

E.G.P., on behalf of minor child, M.B., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF RUTHERFORD, BERGEN :
 COUNTY, :
 RESPONDENT. :
 _____:

SYNOPSIS

Petitioner, grandmother of M.B., challenged Board's residency determination that her grandson was not entitled to a free public education in the District's schools.

Pursuant to motion for summary decision, the ALJ found that M.B. lived with his grandparents since he was three months old and that he has attended District schools since kindergarten and that his records bear petitioner's signature as guardian. In addition, the ALJ found that petitioner supports M.B. *gratis* and claimed him as a dependent on her income tax returns. Even though petitioner was not the legal guardian, the District never questioned M.B.'s residency and does not dispute his residency. Thus, the ALJ found and concluded that petitioner satisfied that portion of the statute that requires a showing of residency and financial support for the minor child. ALJ found that because M.B. has been a resident since he was three months old, he was not residing in the District for the sole purpose of receiving a free public education in the District. ALJ stated that she "was not persuaded" that petitioner need prove hardship since M.B. has always lived with her in the District. ALJ denied the Board's motion for summary judgment and granted petitioner's cross-motion for summary judgment. ALJ ordered that M.B. was entitled to a free education in the District.

Commissioner concurred with the ALJ that the record supported the conclusion that M.B. resided with petitioner, a domiciliary of the District, who supported M.B. *gratis*, as if he were her son. However, in order to fulfill the requirements of the affidavit student statute, petitioner must demonstrate that M.B.'s parents are incapable of supporting or providing care for M.B. due to a family or economic hardship. (*N.J.S.A.* 18A:38-1b(1)) Additionally, the Commissioner found the length of time M.B. actually lived with petitioner to be a disputed, material issue to be resolved only after a hearing. Thus, the Commissioner remanded the matter to OAL for further proceedings as may be necessary to determine (1) the length of time M.B. lived with petitioner, so that petitioner may demonstrate it was not solely for M.B. to attend school in the District free of charge; (2) whether petitioner has demonstrated, consistent with the standard set forth by the State Board in *J.B.* that M.B.'s parents suffer either family or economic hardship rendering them incapable of caring for and supporting him; (3) the Board's annual per pupil costs for the grades and school years at issue.

that some people just are not suited to be parents. While we do not disagree, there is no evidence to suggest that is the situation with the natural parents in this case.” (*Id.*)

Additionally, the Board argues that the ALJ erroneously “found that petitioner was not required to demonstrate a family or economic hardship.” (*Id.* at p. 1) Although the Board acknowledges that petitioner produced evidence that she supports M.B. *gratis*, she has not proven that M.B.’s parents are incapable of providing care and support to him due to family or economic hardship, as per *J.B.*, *supra*. (*Id.* at p. 4) The Board continues,

The conclusion that the parents [of M.B.] did not have to get a larger apartment because M.B. never lived with his parents is not supported by any evidence in the record. Moreover, it strains credulity that the standard enunciated in the *J.B.* case means that if parents choose to live in a one bedroom apartment, they are then incapable of providing support to any child. ***

There is no evidence that M.B.’s parents are incapable of providing support to M.B., either for economic or family hardship reasons. Rather, it is a matter of convenience for M.B.’s parents and for E.G.P. for M.B. to live with E.G.P. *** (*Id.* at p. 7)

***[W]hile M.B.’s mother appears to have a medical condition, she is able to work full time. M.B.’s father on the other hand, works only part time and presumably would have time at home to care for M.B. *** (*Id.* at p. 9)

The Board concedes that it is unclear from its reading of the initial decision whether the ALJ concluded that petitioner has proven hardship, or whether she determined that petitioner need not demonstrate hardship. In either event, the Board raises its objection. (*Id.* at p. 8)

The Board further excepts to the ALJ’s conclusion that M.B. has resided with petitioner since he was three months old. This fact, argues the Board, is not only disputed by the principal of the Pierrepont School in Rutherford, but is contradicted by an Early Screening Inventory which was filled out prior to M.B.’s attendance in kindergarten. (*Id.* at p. 13)

As to the ALJ's conclusion that the Board should be equitably estopped from "****deny[ing] [petitioner's] guardianship at this late date ****" (initial decision at p. 12), the Board argues that

***[t]his conclusion, if accepted, must lead to the further conclusion that a resident who is able to fool a district about a student's entitlement to attend school for a certain length of time, thereby creates an entitlement for the student to attend school tuition free in that district. *** (Board's Exceptions at p. 4)

The Board reasons it is inappropriate to apply the doctrine of equitable estoppel in this case, where there is no basis to conclude that any misinforming or misleading has occurred. (*Id.* at p. 5) Rather, the Board merely discovered during its reregistration process that petitioner was not M.B.'s legal guardian. (*Id.*) However, although petitioner was told what she had to show in order for M.B. to attend school in the District, she refused to cooperate, asserting, instead, that the District was harassing her. (*Id.*)¹ In support of its position, the Board cites *Board of Education of Greater Egg Harbor v. DiDonato*, 97 N.J.A.R. 2d (EDU) 11, aff'd State Board at 307, aff'd Appellate Division at 307 for the proposition that equitable estoppel should not be applied against a district where the party invoking the doctrine fails "****to demonstrate that the Board, or its agents, knew that [the child was] in its school illegally.****" (*Egg Harbor, supra* at 15)

Finally, the Board contends that, contrary to the ALJ's statements, petitioner "****ignored advice from district officials to obtain guardianship papers. Instead, she led district officials to believe that she was obtaining guardianship papers. *** Yet, she never did." (Board's Exceptions at p. 10)

¹ The Board further notes that it was only during discovery, once the petition herein was filed, that it was able to obtain any meaningful information, and that information has been meager, at best. (Board's Exceptions at p. 8)

Upon careful and independent review, the Commissioner determines to affirm in part, and reverse in part, the initial decision granting petitioner's cross-motion for summary judgment, and to remand this matter to the OAL for proceedings consistent with the findings, *infra*.

Initially, the Commissioner notes that this matter is properly analyzed under the affidavit student provision, *N.J.S.A.* 18A:38-1b(1), in that M.B. is not domiciled in the District with his parent or legal guardian. The affidavit student provision establishes a "test," or list of criteria, which a resident must satisfy in order to demonstrate that the student residing with her is entitled to a free education in the district. The affidavit student provision affirms that public schools shall be free of charge to any person over five and under 20 "who is **** kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child ***." *N.J.S.A.* 18A:38-1b(1). The statute further requires that the domiciliary provide the local board of education, if so required by the board, with (1) a sworn statement that she 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 she intends to keep and support the child gratuitously for a longer period of time than merely through the school term; (2) a copy of the lease, if a tenant, or a sworn statement by her landlord acknowledging tenancy if residing as an attendant without a lease; and (3) a sworn statement by the child's parent or guardian that such parent/guardian is not capable of supporting or providing care for the child due to 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. *N.J.S.A.* 18A:38-1b(1). Further, "The statement shall be accompanied by documentation to support the validity of the sworn statements ***." (*Id.*)

This matter arose when the Board elected to conduct a reregistration in the 1996-97 school year. The initial notice of this reregistration, and the rationale for same, was addressed to all parents, guardians and affidavit hosts, by letter dated November 1, 1996. (Affidavit of Ralph, Exhibit D) It was not until April 10, 1997 that petitioner signed the required affidavits, and even then, she did so “under duress.” (*Id.* at p 4) Although petitioner avers that the Board’s actions in requiring that she demonstrate compliance with the enumerated statutory criteria amount to “selective persecution” (Petitioner’s letter to the ALJ dated August 11, 1997), there is nothing in the record to warrant such a contention.

The Commissioner cannot affirm, based on the record herein, that the Board should be equitably estopped from taking action to remove M.B. from its District where it does not now accept petitioner’s claim of guardianship, while it apparently did so prior to the 1996-97 school year². (Initial Decision at p. 12) Although M.B. has been enrolled in the District since 1992-93, when he attended kindergarten, the Board does *not* seek tuition reimbursement for the years prior to 1996-97. Where there is no evidence on record indicating that the Board, or its agents, made any misrepresentations to petitioner or knew prior to the reregistration that M.B.’s attendance was improper, and where the enabling statute clearly contemplates the removal of a student already enrolled in the district, *N.J.S.A.* 18A:38-1b(1) and 1b(2), the Commissioner cannot estop the Board from taking action to remove M.B., if it maintains he is not entitled to a free education, simply based on the fact of his prior admittance.

Moreover, whether the Board advised petitioner “that she seek legal guardianship to avoid M.B.’s disenrollment” (initial decision at p. 12) is of no consequence in this matter, unless petitioner is asserting, which she is not, that the advice was erroneous and she relied upon

² The Board acknowledges that, absent proof that petitioner was, in fact, M.B.’s legal guardian, it was compelled to review M.B.’s enrollment status under the “affidavit student” provision, *N.J.S.A.* 18A:38-1b(1).

it to her detriment. In this regard, however, the Commissioner herein clarifies that although a local board should offer, where appropriate, accurate information about the enabling statute, *N.J.S.A. 18A:38-1 et seq.*, its related policies, and the consequences of noncompliance, it is *not* the role of a local board to provide legal advice to parents, guardians and residents regarding how they may constitute their families and relationships in order to effectuate compliance with the residency law, particularly where the advice may carry legal consequences beyond those which the parties may presently anticipate.

Further, the Commissioner observes that the ALJ made a finding as to a disputed material fact, and did so on summary basis. Summary decision is appropriate where “***there is no genuine issue as to any material fact ***.” *N.J.A.C. 1:1-12.5*. Here, petitioner claims that M.B. has been living with her since he was three months old (Petitioner’s Brief of April 6, 1998 at p. 1), while the Board contends that M.B. has only lived with petitioner since he became school age, notwithstanding that petitioner, before that time, cared for M.B. in Clifton, where M.B.’s parents live. (Affidavit of Vaccarino at pp. 1, 2) This disputed fact *is* material, as it goes to the issues of whether M.B. resides with petitioner for the sole purpose of attending school in the District and whether M.B.’s parents are incapable of supporting or providing care for him. The ALJ found that

*** the minor child has resided with the petitioner since he was three months old. M.B. has attended the District schools since kindergarten and the school record bears the petitioner’s signature as guardian. *** I am not persuaded by the affidavit of Vaccarino that M.B. only began living with petitioner when he became school age. The documents submitted by the petitioner does (sic) not support this contention.*** (Initial Decision at p. 7)

Thus, without the benefit of plenary hearing, the ALJ rejected Vaccarino’s affidavit. This finding is made more troubling by the fact that there is no independent evidence in the record to

corroborate petitioner's claim that M.B. has lived with her since he was three months old. Indeed, although petitioner has provided copies of many checks written on M.B.'s behalf, the earliest date on these checks is August of 1993, *just before M.B. started first grade*. Similarly, the copies of numerous invoices which evidence clothing and school supply purchases for M.B. date from 1995 through 1998, pursuant to M.B.'s commencement of school. Thus, contrary to the ALJ's finding, the evidence submitted by petitioner does not support her contention, but, indeed, appears to support the Board's position.

The Commissioner concurs with the ALJ that the record supports the conclusion that M.B. currently resides with petitioner, a domiciliary of Rutherford, who supports M.B., *gratis*, as if he were her son. That finding is so affirmed. However, contrary to the ALJ's statement at page 12 of the initial decision³, petitioner *must*, even assuming she has met the remaining requirements of the affidavit student statute, demonstrate that M.B.'s parents are presently incapable of supporting or providing care for M.B. due to a family or economic hardship. *N.J.S.A. 18A:38-1b(1)*. Here, the Commissioner is cognizant of the State Board's guidance concerning a petitioner's burden in order to fulfill the requirements of the affidavit student statute. The State Board has specifically provided that

***in order to satisfy that standard, the family or economic hardship must be real and demonstrable, evincing a current incapability on the part of [the minor child's] parents to support him or provide care as a result of that hardship." (*J.B., supra*, State Board Slip Op. at p. 6)

Accordingly, the instant matter is remanded to the OAL for further proceedings as may be necessary to determine (1) the length of time M.B. has lived with petitioner, so that petitioner may be afforded the opportunity to demonstrate that M.B. is not living with her solely to attend

³ "Indeed, given the facts of this case, I am not persuaded that the petitioner need prove hardship since M.B. has always lived with her in the District."

school in the District free of charge; (2) whether petitioner has properly demonstrated, consistent with the standard set forth by the State Board in *J.B., supra*, that either family or economic hardship render M.B.'s parents *incapable* of caring for and supporting him; and (3) the Board's annual per pupil costs for the grades and school years at issue. (See *Board of Education of the Township of Cranford, Union County v. Andre L. McGuire and Lisa McGuire*, 95 N.J.A.R. 2d (EDU) 74, aff'd 96 N.J.A.R. 2d (EDU) 140, rev'd and remanded App. Div., A-4742-95T3, Slip Opinion at pp. 8-10.)

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 21, 1998