#26-08 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu05181-07_1.html)

C.H., ON BEHALF OF MINOR GRANDCHILDREN, B.M., Z.M. and G.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner sought emergent relief, appealing respondent's decision to disenroll her minor grandchildren, B.M., Z.M. and G.P., as of May 1, 2007. Petitioner acknowledged that – because of financial hardship – her family had relocated three blocks from their former residence in Bloomfield to an apartment in East Orange during January 2007, but requested that respondent allow the children – who were deeply affected by a recent family loss as well as the ensuing move – to finish the year in Bloomfield schools, where they had always attended, without payment of tuition.

The ALJ – treating the matter as a residency dispute, as the Board had done at both the local level and OAL hearing – found that: it was unnecessary to hear petitioner's application for emergent relief, since the children would remain in school during the pendency of the appeal by operation of *N.J.S.A.* 18A:38-1; the children were not entitled to a free public education in Bloomfield schools as of the date of their move in January 2007; respondent was entitled to disenroll petitioner's grandchildren due to their change in domicile; tuition can be waived in a disputed residency matter when particular circumstances so warrant; and the Board's refusal to waive tuition in this case was not sufficiently justified. The ALJ affirmed the disenrollment of petitioner's grandchildren but dismissed the Board's tuition reimbursement claim.

The Commissioner modified the Initial Decision, noting that the matter was *not* a residency dispute – since petitioner never claimed her grandchildren were legally entitled to free education once they had moved from the district – but rather an appeal of the Board's discretionary determination not to permit them to attend for the rest of the year as tuition-free nonresident students. Because the children's ineligible attendance continued for the duration of proceedings at the local level and before the Commissioner by virtue of the Board's actions – not those of petitioner – the Commissioner concurred with the ALJ that tuition should not be assessed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

January 23, 2008

OAL DKT. NO. EDU 5181-07
AGENCY DKT. NO. 119-4/07

C.H., ON BEHALF OF MINOR GRANDCHILDREN, B.M., Z.M. and G.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the respondent Board of Education (Board) pursuant to *N.J.A.C.* 1:1-18.4. The petitioner did not reply to the Board's exceptions.

On exception, the Board first objects to the Initial Decision on grounds that the Administrative Law Judge (ALJ) lacked authority to waive tuition for petitioner's grandchildren's period of ineligible attendance in the district. According to the Board, *N.J.S.A.* 18A:38-3(a) – the statute permitting local district boards of education to admit nonresident students in their discretion, erroneously cited by the ALJ – does not apply in this matter, whereas the statute that actually controls – *N.J.S.A.* 18A:38-1(b)2 – clearly "mandates the imposition of tuition against the parent or guardian whose child attends a school district in which the child does not reside." The Board argues that "[no] case has held to the contrary," and that the Legislature could not have reasonably intended for school boards to have "a mandatory right to tuition unless and until a student requests a

'waiver' pursuant to N.J.S.A. 18A:38-3(a)" as was effectively held by the ALJ. Thus, the Board proffers, upon its discovery that C.H.'s grandchildren were unlawfully attending school in the district, the children "came within the auspices of *N.J.S.A.* 18A:38-1(b)2, and, therefore, must, by the express provisions of said statute, reimburse the Board for tuition." Once tuition was reimbursed and the children began attending their "proper school," the Board concludes, C.H. could then petition the Board for the children to "attend the Bloomfield School District under the terms and conditions deemed appropriate by the Board." (Board's Exceptions at 2-4, quotations at 3 and 4-5)

The Board next asserts that – even if C.H. was, *arguendo*, eligible for a waiver of tuition – the ALJ erred in holding the Board's "denial" of such waiver to be arbitrary, capricious and unreasonable; according to the Board, C.H. never made that claim herself and "it is a long held maxim of law that a party which fails to raise a defense waives their right to pursue that defense at a later date." (Board's Exceptions at 5) Moreover, even assuming a claim of arbitrariness was appropriately considered, the Board continues, the ALJ erred by relieving C.H. of any burden of proof and instead placing the burden on the Board – without testimony on this point – to show that its actions were not unreasonable. (*Id*. at 5-6)

Finally, the Board contends that – contrary to the finding of the ALJ – the petitioner did not come to this matter with "clean hands," and, consequently, cannot be awarded equitable relief. The Board explains:

> Despite admitting that her grandchildren did not reside in Bloomfield, petitioner compelled C.H. (*sic*) to attend Bloomfield schools for a period of at least three (3) months (January 2007 to March 2007). Then, after being caught illegally attending Bloomfield schools, Petitioner challenged the Board's decision to disenroll C.H. (*sic*) without legal foundation to mount a challenge. In other words, Petitioner, admitting that C.H. (*sic*)

> lived in East Orange, brought a challenge to the Board's ruling knowing that C.H. (*sic*) improperly attended Bloomfield schools," thus forcing the Board and the State to "expend money hearing a meritless claim."
> (Board's Exceptions at 6-7, quotation at 7)

Upon review, the Commissioner concurs with the ALJ that – as of their move from the district in January 2007 – C.H.'s grandchildren were no longer entitled to a free public education in the Bloomfield school district pursuant to *N.J.S.A.* 18A:38-1, but also that C.H. should not be assessed tuition for the time of the children's ineligible attendance. In so doing, however, she clarifies the ALJ's reasoning as follows.

Initially, the Commissioner concurs with the ALJ that assessment of tuition can, indeed, be waived in a disputed residency matter, and that the Board errs in arguing to the contrary. Over and above the earlier cases cited as examples by the ALJ (Initial Decision at 6), the Commissioner additionally notes that applicable rule adopted in November 2001 expressly provides that nothing in the chapter shall "preclude an equitable determination, by the district board of education or the Commissioner, that, when the particular circumstances of a matter so warrant, tuition shall not be assessed for all or part of any period of a student's ineligible attendance in the school district." (*N.J.A.C.* 6A:22-6.3(b); see also predecessor rule *N.J.A.C.* 6A:28-2.10(d)) Thus, there can be no question that the ALJ had the authority, based on specific facts found, to waive any tuition found to be due pursuant to *N.J.S.A.* 18A:38-1.

However, as implicitly recognized by the ALJ – notwithstanding that the Initial Decision's analysis is couched in terms of "waiver" of tuition pursuant to *N.J.S.A.* 18A:38-1 as consequence of the Board's persistent posture in this matter – C.H.'s true claim is not one of entitlement by residency, but rather of unreasonable exercise by the Board of its discretionary authority to permit her grandchildren to attend

during the spring 2007 term as tuition-free nonresidents. Indeed, once the question of her family's residency was raised and C.H. acknowledged that they no longer lived within the district and did not claim to meet alternate statutory criteria so as to be entitled to free education pursuant to *N.J.S.A.* 18A:38-1, the question of the children's subsequent attendance in Bloomfield should not have been treated as a residency dispute, either at the local district level or at the subsequent OAL hearing.

Although the record does not reveal how the district administration came to be aware in February 2007 that C.H. was no longer living in Bloomfield, there is nothing to indicate that at any time – either at the local district level or before the Commissioner or the ALJ – C.H. disputed or attempted to conceal that she had moved from Bloomfield during the preceding month (January 2007), when – due to family exigency – she rented a smaller home located three doors away but just over the municipal border in East Orange. To the contrary, once she was notified of the district's findings, C.H.'s quest to keep the children enrolled in Bloomfield for the remainder of the year was at all times based on a plea – in the interest of the children's well-being – for the Board to consider them as tuition-free nonresident students (*N.J.S.A.* 18A:38-3 and *N.J.A.C.* 6A:22-2.2), rather than on any claim of entitlement based on purported residency in the district.

From the outset, however, the Board proceeded as though the matter were a residency dispute arising under *N.J.S.A.* 18A:38-1 and its implementing rules, engaging in protracted investigative and removal proceedings and staying disenrollment of the children throughout – even though C.H. readily acknowledged that the family no longer lived in Bloomfield. When the Board ultimately (on April 10, 2007) heard and denied

her request for the children to be considered tuition-free nonresidents and remain in the district with approximately six weeks remaining in the school year – notwithstanding that the April 11, 2007 letter informing her of the children's impending disenrollment provided procedural information specific to claims arising under *N.J.S.A.* 18A:38-1 – C.H. filed with the Commissioner *not* a residency appeal disputing the Board's finding of ineligibility, but a petition *appealing the Board's discretionary determination not to consider the children as tuition-free nonresidents.* She further filed an application for emergent relief so that the children would not be disenrolled on May 1, 2007 (the date set by the Board), since appeals under *N.J.S.A.* 18A:38-3 – unlike timely appeals filed pursuant to claims of domicile or residency under *N.J.S.A.* 18A:38-1 – carry with them no entitlement by operation of law to continue attending school while an appeal is pending.

Consistent with the statutory framework and C.H.'s clear representations, the Department of Education in turn did not transmit this matter to the OAL as a "residency" appeal, but rather as a petition and application for emergent relief with the instruction that the petitioner was seeking an immediate order permitting the named children to "continue attending Board's schools through the end of the [2006-07] school year, notwithstanding having moved from the district." At the OAL, however, the Board first advised the ALJ that a hearing on C.H.'s emergent application was unnecessary because the children would remain in school by operation of law until the matter was decided on the merits, then proceeded to litigate its case – as it continues to do before the Commissioner – substantially as though C.H. had challenged the Board's determination of ineligibility and invoked the protections of *N.J.S.A.* 18A:38-1, rather than conceding such ineligibility and appealing from the Board's discretionary denial of her request that

the children be permitted to attend for the term as tuition-free nonresidents in light of the family's unfortunate personal and financial situation.[1]

Consequently, it was due entirely to the actions of the Board and its agents that C.H.'s grandchildren continued to attend school in Bloomfield – and thus to incur potential liability for tuition – from the time their residency came into question through the end of the school year. Had the Board acted decisively subsequent to February 23, 2007 – the date of investigative referral from which the Board's own calculation of tuition is reckoned,[2] and within a month of the family's move from the district – and not advised the ALJ on appeal that the Board was proceeding pursuant to *N.J.S.A.* 18A:38-1 and keeping the children enrolled pending final decision, C.H.'s emergent appeal of the Board's denial of her request for tuition-free nonresident status could have been promptly heard and decided in accordance with applicable standards of law; then, only if the stringent criteria of *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *N.J.A.C.* 6A:3-1.6(b) were met would the Commissioner have ordered the Board to permit the children to remain in the district pending final determination rather than directing C.H. to enroll them forthwith in the district (East Orange) of their legal entitlement, where – due to the timing of events – they likely would have finished the

[1] That the Board understood the petitioner's position at her hearing before the Board – but misconstrued her position on appeal – is evident from the Board's own recitation of events:

> The Petitioner requested the Board to exercise its discretion to permit her grandchildren to attend the District schools free of charge from January through June 2007. *N.J.S.A.* 18A:38-3(a) recognizes the right of the Board to do so. The Board, after hearing from the Petitioner, denied her request. Rather than withdraw her grandchildren from the District schools at the time of the denial, which occurred on or about April 11, 2007, the Petitioner filed the instant appeal and, pursuant to *N.J.S.A.* 18A:38-1, her grandchildren attended the District schools for the balance of the 2006-07 school year. (Post-hearing Summation at 3)

[2] See Certification of Dr. Nicolette Salerno at 1.

school year had emergent relief not been granted.[3] Moreover, had the Board not insisted on characterizing this matter as a residency dispute, proceedings on appeal would have focused – as they should have – on the reasonableness of the Board's discretionary determination to deny C.H.'s grandchildren tuition-free nonresident status, and the record would not be devoid as it is of argument and evidence – from either party, apart from brief comments from the Board in its post-hearing summation (at 3) – specifically directed to this question. Under such circumstances, the Commissioner simply cannot find assessment of tuition against C.H. to be a just result, notwithstanding that her grandchildren did, in fact, attend Bloomfield public schools for 78 school days after they had moved from the district.

Accordingly, as clarified and amplified above, the Initial Decision of the OAL – finding that C.H. is not responsible for payment of tuition to the Bloomfield Board of Education for the period from February 23, 2007 to the end of the 2006-07 school year – is adopted as the final decision in this matter.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: January 22, 2008

Date of Mailing: January 23, 2008

[3] Particularly under circumstances where the family had already been subjected to major emotional and physical upheaval, the Commissioner finds absurd the Board's stance on exception, *supra*, that C.H. should have withdrawn the children from the Bloomfield schools – the only schools they have ever attended – on her own volition upon discovery of their ineligibility in February or March, enrolled them in East Orange, and then, after paying tuition to Bloomfield for the time of their ineligible attendance, petitioned the Board for permission to have them return to Bloomfield to finish whatever was left of the school year. (The record does not indicate where the children will be attending school during the 2007-08 school year – only that they are being returned to their parents, whose district of domicile is not identified.)

[4] This decision 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.*