

C # 394-02L
SB # 54-02

M.S. AND A.S., on behalf of minor	:	
child, B.S.,	:	
	:	
PETITIONERS-RESPONDENTS,	:	STATE BOARD OF EDUCATION
	:	
V.	:	DECISION ON MOTION
	:	
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF BRICK, OCEAN	:	
COUNTY,	:	
	:	
RESPONDENT-APPELLANT.	:	
_____	:	

Decided by the Commissioner of Education, November 14, 2002

For the Petitioners-Respondents, Robert G. Daroci, Esq.

For the Respondent-Appellant, Wilbert, Montenegro & Thompson (Ben A. Montenegro, Esq., of Counsel)

M.S. and A.S. (hereinafter "petitioners") filed a petition of appeal with the Commissioner of Education on January 4, 2001, challenging the determination by the Board of Education of the Township of Brick (hereinafter "Board") that their grandson, B.S., was not entitled to a free public education in the Brick school district. By letter dated January 5, 2001, the petitioners withdrew their petition.

On September 13, 2001, the Board filed a Complaint in Superior Court, Law Division seeking reimbursement for tuition for the period of B.S.'s attendance in the district's public schools. Both parties filed motions for summary judgment. On

August 30, 2002, the Court denied the motions and stayed the proceedings pending the filing of an application with the Commissioner by the petitioners requesting to reopen their petition of appeal. The petitioners filed such a motion on September 30, 2002.

In a letter decision dated November 14, 2002, the Commissioner granted the petitioners' motion and reinstated the petition. Citing N.J.A.C. 6A:3-8.1(d), which provides, inter alia, that "the Commissioner may order payment of tuition in his decision on withdrawal or abandonment of the appeal," and N.J.S.A. 18A:38-1, "Attendance at school free of charge," the Commissioner reasoned that "[w]hich party has the obligation to file within the regulatory period where the only issue is tuition for a period of prior attendance is not entirely clear from the statutory or regulatory scheme." Commissioner's Decision, slip op. at 2. Finding that N.J.S.A. 18A:38-1 "presents interpretative difficulties concerning whether a Board must file a claim for tuition in such a circumstance," the Commissioner concluded that "[t]he ambiguities created by such statutory and regulatory language weigh in favor of relaxation of the period of limitation." Id. The Commissioner concluded, in addition, that the equities weighed in favor of the petitioners, finding that the effect of the withdrawal of the petition was analogous to a default judgment.

The Board filed the instant motion with the State Board of Education pursuant to N.J.A.C. 6A:4-2.3, seeking leave to appeal the Commissioner's interlocutory decision reinstating the petition. The Board argues, inter alia, that the petitioners "are far outside the mandated statute of limitations for the filing of an appeal," Brief in support of motion,

at 6, and that the petitioners had waived their right to appeal by voluntarily withdrawing the petition.¹

We grant the Board's motion for leave to appeal, and, after a careful review of the record, affirm the Commissioner's decision to grant the petitioners' motion. We do so, however, for the reasons expressed herein.

It is clear from reviewing the record that a determination of B.S.'s entitlement to a free public education in Brick Township under N.J.S.A. 18A:38-1 is a necessary prerequisite in order for the Board to obtain a judgment for tuition reimbursement. In this respect, we stress that the Commissioner of Education has the primary jurisdiction to hear and determine all controversies arising under the school laws. Bower v. Board of Education of the City of East Orange, 149 N.J. 416, 420 (1997) (action in Superior Court, Law Division seeking indemnification pursuant to N.J.S.A. 18A:16-6 and 16-6.1 should have been dismissed since the Commissioner of Education has primary jurisdiction to hear and determine all controversies arising under the school laws).

In this case, the Law Division's Order denying the parties' motions for summary judgment on August 30, 2002 reflects the Court's acknowledgment of the Commissioner's primary jurisdiction by expressly staying further proceedings before the Court in order to allow the petitioners to apply to the Commissioner to reopen their residency appeal. Thus, the Court recognized that because the relief which the Board was seeking was governed by N.J.S.A. 18A:38-1, the question of whether the Board was entitled to tuition reimbursement could not be properly decided without a determination of whether B.S. had been entitled to a free public education in the district

¹ The petitioners did not file a brief in opposition to the Board's motion.

pursuant to that statute. As was implicit in the Court's Order, because the controlling statute is part of the education laws, the issues relating to B.S.'s residency must be resolved by the Commissioner of Education in the first instance. Hence, the petitioners' petition of appeal filed with the Commissioner must be reinstated in order to achieve a proper determination of the residency dispute.

Furthermore, counsel for the petitioners averred in a certification filed in support of the petitioners' motion to reinstate their appeal that he had received a telephone call on January 5, 2001 from a staff member in the Department of Education's Bureau of Controversies and Disputes who, when informed that B.S.'s parents had removed him from the Brick school district, advised counsel for the petitioner that there was no remaining controversy to be decided by the Commissioner. When counsel asked about the issue of tuition, he indicated that he was told that the Board would be required to file a separate action in order to receive an order for tuition reimbursement from the Commissioner. Counsel asserted that it was on the basis of these representations that he withdrew the petition. In his letter of January 5, 2001 to a Controversies Examiner in the Bureau of Controversies and Disputes, counsel for the petitioners stated: "Pursuant to our telephone conference moments ago, this is to confirm that petitioner, [M.S. and A.S.], hereby withdraw their Petition of Appeal filed on January 4, 2001 in reference to the above-entitled matter." Under these circumstances, we conclude that interests of justice dictate that the petitioners be permitted to reopen their petition.

Consequently, we grant the Board's motion for leave to appeal the Commissioner's interlocutory decision in this matter and, for the reasons expressed

herein, affirm the ultimate conclusion of the Commissioner to grant the petitioners' motion to reinstate their petition of appeal.

Finally, we remind counsel of their obligation to ensure that all briefs "strictly preserve the anonymity of any minor who is a party to or witness in the matter by such means as using initials in place of the names of those minors." N.J.A.C. 6A:4-1.13(f).

April 2, 2003

Date of mailing _____