

K.H., on behalf of minor children, A.H. AND V.H., :

PETITIONER,

: COMMISSIONER OF EDUCATION

V.

: DECISION

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY, :

RESPONDENT. :

SYNOPSIS

In August 2016, *pro se* petitioner appealed the determination of the respondent Board that his children, A.H. and V.H., are ineligible to attend school in respondent’s school district. Petitioner contended that he resides in Butler and has shared custody of his children, arguing that A.H. and V.H. stay with him 48% of the time. Petitioner maintained that he and his ex-wife wished to maintain continuity in their children’s education, as they had been enrolled in Butler schools prior to the 2016-2017 school year. Petitioner submitted a copy of a Consent Order from the Chancery Division of the Superior Court – filed on August 22, 2016 – in which he and his ex-wife agreed, pursuant to *N.J.A.C.* 6A:22-3.1, that the children would continue to attend Butler schools. The Board contended that the children were no longer entitled to a free education in Butler schools because of their post-divorce living arrangement, wherein they spend the majority of time with their mother; accordingly, the Board maintained that the children are domiciled in Bloomingdale, and sought tuition reimbursal.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a) and *N.J.A.C.* 6A:22-3.1, children between the ages of five and twenty years are entitled to a free public education in the district in which he or she resides; since their parents’ divorce, A.H. and V.H. live less than half the year in the Butler school district with their father – a fact that the parents admitted to in a letter to the Commissioner; petitioner and his ex-wife entered into a Consent Order in the context of their divorce litigation wherein they agreed that the children would continue to attend school in the Butler school district; pursuant to *N.J.S.A.* 18A:38-1(b)(2) and *N.J.A.C.* 6A:22-4.3, if a school district discovers that a non-resident child is attending one of its schools, it may act to remove the child; here, the petitioner conceded that the children do not reside in Butler; the Board waived tuition reimbursement in this matter, and has agreed that V.H. and A.H. have until the end of the third quarter marking period to enroll in the school district in which they reside. Accordingly, the ALJ denied the petitioner’s residency appeal and ordered that the children must be enrolled in Bloomingdale schools.

The Commissioner rejected the Initial Decision, finding, *inter alia*, that – under *N.J.A.C.* 6A:22-3.1(a)1.i – as of the date of the court order, A.H. and V.H. were entitled to attend Butler schools. Contrary to the conclusion reached by the ALJ herein, when there is a consent order or a written agreement between the parents that designates the school district of attendance, the amount of time spent with either parent does not dictate where the children must attend school. Because the petitioner’s divorce occurred prior to the entry of the consent order, the matter was remanded to the OAL for determination of whether the Board is owed tuition for any period prior to the August 22, 2016 consent order.

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.

March 2, 2017

OAL DKT. NO. EDU 14258-16
AGENCY DKT. NO. 226-8/16

K.H., on behalf of minor children, A.H. AND V.H.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,	:	DECISION
	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. This matter was initiated by the petitioner, K.H., as a *pro se* residency appeal, and the Butler Board of Education (Board) filed a counterclaim for tuition. The Administrative Law Judge (ALJ) found that A.H. and V.H. are no longer entitled to attend school in the Butler school district because of their new living arrangement resulting from their parents' divorce, *i.e.*, the children spend less than half of the year living with their father in the Butler school district. The ALJ ordered the petitioner to enroll the students in the Bloomingdale school district – where they reside with their mother – by the end of the third marking period. The ALJ also dismissed the Board's counterclaim for tuition.

Upon a comprehensive review of the record the Commissioner finds that the ALJ erroneously found that A.H. and V.H. were ineligible to attend school in the Butler school district.

Pursuant to *N.J.A.C.* 6A:22-3.1(a)1.i:

When a student's parents or guardians are domiciled within different school districts and **there is no court order or written agreement between the parents designating the school district of attendance**, the student's domicile is the

school district of the parent or guardian with whom the student lives for the majority of the school year.

[*N.J.A.C.* 6A:22-3.1(a)1.i (emphasis added)]. It is undisputed that the petitioner resides in the Butler school district, and that the students' mother resides in the Bloomingdale school district. It is also undisputed that there was a consent order – entered into on August 22, 2016, as a part of the divorce proceedings – under which it was designated that A.H. and V.H. would attend school in the Butler school district. Therefore – under *N.J.A.C.* 6A:22-3.1(a)1.i – as of August 22, 2016, A.H. and V.H. were entitled to attend school in the Butler school district. Despite the conclusion reached in the Initial Decision, when there is a consent order or a written agreement between the parents that designates the school district of attendance, the amount of time spent with either parent does not dictate where the children must attend school.

The Board filed a counterclaim for tuition in this matter, which was apparently waived at the hearing.¹ The Commissioner recognizes, however, that the Board may not have waived its counterclaim if the petitioner appeared at the hearing. Although the parents entered into the consent order in August 2016, designating the Butler school district as the district of attendance, it appears from the record that the parents were divorced in April 2016. Therefore, in the absence of a consent order or written agreement between the parents, it is possible that A.H. and V.H. were not eligible to attend school in the Butler school district between April 2016 and August 2016. The current record, coupled with the petitioner's failure to appear at the hearing, make it impossible for the Commissioner to ascertain whether or not there was a period of ineligibility during which the Board is entitled to tuition reimbursement.

¹ The petitioner did not appear at the hearing nor did he advise the OAL as to why he did not attend. Additionally, there is no transcript of the hearing, so the circumstances surrounding the Board's waiver of the counterclaim are not clear from the record.

Accordingly the Initial Decision is rejected in its entirety. Pursuant to the August 22, 2016 consent order, A.H. and V.H. are entitled to attend school in the Butler school district. The Board's counterclaim for tuition is remanded to the OAL for a determination as to whether the Board is entitled to tuition for any potential period of ineligibility prior to the entry of the August 22, 2016 consent order.²

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 2, 2017

Date of Mailing: March 2, 2017

² If the Board still wants to waive its counterclaim for tuition after this matter has been remanded to the OAL, the case can be deemed withdrawn and the file returned to the agency.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 14258-16

AGENCY REF. NO. 226-8/16

K.H. ON BEHALF OF MINOR CHILDREN A.H. AND V.H.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE BOROUGH OF
BUTLER, MORRIS COUNTY,**

Respondent.

No appearance for Petitioner K.H.on behalf of A.H. and V.H.

Jeffrey Merlino, Esq., for Respondent, (Sciarillo Cornell Merlino, Mckeever &
Osborne, LLC, attorneys)

Record Closed: January 19, 2017

Decided: January 19, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals a Notice of Final Ineligibility from Respondent school district, dated August 10, 2016, wherein Respondent determined that the minor children are ineligible to attend school in Respondent school district.

Petitioner filed as pro se with the Bureau of Controversies and Disputes in the New Jersey Department of Education on August 29, 2016.

Respondent filed its Answer and Counterclaim thereto on September 16, 2016.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on September 21, 2016, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The matter was listed for a hearing on January 19, 2017. Petitioner failed to appear, or otherwise contact the OAL regarding the non-appearance. A proof hearing was held on January 19, 2017.

ISSUE

Are the minor children eligible to attend school in the Butler school district.

I **FIND** the following **FACTS**:

Prior to the 2016/2017 school year the minor children were enrolled in the Butler school district. The parents of the minor children were divorced, with the minor children living less than half the year in the Butler school district. The parents admit to this pursuant to a letter, dated August 26, 2016, addressed the Commissioner of Education. (R-2).

Respondent school district determined that the minor children were no longer entitled to a free education in the Butler school district due to their new living arrangement resulting from Petitioner and former spouse being divorced. (R-3)

Petitioner and former spouse had entered into a Consent Order in the context of their divorce litigation wherein they agreed that their minor children would continue to attend school in the Butler school district. (R-1)

The minor children are not domiciled in the Butler school district.

LEGAL ANALYSIS AND CONCLUSION

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident.³ N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that “the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.” N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

If a school district discovers that a non-resident child is attending one of its schools, the district may act to remove the child. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.3. If so, the chief school administrator must first issue a notice of ineligibility. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.2, -4.3. The notice shall inform the parent of the right to a hearing before the school district and the right to appeal the school district’s decision to the Commissioner of Education. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-5.1. The notice shall also inform the parent whether the district’s policy allows for continued attendance, with or without tuition, for students who move out of the district during the course of the school year. N.J.A.C. 6A:22-4.2(b)(7)(i). If, on appeal to the Commissioner, the parent fails to demonstrate his child’s entitlement to attend the schools of the district, the parent may be liable for tuition for any period of ineligible attendance. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.2; N.J.A.C. 6A:22-6.2, -6.3.

In the instant matter Petitioner concedes that the minor children do not reside within the Butler school district.

According to N.J.A.C. 6A:22-6.3(a), “[t]uition assessed pursuant to the provisions of this section shall be calculated on a per student basis for the period of a student’s ineligible enrollment, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23-3.1. The individual student’s record of daily attendance shall not impact on such calculation.” However, “[n]othing in this 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).

Respondent school district has waived tuition reimbursement in this matter. Respondent school district has additionally agreed that the minor students have until the end of the third quarter marking period to enroll in the school district where they reside.

ORDER

It is hereby **ORDERED** that Petitioner’s residency appeal is **DENIED**; and;

It is further **ORDERED** that Petitioner has until the end of the third quarter marking period to enroll the minor children in the school district where they reside; and

It is further **ORDERED** that Respondent’s Counterclaim seeking assessment of tuition costs is **DISMISSED** as Respondent has waived the same.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 19, 2017



DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

Ljb

APPENDIX

List of Witnesses:

For Petitioner:

None

For Respondent:

None

List of Exhibits:

For Petitioner:

None

For Respondent:

- R-1 Consent Order dated Aug. 22, 2016
- R-2 letter from Petitioner and former spouse dated Aug. 26, 2016
- R-3 Notice of Final Eligibility dated August 10, 2016