

C.M., on behalf of minor child, S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
LENAPE REGIONAL HIGH SCHOOL	:	
DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioning grandparent, C.M., challenged Board's residency determination concerning her grandson, S.F. Petitioner claimed S.F.'s mother and husband were not capable of supporting or providing care for S.F. due to economic hardship.

ALJ found that C.M. was domiciled within the District; that S.F. was living with C.M.; that C.M. was supporting S.F. *gratis* and intended to keep and support S.F. gratuitously for a longer time than merely through the school term. However, ALJ further found that there was insufficient testimony in the record to establish that W.B., C.M.'s mother, was not capable of supporting S.F. as a result of economic hardship; that petitioner failed to establish that the effects of prior abuse of S.F. by his stepfather and of W.B. by her former husband prevented S.F. from living with W.B. and prevented her from providing care for S.F. Therefore, ALJ concluded that petitioner failed to establish any legally sufficient reason for providing a free public education to S.F. in the District. Petition was dismissed. ALJ determined petitioner was responsible for the payment of the annual tuition of \$21,475.80 prorated for that portion of the 1996-97 school year during which S.F. was enrolled in respondent's School District.

Commissioner adopted in part and reversed in part the initial decision. Commissioner concurred with the ALJ that petitioner had demonstrated that S.F. was living with her and was supported by her *gratis*. Commissioner, however, declined to find that S.F. was not entitled to a free public education in the District. Commissioner found that petitioner met her burden of proving that the parents of S.F. were incapable of supporting or providing care for him due to family or economic hardship, thereby establishing S.F.'s entitlement to a free public education provided by the Lenape Regional High School District. *N.J.S.A. 18A:38-1b(1)*.

JULY 28, 1997

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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Both petitioner's exceptions and the reply thereto were timely filed pursuant to *N.J.A.C. 1:1-18.4*.

Petitioner refutes the ALJ's conclusion that she failed to show that family hardship exists in the instant matter sufficient to render W.B. incapable of providing support to S.F. Rather, petitioner asserts,

***It is irrelevant whether [S.F.'s] mental condition came from his early childhood, or whether he had been diagnosed as being mentally disturbed. The issue with regard to family hardship in the present case is whether S.F.'s behavior caused a family hardship, which made W.B. incapable of providing support for him. There is no need for an expert witness for that. The best witness for such determination is W.B. The basis of S.F.'s behavior is not relevant, as Judge Martone provides. (Petitioner's Exceptions at p. 1)

Petitioner argues that W.B.'s testimony established that S.F.'s behavior was beyond her control when he resided with her, and "[t]here was constant tension, fighting and brawling throughout the house." (*Id.* at p. 2) Petitioner continues,

Regardless of the basis or origin of S.F.'s mental condition, when he resided with W.B. it caused a family hardship which made W.B. incapable of supporting him. It is submitted, that when a child physically accosts his parent, that is a hardship which makes the parent incapable of providing support for that child. (*Id.*)

Thus, petitioner maintains that she has proven that when S.F. lives with W.B., "it caused a family hardship which made W.B. incapable of supporting him." (*Id.*)

Further, petitioner contends that W.B.'s testimony has established that she cannot financially support S.F.

***There was the testimony of W.B. that she could not financially support S.F. *** [Petitioner] also testified that she gives W.B. substantial funds for the maintenance and support of her family without S.F. residing with W.B. Logically, if S.F. were to reside with W.B., she would even have a harder time financially. *** Furthermore, [W.B.] testified that she had just been laid-off from her employment. Judge Martone did not provide that the testimony of the witnesses was incredible. As a matter of fact, he found in favor of [petitioner] on the other portions of his decision without [petitioner] submitting any paper evidence, and solely based [on petitioner's] and W.B.'s testimony as evidence. (*Id.* at p. 3)

Moreover, petitioner asserts that the Board has "****submitted no evidence to dispute the contention that W.B.'s expenses were in excess of her and her husband's income, and that if S.F. were to live with her it would not create a[n] economic or financial hardship." (*Id.*)

In reply to petitioner's exceptions, the Board asserts that the ALJ properly found that petitioner failed to establish by a preponderance of the record evidence that W.B. was incapable of providing care for S.F. due to family hardship. (Board's Reply at p. 1) Here, the Board contends that "****[p]etitioner's claim that S.F. allegedly physically abused W.B. amounts to nothing more than hyperbole." (*Id.* at p. 2) The Board argues that, contrary to petitioner's assertion, the fact that S.F. may have pushed her on one occasion, as W.B. so testified, does not create family hardship, nor does it render W.B. incapable of providing care for S.F., as required by *N.J.S.A. 18A:38-1b(1)*. (*Id.*) Not only did W.B. fail to testify that S.F. was residing with

petitioner because she was incapable of providing care for him, but the documentary evidence, according to the Board, also fails to support petitioner's claim of incapability.¹ The Board further notes that W.B. "testified that S.F. was 'doing better with his behavior at the present time,'" and that S.F. could return to W.B.'s home whenever he wanted. (*Id.*)

As to petitioner's argument that the ALJ impermissibly focused on the cause of S.F.'s behavior rather than the effects of the behavior, the Board contends that petitioner's argument ignores the fact that W.B.'s claims of family hardship are grounded "*solely* on the alleged lingering effects of alleged parental abuse over seven years ago ***." (emphasis in text) (*Id.* at p. 3) However, without expert testimony and documentation to support petitioner's claim, the Board asserts that the ALJ properly determined that he could not make a finding that "family hardship" renders W.B. incapable of providing care to S.F.

The Board next addresses petitioner's contention that she has shown that W.B. is incapable of providing care to S.F. due to economic hardship. Here, the Board argues that petitioner has improperly cited the record evidence with regard to W.B.'s testimony, and has further impermissibly attempted to shift the burden of proof. (*Id.* at p. 4) The Board affirms that W.B. did not testify, as petitioner's exception arguments so state, that "if S.F. were to come [to] live with her that 'she was certain that she could not make ends meet.'" (*Id.*, citing to Petitioner's Exceptions at p. 2) Rather, the Board refutes, W.B. testified that "***it would be difficult, but not impossible, to financially support S.F." (*Id.*) The Board herein underscores that the pertinent statute requires that a petitioner support her claims of incapability due to economic hardship with documentation. Moreover, the Board stresses that the burden of proof remains with petitioner to prove each and every element of the statute. (*Id.*)

¹ The Board points out that "W.B. testified that when S.F. resides with her, it 'makes it difficult for her'***." (Board's Reply at p. 2, citing to Initial Decision at p. 6) Moreover, W.B.'s affidavit submitted to the District

The Board next presents its cross-exceptions to the ALJ's initial decision, first offering a list of 23 specific findings which it proposes in lieu of, or in addition to, those findings of the ALJ. The Board then asserts that petitioner failed to establish by a preponderance of the record evidence that she assumed all personal obligations for S.F. relative to school, contrary to the ALJ's finding. The Board contends that the ALJ's own factual findings contradict his conclusion in this regard.

For example, Judge Martone found that W.B. regularly attended important meetings over the years, both prior to and after S.F.'s application to the Lenape District, with respect to S.F.'s educational and treatment planning and review, and was involved in other aspects of S.F.'s schooling. The documentary evidence admitted at the hearing corroborates W.B.'s assumption of these responsibilities. (*Id.* at p. 8)

The Board further excepts to the ALJ's failure to make a finding on the issue of whether S.F. was living with petitioner for the sole purpose of receiving a free public education within the Lenape District. (*Id.* at p. 9) The Board notes that S.F. has not lived with petitioners continuously and that it is merely S.F.'s "word" that he will abide by his grandparents' rules which keeps him in their home. (*Id.*) Yet, the Board contends that, "****both petitioner and W.B. *** testified that S.F. can return home whenever he wants, [and] admitted that S.F. still regularly returns to W.B.'s house to spend nights and, on occasion, entire weekends." (*Id.*) The Board further argues that, on cross-examination, W.B. admitted that petitioner advised her that she needed to sign the affidavit submitted with the Petition of Appeal in order to establish S.F.'s residence within the Lenape District. This admission, asserts the Board, renders petitioner unable to reestablish that S.F. is not living with her for the sole purpose of obtaining a free public education from the Lenape District. (*Id.* at p. 10)

affirms that "S.F. is not living with her because he '[didn't] get along with [his] father and fe[lt] better living with [his] grandparents.'" (*Id.*, citing Petitioner's Affidavit at p. 17, Respondent's Exhibit No. 4)

Finally, the Board excepts to the ALJ's finding that petitioner has established that she is supporting S.F. *gratis* within the meaning of *N.J.S.A.* 18A:38-1b(1). (*Id.*) Here, the Board points to the uncontroverted evidence which belies W.B.'s assertion that she did not provide support to S.F. The Board concludes,

W.B. is still physically and emotionally able to care for S.F., and testified that she did for two extended periods of time previously, and for countless additional nights and weekends now, and during the past two years. No claim of economic or family hardship was made by W.B. until after the Lenape Board denied S.F.'s application for non-resident pupil status, and then only after W.B. was advised by petitioner as to the applicable statutory standards. W.B. lives only a short distance from petitioner's house *** and both petitioner and W.B. testified that W.B. sees S.F. on a daily basis, that W.B. regularly speaks to S.F. on the phone, and that W.B. is still actively involved in his life. W.B. testified unequivocally that she has, and continues to, assume significant obligations relative to S.F.'s school requirements. W.B. and her husband, with whom W.B. testified that S.F. has a good relationship, provide support to S.F. in the form of clothes, gifts, money, and health insurance. W.B. also testified that S.F. can return home at any time he wishes. Clearly, the relationship between petitioner and S.F. is not the type of relationship that the affidavit law was designed to recognize. (*Id.* at p. 12)

Accordingly, the Board urges that the Commissioner modify the initial decision consistent with its cross-exceptions and affirm the ALJ's ultimate conclusion denying petitioner's instant appeal and ordering petitioner to reimburse the Board, as stated in the initial decision. (*Id.*)

Upon careful and independent review of the record in this matter, which did not include transcripts of the hearing held at the OAL, the Commissioner adopts in part, and reverses in part, the recommended decision of the ALJ. Initially, the Commissioner concurs with the ALJ that petitioner has demonstrated that S.F. is living with her and is supported by her *gratis* (initial decision at p. 13). Contrary to the Board's assertions, the fact that S.F. occasionally spends an evening or weekend at his mother's home, and that he has, from time to time, returned there for more extended periods and is free to do so provided that he behaves appropriately, does not alter

the fundamentally long-term and stable nature of his residence in the home of his grandmother. Nor does the fact that his mother, who has given up neither legal custody nor her parental rights, retains a level of interest and involvement in her son's personal and educational welfare rise to the level of precluding a finding that S.F.'s grandmother is primarily responsible for these matters. Thus, the Commissioner is satisfied that the ALJ's findings and conclusions in this regard are both appropriate and correct.

However, the Commissioner declines to further concur that S.F. is not entitled to a free public education in the District by virtue of petitioner's failure to establish that the parents of S.F. are incapable of supporting or providing care for him due to family or economic hardship. *N.J.S.A. 18A:38-1b(1)*. The Commissioner recognizes that "[t]he amendments to N.J.S.A. 18A:38-1 *** were intended to ease the burden on local boards of education attempting to remove illegally enrolled students ***." *Gunderson v. Board of Education of the City of Brigantine, Atlantic County*, 95 N.J.A.R. 2d (EDU) 39, 42. Prior to the enactment of the amendment, if a local board doubted the validity of sworn statements submitted to it by a resident in order to show the residency of a child within the district, it was required to initiate proceedings before the Commissioner to contest the validity of the statements. (Senate Bill No. 1447, Statement of 1993, enacted as c. 380) However, under those circumstances where a local board determines the evidence does not support the validity of the resident's claim, the amended statute allows the board to deny the child admission, and provides that *the resident* may appeal the board's decision to the Commissioner. The amendment further requires additional proofs to be filed by a parent or guardian attesting to the fact that the parent or guardian "****is not capable of supporting or providing care for the child due to family or economic hardship and the child is not

residing with the resident of the district solely for the purpose of receiving a free public education within the district.” *N.J.S.A. 18A:38-1b(1)*.²

Notwithstanding the increased burden placed on the resident by this amendment, the fundamental purpose of the statute was not altered. That is, the statute continues to aim to prevent enrollment in a local district by those students who, through deceptive living arrangements, are attempting to fraudulently obtain a free public education in the district. Thus, where there is nothing in the record to indicate that a petitioner has acted with fraudulent intent to mislead the Board into permitting a nonentitled student to attend school in the District, see *H.M. and L.M., on behalf of their minor children, J.M. and J.M. v. Board of Education of the Township of Freehold, Monmouth County*, decided by the State Board April 2, 1997, and where, as herein, the finder of fact has, in all respects, accepted the testimony of petitioners and their witnesses as credible, claims of family or economic hardship should not be invalidated as “conclusory” because petitioners do not buttress their statements with extensive documentary evidence or assessments from expert witnesses (as here, in the field of psychology, *id.* at pp. 14, 15). To the contrary, certain types of hardship, such as those arising from a child’s behavior in the parent’s home or from a precarious but not destitute financial status, are often not amenable to evidence beyond the credible testimony, for instance, as to the child’s actions and their effect on the remainder of the family and on the need for supplemental support from relatives.

In the present instance, petitioner and W.B. have testified regarding S.F.’s quick, and sometimes violent, temper, and described aggressive and disruptive behaviors of a type that are corroborated by the assessments contained in S.F.’s annual review conference reports (Exhibits R-10 through R-14) and by the fact of his having been suspended from school bus

² In all such cases where a local residency determination is challenged, the resident is entitled to an expedited hearing and the child may not be denied admission during the pendency of the proceedings. *N.J.S.A. 18A:38-1b(1)*.

privileges due to his actions (*id.*, at p. 6). Additionally, they have testified as to S.F.'s negative effect on W.B.'s other children when S.F. lives with W.B. and the family (*id.* at p. 3), as well as W.B.'s inability to give S.F. the individualized emotional attention he requires and control him when he evinces aggressive or disruptive behavior (*id.* at p. 6). Both petitioner and W.B. have attested to the history of abuse in their family and its effect on petitioner and S.F. (*id.* at p. 3, 6), particularly with regard to S.F.'s behavior and W.B.'s inability to handle it. Finally, W.B. has attested to the financial burden of raising five additional children, of being recently laid off, of being continually short of money and the fact of her dependence on the continued support of her parents, both in terms of money and provision of living quarters (*id.* at p. 1, 5).

Under these circumstances, the Commissioner finds that petitioner has sufficiently demonstrated that W.B. is not presently capable of supporting or providing care for S.F. due to family and economic hardship, and that S.F. is not living with petitioner solely for the purpose of receiving a free public education in the District.

Accordingly, the initial decision of the ALJ is affirmed in part, and modified to the extent that the Commissioner finds that petitioner has met the burden of proof, as set forth above, necessary to establishing S.F.'s entitlement to a free public education in the Lenape Regional High School District.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 28, 1997