

M.O’K. AND S.O’K. on behalf of minor children :
K.O’K., A.O’K. AND C.O’K., :
 : COMMISSIONER OF EDUCATION
 PETITIONERS, :
 : DECISION
 V. :
 :
 BOARD OF EDUCATION OF THE BOROUGH :
 OF CRESSKILL, BERGEN COUNTY AND :
 BOARD OF EDUCATION OF THE BOROUGH OF :
 LITTLE FERRY, BERGEN COUNTY, :
 :
 RESPONDENTS. :

SYNOPSIS

The parties herein asked for determinations regarding where the petitioners’ children should attend school and which school district should be financially responsible for the children’s educations. Petitioners contended that they remain homeless under 42 U.S.C.A. § 11432A and N.J.A.C. 6A:17-2.3(a)(3) in the aftermath of being evicted from their longtime home in Cresskill in 2011, and that their children are therefore entitled to be enrolled in Cresskill schools, with tuition paid either by Cresskill or Little Ferry – where they have lived, with S.O’K.’s parents, for most of the period since the 2011 foreclosure. Respondent Cresskill Board of Education (Cresskill) filed a motion for summary decision acknowledging that the family was rendered homeless in 2011 and the children were therefore entitled to be enrolled in its schools, but contending that Little Ferry became responsible for the cost of the children’s education and transportation to Cresskill schools after one year. Little Ferry submitted a reply brief arguing that Little Ferry is now the district of residence and is responsible for the children’s education, and that they must be enrolled in Little Ferry schools.

The ALJ found, *inter alia*, that: the facts reflect that, after they became homeless, the O’K. family resided in Little Ferry with S.O’K.’s parents for more than a year before they were displaced by Hurricane Sandy, and have now been back in Little Ferry for another year; their living arrangement with S.O’K.’s parents has become sufficiently fixed, regular and permanent so as to preclude a finding of homelessness under N.J.A.C. A:17-2.2 – 2.3 and N.J.S.A. 18A:7B-12(c); accordingly, the O’K. children are no longer entitled to free enrollment in Cresskill schools; once the family resided in Little Ferry for more than one year, Little Ferry became financially responsible for the education of the O’K. children; and Little Ferry shall reimburse Cresskill for the full cost of the educational program provided to the O’K. children for the 2013-2014 school year. The ALJ granted summary judgment to respondent Cresskill, finding that the children are no longer homeless, and ordered that the children be enrolled in Little Ferry schools.

Upon review, the Commissioner adopted the determination of the ALJ that Little Ferry is financially responsible for the education of the O’K. children for the 2013-2014 school year and thus owes Cresskill tuition for that year. However, the Commissioner disagreed with the ALJ’s conclusion that petitioners’ children are no longer homeless. Finding that the O’K.’s are still homeless, the Commissioner granted the petition requesting continuation of the children’s education in Cresskill, and ordered that Little Ferry will remain financially responsible until the parents establish a permanent residence or are deemed domiciled in another jurisdiction pursuant to N.J.S.A. 18A:38-1d.

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.

August 12, 2014

OAL DKT. NO. EDU 14830-13
AGENCY DKT. NO. 214-9/13

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The parties to the instant controversy ask for determinations about 1) where petitioners' children should attend school and 2) which school district should be financially responsible for the children's educations. Upon review of the record, the Initial Decision of the Office of Administrative Law (OAL) and the parties' exceptions, the Commissioner adopts the determination of the Administrative Law Judge (ALJ) that respondent Little Ferry Board of Education (Little Ferry) is financially responsible for the educations of petitioners' children for the 2013-2014 school year and, accordingly, owes respondent Cresskill Board of Education (Cresskill) tuition for that year. However, the Commissioner finds that the record does not support the ALJ's conclusion that petitioners' children are no longer homeless and should attend school in Little Ferry.

Procedurally, this matter has come before the Commissioner by way of a motion brought by Cresskill for summary disposition, which was joined by petitioners, and an

Initial Decision “on the papers.”¹ It appears that initially the parties all agreed that summary disposition was appropriate. However, in its March 2014 responsive brief Little Ferry recognized that the parties may have misunderstood each others’ positions. Notwithstanding the foregoing, the Commissioner is satisfied that the two primary issues posed by the parties may be resolved by summary disposition.

As to the question concerning which district should pay for the children’s educations, it is undisputed that petitioners have resided with S.O’K’s parents in Little Ferry for over a year. Pursuant to *N.J.S.A.* 18A:38-1(d), that is long enough for them to be *deemed* domiciliaries of Little Ferry, triggering Little Ferry’s obligation to fund the children’s educations, pursuant to *N.J.S.A.* 18A:38-1(a).

The foregoing finding regarding domicile and Little Ferry’s financial responsibility does not settle the separate questions of whether petitioners are homeless and, if so, whether it is in the best interests of their children to be transferred from Cresskill schools to the Little Ferry school district. *See, e.g., A.M. and M.S. on behalf of minor children A.S. and L.S. v. Board of Education of the Town of Dover, Morris County*, Commissioner Decision No. 222-11 (June 15, 2011) at 3. As mentioned above, the Commissioner rejects the ALJ’s determination that petitioners are no longer homeless, and offers the following analysis.

N.J.A.C. 6A:17-1.1 *et seq.* provides guidance regarding the education of homeless students. Those regulations were promulgated with the intent that nothing in them would “limit the educational rights of homeless children and youth or school district responsibilities under Subtitle VII-B of the Stewart B. McKinney-Vento Homeless Assistance Act (42 *U.S.C.* secs.11431 *et seq.*) (McKinney-Vento Act).” *See, N.J.A.C.* 6A:17-2.1. Thus, in deciding where petitioners’ children

¹ In their exceptions, petitioners correctly point out that while the ALJ stated that she was granting Cresskill’s motion for summary disposition, she made a determination about homelessness which is the opposite of the determination which Cresskill’s motion sought.

should attend school, it is necessary to refer both to New Jersey's regulations and the corresponding provisions of the McKinney-Vento Act.

The threshold inquiry, *i.e.*, whether petitioners may be considered homeless, may be evaluated pursuant to both *N.J.A.C.* 6A:17-2.3(a)² and 42 *U.S.C.* sec. 11434a(2)(A) and B(i). The regulation *N.J.A.C.* 6A:17-2.3(a)(3), for example, provides that children are homeless when they stay in the home of relatives or friends, with whom they are temporarily residing because the family lacks a regular or permanent residence of its own. Similarly, 42 *U.S.C.* sec. 11434a(2)(A) and (B)(i) describe homeless children as those “who lack a fixed, regular, and adequate nighttime residence” including, *inter alia*, “children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason” Thus, an evaluation of “homelessness” cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality. The reasons for the children’s homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant.

In the present case, the facts were stipulated and/or were supported by the verified petition and sworn answers to interrogatories. Petitioners’ answers to both Cresskill’s and Little Ferry’s interrogatories reveal that petitioners lost their home through foreclosure in October 2011. After a year of living with S.O’K’s parents in Little Ferry, flooding from hurricane Sandy badly damaged the parents’ home, destroyed petitioners’ cars, furniture and remaining belongings, and forced petitioners to find other temporary housing, first with a relative in Paramus, New Jersey, and then with relatives in Queens, New York. On or about May 16, 2013, petitioners returned to S.O’K.’s parents’ home in Little Ferry, where the two parents and three children occupy the bottom floor of the house, which floor has no shower, sink or kitchen. Because there is only one small bedroom on that floor, the 13-year old daughter and ten-year old son share a bunk-bed in the parents’ bedroom and the oldest son, 18, sleeps in the common area. *See*, Par. 15 of petitioners’ answers to

² The corresponding New Jersey statute is *N.J.S.A.* 18A:7B-12(c).

Little Ferry's interrogatories. Petitioners have always maintained that they wish to return to Cresskill, where M.O'K. lived for 27 years and where the three children were raised until their home was foreclosed upon. Although neither parent is currently employed and the family's sole income consists of Social Security Disability benefits, they certify that they are actively searching for housing in Cresskill.

The forgoing facts rebut Little Ferry's claim (which is opposed not only by petitioners but was also opposed by Cresskill in both its summary disposition motion and its reply brief to the other parties' responses to its motion) and the ALJ's finding that petitioners are not homeless. Pursuant to *N.J.A.C.* 6A:17-2.3(a)(3), petitioners are clearly staying in the home of relatives because the family lacks a regular or permanent residence of its own and because of economic hardship. Similarly, pursuant to 42 *U.S.C.* sec. 11434a(2)(B)(i), petitioners' children are "sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason" Moreover, the setting in which the children live constitutes a less than regular and adequate nighttime residence. 42 *U.S.C.* sec. 11434a (2)(A).

In their February 14, 2014 responsive brief, petitioners cite to a persuasive case from the Pennsylvania Federal District Court. The fact pattern in that case was not dissimilar to the instant matter. A grandmother and the grandson whom she was raising lost their home to a fire. They were forced to live with the grandmother's daughter, under less than ideal conditions, but stayed in the daughter's house for an extended period of time. After the end of the school year in which the fire occurred, the district of origin declined to provide a free public education to the child, reasoning that the grandmother and grandchild's continued residence in the daughter's house signified that they were no longer homeless.

Interpreting the federal McKinney-Vento Act, the federal district court judge disagreed, determining that the child qualified as a homeless student because he lacked a fixed, regular and adequate nighttime residence, and was sharing the housing of other persons due to loss of

housing, economic hardship or a similar reason. Moreover, the judge pointed out that the district of origin had recognized the child as homeless from January through June 2009, and nothing about the student's situation had changed subsequent thereto. In finding that the district of origin was obliged to continue to educate the child, the judge stated: "the [McKinney-Vento] Act makes it clear that there is no maximum duration of homelessness. Instead the LEA [district of origin] must accommodate a homeless child for the entire time that they are [sic] homeless." *L.R. v. Steelton-Highspire School District*, 54 IDELR 155 (M.D. Pa. 2010), citing 42 U.S.C. sec. 11434a (3)(A)(i).

The foregoing precludes the Commissioner from determining that petitioners are no longer homeless.³ What remains to be addressed is the question of whether it is in the best interests of the children to continue attending the Cresskill schools or transfer to the Little Ferry School district.⁴ *N.J.A.C.* 6A:17-2.6(b) directs that the chief school administrator of the school district of origin shall decide upon the district of enrollment for a homeless child – based upon the best interests of that child. Throughout its summary disposition motion Cresskill, the school district of origin, contended that the Executive County Superintendent's determination that petitioner's children must attend school in Little Ferry, "must be reversed." *See, e.g.* Cresskill's March 18, 2014 Reply Brief at 3 and 10-11. Now, in its reply-exceptions, it reverses itself and requests that the Commissioner adopt the Initial Decision.

However, incorporated into the McKinney-Vento Act is a presumption that continuation in the school district of origin is the most desirable option for homeless students –

³ The Commissioner recognizes that the status of some homeless families can evolve into acceptable and permanent situations. However, the Commissioner is not persuaded that the case at bar manifests such an evolution.

⁴ The Executive County Superintendent and ALJ referenced, as a justification for transferring petitioners' children to the Little Ferry school district, the children's high rate of absenteeism from the Cresskill schools during the 2012-2013 school year. Petitioners point out that the referenced absences occurred during the period of time in which petitioners were temporarily residing in Queens, New York, and driving their children to school in Cresskill, New Jersey. In exceptions submitted on July 7, 2014, Cresskill endeavors to rebut petitioner's point by offering attendance reports for the 2013-2014 school year, which reports are nowhere to be found in the record before the Commissioner. *N.J.A.C.* 1:1-18.4(c) specifically precludes a party from referring in exceptions to evidence that was not presented to the ALJ.

unless the parents or children disagree. 42 U.S.C. sec. 11434(g)(3). Petitioners clearly do not disagree. In the present case, the McKinney-Vento presumption seems appropriate. In that regard, the record reflects the following facts:

- In October 2011, the children had to leave the only home they had known.
- After a year in their grandparents' house, at which time they were presumably becoming familiar with the new surroundings, a flood ruined their possessions and forced them to move.
- After a week in Paramus and six months in Queens, they returned to Little Ferry.
- Their quarters in Little Ferry are cramped and offer little privacy.
- All three children receive special education services, making curriculum and staffing in the provision of their programs especially important.

Thus, it appears that an important element of normalcy and continuity in the children's lives for the past two and one half years has been their education in Cresskill. Cresskill advises in its reply exceptions that petitioners' oldest child has graduated from high school and is no longer a subject of this controversy. However the middle child – a teenager – and the youngest child have been attending school in Cresskill since Kindergarten, and throughout the disruptive experiences of eviction from their home, destruction of their belongings by a flood, four moves and temporary residence in the homes of others.

After reviewing the facts which were certified, and examining the applicable law, the Commissioner is satisfied that the petition requesting the continuation of the education of petitioners' children in Cresskill should be, and is hereby, granted. Further, Cresskill's cross-claim against Little Ferry for tuition reimbursement – beginning with the 2013-2014 school year and going forward – is granted and Little Ferry's counterclaim against petitioners is dismissed. Cresskill's summary disposition motion has been resolved in its favor by the foregoing determinations except that, on the issue of where petitioners' children should attend school, the relief requested in the motion is granted

and Cresskill's eleventh hour application for the children's enrollment in the Little Ferry school district is denied.

Accordingly, the Commissioner orders Little Ferry to reimburse Cresskill for tuition and transportation for the 2013-1014 school year. Little Ferry will remain financially responsible until the parent(s) establish a permanent residence or are deemed domiciled in another jurisdiction pursuant to *N.J.S.A. 18A:38-1d*.

IT IS SO ORDERED.⁵

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 12, 2014

Date of Mailing: August 12, 2014

⁵ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).