

EDU # 8199-91  
C # 89-95  
SB # 48-95  
APP. DIV. #A-1753-95T3  
EDU # 11593-96  
C # 233-98  
SB # 60-98

BOARD OF EDUCATION OF THE :  
TOWNSHIP OF LIVINGSTON, ESSEX :  
COUNTY, :

PETITIONER-RESPONDENT, : STATE BOARD OF EDUCATION

V. : DECISION

H.L. AND D.L., individually, and as :  
natural guardians of K.L. AND J.L., :

RESPONDENTS-APPELLANTS. :

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Decided by the Commissioner of Education, March 14, 1995

Decision on motion by the State Board of Education, July 5, 1995

Decided by the State Board of Education, October 5, 1995

Remanded by the Appellate Division, October 24, 1996

Decision on remand by the Commissioner of Education, May 26, 1998

For the Petitioner-Respondent, Riker, Danzig, Scherer, Hyland & Perretti  
(James S. Rothschild, Jr., Esq., of Counsel)

For the Respondents-Appellants, H.L. and D.L., pro se

On May 26, 1998, following a hearing in the Office of Administrative Law, the  
Commissioner of Education determined that H.L. and D.L. (hereinafter "respondents")  
had not been domiciled in Livingston until January 22, 1991 and, as a result, that their

children had not been entitled to a free public education in the Livingston school district prior to that date. The Commissioner therefore directed the respondents to pay tuition to the Board of Education of the Township of Livingston (hereinafter "Board") in the amount of \$5,614.03. The Commissioner also granted the Board's request for pre-judgment interest in the amount of \$4,097.41. The Commissioner did not grant the Board's request for post-judgment interest. He also denied the Board's request for legal fees, stressing that there was no statutory authority for such an award.

On June 29, the respondents filed the instant appeal to the State Board, contending that the Commissioner had improperly awarded tuition and pre-judgment interest to the Board.

After a thorough review of the record, including the transcripts of the hearings held in the Office of Administrative Law, we affirm the decision of the Commissioner as modified herein. We fully agree with the Commissioner that the Board has demonstrated by a preponderance of the credible evidence that the respondents were not domiciled in Livingston until January 1991. The record indicates only that respondent H.L., who is a builder, spent occasional nights at the family's new house in Livingston prior to that time in order to oversee construction.<sup>1</sup> The remainder of his nights were spent with his family at their home in Staten Island. We therefore affirm the Commissioner's determination directing respondents to pay the Board tuition in the amount of \$5,614.03 for the period from October 1, 1990 through January 18, 1991.<sup>2</sup>

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<sup>1</sup> Respondents did not receive a temporary certificate of occupancy for their Livingston house until January 22, 1991.

<sup>2</sup> We note that January 18, 1991 was a Friday and that Monday, January 21, 1991 was an official State holiday.

We also affirm the Commissioner's grant of pre-judgment interest to the Board, although we modify the amount of interest awarded by the Commissioner. The calculations submitted by the Board and relied upon by the Commissioner were based on the Board's contention that respondents' children were not entitled to a free public education in Livingston until mid-April 1991 and that respondents therefore owed more than \$10,000 in tuition. However, the Commissioner concluded, and we agree, that respondents were domiciled in Livingston beginning in January 1991. Hence, pre-judgment interest must be calculated on the basis of tuition due for the period from October 1, 1990 through January 18, 1991 in the total amount of \$5,614.03. We therefore direct the respondents to pay pre-judgment interest to the Board for the period from January 22, 1991 through the date of the Commissioner's decision, May 26, 1998, calculated on tuition owed in the amount of \$5,614.03. Such interest must be computed in accordance with the terms of N.J.A.C. 6:24-1.16(d)1.

We deny the Board's request that the Commissioner's decision be modified to include an award of legal fees, post-judgment interest and tuition for the period from January 22 through April 15, 1991. The Board did not file a cross-appeal from the Commissioner's decision. Rather, it requested modification of the Commissioner's decision in its answer brief. In addition, on July 10, after the 30-day period for filing an appeal had expired, see N.J.S.A. 18A:6-28, the Board filed a brief in which it indicated that the Law Division of Superior Court had recently awarded it legal fees as part of a default judgment in another case. The Board requested that the State Board "revisit" its request for legal fees.

Since the Board did not file a cross-appeal from the Commissioner's decision, the Commissioner's determination not to grant the Board's request for legal fees, post-judgment interest and tuition after January 22, 1991 is not properly before us. Nonetheless, we agree with the Commissioner's finding that the respondents were domiciled in Livingston by January 22, 1991 and that tuition would be due only for the period of their children's attendance in the Livingston public schools prior to that date. In addition, we find that the default judgment relied upon by the Board does not constitute legal authority for the award of legal fees in this case. As pointed out by the Commissioner, it is now well established that "the absence of express statutory authority is fatal to the claim for counsel fees." Balsley v. North Hunterdon Bd. of Educ., 117 N.J. 434, 442 (1990).

Therefore, as modified herein with regard to pre-judgment interest, we affirm the decision of the Commissioner.

February 3, 1999

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