

198-04 (Link to OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu06861-03_1.html)

N.S. AND J.S., on behalf of minor child, A.S., :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
OF NORTH BRUNSWICK, MIDDLESEX :
COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioners challenged the Board's residency determination that their son, A.S., was a nonresident of the District and was not entitled to a free public education.

The ALJ found that the matter was ripe for summary decision since petitioners met the requirements of *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:28-2.4. *Citing P.B.K.*, the ALJ found that A.S. had a relative domiciled in the United States who had legal guardianship over A.S. and who was willing to support him *gratis* while petitioners were in India and would be unable to care for A.S. The ALJ granted petitioners' motion for summary decision. A.S. was entitled to a free education in the District.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

<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>

May 7, 2004

OAL DKT. NO. EDU 6861-03
AGENCY DKT. NO. 318-9/03

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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’s exceptions and petitioners’ reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

The Board reiterates its objection to this matter being decided on summary judgment, an issue raised in proceedings before the Administrative Law Judge (ALJ), contending that the matter is not ripe for summary judgment because discovery is incomplete. (Board’s Exceptions at 1) In support thereof, the Board cites *J. Josephson, Inc. v. Crum & Forster*, 293 *N.J. Super.* 170, 203 (App. Div. 1996), claiming that “[o]ur Appellate Division has specifically stated ‘our case law has made plain, as a matter is not “ripe” for summary judgment where discovery is incomplete.’” (*Ibid.*) The Board claims that no discovery whatsoever has occurred in this matter, and that the facts sought by the Board are relevant and material with

respect to whether a legitimate financial and/or family hardship exists as alleged by petitioners.
(*Id.* at 2)

Moreover, the Board avers that the ALJ overlooked the inconsistencies in petitioners' statements and that "[c]ontradictory factual statements by the Petitioners cannot be used to create or avoid a material question of fact." (*Ibid.*) In this regard, the Board points out that, by letter of August 14, 2003, A.S.'s parents indicated that A.S. would be moving in with his cousin the week of August 21, 2003 and requested that their son be accepted at North Brunswick High School "in the best interest of his education." (*Ibid.*) After the Board denied the parents' request on September 15, 2003 for A.S. to attend school free of charge in the District, A.S.'s father submitted an affidavit stating that he and A.S.'s mother lived in Orlando, Florida, and that A.S. had lived with them until June 2003, at which time A.S. went to live with his cousin and his wife, petitioners in this matter.¹ (*Ibid.*) The Board claims that A.S.'s father never explained the discrepancy of when his son actually began living with petitioners or when he and A.S.'s mother left for India for their business venture. (*Ibid.*) Additionally, the Board contends that it was only after A.S. was denied admission to the District that N.S. petitioned for guardianship, and that, absent further discovery, there will be no way to determine whether guardianship was done solely to circumvent the applicable residency statutes. (*Ibid.*)

Additionally, the Board argues that petitioners have not met the affidavit requirements of *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:28-2.4 in that: 1) *N.J.S.A.* 18A:38-1(b)1 mandates that the child's parents file a sworn statement stating that they are not capable of supporting or providing care for the child due to a family or economic hardship, and the affidavit

¹ There is some confusion in the Initial Decision caused by references to petitioners as A.S.'s parents. Petitioners in this matter are A.S.'s cousin, N.S., and his wife, J.S. A.S.'s father is H.S. and his mother is V.S.

provided is “filed solely by the child’s father, not both parents” (*Ibid.*);² and 2) “the record reveals no evidence of any economic hardship or family hardship which would warrant A.S.’s attendance at North Brunswick High School free of charge.” (*Id.* at 2-3) The Board also takes issue with the ALJ’s reliance on *P.B.K.*, *supra*, arguing that, in *P.B.K.*, the Appellate Division relied on substantial credible evidence in making its determination that the student in that matter was entitled to attend school in the Tenafly School District free of charge, as opposed to the instant matter where the Board has been barred from engaging in even minimal discovery to determine if such facts exist. (*Ibid.*)

In response, petitioners argue that, “once legal guardianship was granted to N.S., any fact-sensitive issues that may have required a plenary hearing under the hardship standard of *N.J.S.A.* 18A:38-1(b) became moot” in that, “at that point, A.S. became entitled to attend the North Brunswick schools as a matter of law by virtue of *N.J.S.A.* 18A:38-1(a), since his ‘legal guardian’ was domiciled there.” (Petitioners’ Reply at 1-2) Moreover, *citing R.C.P. v. Board of Education of the Ramapo-Indian Hills Regional High School District, Bergen County*, decided by the Commissioner August 18, 2000, *aff’d* State Board January 3, 2001, petitioners submit that, as the ALJ concluded in *R.C.P.*, under *N.J.S.A.* 18A:38-1(a) motivation for obtaining guardianship is not an issue. (*Id.* at 2) Petitioners further argue that the law recognizes a number of ways, including guardianship under Title 3B, in which adults other than natural parents assume the rights and responsibilities of parenthood, and that, once guardianship is established in this fashion, “it is none of the school district’s business what the motivation might be.” (*Ibid.*)

² The Commissioner observes that all references to filing a sworn statement with respect to the inability of supporting or providing care for the child due to a family or economic hardship in *N.J.S.A.* 18A:38-1 and *N.J.A.C.* 6A:28-2.4 specify that such affidavit must be filed by the student’s *parent* or legal guardian.

Upon a thorough and independent review of the record, the Initial Decision, the Board's exceptions and petitioners' reply thereto, the Commissioner has determined to adopt the Initial Decision in this matter for the reasons expressed therein. In so determining, the Commissioner notes his concurrence that summary decision is appropriate in this instance in that there is no genuine issue as to any material fact and petitioners are entitled to prevail as a matter of law. With respect to the discovery sought by the Board, the Commissioner points out that the relevancy standard applicable to a determination as to whether to permit discovery is whether the subject matter to be discovered is admissible or reasonably calculated to lead to admissible and useful evidence. (Initial Decision at 6) *See, also, Gureghian, supra; Oppenheimer Fund, Inc., supra; and Berrie, supra.* Even assuming, *arguendo*, that the Board's questions are relevant, the Commissioner does not find the answers to the Board's questions raise any genuine issue as to any material fact, nor would the answers to the Board's questions, considered in the light most favorable to the Board, support its position or undermine petitioners' position so as to alter the decision herein. *See Brill, supra*, at 540.

Moreover, the Commissioner finds the inconsistency raised by the Board concerning conflicting statements made by A.S.'s parents in their letter of August 14, 2003 and A.S.'s father's affidavit with respect to whether A.S. moved into his cousin's home in June 2003 or August 2003 *de minimus* in that the Board does not dispute that, at the time A.S. began attending school in the District in September 2003, A.S. was residing in the North Brunswick School District with his cousin.

As in *P.B.K., supra*, A.S., an American citizen, has a relative domiciled in the United States who has legal guardianship over him and who is willing to support A.S. while his

parents are away on business in India. The Commissioner points out that, under *N.J.S.A.* 18A:38-1(a) and *N.J.S.A.* 6A:28-2.4(a)1, a district is required to provide a free public education to any person under the age of 20 who is domiciled within the school district. *N.J.S.A.* 6A:28-2.4(a)(1)(i) clarifies that:

A student is domiciled in the district when he or she is living with a parent or *legal guardian* whose permanent home is located within the district.*** (emphasis supplied)

Notwithstanding the Board's assertion that petitioners became legal guardians of A.S. solely to circumvent the residency statutes, *N.J.S.A.* 18A:38-1(a) and *N.J.S.A.* 6A:28-2.4(a)1 do not provide for an assessment of the motivations for obtaining legal guardianship. Moreover, the Commissioner points out that the Appellate Court in *P.B.K., supra*, a case strikingly similar to the matter herein, rejected this same argument by the Tenafly Board in *P.B.K., supra*, finding that, "with E.Y.'s parents over a half a world away, ample reasons existed for a formal guardianship aside from satisfying the conditions of *N.J.S.A.* 18A:38-1(a)." *P.B.K., supra*, at 428. In that A.S. is domiciled in North Brunswick with his legal guardian, therefore, the Commissioner finds that he is entitled to a free public education in the North Brunswick School District, pursuant to *N.J.S.A.* 18A:38-1(a) and *N.J.S.A.* 6A:28-2.4(a)1.

Moreover, for the period of A.S.'s attendance in the District's schools from the beginning of classes in September 2003³ until October 16, 2003, the date Petitioner N.S. obtained guardianship of A.S., the Commissioner concludes that A.S. was entitled to free public

³ The record is silent on the actual date A.S. began attending school in the District. However, when the petition in this matter was filed on September 5, 2004, an acknowledgement letter was faxed to the Board that same date notifying the Board of the filing of the within petition and reminding the Board that, pursuant to *N.J.S.A.* 18A:38-1, "no child shall be denied admission to the district during the pendency of proceedings." The Board's Answer, dated September 16, 2003, states that "***upon receipt of the Petition, A.S. has been temporarily admitted as a student at the North Brunswick Township High School." (Answer at 1, No. 1) Accordingly, it appears that A.S. began attending school in the District at the beginning of the school year in September 2003.

education in the District's schools, pursuant to *N.J.S.A.* 18A:38-1(b), in that petitioners have established that A.S.'s parents are not capable of supporting him or providing care for him due to a family hardship and that A.S. is not residing with petitioners solely for the purpose of receiving a free public education in the District. In so determining, the Commissioner points out that the affidavits filed by petitioners and A.S.'s father establish that petitioners are supporting A.S. *gratis* and intend to do so for at least as long as A.S.'s parents are traveling in India, that A.S.'s parents are unable to care for him because they will be in India for a minimum of eight months on business and that it would be disruptive to their son academically, emotionally and socially to require him to leave the United States and travel in India during his senior year. (Petitioners' Motion for Summary Decision, Exhibit 5a at 3 and Exhibit 6a at 4-5) In this matter, as in *P.B.K*, *supra*:

This is not an instance when a child and the parents or guardian establish a convenient residence in another school district to take advantage of academic or athletic programs. No other school in the United States existed for E.Y. other than the school district of his uncle and guardian. *P.B.K. supra*, at 427.

Accordingly, as amplified above, the Initial Decision in this matter is adopted for the reasons expressed therein.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: May 7, 2004

Date of Mailing: May 7, 2004

⁴ 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.*