381-98

H.K. AND G.K., on behalf of minor children, J.K. AND C.K.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents challenged Board's residency determination that their sons, J.K. and C.K., were not legally domiciled in the District.

ALJ concluded that petitioners proved by a preponderance of evidence that J.K. and C.K. were not residing with their aunt and uncle solely for the purpose of receiving a free education. Pursuant to *N.J.S.A.* 18A:38-1b(1), the ALJ found that the aunt and uncle were properly domiciled in the District; that the aunt and uncle supported their nephews *gratis*; that the aunt and uncle proved that they have assumed all personal obligations for their nephews relative to school requirements; and that the aunt and uncle intended to keep and support their nephews, gratis, for longer than the school year. However, the ALJ concluded that petitioners did not prove by a preponderance of the evidence that they were incapable of supporting or providing care for J.K. and C.K. due to that family hardship. That petitioners may not be able to supervise their teenage sons during the week between the hours of 7:30 a.m. and 4 to 5 p.m., when G.K. arrives home form work, does not render them *not capable* of caring for their sons. Thus, the ALJ concluded that J.K. and C.K. were not entitled to a free public education in the District. ALJ found that until the 1996-97 school year, the Board's affidavits did not ask about family hardship, just to swear that the boys were living with relatives *gratis* and that the parents were not claiming their sons as dependents. Thus, the Board was estopped from seeking tuition reimbursement prior to the 1996-97 school year. ALJ did conclude that H.K. and G.K. were responsible for the tuition of J.K. for the 1996-97 school year and the tuition of C.K. for the 1996-97 and 1997-98 school years. ALJ ordered the parents to reimburse the Board for said tuition costs.

Commissioner found no basis on which to disturb the findings and conclusions rendered by the ALJ. Thus, the Commissioner adopted the initial decision as his own and directed petitioners to reimburse the Board for the tuition costs for the periods of ineligible attendance of J.K. and C.K. for the 1996-97 and 1997-98 school years.

AUGUST 28, 1998

OAL DKT. NO. EDU 673-97S
AGENCY DKT. NO. 5-1/97

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PETITIONERS,	:	
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RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Both parties filed exception and reply arguments in accordance with *N.J.A.C.* 1:1-18.4. However, prior to the expiration of time within which to render a final decision in this matter, the parties were invited to submit briefs on the threshold issue of standing, and an extension of time to issue the final decision was sought and received, in order to accommodate the filing of briefs by the parties.

By letter dated July 14, 1998, the parties were advised that the initial decision and record of proceedings at the OAL did not address a fundamental issue in this matter. Here, the Petition of Appeal was filed by H.K. and G.K., the parents of J.K. and C.K. As the record indicates, both parents live in Cinnaminson. However, the parties were advised that the enabling statute requires that, where a student is denied admission to a district upon a board's conclusion that the student fails to meet the "affidavit student" requirements set forth under *N.J.S.A.* 18A:38-1b(1), it is the *resident* who may contest the board's decision to the Commissioner within 21 days of the date of the Board's decision. Further, the parties were advised that it is the *resident* who, according to the statute, carries the burden of proof, and the *resident* who may be assessed tuition by the

Commissioner if the evidence does not support his/her claims. *N.J.S.A.* 18A:38-1b(1). The positions taken by the parties on this issue are summarized below.

Initially, the Commissioner observes that the following facts are not in dispute. The within proceedings were initiated when the Board's Superintendent sent petitioners, as the parents of J.K. and C.K., a letter dated August 20, 1996 advising them that the Board may seek tuition from them for their children's illegal attendance in the District. (Petitioners' Brief, July 23, 1998 at p. 2, Exhibit A) That correspondence stated, in full,

> Please be advised that in accordance with *N.J.S.A.* 18A:38-1(b)(2), a determination has been made that your children, [J. and C.] are not legally domiciled within the Township of Cherry Hill and therefore, are not entitled to attend school in Cherry Hill. Pursuant to law, you are entitled to a hearing before the Board, and if in the judgment of the Board it is determined that your children are not legally domiciled within the Township, the Board may order the transfer or removal of your children from the school. In addition, the Board may, likewise, seek tuition reimbursement from you for your children having illegally attended the Cherry Hill School System.
>
> You will have the right to contest this determination by a hearing before the Board of Education. If you choose to exercise that right, please complete the form attached entitled "Parent Request for Hearing" and return to the undersigned within seven [7] days of your receipt of this letter. You will, thereafter, be notified of the time, date and place of the hearing.
>
> Should you fail to respond within the seven [7] day period, your children will be removed from the Cherry Hill Public School System and you may be assessed for the period of time of your children's illegal enrollment and attendance in school. (*Id.*)

After receiving the letter, petitioners appeared before the Board, together with their children and Z.K. and D.K., the aunt and uncle of the children, who are residents of Cherry Hill. The Board determined that the parents, H.K. and G.K., failed to sustain their burden of proof, and the children were ordered removed from the District. The Board's resolution in this regard states

> WHEREAS, on December 17, 1996, a hearing was held before the Board of Education pursuant to *N.J.S.A.* 18A:38-1(b)(2) and;
>
> WHEREAS, all parties were present and/or represented by independent counsel and;

> WHEREAS, the Board of Education having heard all the proofs as presented, and having considered same as well as the testimony offered, hereby adopts the following Resolution:
>
> BE IT RESOLVED *** the Board has determined that the applicants have failed to sustain their burden of proof pursuant to statute, and students #9300715 and #9500931 are hereby ordered removed from the School District.[1] (*Id.* at Exhibit C)

By letter dated December 18, 1996 addressed to petitioners' prior counsel, the Board advised that petitioners had "the right to contest the decision before the Commissioner of Education." (*Id.* at Exhibit D) The Board added, that, should petitioners appeal and should the Commissioner determine that the Board's decision was correct, "the Commissioner will assess a prorated tuition charge against your client for the time [J.K.] and [C.K.] attended class and were not entitled by law to do so. ***" (*Id.*)

After receiving the letter of December 18, 1996, petitioners retained their current counsel to prosecute their appeal before the Commissioner of Education. (*Id.* at p. 3) Petitioners filed a Verified Petition of Appeal before the Commissioner on January 7, 1997. That petition was docketed and acknowledged by the Department of Education. On January 21, 1997, the Board filed its Answer; that Answer did not raise as an affirmative defense that petitioners lacked the standing to prosecute the petition. (*Id.*) On February 3, 1997, the parties were notified that the matter was being transmitted to the OAL for appropriate proceedings. The case was received by the OAL, a prehearing conference was conducted on March 19, 1997 and, again, the issue of standing was not raised. (*Id.*) The hearing in this matter was held on June 4, 1997 and June 5, 1997. Thereafter, extensive briefs were filed, wherein the issue of standing was never raised.

Petitioners contend that, as the parents of C.K. and J.K., they have standing to seek relief from the Commissioner. First, they assert that they are "interested persons" within the definition provided by *N.J.A.C.* 6:24-1.1, noting that they were the persons who were repeatedly advised that, absent relief from either the Board or the Commissioner, their children would be

[1] The Board notes that neither student was removed from school pending appeal of the decision to the Commissioner of Education. (Board's Brief, July 28, 1998 at p. 5)

removed from the District and they would be assessed tuition. (*Id.* at p. 5) Petitioners reason that if the Commissioner were to find that they did not have standing to prosecute the appeal, then they would be without remedy. They add that they have a "real and genuine stake in this controversy ***." (*Id.* at p. 6)

Petitioners next contend that to require that the petition be filed by the residents would be placing form over substance. Petitioners underscore that both Z.K. and D.K. testified at the hearing and, had they, as residents, been the petitioners, "***the proofs would have been identical, the issues would be identical and the ultimate outcome would not be in any way affected by the 'residents' petitioning in place of the parents." (*Id.*)

Further, petitioners contend that the prosecution of this appeal is based upon precedent established by the Commissioner in the case entitled *A.S., on behalf of minor A.S., N.S. and R.F.S. v. Board of Education of the South Orange Maplewood School District,* decided by the Commissioner on May 29, 1997. There, the Commissioner granted relief to the mother as petitioner. In the instant matter, petitioners argue that *A.S.* clearly established controlling precedent for allowing a parent to petition for relief from the Commissioner pursuant to *N.J.S.A.* 18A:38-1b(1). (*Id.* at p. 7)

Finally, petitioners aver that to deny them standing at this juncture of the proceedings would violate the demands of justice and good conscience. (*Id.*) Petitioners herein assert that, as a matter of practice, the issue of standing should be raised as an affirmative defense so that the court does not consume unnecessary time litigating a matter only to determine that the litigants "did not belong before the court in the first place." (*Id.*) Petitioners note that the Commissioner, in accordance with N.J.A.C. 6:24-1.9 has the right to make such preliminary determinations prior to transmitting a matter to the OAL. However, petitioners contend that, once this case was transmitted to the OAL, both parties assumed that the petitioners had full standing to have the case adjudicated. (*Id.* at p. 8) Petitioners reason, therefore, that it would be unconscionable to now find otherwise.

The Board also contends that petitioners should be found to have standing to pursue this matter. Initially, the Board argues that *N.J.S.A.* 18A:38-1b(1) is not applicable, since petitioners

have standing to maintain this action under *N.J.S.A.* 18A:38-1b(2). (Board's Brief, July 28, 1998 at p. 2) Here, the Board asserts that C.K. and J.K were not denied admission to the District pursuant to *N.J.S.A.* 18A:38-1b(1), but, rather were *removed* from the District pursuant to *N.J.S.A.* 38-1b(2). Since the students were already enrolled in the District, the Board finds its authority to remove the students pursuant to *N.J.S.A.* 18A:38-1b(2), rather than under subsection b(1), which the Board interprets to be relevant to those instances where a student is *seeking admission* to a district. The Board argues that subsection 1b(2) is controlling, inasmuch as it allows for removal of a student whose parent or guardian is not a domiciliary of the district *and* a student who "is not kept in the home of another person domiciled within the district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection***." *N.J.S.A.* 18A:38-1b(2). The Board notes, "While subsection (b)(2) does not specifically delineate the affidavit requirements, these requirements are directly incorporated into subsection (b)(2) by reference to subsection (b)(1)." (Board's Brief, July 28, 1998 at p. 6) Additionally, the Board points out that subsection b(2) *does* permit the parent or guardian to contest the Board's decision to remove the student, and further provides the parent or guardian with the right of appeal to the Commissioner. In sum, the Board argues that "[i]n these *removal* cases it is the parent or guardian who may challenge the board's determination. On the other hand, when a student is *denied admission* under (b)(1), it is the resident who may challenge the Board's determination ***." (emphasis in text) (Board's Brief, July 28, 1998 at pp. 7-8)

The Board next contends that, irrespective of the requirements set forth in *N.J.S.A.* 18A:38-1, petitioners have standing to maintain this action under the traditional notions of standing applied by the Commissioner. Urging that the Commissioner forego the adoption of an "overly technical reading of the statute" (*id.*), the Board maintains that petitioners have a tangible stake in this matter. The Board agrees that petitioners are "interested persons" within the meaning of *N.J.A.C.* 6:24-1.1 and argues that "***the Commissioner should have no hesitation holding that

petitioners have standing to maintain the instant appeal, given that it is [their] own children who are at the center of the dispute." (*Id.* at p. 12)

Finally, the Board asserts that, assuming *arguendo*, petitioners lack standing to maintain the instant appeal, they should nevertheless be required to pay back tuition for C.K. and J.K.'s ineligible attendance in the District. (*Id.* at p. 14) The Board herein reasons that it should be made whole, and the Commissioner should, therefore, "construe this response as [its] application for tuition for C.K. and J.K.'s ineligible enrollment in the District***." (*Id.* at p. 15) To dismiss the instant appeal without awarding tuition to the Board would constitute unjust enrichment, as "petitioners' sons received the benefit of seven (7) years worth of education in the District for which they have not paid any money." (*Id.* at p. 16) Under such circumstances, it is the taxpayers, the Board avers, who will be punished.

Upon review of the parties' arguments on the issue of standing, the Commissioner finds that a careful reading of both *N.J.S.A.* 18A:38-1b(1) and 38-1b(2) compels an interpretation different from that set forth by the Board. Contrary to the Board's reading of the statute, *N.J.S.A.* 18A:38-1b(1) *does* contemplate situations where affidavit students are already attending school in the district, as it states, in pertinent part,

> ***In the event the child *is currently enrolled in the district*, the student shall not be removed from school during the 21-day period in which the *resident* may contest the board's decision nor during the pendency of the proceedings before the commissioner.*** (emphasis added) *N.J.S.A.* 18A:38-1b(1).

Further, subsection 1b(2) states, in pertinent part,

> If the superintendent or administrative principal of a school district finds 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 as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or 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 as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision ***. *N.J.S.A.* 18A:38-1b(2).

If the Board's interpretation were to be accepted, (*i.e*. affidavit students are removed from school under subsection 1b(2) rather than subsection 1b(1)), then the language in subsection 1b(1), above, is contradictory, or, at best, superfluous. It is illogical to conclude that the Legislature would incorporate into paragraph 1b(2) language which directly conflicts with that in the preceding paragraph, so as to establish two different avenues of appeal for affidavit students currently enrolled in a district. The Commissioner recognizes that

> ***it is beyond question that "[s]tatues [should] not be interpreted in a manner leading to absurd or unreasonable results." *** In fact, when construing a statute, "every effort should be exerted to avoid . . . an anomalous result. ***" (*State v. Tekel*, 281 *N.J. Super.* 502, 506, citations omitted)

Further, "[w]hen a statute has more than one possible meaning, courts must look beyond its literal language to determine the legislative intent." *State v. Galloway*, 133 *N.J.* 631, 658, (1993) citing *State v. Butler*, 89 *N.J.* 220, 227 (1982). Here, the Board's interpretation is inconsistent with the Legislature's overall intent when drafting and adopting the affidavit student requirements. As the Commissioner affirmed by prior decision

> The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme when *it is clear that the child has no home, or possibility of school attendance, other than with the non-parent district resident and that such resident is for all intents and purposes the sole caretaker and supporter of the child.**** (emphasis added) *Gunderson v. City of Brigantine Board of Education*, 95 *N.J.A.R.* 2d (EDU) 39, 42.

It is clear from the language in *N.J.S.A.* 18A:38-1b(1) that the Legislature contemplated, in affidavit student cases, that the resident, for all practical purposes, would be acting in the stead of the child's parent or legal guardian and should, therefore, be the party granted the legal standing to appeal a board's adverse determination, *even where the affidavit student is presently enrolled in the district*. It

is for this reason that the Legislature established the "test," or list of criteria, which a resident must satisfy in order to demonstrate that the student is entitled to a free education in the district.[2] Indeed, the Board's interpretation would be unworkable, since in many affidavit student cases, the parent or guardian is unable, unwilling or incapable of prosecuting a claim before the Commissioner. (See *Gunderson v. City of Brigantine Board of Education*, 95 *N.J.A.R.* 2d (EDU) 39, where the child's natural mother had passed away and natural father had a long history of mental illness; *MacKinney v. City of Clifton Board of Education*, 96 *N.J.A.R.* 2d (EDU) 434, where parents of the child were divorced, mother was a drug addict and father, living in Idaho and unable to read or write, could not care for or support the child; *S.L. on behalf of minor R.L. v. City of Clifton Board of Education,* 95 *N.J.A.R.* 2d (EDU) 476, where the child's father lived in the Philippines, was caring for seven children and could not afford to care for the child; *G.L. on behalf of minors Y.-C.L. and Y.-Y.L. v. Board of Education of the Township of Holmdel*, 97 *N.J.A.R*. 2d (EDU) 643, where the children's parents were in the course of emigrating to the United States from Taiwan and petitioners assumed the care and support for the children; *J.A. on behalf of her minor niece, T.C. v. Board of Education of the School District of South Orange and Maplewood*, 97 *N.J.A.R.* 2d (EDU) 370, where the child's father was deceased, and the mother was mentally retarded, unable to work and did not have adequate living accommodations for a child; and *C.N., Sr. and M.N. v. Board of Education of the School District of South Orange and Maplewood*, 96 *N.J.A.R.* 2d (EDU) 914, where the child's mother had taken no responsibility for her since she was 18 months old and her father was financially unable to care for her.)

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[2] The affidavit student provision affirms that public schools shall be free of charge to any person over five and under 20 "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 ***." The domiciliary must provide the local board of education, if so required by the board with (1) a sworn statement that s/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 s/he intends to keep and support the child gratuitously for a longer period of time than merely through the school term; (2) a copy of the lease, if a tenant, or a sworn statement by his/her landlord acknowledging tenancy if residing as a tenant without a lease; and (3) a sworn statement by the child's parent or guardian that such parent/guardian is not capable of supporting or providing care for the child due to 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. N.J.S.A 18A:38-1b(1).

The Commissioner finds, therefore, that the language in *N.J.S.A.* 18A:38-1b(2) should *not* be read to confer upon parents or guardians the legal standing to appeal a board's decision to remove a child from the district where that child was already admitted to the district as an affidavit student under *N.J.S.A.* 18A:38-1b(1). This interpretation is not, as petitioners contend, merely placing form over substance, but is consonant with the purpose of the law: to ensure that all students receiving a free education in the district are *either* living with a parent or guardian who is properly domiciled in the district (*N.J.S.A.* 18A:38-1a) *or* living with a resident because the parent or guardian is not capable of supporting or caring for the child, due to family or economic hardship, and the child is not residing within the district solely for the purpose of receiving a free education, thus satisfying the conditions of *N.J.S.A.* 18A:38-1(b)1. Neither should subsection 1b(2), be read to incorporate by reference subsection 1b(1), as the Board proposes. Rather, the more persuasive view is that subsection 1b(2) merely references subsection 1b(1) as it confers upon a parent or guardian the right to appeal a board's decision to remove a child where the Board asserts that the parent or guardian is not domiciled within the district, *and where subsection 1b(1) is not applicable.*

Further, the Commissioner finds petitioners' exception arguments with respect to the precedential value of the matter entitled *A.S., on behalf of minor A.S., N.S. and R.F.S. v. Board of Education of the South Orange Maplewood School District, supra,* on the issue of standing to be without merit. In that case, the residents, as the grandparents of the child, *were petitioners*, along with the mother, A.S. Indeed, the resident grandparents, appeared *pro se*, without A.S. to prosecute the case at the OAL. The Commissioner, therefore, declines to determine that precedent compels that he find that petitioners in this matter have standing pursuant to *N.J.S.A.* 18A:38-1b(1).

Moreover, although both parties in the instant matter argue that petitioners as parents may be granted standing to appeal in accordance with general legal principles in that they are undoubtedly "interested persons" under *N.J.A.C.* 6:24 –1.1, the Commissioner declines to accept their standing on this general basis, where the Legislature has designed a specific statutory scheme which must clearly apply to disputes such as the one herein.

However, the Commissioner is not unmindful that this matter of first impression has been fully litigated, and that the parties' differing interpretations clearly evidence confusion with respect to the application of this relatively new statute.[3] Therefore, principles of equity would demand, *under these particular circumstances,* that petitioners not be denied standing to prosecute their Petition of Appeal. The Commissioner so decides, noting that a contrary determination in this matter would offend principles of fundamental fairness. Having so found, the Commissioner notes that he has reviewed the full record in this matter, including the copies of transcripts from hearings conducted on June 4, 1997 and June 5, 1997, as well as the parties' exceptions to the initial decision and the respective replies to the exceptions. The Commissioner finds, however, no basis on which to disturb the careful findings and conclusions rendered by the ALJ, which are amply supported by the record.

Accordingly, the initial decision of the ALJ is adopted for the reasons well-articulated therein.[4] Petitioners are hereby ordered to reimburse the Board for the tuition costs for the attendance of J.K. and C.K. for the 1996-97 school year at a rate of $8,837 per student (Exhibit R-4, 1996-97 Non-Resident Tuition Rate) and $9,213 per student for C.K.'s attendance in the 1997-98 school year.[5]

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

AUGUST 28, 1998

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[3] The statute was amended in 1993 and took effect on January 11, 1994.

[4] To the extent the initial decision can be read to lend support to a finding on the issue of standing which is contrary to the Commissioner's determination herein, any such finding rendered by the ALJ is disavowed.

[5] It is herein noted that, although the 1997-98 non-resident tuition rate was not made a part of the record, such information is a matter of public record and said rate is not contested by petitioners. Thus, the Commissioner takes judicial notice of the Board's 1997-98 non-resident tuition rate, so as to render a final determination herein.

[6] This decision, as the Commissioner's final determination in the instant matter, 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.* 6:2-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.