

#101-05 (No OAL Decision)

S.B., on behalf of minor child, J.B., :  
 PETITIONER, :  
 V. : COMMISSIONER OF EDUCATION  
 BOARD OF EDUCATION OF THE TOWNSHIP : DECISION  
 OF NUTLEY, ESSEX COUNTY, :  
 RESPONDENT. :  
 \_\_\_\_\_ :

SYNOPSIS

Petitioner filed a *Pro Se* Residency Appeal Form, challenging the Board’s decision to disenroll his son, J.B., from the Nutley School District subsequent to its determination that J.B. is not domiciled within the Township of Nutley. The residency determination was based upon information provided by the District’s investigator that J.B. has not resided in Nutley during the current school year, and upon the admission of the petitioner that his son lived with him in New York City.

Petitioner based his residency appeal upon his claim that a change of schools would be detrimental to J.B.’s health, as he suffers from Crohn’s disease and needs to be near his doctor in New Jersey. Respondent Board asserted that J.B. was not entitled to a free public education in the Nutley School District in that petitioner had not met the burden of proof of legal residency or domicile in the Township of Nutley, pursuant to *N.J.S. A. 18A:38-1*, and counterclaimed for tuition in the amount of \$54.46 per day for the period of J.B.’s ineligible attendance during the 2004-05 school year.

The Commissioner found that there are no material facts in dispute in this matter, in that petitioner acknowledged that he and his son are residents of New York City, and that *N.J.S.A. 18A:38-1*, the statute delineating those persons who are entitled to attend school within a district, contains no provision granting entitlement to attend school in a New Jersey school district to a student who is domiciled in another state. Accordingly, the Commissioner found that the petitioner failed to carry his burden of proof that J.B. is entitled to a free education in the Nutley School District, and dismissed the petition with prejudice. The Commissioner granted the Board’s counterclaim for tuition in the amount of \$5,936.14 for the 109 days of J.B.’s ineligible attendance from the beginning of the 2004-05 school year through March 3, 2005, plus \$54.46 per day for any additional days of J.B.’s ineligible attendance between March 3, 2005 and the date of his removal pursuant to this decision.

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.

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For Petitioner, S.B., *Pro Se*

For Respondent, Mark A. Wencel, Esq. (Gaccione, Pomaco & Malanga)

This matter was initiated by a December 28, 2004 letter from petitioner wherein he indicated that he wished to appeal the decision of the Nutley Board of Education (Board) to disenroll his son, J.B., subsequent to his move to New York City to live with petitioner. (Petitioner’s Letter of December 28, 2004 at 1) Petitioner stated that J.B. had moved to New York City to live with him in December 2002 as a result of J.B.’s mother deciding “she did not want him” and that his appeal was based on the fact that J.B. has Crohn’s disease, which necessitates his being near his doctor for treatment in case of a problem. (*Ibid.*) In support thereof, petitioner attached an undated letter from Francis Sunaryo, M.D., Director of Pediatric Gastroenterology, stating, in pertinent part:

[J.B.] is a 14 year old male with Crohn’s disease. His primary care physician and the GI specialist both are in New Jersey. His mother lives in New Jersey. Because of his disease [J.B.] requires frequent doctor visits. I recommend he attend school in the New Jersey area.

In response, the Director of the Bureau of Controversies and Disputes, by letter dated December 28, 2004, advised petitioner that “[a]lthough the communications attached to your letter suggest that you wish to file a ‘residency’ appeal, pursuant to *N.J.S.A.* 18A:38-1, you have not included a signed attestation as to the truth of your allegations and your understanding of responsibility for payment of tuition should your appeal not be successful.” (Letter of December 28, 2004 from the Director, Bureau of Controversies and Disputes at 1) A copy of the *Pro Se* Residency Appeal Form was enclosed to facilitate petitioner’s filing of the required information for the matter to proceed as a residency appeal. (*Ibid.*) Additionally, petitioner was provided detailed information and a copy of the applicable regulations, *N.J.A.C.* 6A:3 *et seq.*, with respect to the filing of a Petition of Appeal through the contested case process in the event he was not claiming that his son was entitled by law to a free education in the Nutley School District, but, instead, was seeking to appeal the Board’s discretionary determination not to permit his son to remain in the district as a nonresident student. (*Id.* at 1-2)

On January 21, 2005, petitioner filed a completed *Pro Se* Residency Appeal Form, stating that “[m]y son has Crohn’s disease and is sick life threaity (sic) his doctor insists he stays in NJ.” In its Answer, filed on January 28, 2005, the Board asserted that petitioner’s son was not entitled to the education provided by the Nutley School District in that petitioner had not met the burden of proof of legal residency or domicile in the Township of Nutley, pursuant to *N.J.S.A.* 18A:38-1. (Answer at 2) Additionally, the Board counterclaimed for tuition in the amount of \$54.46 per day for the days of J.B.’s ineligible attendance in the 2004-05 school year. (*Id.* at 3)

By letter from the Director of the Bureau of Controversies and Disputes, sent January 31, 2005 via certified<sup>1</sup> and regular mail, petitioner was advised that:

Upon review of the Petition of Appeal and Answer in the above-titled residency appeal, it is noted that you do not dispute that your son lives with you in New York City. Notwithstanding your claim that a change of schools will be detrimental to your son's health in that he suffers from Crohn's disease, therefore, since you concede that you and your son, J.B., do not reside within the Nutley School District so as to entitle J.B. to a free public education with that District, pursuant to *N.J.S.A. 18A:38-1 et seq.*, there *appears* to be no basis upon which the Commissioner can grant the relief sought and no grounds on which the Commissioner may direct further proceedings.

Entitlement to a free public education is strictly established by State statute, *N.J.S.A. 18A:38-1*, which delineates those persons who are entitled to attend school within a district. These laws are based on domicile and residency. Such entitlement is basically limited to persons who are domiciled in the district (for minor children, this is linked to the domicile of the parent or guardian) or who are living with a district resident other than a parent or guardian for reasons not related to school attendance and who additionally meet the specific criteria listed in section (b) of the law. In other cases, the decision to admit non-resident students, and whether or not to charge tuition for such attendance, is generally left to the discretion of the local board of education.

Accordingly, given your acknowledgement that you and your son do not reside within the Nutley School District, you are hereby requested to submit a letter brief or memorandum of law, within ten (10) days of receipt of this letter, setting forth your reasons as to why the Commissioner should not exercise his discretionary authority under *N.J.A.C. 6A:3-1.10* and *N.J.A.C. 6A:3-1.12* to dismiss the within petition and to grant the Board's counterclaim for tuition in the amount of \$54.46 per day for the period of J.B.'s ineligible attendance in the Nutley School District since the beginning of the 2004-05 school year. The Board may submit its response within ten (10) days of receipt of petitioner's submission; whereupon it will be determined what further proceedings, if any, will occur in this matter. ((Letter of January 31, 2005 from Director, Bureau of Controversies and Disputes at 1-2)

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<sup>1</sup> The "green card, marked "unclaimed," was returned on February 18, 2005. The letter sent via regular mail was not returned and was, thus, presumed received.

Because petitioner failed to respond to the January 31 letter, by letter of February 14, 2005, sent via certified<sup>2</sup> and regular mail, petitioner was provided a final opportunity to set forth his arguments as to why the within residency petition should not be dismissed and the Board's counterclaim for tuition be granted. (Letter of February 14, 2005 from the Director, Bureau of Controversies and Disputes at 1) Petitioner responded by letter, filed on March 1, 2005, reiterating his assertion that his son needs to be near his doctor in New Jersey for treatment of Crohn's disease, noting that J.B. had been abandoned by his mother and claiming that moving his son to another school would affect him mentally and physically, particularly since the school term is three-fourths over. (Petitioner's Response at 1-2) Petitioner did not address the Board's counterclaim for tuition, except to indicate that "[m]y finances do not permit any tuition for his education on a private basis." (*Id.* at 2)

In its reply, filed on March 7, 2005, the Board submitted a motion for summary decision and dismissal of the petition, claiming that, "[a]s Petitioner acknowledges residing in New York City with his son, the Commissioner has no authority under *N.J.S.A.* 18A:38-1 to compel the district to permit J.B. to remain in the ninth grade of the Nutley High School for the balance of the school year," and urging the Commissioner "to grant the Board's counterclaim for tuition in the amount of \$54.46 per day for the period of J.B.'s ineligible attendance in the Nutley School District, *i.e.*, \$5,936.14 through March 3, 2005 (108 days x \$54.46)," pursuant to the attached certification of James S. Vivinetto, Ed.D., Assistant Superintendent of the Nutley Public Schools. (Letter Brief in Support of Motion at 1-2 and Certification of James S. Vivinetto, Ed.D.)

Upon a thorough review of the parties' submissions, the Commissioner has determined, pursuant to his discretionary authority under *N.J.A.C.* 6A:3-1.2 and

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<sup>2</sup> The signed "green card" indicates that this second notice was received on February 22, 2005.

*N.J.A.C. 6A:3-1.10*, to grant summary decision to the Board and to dismiss the within petition. Pursuant to *N.J.A.C. 1:1-12.5(b)* and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (citing *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995)), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. In that petitioner freely acknowledges that he and his son have been residents of New York City since November 2002, and in that entitlement to a free public education is strictly established by State statute, *N.J.S.A. 18A:38-1*, which delineates those persons who are entitled to attend school within a district, the Commissioner finds that there are no material facts in dispute in this matter and that the Board is entitled to prevail as a matter of law.

In so determining, the Commissioner emphasizes that entitlement to attend school within a specified school district in New Jersey is basically limited to persons who are domiciled in the district (for minor children, this is linked to the domicile of the parent or guardian) or who are living with a district resident other than a parent or guardian for reasons not related to school attendance and who additionally meet the specific criteria listed in section (b) of the law. There is no provision in the statute granting entitlement to attend school in a New Jersey school district to a student who is domiciled in another state under any circumstances. Notwithstanding petitioner's concerns for his son's health, therefore, since petitioner concedes that he and his son live in New York City, there is no basis upon which the Commissioner may conclude that J.B. is entitled to a free public education with the Nutley School District, pursuant to *N.J.S.A. 18A:38-1 et seq.*

Accordingly, the Commissioner finds that petitioner has failed to carry his burden of proof that J.B. is entitled to a free education in the Nutley School District and, thus, dismisses

the petition in this matter, with prejudice. The Board's counterclaim for tuition in the amount of \$5,936.14 for the 109 days of J.B.'s ineligible attendance in school in the Nutley Township School District from the beginning of the 2004-05 school year through March 3, 2005, plus \$54.46 per day for any additional days of J.B.'s ineligible attendance between March 3, 2005 and the date of his removal pursuant to this decision, is granted.

IT IS SO ORDERED.<sup>3</sup>

COMMISSIONER OF EDUCATION

Date of Decision: March 22, 2005

Date of Mailing: March 22, 2005

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<sup>3</sup> 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.*