

#115-10 (OAL Decision: Not yet available online)

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

SYNOPSIS

Petitioner challenged the respondent Board's determination that her child, B.B., is not entitled to a free public education in its schools, contending that she is homeless and that her last permanent domicile was within the Township of West Orange. B.B. turned 18 in December 2009, and has been living since July 2009 in West Orange with R.P., who originally filed this petition as a residency appeal. The Board asserted that the petition should be dismissed, as R.P. was not the mother, legal guardian nor affidavit host of B.B., and petitioner does not reside within the district. The Board counterclaimed for tuition for the period of B.B.'s alleged ineligible attendance.

The ALJ found that: A.B. has not had an established residence in any municipality since her eviction from her residence in West Orange in July 2009; prior to becoming homeless, the last residence of A.B. and B.B. was in West Orange; and West Orange was the district of origin and the district of last attendance for B.B., as well as the district in which B.B. has been temporarily living. The ALJ concluded that, by virtue of the foregoing, B.B. should be enrolled in the West Orange School District. Moreover, because B.B. has reached the age of 18 and has established a residence in West Orange, she is entitled to a free public education in the district's schools. Accordingly, the ALJ granted petitioner's appeal, and dismissed the Board's claim for tuition.

Upon full consideration, the Commissioner concurred with the ALJ's findings and adopted the Initial Decision as the final decision in this matter. In so deciding, the Commissioner rejected the respondent Board's exception arguments contending that the ALJ improperly substituted A.B. for the original petitioner, finding that this matter is a homeless situation rather than a residency case, and the ALJ appropriately facilitated amendment of the proceedings, pursuant to *N.J.A.C. 1:1-6.2(a)*, replacing petitioner R.P. with A.B. to conform to the particular situation existing in this matter. The Commissioner directed that B.B. receive a free public education in the West Orange School District for the 2009-2010 school year.

<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>

April 12, 2010

A.B., on behalf of minor child, B.B.,¹ :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF WEST ORANGE,
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RESPONDENT. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions – filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

The Board excepts to what it alleges was the Administrative Law Judge's (ALJ) improper substitution of A.B. (B.B.'s mother) for the original petitioner, R.P., and her simultaneous denial of the Board's motion for summary decision seeking dismissal of the petition because R.P. lacked standing to bring this action. In so contending, it argues:

The substitution of parties by the ALJ is without legal authority. Respondent's school residency decision can only be challenged by the student's parent or guardian within 21 days of the decision. *N.J.S.A.* 18A:38-16.(2) While an ALJ has authority to relax rules, they can only be relaxed when they do not reflect a specific statutory requirement. *N.J.A.C.* 6A:3-1.16. The statutory prescription that a residency decision be contested by a proper party within 21 days cannot be amended or adjusted by the ALJ. The substitution of the parent (the proper party) for the original petitioner (some two months late) is not permissible. To hold otherwise would render meaningless the particular filing requirements of the

¹ It is noted that the petition of appeal in this matter was originally brought by R.P.

statute. Further, once an answer is filed in an action, an amendment to a petition can only be made with the consent of the adverse party or by leave of the Commissioner upon written application. *N.J.A.C. 6A:3-1.7*. The ALJ cannot take it upon herself to simply supplant petitioners without doing violence to the specific demands of the school residency law. (Board's Exceptions at 2)

The Board states that because B.B. is a senior scheduled to graduate in June it will not seek her removal from its schools; however, it strongly urges the Commissioner to reject the Initial Decision and assess tuition for the period of her ineligible attendance in the district. (*Id.* at 3)

Upon his considered review of this matter, the Commissioner concurs with the ALJ, for the reasons clearly presented on pages 6-9 of her decision, that B.B. was entitled to a free public education in the West Orange School District from the beginning of the 2009-10 school year through December 4, 2009 by virtue of the fact that she and her mother, A.B., were homeless. The Commissioner further agrees with the ALJ that as of December 5, 2009 – B.B.'s eighteenth birthday – she possesses entitlement to a free public education in the district by virtue of being a domiciliary of West Orange.

Finding the Board's exception arguments disingenuous at best, the Commissioner concludes that, under the factual underpinnings of this case, the ALJ appropriately facilitated amendment of the pleadings, pursuant to *N.J.A.C. 1:1-6.2(a)*, replacing petitioner R.P. with A.B. to conform to the particular situation existing in this matter. Moreover, the necessity for such amendment appears to be directly attributable to actions of the Board. Specifically, based upon her credibility determinations, the ALJ made the following factual findings²:

A.B. credibly testified that she is at work overnight at least two nights, and for the remainder of the week, alternates between the apartments of two friends. She

² The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. (*N.J.S.A. 52:14B-10(c)*)

undoubtedly cannot remain in the subsidized apartment on Georgia King Village, and although N.L. has allowed A.B. to stay with her, she is not on the lease, and there is already one adult and five, soon to be six, children living in the apartment. A.B. has no legal right to remain in either Newark apartment, nor is she related to either tenant. She further testified credibly that she lost her full-time job in 2008, and that she has since had only her part-time job. A letter from her employer states that she works 20 hours per week, at a rate of \$11 per hour, which would gross approximately \$880 per month. Even her gross earnings would be insufficient to pay for an apartment and utilities, not taking into account any other expenses for herself and B.B., including medical insurance or auto insurance. Based on the above, it is clear that A.B. does not have a permanent or regular residence since her eviction from the apartment on High Street in July 2009.

It was undisputed that R.P. is domiciled in West Orange, and that B.B. was living with R.P. (Initial Decision at 6)

The Commissioner has no cause whatsoever to challenge the ALJ's finding as to A.B. and B.B.'s homeless status within the intendment of *N.J.S.A. 18A:7B-12(c)* and *N.J.A.C. 6A:17-2.3(a)3*. Significantly, the ALJ's decision further reports that "A.B. testified that, in July 2009, she made the District aware of her situation, including that she had no place to live, and that B.B. was living with R.P." (Initial Decision at 5), a representation which on this record is not contested by the Board. Notwithstanding that, upon being so informed, the Board was obligated by law to proceed in accordance with *N.J.A.C. 17-2.1, et seq.* (Education of Homeless Children) it, rather, proposed to disenroll the student pursuant to *N.J.S.A. 18A:38-1a.*, thereby treating this matter as a "residency" rather than a "homeless" case. A.B. sought guidance from the Bureau of Controversies and Disputes with respect to appealing the Board's proposed action and, upon A.B.'s telephonic representation to Bureau staff³ that she had received a letter from the Board stating that it intended to disenroll B.B. due to lack of residency in the District and A.B.'s further representation that, of necessity, B.B. was living with R.P. not A.B, she was correctly advised that, under these circumstances, the appropriate petitioner was R.P. When it was ultimately

³ It is noted that A.B. did not speak to the Bureau's Director, M. Kathleen Duncan.

discovered at the OAL that this matter was a homeless situation rather than a residency case, A.B.'s substitution for R.P. was mandatory, not discretionary.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons stated therein. It is hereby directed that B.B. receive a free public education in the West Orange School District for the 2009-10 school year and the Board's counterclaim for tuition is hereby dismissed.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: April 12, 2010

Date of Mailing: April 13, 2010

⁴ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, c. 36 (*N.J.S.A.* 18A:6-9.1).