

EDU #3637-97
C # 540-97
SB # 92-97

P.B.K., on behalf of minor child, E.Y., :
PETITIONER-APPELLANT, :
V. : STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF TENAFLY, BERGEN :
COUNTY, :
RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, October 14, 1997

Decision on motion by the State Board of Education, April 1, 1998

For the Petitioner-Appellant, Cillick & Sprague (Michael J. Sprague, Esq., of Counsel)

For the Respondent-Respondent, Apruzzese, McDermott, Mastro & Murphy (Robert Merryman, Esq., of Counsel)

P.B.K. (hereinafter "petitioner") filed a petition of appeal with the Commissioner of Education alleging that his nephew, E.Y., who resided with him in Tenafly, was entitled to a free public education in that district pursuant to N.J.S.A. 18A:38-1.¹ E.Y., an

¹ 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

American citizen, had resided with his parents in South Korea before moving to Tenafly in December 1996 to live with the petitioner. The Board of Education of the Borough of Tenafly (hereinafter "Board") countered that E.Y. had failed to meet the legal requirements for a free public education in the district. The Board subsequently filed a motion for summary decision.

On August 21, 1997, an administrative law judge ("ALJ"), finding that there were no genuine issues of material fact, concluded that the petitioner had established that E.Y. was entitled to a free public education in Tenafly. The ALJ found that E.Y. was not seeking to be educated in Tenafly solely for the purpose of receiving a free public education in the district and that he had otherwise met the requirements of N.J.S.A. 18A:38-1b. The ALJ stressed that "petitioner has taken full charge of E.Y.'s welfare, and is currently in the process of obtaining guardianship over E.Y. As noted by petitioner, E.Y. would otherwise have no entitlement to an education anywhere in the U.S." Initial Decision, slip op. at 9. Treating the petitioner's request for relief as a cross-motion for summary decision, the ALJ recommended that E.Y. be admitted to the Tenafly district and that the Board's motion for summary decision be denied.

if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, 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 and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district....

On October 14, 1997, the Commissioner rejected the ALJ's recommendation, concluding that petitioner had not established that E.Y. was entitled to a free public education in Tenafly. Initially, the Commissioner agreed with the ALJ that "since petitioner has not brought forth proof that he has gained legal custody of his nephew, then E.Y. cannot be found to be domiciled with him, since the domicile of an unemancipated minor follows that of the parent or guardian having legal control over him." Commissioner's Decision, slip op. at 12. The Commissioner found that "petitioner has not established, nor has he even claimed, that E.Y.'s parents, due to family or economic hardship, are not presently capable of supporting or providing care for E.Y.," *id.* at 13, as required by N.J.S.A. 18A:38-1b(1). The Commissioner observed that "should E.Y.'s parents wish to procure an education for their son in a school district in New Jersey, they may presumably do so, with the consent of the local board, by paying the necessary tuition in accordance with N.J.S.A. 18A:38-3." *Id.* at 14. Accordingly, the Commissioner directed the petitioner to remit tuition to the Board for the period of E.Y.'s attendance in the district.

Petitioner filed the instant appeal to the State Board. He also filed a motion seeking to supplement the record on appeal with 1) an affidavit of E.Y.'s father averring that E.Y. was living with the petitioner as the result of a family and economic hardship, and 2) Letters of Guardianship issued by the Bergen County Surrogate on June 11, 1997 appointing petitioner as the legal guardian of E.Y.

On April 1, 1998, the State Board granted the petitioner's motion to supplement the record and, in addition, stayed the decision of the Commissioner sua sponte pending its final determination on the merits of this matter.

After a careful review of the record as supplemented on appeal, we conclude that E.Y. was entitled to a free public education in the Tenafly school district.

As pointed out by the Commissioner, the domicile of an unemancipated minor follows that of the parent or guardian having legal control over him. Thus, once the petitioner was appointed E.Y.'s legal guardian on June 11, 1997, the inquiry became whether he was domiciled in Tenafly. V.H., on behalf of minor, J.T. v. Board of Education of the Township of Quinton, decided by the Commissioner of Education, October 15, 1996, aff'd by the State Board of Education, May 7, 1997. The Board does not dispute the fact that the petitioner has been domiciled in Tenafly during all periods relevant to this matter. Nor is there any indication of fraud on his part. Given these circumstances, we conclude that E.Y. was entitled to a free public education in the Tenafly school district pursuant to N.J.S.A. 18A:38-1a once the petitioner was appointed as his legal guardian.

The only remaining issue involves the period between December 1996, when E.Y. began to live with the petitioner in Tenafly, and June 11, 1997, when the petitioner became E.Y.'s legal guardian. In his affidavit submitted in supplementation of the record, E.Y.'s father, H.K.Y., avers that E.Y. had been born in California and had lived there until the family moved to Korea when he was three. According to H.K.Y., his son had attended the international school in Korea "at substantial expense to us" in preparation for attending college in the United States. In 1994, H.K.Y. lost his job with Citibank and was unemployed for two years before securing a position at a "substantially lower salary." He indicates that the cost of sending E.Y. to the

international school was an expense he could no longer afford. H.K.Y. further avers that:

7. The public high school in Seoul is not an option due to the fact that E.Y. is an American citizen and because he had attended the international middle school. At the international school, he had been instructed in English, and the curriculum and cultural environment were substantially different from that in the public school. E.Y. does not have the foundation in the Korean language necessary to succeed at an advanced educational level in the public school. His status as an American citizen is cause for harassment at the hands of students at the public school.

8. Thus, the family was faced with the prospect of not being able to provide our son with a proper education due to economic hardship. Although I am employed, my salary is not sufficient enough to be able to pay the international school tuition while providing for the other needs of my family....

9. ...It was solely for the reason of economic hardship that E.Y. moved to Tenafly to live with his uncle, who has obtained legal guardianship of him....

Although the record does not indicate when the petitioner applied to become E.Y.'s legal guardian, a consent form submitted by H.K.Y. to the Bergen County Surrogate's Court assenting to the appointment of the petitioner as his son's guardian was notarized on January 21, 1997, shortly after E.Y. began to live with the petitioner in Tenafly. As previously indicated, petitioner was appointed E.Y.'s legal guardian on June 11, 1997. Given the unique circumstances before us and on the basis of the record as supplemented, we conclude that the petitioner has demonstrated that E.Y.'s parents were not capable of supporting or providing care for him due to a family or economic hardship and that E.Y. was not residing with the petitioner solely for the purpose of receiving a free public education in the district.

Consequently, on the basis of the record as supplemented on appeal, we conclude that E.Y. was entitled to a free public education in the Tenafly school district commencing in December 1996, when he began to live with the petitioner.²

Attorney exceptions are noted.

January 5, 2000

Date of mailing _____

² In response to exceptions filed by the Tenafly Board to the report of our Legal Committee, we note that our review of this matter is not limited to consideration of the documents which the petitioner had provided to the Board at the time he was attempting to enroll E.Y. in the district. Rather, the issue before us is whether—on the basis of the entire record developed during these proceedings—E.Y. was entitled to a free public education in the Tenafly district under the standard set forth in N.J.S.A. 18A:38-1. We reiterate in that regard that the petitioner had not filed a motion for summary decision with the ALJ. Rather, the ALJ treated the petitioner’s claim for relief as a motion for summary decision and determined on the basis of the record before him that the petitioner had established E.Y.’s entitlement to attend school in Tenafly. Hence, the petitioner had not submitted documents in support of such a motion during the proceedings in the Office of Administrative Law.

Moreover, in any event, N.J.A.C. 6:2-1.9 expressly authorizes the State Board to direct supplementation of the record if “[a]t any time during the pendency of the appeal...it appears that evidence unadduced at the proceedings below may be material to the issues on appeal....” By decision dated April 1, 1998, we granted the petitioner’s request to supplement the record with, inter alia, the affidavit of E.Y.’s father. Such document was, therefore, part of the record before us during our review of the merits of this case.