

EDU #1160-99  
C # 316-99  
SB # 47-99

D.W., on behalf of minor child, T.N., :  
PETITIONER-RESPONDENT, :  
V. : STATE BOARD OF EDUCATION  
BOARD OF EDUCATION OF THE : DECISION  
TOWNSHIP OF WEST ORANGE,  
ESSEX COUNTY, :  
RESPONDENT-APPELLANT. :

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Decided by the Commissioner of Education, October 4, 1999

For the Petitioner-Respondent, D.W., pro se

For the Respondent-Appellant, Stephen J. Christiano, Esq.

On November 23, 1998, D.W. (hereinafter "petitioner") filed a petition of appeal with the Commissioner of Education, challenging the determination by the Board of Education of the Township of West Orange (hereinafter "Board") that her nephew, T.N., who had recently begun to live with her in West Orange, was not entitled to a free public education in that district.<sup>1</sup> T.N. had previously lived with his mother and stepfather in Los Angeles. In an affidavit submitted to the Board by T.N.'s mother, she indicated that she was having marital problems, would be filing for a divorce, and felt that the petitioner, her sister, would be "able to provide the stability and support that my son needs at this time." Affidavit of Parent, at ¶4.

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<sup>1</sup> We note that T.N. began to attend public school in West Orange on December 1, 1998, following the filing of the petition in this matter, as required by N.J.S.A. 18A:38-1b(1).

On August 16, 1999, an administrative law judge (“ALJ”) recommended dismissing the petition, finding that the petitioner had provided no evidence to substantiate her claim that T.N.’s mother was not capable of supporting or providing care for him due to a family or economic hardship, as required by N.J.S.A. 18A:38-1(b).<sup>2</sup> The ALJ recommended that the petitioner be directed to compensate the Board in the amount of \$7,198, representing tuition for the period of T.N.’s attendance at West Orange High School.

On October 4, 1999, the Commissioner concluded that the record was insufficient to enable him to determine this matter, observing that the petitioner had filed an application for custody of T.N. with the Superior Court, Chancery Division on June 17, 1999. Accordingly, the Commissioner directed that the case be returned to the Office of Administrative Law (“OAL”) “for expansion of the record, and for such further analysis as may be necessary, with respect to the status of petitioner’s custody application and its effect on the within dispute.” Commissioner’s Decision, slip op. at 9.

The Board filed the instant appeal to the State Board. The Board acknowledges that the petitioner was awarded custody of T.N. on September 15, 1999,<sup>3</sup> and it concedes that T.N. was thereafter entitled to a free public education in West Orange.

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<sup>2</sup> N.J.S.A. 18A:38-1 provides, in pertinent part:

Public schools shall be free to the following persons over five and under 20 years of age:

a. Any person who is domiciled within the school district;

b.(1) Any person 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...and upon filing by the child’s parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship....

<sup>3</sup> We note that the petitioner apparently did not inform the Commissioner of the fact that she had been awarded legal custody of T.N.

Consequently, the Board limits its argument on appeal to the period prior to September 15, 1999, contending that a remand to determine the effect of the petitioner's application for custody was unnecessary since the only relevant issue for the period prior to issuance of the custody order was whether the petitioner had demonstrated hardship under the standard set forth in N.J.S.A. 18A:38-1(b).

After a careful review of the record, including the papers submitted on appeal, we find that it is unnecessary to remand this matter to OAL in order to resolve it. Under the circumstances, we conclude that T.N. was entitled to a free public education in West Orange during the period of his attendance in the district.

As previously noted, public school is free to any person over five and under 20 "who is domiciled within the school district." N.J.S.A. 18A:38-1a. In this instance, T.N. moved from Los Angeles to live with the petitioner, his aunt, in West Orange in November 1998. The petitioner, however, could not apply for legal custody until T.N. had lived in New Jersey for six consecutive months. N.J.S.A. 2A:34-31. [The Superior Court has jurisdiction to make a child custody determination if New Jersey "is the home state of the child at the time of commencement of the proceeding...." "Home state" is defined as "the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least 6 consecutive months...." N.J.S.A. 2A:34-30(e).] On June 17, 1999, shortly after expiration of the six-month period, the petitioner filed an application for custody, which was granted by the Court.

Given that the Court did not have jurisdiction to award custody of T.N. to the petitioner until after the six-month waiting period had expired, that the petitioner applied

for and was awarded legal custody of T.N. shortly after the expiration of that period, and that a condition for the Court having jurisdiction to issue such an order was that T.N. had been domiciled in New Jersey with “his parents, a parent, or a person acting as parent, for at least 6 consecutive months,” N.J.S.A. 2A:34-30(e) (emphasis added), we conclude that the custody order should relate back to the waiting period for purposes of T.N.’s entitlement to a free public education in West Orange.

We note in that regard that if T.N. had resided in New Jersey with his mother for six months prior to his moving to West Orange to live with the petitioner, the petitioner could have applied for legal custody immediately. T.N.’s entitlement to a free public education in West Orange should not be altered by the happenstance that he had lived in another state prior to moving to that district.

Thus, under the particular circumstances presented by this case, we conclude that T.N. was entitled to a free public education in West Orange during the entire period of his attendance in that district.<sup>4</sup> In view of our determination, further proceedings are unnecessary and we set aside the Commissioner’s decision to remand this matter to the Office of Administrative Law.

Attorney exceptions are noted.

August 2, 2000

Date of mailing \_\_\_\_\_

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<sup>4</sup> We find that the interpretation urged by the Board in its exceptions to the report of our Legal Committee, *i.e.*, that a custody order under these circumstances should not relate back to the waiting period for purposes of the educational entitlement of the children involved, is inconsistent with our obligation to assure continuity of education for those children and contrary to their best interests.