

J.G. on behalf of minor child S.G., :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE :
LENAPE REGIONAL HIGH SCHOOL :
DISTRICT, BURLINGTON COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner appealed the determination of the respondent Board that his child, S.G., be removed from Cherokee High School (Cherokee) because she had moved out of the Lenape Regional High School district. Petitioner conceded, prior to a residency hearing before the Board in November 2011, that S.G. no longer resided in the district, but requested that she be allowed to remain at the high school as a tuition student. The Board did not address this request, but issued a resolution stating that S.G. was no longer domiciled in the district, would be disenrolled, and would be charged tuition for the period of her ineligible attendance. This resolution was forwarded to the petitioner, along with an advisement that an appeal could be filed with the Commissioner. Petitioner filed the within appeal in December 2011, arguing that: the Board's refusal to exercise its discretion to allow S.G. to attend Cherokee as a non-resident student with payment of tuition was arbitrary and capricious; the Board's policy on eligibility of non-resident students (Policy 5111) permits S.G.'s attendance as a non-resident student; and that the Board's notice of ineligibility was insufficient. The Board filed a counterclaim seeking reimbursement for tuition for the 2011-2012 school year. Subsequently, the Board filed two motions for summary judgment.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact, as J.G. does not dispute S.G.'s residency outside the district, and the matter is ripe for summary decision; the Board properly determined that S.G. was ineligible to attend school in the district, and was entitled to remove her from Cherokee pursuant to *N.J.S.A. 18A:38-1(b)(2)*; the Board was not arbitrary or capricious in declining to allow S.G. to attend Cherokee as a non-resident tuition student, as S.G.'s circumstances did not fit into any of the categories for eligibility to continue attendance under the Board's Policy 5111; the Board is entitled to tuition reimbursement for the 2011-2012 and 2012-2013 school years; and fairness and time considerations dictate that S.G. should be allowed to finish her senior year at Cherokee. The ALJ granted the Board's motions for summary decision and ordered J.G. to pay – by July 1, 2013 – tuition in the amount of \$32,393 for S.G.'s ineligible attendance during the 2011-2012 and 2012-2013 school years; further, the ALJ ordered that S.G. be allowed to finish her senior year at Cherokee.

Upon a full and independent review, the Commissioner concurred with the ALJ's findings, and adopted the Initial Decision of the OAL as the final decision in this case. The petitioner was ordered to pay tuition in the amount of \$32,393, by July 1, 2013, for the period of S.G.'s ineligible attendance

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.

April 3, 2013

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This controversy was precipitated by respondent’s discovery – in September 2011– that petitioner’s minor child, S.G., was no longer domiciled in its district. Respondent sent notification to S.G.’s parents that S.G. was no longer eligible for a free public education in respondent’s school district, and advised that they could participate in a residency hearing which would be held during a Board of Education meeting on October 19, 2011.

Before the hearing petitioner conceded – via correspondence from his counsel to respondent’s counsel – that S.G. no longer resided in respondent’s district, but requested that S.G. be allowed to remain in the district as a tuition student. However, after the close of the Board hearing – which ultimately took place on November 16, 2011 – respondent issued a resolution declaring that S.G. was not domiciled in its district, that she would be disenrolled, and that tuition reimbursement would be sought. In a letter dated November 17, 2011, respondent’s attorney forwarded the resolution to petitioner’s counsel. She advised counsel that an appeal could be taken to the Commissioner and that – during the pendency of the appeal – S.G. could remain enrolled in respondent’s district, subject to tuition reimbursement if petitioner’s appeal

was unsuccessful. Petitioner's request for S.G.'s acceptance as a tuition student was not addressed.

Petitioner's appeal to the Commissioner, filed on December 6, 2011, did not contest respondent's residency determination. Rather, it charged that respondent's refusal to make a determination regarding petitioner's request that S.G. be allowed to stay in its district as a tuition student was arbitrary, capricious and unreasonable. The proceedings in the Office of Administrative Law (OAL) continued through the 2011-2012 school year and into the 2012-2013 school year, during which time respondent allowed S.G. to remain enrolled in its district.

On March 4, 2013, the OAL issued an Initial Decision finding 1) that S.G. was not entitled to a free public education in respondent's district – a finding which was not contested by petitioner; 2) that respondent had not acted arbitrarily or unreasonably in declining to allow S.G.'s continued enrollment in its district as a tuition student; 3) that because S.G. was then three months away from graduation from high school, she should be allowed to stay in respondent's district; and 4) that petitioner would have to pay respondent the full amount of tuition due for S.G.'s attendance at Cherokee High School for the 2011-2012 and 2012-2013 school years – by no later than July 1, 2013. After consideration of the record and Initial Decision, the Commissioner concurs with each of the Administrative Law Judge's findings.

Petitioner has not objected to the recommendations in the Initial Decision, but respondent has registered seven exceptions: three to factual findings and four to conclusions of law.

In the first exception, respondent objects to the ALJ's identification of respondent's Business Administrator, James Hager, as the author of the above-referenced November 17, 2011 letter, which was actually from respondent's attorney to petitioner's counsel.

The Commissioner agrees that the attribution was in error but notes that it has no significance to the outcome of this case. Similarly, respondent's second exception is correct, but of no significance. Respondent asserts that the ALJ erroneously characterized the petition as including an allegation that respondent's notice to petitioner of S.G.'s ineligibility for a free public education in respondent's district was defective. That allegation was not expressly articulated in the petition itself, but was rather set forth in correspondence which was incorporated by reference into the petition.

In the third exception to a factual finding, respondent asks that the Initial Decision be modified to "reflect that the Board's position is that tuition is due and payable as of the date of the Court's Order" This exception is made notwithstanding the fact that respondent admittedly offered to set March 29, 2013 as the deadline for tuition reimbursement. Accordingly, the Commissioner rejects the exception. There is no reason to change a factual finding that is supported by the record and, as a matter of law, the "Court's Order" (Initial Decision) has no significance until it is adopted, rejected or modified by the Commissioner.

The fourth of respondent's exceptions is a challenge to a legal finding. More specifically, the Fourth Exception pertains to the ALJ's conclusion that respondent's initial notice of ineligibility was defective. Respondent urges that the ALJ's reliance on *N.J.A.C. 6A:22-4.2* for the required elements of a notice of ineligibility was misplaced, since that regulation governs applications for enrollment – not disenrollment of students already attending school in a district. However, the Commissioner notes that *N.J.A.C. 6A:22-4.3*, which governs the removal of "currently enrolled students," expressly states that ineligibility notices must include all the requirements of *N.J.A.C. 6A:22-4.2*, as well as provisions informing parents or custodians of their right to a hearing.

Respondent also posits 1) that *N.J.A.C. 6A:22-4.2* and *N.J.A.C. 6A:22-4.3* only apply to final notices of ineligibility (sent to parents/custodians after a board resolution mandates the disenrollment of a student) and 2) that any deficiencies in respondent's initial ineligibility notice were cured by subsequent correspondence. The Commissioner regards the first contention as contrary to the plain language of *N.J.A.C. 6A:22-4.3* and the fundamental principles of notice and due process upon which it stands. As to respondent's second contention, any clarification it offered on the eve of the residency hearing or subsequent to it did not likely provide petitioner with the measure of notice and opportunity to make his case that is contemplated by the regulation.

Thus, the Commissioner rejects respondent's exception to the ALJ's conclusion that respondent's initial notice of ineligibility was lacking. Further, the Commissioner reminds respondent that the ALJ's conclusion about the notice did not prevent him from finding S.G. ineligible to receive a free public education in respondent's district.

Respondent's fifth, sixth and seventh exceptions reiterate arguments set forth in previous exceptions and need not be readdressed.

In summary, the Commissioner adopts the Initial Decision of the OAL as the final decision in this case. The petition is dismissed. The portions of respondent's motions for summary disposition which ask that the Commissioner uphold its determinations 1) that S.G. was not entitled to a free public education in its district and 2) that it was not obligated under its policies to accept S.G. as a tuition student are granted. However, given the fact that there are less than three months left in S.G.'s senior year, the disenrollment mandated by respondent's board resolution is not upheld. Finally, respondent's request for tuition for both the 2011-2012

and 2012-2013 school years – in the amount of \$32,393 – is granted, and the ALJ's recommended payment date of July 1, 2013 is adopted.

IT IS SO ORDERED.¹

COMMISSIONER OF EDUCATION

Date of Decision: April 3, 2013

Date of Mailing: April 3, 2013

¹ 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*).