#128-11 (OAL Decision: Not yet available online)

P.B. on behalf of minor child, Y.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that Y.S. does not reside in Ewing and is not eligible for a free public education in the Ewing school district. The respondent contended that Y.S. resides with her mother, Y.B., in Trenton and is dropped off in Ewing before the start of each school day. Petitioner supplied the school district with a Joint Residential Custody Order, entered September 9, 2010 and effective August 1, 2010, the application for which requested joint residential custody because "the child resides at both residences". Respondent Board maintains that this order does not establish that Y.S. resides in Ewing and therefore is entitled to enrollment in the district.

The ALJ found that: the witness for the respondent Board was credible in his testimony, while P.B.'s testimony was contrived and non-credible; at all times that surveillance of Y.S. was conducted by the District, Y.S. was residing with her mother in Trenton; P.B. has not established any family or economic hardship pursuant to *N.J.S.A.* 6A:22-3.2 that would allow Y.S. to reside with her in Ewing. P.B. failed to carry her burden of proof that Y.S. is entitled to a free public education in Ewing Township; and the District waived any claim for tuition in this case. Accordingly, the ALJ ordered that Y.S. may be excluded from enrollment in the Ewing School District.

Upon a full and independent review, the Commissioner concluded that Y.S. is not eligible for a free public education in Ewing. The joint custody order notwithstanding, the record shows that Y.S. has resided at all times with her mother in Trenton, and contains multiple examples of efforts by petitioner and Y.B. to enroll Y.S. in respondent's school district on false pretenses. Further, there is no basis for the Commissioner to reject the ALJ's credibility findings. Accordingly, the Commissioner adopted the Initial Decision and dismissed the petition.

March 24, 2011

OAL DKT. NO. EDU 10545-10
AGENCY DKT. NO. 537-9/10

P.B. on behalf of minor child, Y.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

Upon review of the record[1] and Initial Decision in the instant residency controversy, the Commissioner concludes that Y.S. is not eligible for a free public education in respondent's district. The facts set forth in the record and summarized by the Administrative Law Judge (ALJ) in the Initial Decision indicate that in 2003 a surveillance investigation disclosed that Y.S., whom Y.B. had enrolled in respondent's district in 2001, was being driven on each school day from Y.B.'s Trenton home to the Ewing residence of P.B., the mother of a former spouse of Y.B. Y.S. was consequently disenrolled from respondent's district in June 2003 and did not appeal the disenrollment.

However, in September 2009, when Y.S. was ready to enter high school, Y.B. again enrolled her in respondent's district. On this occasion Y.B. produced a purported lease between herself and P.B. for occupation of P.B.'s premises in Ewing. However, two subsequent

[1] The Commissioner was not provided with a transcript of the hearing in the Office of Administrative Law (OAL) and the parties have filed no exceptions.

surveillances showed that Y.B. and Y.S. still resided in Trenton and that Y.S. was again being driven to Ewing each school day. Respondent disenrolled Y.S. but allowed her to finish the school year. Y.B. did not appeal the disenrollment.

Y.B. again attempted to enroll Y.S. in respondent's district in August of 2010 but her application was denied. A few weeks later Y.B. presented respondent with a family court order – dated September 9, 2010 – assigning joint residential custody to Y.B. and P.B. On the basis of the court order, P.B. filed the instant appeal of the enrollment denial with the Commissioner.

After hearing the parties' testimony and considering the documentary evidence, the ALJ found respondent's residency/attendance officer – who had ordered the above referenced surveillances and testified about same – to be credible. In contrast, he found that P.B.'s testimony was both internally inconsistent and contrived. More specifically, he did not believe P.B.'s testimony that Y.S. resides in her home in Ewing.

The Commissioner must defer to the ALJ's credibility finding unless it is clearly arbitrary, capricious or unreasonable. *See, e.g. D.L. and Z.Y. on behalf of T.L. and K.L. v. Board of Education of the Princeton Regional School District*, 366 *N.J. Super.* 269, 273 (App. Div. 2004) and *N.J.S.A.* 52:14B-10(c). A review of ALJ Spence's discussion of the bases for his credibility determination reveals nothing arbitrary, capricious or unreasonable. To the contrary, the record contained multiple examples of efforts by petitioner and Y.B. to enroll Y.S. in respondent's school district on false pretenses.

An order awarding residential custody does not, in and of itself, determine a minor child's domicile. If a district can show that a child does not actually reside with the person who has been named as his or her residential custodian, the district in which the purported

custodian resides will not be obliged to provide the child with a free education. *See, e.g. B.C., on behalf of M.W. v. Board of Education of the City of Atlantic City, Atlantic County,* Commissioner's Decision No. 381-09, decided November 18, 2009 (if a petitioner claims that a child is entitled to attend school in a school district on the basis of a court order granting custody/guardianship to the domiciled petitioner, the school district may present evidence that the child is not in fact domiciled in the school district). In the instant case, respondent has met its burden to rebut the presumption of residence/domicile – created by the joint custody order – by offering credible evidence that Y.S. does not reside with P.B.

Accordingly, the Commissioner adopts the Initial Decision of the OAL and dismisses the petition. Respondent may disenroll Y.S. However, no tuition shall be due respondent, as it has waived same. (Respondent's Exhibit R-15)

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 24, 2011
Date of Mailing: March 24, 2011

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).