

B.A. AND J.H., ON BEHALF OF	:	
MINOR CHILD, M.A.A.,	:	
	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
BOARD OF EDUCATION OF THE	:	
BOROUGH OF SOMERVILLE,	:	
SOMERSET COUNTY,	:	
	:	
RESPONDENT,	:	
_____	:	

SYNOPSIS

In August 2007, petitioners sought to enroll M.A.A. in Somerville High School after the sixteen-year-old relocated from Venezuela to live with her mother and stepfather in Somerville. Initially, a guidance counselor from the high school reviewed M.A.A.'s course transcripts from Venezuela, and petitioners were given a schedule showing that M.A.A. would enter high school in September 2007 as a senior. Subsequently, petitioners were notified that the district had determined M.A.A. to be ineligible to enroll as a student based on the fact that she already held a high school diploma from Venezuela. Petitioners argued that M.A.A. was entitled to attend school in the district because she was eligible by age and residency and had not taken all of the courses necessary to graduate with a New Jersey State-endorsed diploma. Petitioners sought, *inter alia*, reversal of the Board's determination, reimbursement of private school tuition, and attorney fees and costs. Both parties filed motions for summary decision.

The ALJ granted summary decision to the petitioners, finding that: the Board's determination not to enroll M.A.A. based solely on the fact that she had already graduated from school in Venezuela – and its contention that it was not qualified to review school records from a foreign high school – was arbitrary, capricious and unreasonable, and additionally constituted discrimination based on national origin.

The Commissioner remanded the matter for further proceedings, rejecting the summary positions taken by each of the parties and holding that the appropriate inquiry was a fact-specific determination of whether the credential held by M.A.A. was equivalent to a New Jersey State-endorsed high school diploma. The Commissioner found the existing record insufficient for this purpose, and directed that, on remand, petitioners must present a full recitation of the facts pertaining to M.A.A. and her Venezuelan education, while the Board must present a thorough assessment of such facts in relation to the goals and requirements for graduation from the New Jersey public schools, with petitioners thereafter bearing the burden – if the Board concludes that M.A.A. is not entitled to a free public education because the credential she holds is equivalent to a New Jersey State-endorsed diploma – of demonstrating by a preponderance of the competent and credible evidence that the Board's assessment was arbitrary, capricious, unreasonable, or otherwise contrary to law.

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.

OAL DKT. NO. EDU 8740-07
AGENCY DKT. NO. 280-9/07

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the Board of Education’s exceptions and petitioners’ reply, both duly filed pursuant to *N.J.A.C.* 1:1-18.4.

In its exceptions, the Board urges rejection of the Initial Decision, contending that it: 1) was not issued within the time frame required by applicable rules of the OAL; 2) ignored the Board’s claim that this matter is not appropriate for judicial determination because the child in question had returned to Venezuela and the Board had no idea of her current status – a situation further exacerbated by the delay in issuance of the Initial Decision; 3) wrongly placed on the Board the burden of proving the equivalency of Venezuelan and New Jersey high school educations; and 4) improperly substituted the judgment of the Administrative Law Judge (ALJ) for that of the Board. The Board additionally asserts that the ALJ erred in concluding that the Board had a duty to further educate a pupil from a foreign country who has graduated from high school in her native land and is eligible to attend college, and that the Board’s denial of admission to M.A.A. because she held a Venezuelan diploma constituted discrimination based on national origin. (Board’s Exceptions at 1-3)

In reply, petitioners counter that: 1) the ALJ's decision is correct for the reasons set forth therein; 2) the delay in issuance of the Initial Decision should be accorded no weight, since it prejudiced no one but petitioners, whose child should by now have graduated from the Board's high school;¹ 3) this matter is certainly ripe for adjudication, since the harm caused by the Board's decision was real and immediate – requiring petitioners to fund a private education – and will, moreover, be felt for years – resounding through everything M.A.A. does and tries to do; 4) the Board misstates the ALJ's conclusions, and further ignores the language of the New Jersey Constitution and statutes; 5) the Board's position has been contradictory, claiming on the one hand that it has neither the duty nor the capacity to establish the equivalency of foreign high school degrees, but arguing on the other that it properly denied admission to M.A.A. because she held the equivalent of a New Jersey high school diploma; 6) the ALJ's findings are clearly supported by law and by sufficient, competent and credible evidence in the record, and are based on appropriate standards of review; and 7) the Board's exceptions should be disregarded because they “do not comply with the requirements of *N.J.A.C. 1:1-18.4*.” (Petitioners' Reply at 2-5, quotation at 5)

Upon review and consideration, the Commissioner initially notes that she is compelled by neither statute nor rule to reject an Initial Decision solely because it was not issued within the regulatory time frame established by the OAL, and she declines to do so in this matter because the interests of justice would not be served thereby. Similarly, the Commissioner finds the Board's exceptions to have been timely filed,² as well as sufficiently in compliance with *N.J.A.C. 1:1-18.4* so as not to warrant their exclusion solely on the basis of petitioners'

¹ Petitioner refers to the fact that M.A.A. was initially slated to enter Somerville High School in September 2007 as a 12th grader; see Initial Decision at 1.

² Exceptions were due on January 22, 2009, and were filed by fax on that date.

unspecified procedural objection.³ Finally, although M.A.A. has returned to Venezuela and the circumstances of her possible return to Somerville are not known for certain, the Commissioner finds that the central question in this matter – whether M.A.A. is entitled to attend school in the district until she either reaches age 20 or receives a New Jersey State-endorsed high school diploma – cannot be considered moot, since an affirmative response would enable her to attend Somerville High School during the 2009-10 and possibly the 2010-11 school years, if she so wished and continued to be deemed eligible by age and domicile pursuant to *N.J.S.A.* 18A:38-1.⁴ Accordingly, the Commissioner has considered this matter on its merits, taking into account both the Initial Decision and the full record inclusive of the parties’ submissions on exception.

Having so considered, however, the Commissioner finds that she must reject the Initial Decision on substantive grounds.

The ALJ has correctly set forth the standard of review governing the decisions of local district boards of education, and her analysis of the merits of petitioners’ claim begins with several propositions that are beyond dispute: 1) The New Jersey Constitution requires children between the ages of five and eighteen to be provided with a thorough and efficient system of free public schools; 2) the Legislature has extended to 20 the age up to which students are entitled to attend such schools; 3) the Legislature and State Board of Education have set specific requirements for graduation from high school; and 4) school districts may not discriminate based on national origin. *New Jersey Constitution*, Article VIII, Section IV, paragraph 1; *N.J.S.A.* 18A:38-1; *N.J.A.C.* 6A:8-5.1 (incorporating statutory requirements); *N.J.S.A.* 18A:38-5.1, *N.J.A.C.* 6A:7-1.1 *et seq.* These propositions, however, do not end the inquiry in this matter.

³ Additionally, the Commissioner notes that – apart from their objection to the issuance date of the Initial Decision – the Board’s exceptions essentially reiterate the position the Board has taken from the outset of this proceeding, as set forth by the ALJ (Initial Decision at 4-5).

⁴ The Board has not disputed M.A.A.’s eligibility in this regard.

To properly establish the context of petitioners' claim, it is also necessary to consider that: 1) the Legislature and State Board of Education have provided for implementation of the constitutional mandate through a K-12 delivery system, a student's successful progression through which culminates in receipt of a State-endorsed high school diploma, *N.J.S.A.* 18A:7C-1 *et seq.* and *N.J.A.C.* 6A:8-1.1 *et seq.*; 2) a general education student's entitlement to access this system terminates either upon graduation through receipt of a State-endorsed diploma – which in the normal course of events occurs at the end of 12th grade, but may occur sooner or later under certain circumstances – or upon reaching the age of 20 without having so graduated, *N.J.A.C.* 6A:8-5.2(a), *N.J.A.C.* 6A:8-5.2(b)⁵ and *N.J.A.C.* 6A:8-5.2(d); 3) a State-endorsed high diploma – the credential signifying attainment of the skills and knowledge deemed necessary by the State of New Jersey for its students to be successful in their careers and daily lives⁶ – can be earned not only by completing the specific course, credit and assessment requirements of *N.J.A.C.* 6A:8-5.1(a), but also by demonstrating academic skills and knowledge equivalent to such requirements through alternative means, specifically, by performing at proficient levels in all areas of the High School Proficiency Assessment (HSPA) and completing 30 general education college credits, *N.J.A.C.* 6A:8-5.2(d), or by achieving the required scores on the General Educational Development (GED) test of the American Council on Education, *N.J.A.C.* 6A:8-5.2(c); *N.J.A.C.* 6:30-1.3; and 4) the law is silent on the status of age-eligible persons, such as M.A.A., who come to live in New Jersey after having received a high school diploma – or a credential that might be found equivalent thereto – from another jurisdiction.

⁵ *N.J.A.C.* 6A:8-5.2(b)2 additionally provides that out-of-school individuals, up to age 20, who have otherwise met all State and local graduation requirements but failed to pass the High School Proficiency Assessment (HSPA) may return to school at scheduled times to take the necessary test.

⁶ *N.J.A.C.* 6A:8-1.1, referencing the Core Curriculum Content Standards; see Introduction at http://education.state.nj.us/cccs/?_intro).

In the present matter, petitioners have advanced the argument – effectively adopted by the ALJ in the Initial Decision – that M.A.A. is unequivocally entitled to attend the schools of respondent’s district notwithstanding that she has already obtained a credential that could be construed as analogous to a high school diploma, because it is undisputed that she meets applicable statutory age and residency requirements and has not taken all of the specific courses and tests necessary to obtain a New Jersey State-endorsed diploma pursuant to *N.J.A.C. 6A:8-5.1(a)* – which she could readily complete as a 12th grader through the schedule devised by the guidance counselor who initially reviewed her Venezuelan course records.⁷

The Commissioner’s endorsement of petitioner’s claim on this reasoning alone, however, would effectively mean that any age-eligible person moving to New Jersey after having obtained a high school diploma elsewhere – even another state not having requirements identical to New Jersey’s – would be entitled to attend New Jersey public schools until all “missing” tests, courses and credits were completed and a State-endorsed diploma was issued; indeed, the same reasoning could be applied to any New Jersey student seeking a State-endorsed diploma after having already graduated from a nonpublic high school. While the applicable statutes and rules as cited above do not address – nor do they appear to have contemplated – the status of such students, the Legislature and State Board surely cannot have intended that any resident under age 20 who does not hold a New Jersey State-endorsed high school diploma is automatically entitled to attend New Jersey public schools until one is obtained, despite having earned a high school diploma – or a credential determined to be its equivalent – elsewhere.

The Board, on the other hand, has taken an equally categorical stance that M.A.A. is *not* entitled to attend school in the district because she already holds the Venezuelan

⁷ This schedule consisted of year-long classes in pre-calculus, health and physical education, English, French I, U.S. History I, U.S. History II and a year-long assignment to study hall, as well as semester-long classes in public speaking and dramatics. (Affidavit of B.A. in support of petitioner’s motion for summary decision, Exhibit D)

equivalent of a high school diploma. Here, the Commissioner finds support for the Board's position in the fact that, through its acceptance of alternative measures as set forth above – particularly the GED program, which employs a testing instrument that is not unique to New Jersey – the State has implicitly recognized that means other than course/credit/assessment completion as contemplated by *N.J.A.C. 6A:8-5.1(a)* can legitimately evidence acquisition of an education sufficient to satisfy the statutory and constitutional mandate and warrant issuance of a State-endorsed diploma so as to end a student's entitlement to attend the public schools of a district pursuant to *N.J.A.C. 6A:8-5.2*. However, the Commissioner cannot accept the Board's position that the mere existence of M.A.A.'s Venezuelan credential – with no meaningful assessment as to whether it does, in fact, represent an education sufficient to meet the goals embodied in a New Jersey State-endorsed high school diploma – is reason enough to deny her admission to the schools of the district.

The appropriate inquiry in this matter, then, is whether M.A.A.'s possession of the "Bachiller en Ciencias" degree is indicative that she has already received the requisite education. While there is no definitive "formula" for such a determination, nor is there past precedent to offer guidance – this matter being one of first impression and the necessary analysis being inherently fact-specific – the inquiry by its very nature suggests exploration of questions including, for example: Have M.A.A.'s courses provided a sufficient depth and breadth of program? Was she required to demonstrate comparable types of skills and knowledge? Will she be able to pursue post-secondary education at institutions requiring high school graduation as a prerequisite to admission? Will her credential be accepted by an employer as satisfaction of a requirement for high school graduation? Has her education prepared her to participate meaningfully in the common cultural and civic life of our State and nation? Where the answer to such questions is "no," the Commissioner will not permit a local district board of education to

deny a student access to the public schools of the State; however, where the answer is “yes,” the Commissioner will not compel a board to enroll a student who has already met the goals of a New Jersey public education and obtained the equivalent of the credential endorsed by the State as the culmination – and terminus – of the New Jersey public school experience.

Unfortunately, the record in this matter – due largely to the summary nature of the parties’ positions and the insistence of each that the other bears the entire burden of proof – does not permit resolution of the controlling inquiry, so that further proceedings are necessary to enable the Commissioner to fully and fairly decide this matter. In so holding, the Commissioner recognizes that it is the petitioners who are best able to present the facts specifically related to M.A.A., such as, for example, the nature of the educational system through which she has progressed and the significance of the “Bachiller en Ciencias” degree within it, the specific content and objectives of the courses she has taken, the types and levels of skills evidenced by her possession of the “Bachiller en Ciencias” degree, and her experiences, if any, in seeking entry into higher education, the workforce and the social-cultural-civic life of her community; while it is the Board that is best able, through its expertise as a provider of the thorough and efficient system of education directed by the State Constitution and Legislature, to assess such facts relative to the goals and requirements of a New Jersey State-endorsed high school diploma – including, for example, why the courses identified as necessary for M.A.A. to complete State requirements (see note 7 above) do not preclude a finding of equivalency between the credential she holds and the State diploma.

Consequently, the Commissioner directs that, upon remand of this matter to the OAL, petitioners shall be responsible for bringing to the record a full recitation of the facts pertaining to M.A.A. and her Venezuelan education, while the Board shall be responsible for presenting a thorough assessment of such facts in relation to the goals and requirements for

graduation from the New Jersey public schools, together with opposing facts as it deems appropriate;⁸ whereupon – if the Board concludes that M.A.A. is not entitled to a free public education because the credential she holds is, in fact, equivalent to a New Jersey State-endorsed diploma – petitioners shall thereafter bear the burden of demonstrating, by a preponderance of the competent and credible evidence, that the Board’s assessment was arbitrary, capricious, unreasonable, or otherwise contrary to law.⁹

Accordingly, for the reasons expressed herein, the Initial Decision is rejected and this matter is remanded to the OAL for further proceedings consistent with the Commissioner’s analysis and directives as set forth above.

IT IS SO ORDERED.¹⁰

COMMISSIONER OF EDUCATION

Date of Decision: June 22, 2009

Date of Mailing: June 22, 2009

⁸ Either party, of course, may proffer expert testimony in addition to any other testimony and evidence.

⁹ In this latter regard, the Commissioner expressly rejects any suggestion that the Board’s position in this matter constituted discrimination based on national origin, since its result would have been the same for any student who sought entry into the Board’s schools in order to fulfill the course/credit/testing requirements of *N.J.A.C.* 6A:8-5.1(a), but was already in possession of a high school diploma or its facial equivalent from another jurisdiction or a nonpublic school. The Commissioner additionally notes that the ultimate burden of proof assigned herein is consistent with the burden upon applicants for enrollment in the schools of a district based on age and domicile/residency as set forth in *N.J.S.A.* 18A:38-1.

¹⁰ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.