

B.C., ON BEHALF OF MINOR CHILD, M.W., :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE CITY OF :
ATLANTIC CITY, ATLANTIC COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her granddaughter, M.W., is not eligible for a free public education in the Atlantic City school district because she allegedly resides out of the district. Petitioner, a resident of Atlantic City, contends that she is the legal guardian of M.W. and that her granddaughter lives with her.

The ALJ found that: it is undisputed that the petitioner was awarded custody/guardianship of her granddaughter, M.W., by court order on October 4, 2007; there is no dispute that the petitioner is domiciled within respondent's school district; and the Board's evidence that M.W. is not, in fact, domiciled within the school district is speculative at best and fails to establish that M.W. is not domiciled in Atlantic City. The ALJ concluded that the school district's residency determination should be reversed and petitioner's appeal should be granted.

Upon a full and independent review, the Commissioner concurred with the ALJ that M.W. is entitled to a free public education in the Atlantic City school district pursuant to *N.J.S.A. 18A:38-1(a)*, and adopted the Initial Decision as the final decision in this matter, with the clarification that *N.J.S.A. 18A:38-2* does not apply in matters of this type.

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 2623-08
AGENCY DKT. NO. 88-3/08

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that M.W. is entitled to a free public education in the Atlantic City school district pursuant to *N.J.S.A. 18A:38-1(a)*. As found by the ALJ, it is undisputed that petitioner has been awarded sole custody of minor child M.W. – regardless of the family’s reasons for the arrangement, which have no bearing on the determination in this matter – and she herself is domiciled in the district; therefore, M.W. would be ineligible for free education at the Board’s expense only if the preponderance of credible evidence showed – which it clearly did not – that M.W. was not living with petitioner notwithstanding the existence of the custody order.

However, although it does not affect the outcome of the dispute or the accuracy of the ALJ’s legal analysis and assessment of facts overall, the Commissioner must correct the Initial Decision’s inclusion of *N.J.S.A. 18A:38-2* in its discussion of laws applicable to matters of this type. Specifically, although the Commissioner’s decision in *I.B., infra*, is accurately summarized and quoted (at 13-14) as finding *N.J.S.A. 18A:38-2* applicable to court orders

granting residential custody, that decision was reversed on appeal to the State Board of Education, which instead held that – as demonstrated by the statute’s legislative history – the court orders referenced in *N.J.S.A. 18A:38-2* are actually orders of placement in resource family (foster) homes, so that the statute does *not* apply to orders of custody of the type at issue in this matter, which are instead subject to the provisions of *N.J.S.A. 18A:38-1*. *I.B., on behalf of minor child, M.A., III v. Board of Education of the Township of Belleville, Essex County*, Commissioner Decision No. 381-05, decided October 24, 2005; State Board of Education Decision No. 51-05, decided December 6, 2006. Indeed, as a consequence of its decision in *I.B.*, the State Board of Education has, in its recently proposed readoption of *N.J.A.C. 6A:22* (Student Residency),¹ sought to amend pertinent sections of regulation to provide notice of the distinction between custody and foster placement orders and establish as a matter of rule that, in determining eligibility to attend school in a district, orders of residential custody are subject to the provisions of *N.J.S.A. 18A:38-1* rather than *N.J.S.A. 18A:38-2*, and that the existence of such an order creates a rebuttable presumption – as was effectively employed by the ALJ in deciding this matter – that the student in question is actually living with the designated custodian.

Accordingly, for the reasons expressed therein as clarified above, the Initial Decision of the OAL – finding M.W. entitled to free public education in the Atlantic City School District – is adopted as the final decision in this matter.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: November 18, 2009

Date of Mailing: November 18, 2009

¹ See 41 *N.J.R.* 3484(a).

² Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Appellate Division of the Superior Court.