

BOARD OF EDUCATION OF THE CITY OF :
ABSECON, ATLANTIC COUNTY,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

M.L.G. AND L.G.-P., on behalf of minor child, : DECISION
B.G., :

RESPONDENTS. :

_____ :

SYNOPSIS

Petitioning Board sought a determination that it is not responsible to provide B.G. a free public education pursuant to law and reimbursement from respondents of tuition paid on B.G.'s behalf to the R.E.A.C.H. Charter School.

The ALJ concluded that respondents failed to demonstrate that B.G. was a *bona fide* resident of Absecon and thus entitled to a free public education from the District. The ALJ further concluded that M.L.G.'s securing of an order of custody of B.G. was solely for the purpose of establishing residency in Absecon in order to entitle B.G. to a free education from the District. As such, the ALJ concluded that B.G. is not domiciled in the Absecon School District and, thus, not entitled to a free education from the District. In addition, the ALJ ordered that respondents reimburse petitioner tuition paid to the R.E.A.C.H. Charter School on behalf of B.G.

The Commissioner reversed the decision of the ALJ. The Commissioner concluded that an analysis pursuant to *N.J.S.A. 18A:38-1(b)* was inappropriate once it was determined that M.L.G. had legal custody of B.G. Consistent with decisional law, the Commissioner further held that the motives of respondents in obtaining an order transferring custody of B.G. to M.L.G. are not subject to inquiry, and, absent a showing of fraud or other exceptional circumstances, B.G., pursuant to the order awarding custody to M.L.G., is domiciled in Absecon and entitled to a free public education from the District pursuant to *N.J.S.A. 18A:38-1(a)*. Finally, the Commissioner determined that petitioner is not entitled to reimbursement of tuition.

OAL DKT. NO. EDU 10944-99
AGENCY DKT. NO. 339-11/99

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The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. It is noted that on May 4, 2000, after issuance of the Initial Decision, a letter was received from Ellen M. Boylan, Esq. (Education Law Center), indicating that she was now representing respondents who had, until that point, proceeded *pro se* in this matter. Respondents' counsel requested an extension of time to file exceptions because she needed to obtain and review the transcripts of the matter. An extension was granted for the filing of exceptions to May 30, 2000. This resulted in the need for the Commissioner to obtain an extension of time from the OAL until July 20, 2000 for issuance of the final decision. Because of a delay in obtaining the transcripts, respondents' counsel requested and was granted a second extension for the filing of exceptions until June 12, 2000. Exceptions were timely filed on that date. Petitioner's reply exceptions were also timely filed.

In their exceptions, respondents argue that the Administrative Law Judge (ALJ) erred in not finding that B.G. is domiciled in Absecon, as it is undisputed that he resides with M.L.G. in Absecon and she obtained legal custody of him on December 2, 1999. Further,

respondents argue that the ALJ failed to consider the equities in this matter and the Board's obligation to provide M.L.G. with written notice specifying the reasons for denying admission to B.G. Moreover, it is respondents' position that the ALJ miscalculated the amount of tuition owed by respondents for B.G.'s attendance at the R.E.A.C.H. Charter School.

More specifically, respondents aver that the ALJ's failure to establish Absecon as B.G.'s domicile in the Absecon School District is plainly erroneous and contrary to established case law, arguing, *inter alia*, that it is undisputed B.G. has resided with M.L.G. in Absecon since March 1997 (Tr. 3/15/00, at 16 and 32; Initial Decision at 7), and that M.L.G. applied for legal custody of B.G. in November 1999, which the court granted on December 2, 1999. As to this, respondents argue that it is well-established that, once legal guardianship is established, the only inquiry for a board of education is whether the guardian and child are domiciled in the school district pursuant to *N.J.S.A. 18A:38-1(a)* and cite in support thereof *Y.L., on behalf of M.A. v. Board of Education of South Orange-Maplewood*, Number 658-97, decided by the Commissioner of Education December 24, 1997; *L.A. v. Board of Education of the Town of West Orange*, 97 *N.J.A.R.2d* (EDU) 266 (1996), *aff'd* by the State Board of Education, 97 *N.J.A.R.2d* (EDU) 554 (1997); and *V.H. v. Board of Education of the Township of Quinton*, 97 *N.J.A.R.2d* (EDU) 124, *aff'd* by the State Board of Education 97 *N.J.A.R.2d* 554 (1997).

Respondents further urge that the instant matter is wholly unrelated to the criteria for establishing affidavit student status pursuant to *N.J.S.A. 18A:38-1(b)*, urging that since the domicile of the child follows the parent or guardian having legal control over him or her, B.G.'s domicile became Absecon once M.L.G. obtained legal custody of him. Respondents state:

The ALJ accords no legal effect to the custody order, finding instead that custody was transferred to M.L.G. "solely for the purpose of establishing B.G.'s residency within the Board's jurisdiction." Initial Decision at p. 6. However, the Commissioner

has explicitly rejected the appropriateness of inquiring into the district resident's motives for establishing custody of a student. [Y.L., *supra* at 12.] Absent a showing of fraud on the part of the district resident, [V.H., *supra*] at 125, and where it does not appear that the custody order is a temporary one, the custody order must be accepted on its face. [L.A., *supra*] at 269. (Respondents' Exceptions at 3)

Respondents further aver that the instant matter is distinguishable from case law dealing with the issue of a resident's legal custody of a student and eligibility to attend school free of charge under the provisions of N.J.S.A. 18A:38-1; *See e.g., Cranford Township Board of Education v. A.McG. et al.*, 95 N.J.A.R.2d (EDU) 74 (1994) (wherein the Commissioner upheld the denial of admission because evidence established that the resident obtained a custody order solely to gain school admission for children who actually resided with their mother in another town); *R.N. v. Board of Education of the Borough of Haddon Heights*, Number 161-98, Agency Docket No. 14-1/97, decided April 24, 1998 (wherein the Commissioner upheld the denial of admission even though the district resident had legal guardianship because there was no evidence that the child lived with the resident). Whereas, in the current matter, "**** there is no evidence of fraud. In fact, the Board concedes that M.L.G. and B.G. reside in Absecon and that B.G.'s mother, L. G-P., resides in Virginia. Petition, ¶ 2; T16-12." (*Id.* at 4) Respondents, therefore, argue that since M.L.G. has had legal control over B.G. since December 2, 1999, he has been domiciled in Absecon since that date and is entitled to attend the Board's schools under N.J.S.A. 18A:38-1(a).

Respondents further argue that it would be inequitable to hold M.L.G. liable for payment of any tuition under the facts of this case for the period between October 13, 1999, when M.L.G. attempted to enroll B.G. in the Absecon schools, and December 2, 1999, when the custody order was entered. Of this, they aver that the evidence established that M.L.G. simply

did not understand the requirements of *N.J.S.A. 18A:38-1*; *i.e.*, that in order to enroll a child in school, the district resident must establish either legal control over the child, or the elements of affidavit student status. Respondents aver that as soon as M.L.G. understood that she had to obtain legal custody of B.G. to establish his domicile, she did so. Of this, respondents urge that:

Under these circumstances, where there is no allegation that the child lives with the district resident solely to obtain an education in the district's schools; where the resident acted as the sole custodian and *de facto* guardian of the child for 21 months prior to obtaining legal custody; and where the resident obtained custody as soon as she understood the requirements of the school residency statute, it would be unfair and contrary to the purpose of the school residency statute to assess tuition against M.L.G. Indeed, a reading of the residency statute which fails to recognize the educational entitlement of students such as B.G., who are living in nontraditional families and may not fit as neatly as either domiciled students or affidavit students, conflicts with the student's fundamental right to a public education under the Education Clause of the New Jersey Constitution. (Respondents' Exceptions at 5)

Moreover, it is respondents' contention that, in this case, assessment of tuition would be particularly inequitable in light of the Board's failure to meet its obligation to explain to M.L.G. the basis for the denial of admission, including the obligation to provide written notice of the reasons for denial, citing in support thereof, *J.A. v. Board of Education of South Orange-Maplewood*, 318 *N.J. Super.* 512 (App. Div. 1999). As such, respondents urge that, without knowledge of the reasons for denial, M.L.G. had no opportunity to cure the deficiencies in the application. They also assert that the Board did not make an effort to assist M.L.G. with B.G.'s application for admission.

Lastly, respondents maintain that the Board failed to meet its burden of establishing an accurate accounting of tuition. Initially, respondents assert that, while there is no dispute B.G. attended R.E.A.C.H. Charter School in September, October and November, 1999,

the Board admits that “[d]uring the initial weeks of school [for the 1999-2000 school year] B.G. remained registered as a Pleasantville student *****” Petition ¶ 5. Thus, respondents argue that Pleasantville apparently paid B.G.’s tuition at the R.E.A.C.H. Charter School for at least part of the school year, yet the Board provided no evidence of when Pleasantville stopped paying and it assumed responsibility for B.G.’s tuition. Respondents further assert that, while the Board Business Administrator testified that the State paid only .5 percent of B.G.’s tuition at R.E.A.C.H. for the 1999-2000 school year, the Board in fact received \$1,133 in State aid for every student enrolled in the district.

In reply, the Board urges, *inter alia*, that *N.J.S.A.* 18A:38-1 clearly prohibits free attendance at school where the evidence demonstrates that the child’s presence is solely for the purpose of receiving a free public education within the district, and asserts that:

[t]he evidence in the record shows that the purported “custody” order was obtained by M.L.G. only long after commencement of the legal proceedings. Prior to that time, she had indicated only that B.G. did not want to leave the area when his mother moved away. No more, no less. The “custody” order in question is an obvious “over-the-counter” document obtained by M.L.G. and her niece (B.G.’s mother) “solely for the purpose of receiving a free public education within the district”, as was obvious to the [ALJ]. (Board’s Reply Exceptions at 1-2)

In support of this contention, the Board points to the testimony of its Business Administrator that M.L.G.’s explanation as to why B.G. remained in Absecon when his mother moved to Virginia was that “B. was just staying out of choice because he had all of his friends locally at the Pleasantville High School, so now he wanted to stay with his friends and was living at Mrs. G.’s [sic] so he could continue school with the same group of friends [Tr. at 12].” (*Id.* at 2) The Board goes on to state that “[t]he solution pursued for B.G. was to enroll in the local

charter school at the expense of the Absecon school district. The only ‘hardship’ in this case is B.G.’s desire to attend school locally.” (*Ibid.*)

As to respondent’s exceptions regarding Absecon’s failure to inform and/or assist M.L.G. with B.G.’s application, the Board urges that counsel for M.L.G. is attempting to enter facts into the record which were not pled prior to hearing or elicited in the testimony at the time of hearing, nor were they argued at the hearing. The Board further asserts that respondents’ argument about “notice of reason” is refuted by the testimony of both its Superintendent and Business Administrator and that “the self-serving ‘custody’ order presented at trial makes it clear that M.L.G. was fully aware of the reasons why school admission was denied and tuition sought. Due process does not operate in a vacuum. M.L.G. was obviously aware of the problems. Why else would they attempt to cover their trail with the custody order?” (*Ibid.*)

Lastly, the Board urges that the tuition calculation made by its Business Administrator is proper.

Upon careful and independent review of the record in this matter, the Commissioner determines to reverse the Initial Decision of the ALJ, as set forth herein. Initially, the Commissioner finds that as of December 2, 1999, when M.L.G. was granted legal custody of B.G., he was entitled to attend the Absecon schools free of charge pursuant to the requirements of *N.J.S.A.* 18A:38-1(a). As was determined by the Commissioner and affirmed by the State Board of Education in *L.A., supra*, and *V.H., supra*, as of the date that a resident of a district takes legal control of a child, entitlement to attend school free of charge is no longer to be examined pursuant to *N.J.S.A.* 18A:38-1(b); the “affidavit student” provision.

Thus, in the instant matter, once M.L.G. assumed legal and physical custody of B.G., the only appropriate inquiry for the Board was whether M.L.G. and B.G. were domiciled in

the district pursuant to *N.J.S.A. 18A:38-1(a)*. Inasmuch as the Board does not dispute that M.L.G. is domiciled in Absecon, and the domicile of the child follows that of the parent or guardian having *legal custody* over him or her, *Mansfield Twp. BOE v. State Board of Education*, 101 *N.J.L.* 474, 479-480 (Sup. Ct. 1925), it is hereby found and determined that B.G. is entitled to a free public education pursuant to *N.J.S.A. 18A:38-1(a)* as of the date M.L.G. acquired legal custody of him. See also *Y.L., supra*. In so finding, the Commissioner notes that there is no claim of fraud on the part of petitioner. See, *L.A., supra*; *V.H., supra*; and *Y.L., supra*. Further, as was stated in *L.A.*, and affirmed by the State Board, “the motives pertinent to the custody order are not determinative. The order must be accepted on its face.” *L.A., supra*, 97 *N.J.A.R.2d* at 269. See also *Y.L., supra*. Moreover, unlike the circumstances found in *Cranford, supra*, there is no claim that B.G. is not residing with M.L.G.

Further, the Commissioner finds and determines that, in light of the circumstances particular to this matter, an order for tuition from October 13, 1999, when M.L.G. sought to enroll B.G. in the Absecon school district, to December 2, 1999, the date upon which she acquired legal custody, is not warranted.¹

Accordingly, for the reasons stated herein, the Petition of Appeal is hereby
DISMISSED.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: July 13, 2000

Date of Mailing: July 20, 2000

¹ The record reveals that M.L.G. applied to the Superior Court of New Jersey for custody of B.G. on November 17, 1999.

² This decision, as the Commissioner’s final determination, 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. 6A:4-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.