

T.B., on behalf of minor child, L.B., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF WEST ORANGE,
ESSEX COUNTY, :
RESPONDENT. :

SYNOPSIS

T.B. – aunt of L.B., a fifteen year old student currently enrolled in respondent’s schools and living with petitioner – contends that L.B. is entitled to continue her education in West Orange as a result of family and economic hardship pursuant to *N.J.S.A. 18A:38-1(b)(1)*. L.B. has been attending West Orange schools since second grade, and lived – together with her mother, D.B., and two younger brothers – with her aunt, a homeowner in the district. In September 2005, D.B. and her sons moved to a two bedroom apartment in Keansburg; L.B. remained living with her aunt. Respondent district contends that L.B. does not meet the requirements of the above statute.

The ALJ found, *inter alia*, that: the only issue in dispute is whether L.B.’s mother, D.B., is incapable of supporting or caring for her due to family or economic hardship; D.B. has financial restraints, but inadequate detail was offered to establish hardship pursuant to *N.J.S.A. 18A:38-1(b)(1)*; petitioners did not attempt to defraud the district in this matter, and should be differentiated from those who intentionally seek to establish a false or fraudulent residence; and it is fundamentally unfair to burden this family with the obligation to pay tuition. The ALJ determined that L.B. cannot attend school in West Orange unless there is a change in circumstances that meets the restrictions of the residency statute, and that no tuition is due.

The Commissioner adopts in part, and rejects in part the recommended decision of the ALJ. The Commissioner concurs that petitioner has failed to sustain her burden of establishing family and economic hardship, and that L.B., therefore, is ineligible to attend West Orange schools free of charge. However, the Commissioner cannot concur that equitable considerations dictate forgiveness of all tuition; rather, equitable considerations compel that the Board’s tuition recovery should commence on December 7, 2005 – the date on which petitioner filed her Petition of Appeal. Accordingly, the Commissioner ordered that L.B. is not entitled to a free education in respondent’s schools, and directed the petitioner to remit tuition to the Board at the rate of \$73.81 per day for the period from December 7, 2005 through the end of the 2005-06 school year, plus such additional per diem rate applicable from the beginning of the 2006-07 school year through the filing date of this decision.

<p>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.</p>

OAL DKT. NO. EDU 3276-06
AGENCY DKT. NO. 359-12/05

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board filed timely exceptions. Petitioner’s exception submission, however, was filed outside the timelines specified by *N.J.A.C. 1:1-18.4* for the filing of either primary or reply exceptions and, therefore, was not considered by the Commissioner in reaching her determination herein.¹

The Board excepts to the Administrative Law Judge’s (ALJ) denial of its counterclaim for tuition on the basis of what it categorizes as “some vague notion of fundamental fairness.” (Board’s Exceptions at 1) Such a determination, it avers, is directly contrary to the governing statute, *N.J.S.A. 18A:38-1 b(2)* which in pertinent part specifies:

[i]f in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student***.
(emphasis added) (*Ibid.*)

¹ It is additionally noted that petitioner’s exceptions attempted to introduce new evidence which, pursuant to *N.J.A.C. 1:1-18.4(c)*, could not be considered by the Commissioner even if this submission had been timely filed.

It is clear, the Board argues, that this provision's use of the mandatory "shall" as opposed to the permissive "may" proscribes the exercise of discretion on the part of the Commissioner. Where, as here, petitioner fails to sustain the burden of proof, the Board asserts that payment of tuition is compulsory. It, therefore, claims tuition due and owing of \$8,931.81 for the period of L.B.'s ineligible attendance in the District's schools. (Board's Exceptions at 2)

Upon careful and independent review of the record in this matter, which did not include transcripts of the hearing conducted at the OAL, the Commissioner adopts in part, and rejects in part, the recommended decision of the ALJ. Initially, the Commissioner concurs with the ALJ, for the reasons detailed in his decision, that petitioner has failed to sustain her burden of establishing, pursuant to *N.J.S.A.* 18A:38-1(b)(1), that L.B.'s mother, D.B. is incapable of supporting or providing care for the child due to a demonstrated family or economic hardship and, L.B., therefore, is ineligible to attend the West Orange schools free of charge. (Initial Decision, Pages 3-6)

With respect to assessment of tuition, however, although the Board is mistaken in arguing that the statutory language requiring assessment of tuition is mandatory in nature, so that the Commissioner has no discretion in this regard – a contention previously rejected by the State Board and the courts, as set forth in *M.R.N. and K.H., on behalf of minor children, D.J.N. and J.M.N., v. Board of Education of the Flemington-Raritan Regional School District, Hunterdon County*, decided by the Commissioner February 24, 2003, Slip Opinion at 13-14, as well as the plain language of *N.J.A.C.* 6A:22-6.3(b) – the Commissioner cannot concur with the ALJ, based on the record before her, that equitable considerations dictate forgiveness of all tuition that would otherwise be due. Nonetheless, the Commissioner observes that although the literal interpretation of petitioner's tuition obligation here would suggest that she is obligated for such

tuition effective with D.B.'s move to Keansburg in September 2005, it would be inequitable on this record to assess her with tuition for this entire period. As found by the ALJ:

L.B. legally attended the West Orange School System since second grade, a period of approximately 8 to 9 years. West Orange was struggling with out-of-district students attempting to attend their various elementary schools, junior highs and high schools. To combat the influx of illegal students, the Board required all students to document their status. Neither D.B. nor T.B. on behalf of L.B. delineated their situation inaccurately. They provided the documentation requested, submitted affidavits when needed and were undoubtedly under the impression that continued attendance of L.B. at the West Orange School was legally acceptable. They did not move into the district seeking a free education, they simply continued with the education that L.B. had received for the prior eight years. (Initial Decision at Pages 5-6)

Petitioner here had no knowledge of any problem or that anything had altered L.B.'s entitlement to attend school in West Orange until the Board ultimately notified her to this effect, presumably sometime in late November 2005. At this point in time, when confronted with evidence of ineligibility, rather than promptly withdraw L.B. from the district, petitioner chose to avail herself of the benefit of *N.J.S.A. 18A:38-1* to secure L.B.'s continued attendance in the Board's schools and cannot now disavow the statute's concomitant obligation for payment of tuition. Therefore, the Commissioner is persuaded that equitable considerations compel that the Board's tuition recovery should commence on December 7, 2005, the date on which petitioner filed her Petition of Appeal.

Accordingly, the recommended decision of the OAL is adopted with respect to its determination that L.B. is not entitled to a free public education in the District's schools, but rejected with respect to its determination that no tuition may be assessed for any of the period of L.B.'s ineligible attendance. Petitioner is hereby directed to remit tuition to the Board at the rate of \$73.81 per day for the period from December 7, 2005 through the end of the 2005-06 school

year, plus such additional per diem rate applicable from the beginning of the 2006-07 school year through the filing date of this decision.²

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 12, 2006

Date of Mailing: October 13, 2006

² Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner's decisions are deemed filed three days after the date of mailing to the parties.

³ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*