case, in which the evidentiary record overwhelmingly supports the Board's position that B.N. is not living with the petitioner. Moreover, although the page of the return submitted by the petitioner is not dated, we note that this document was prepared after the end of the 2001 tax year, which was subsequent to the close of the record in this matter in December 2001. We note, in addition, that, in claiming B.N. as a dependent on her 2001 return, the petitioner inaccurately identified B.N. as her child, rather than as her niece.

[8] We make no judgment as to the validity of the custody order for other purposes. Nor, under the circumstances, is it necessary to resolve whether the custody order constituted a "guardianship" within the intendment of N.J.S.A. 18A:38-1(b).

public education in the Ewing school district, and, on the basis of that decision, she continued to attend school in Ewing. We stress that N.J.S.A. 18A:6-25 provides that a decision of the Commissioner is binding on the parties unless and until reversed on appeal.[9] Thus, during the pendency of this appeal, B.N. was entitled to attend school in Ewing without the payment of tuition, and we direct that this period be excluded from the calculation of tuition.

We add, in response to the petitioner's concerns, that, on the basis of our concurrence with the ALJ's finding that B.N. is living with her mother in Trenton, she is entitled to a free public education in the Trenton school district.[10]

November 5, 2003

Date of mailing ___________________________

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[9] The Ewing Board did not seek and was not granted a stay of the Commissioner's decision.

[10] We note, in response to the petitioner's exceptions to the revised report of our Legal Committee, in which she contends that many changes have occurred in recent years, that our factual determination that B.N. was living with her mother in Trenton is based on the evidentiary record before us. That record closed in December 2001, and the petitioner has not moved to supplement the record with additional evidence. However, our decision today does not determine any future entitlement that B.N. might have to a free public education in Ewing under the standard set forth in N.J.S.A. 18A:38-1 in the event that the circumstances have changed. Nonetheless, any such change in circumstances does not alter our determination herein for the period of time at issue in this matter.