

A.B. on behalf of minor child L.M.D.-R., :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE :
TOWNSHIP OF BURLINGTON, :
BURLINGTON COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her grandson, L.M.D.-R., was not eligible for a free public education in the Burlington Township school district. Petitioner contended that L.M.D.-R. resides with her, and that she shares custody with her daughter, T.O., the child's mother. The Board asserted that – based on a residency investigation – L.M.D.-R. resides with T.O. in Philadelphia, Pennsylvania. The Board filed a counterclaim for tuition reimbursement, submitting that \$9,085.04 is due for the period from February 13, 2013 to June 25, 2013, and \$9,296.30 for the period from September 9, 2013 to February 4, 2014.

The ALJ found, *inter alia*, that: the weight of evidence, including exhibits and testimony, indicates that L.M.D.-R. resides with his mother, T.O., in Philadelphia, and not with the petitioner in Burlington Township; although T.O. produced a Custody and Parenting Agreement to show that A.B. was designated to have primary residential custody of L.M.D.-R., A.B. is not the legal guardian nor the parent, as required under *N.J.A.C. 6A:22-3.1(a)(1)*; petitioner provided no proof that she was supporting L.M.D.-R. gratis, as required by *N.J.S.A. 18A:38-1(b)(1)*; the mother, T.O., admitted that she lived in Pennsylvania, and was observed leaving her home in Philadelphia and driving L.M.D.-R. across the Burlington-Bristol Bridge from Pennsylvania to drop him off for school in Burlington Township; and, since A.B. is not L.M.D.-R.'s guardian, any assessment of tuition must be against T.O., and would need to be pursued under a separate action. Accordingly, the ALJ affirmed the Board's determination that L.M.D.-R. is not domiciled in Burlington Township, but – with respect to the question of tuition – dismissed the Board's counterclaim against A.B., as she found that A.B. is not the legal guardian, and the mother, T.O., is not a party to the case herein.

Upon review, the Commissioner concurred with the ALJ's conclusions that 1) the petitioner has failed to sustain her burden of proving that L.M.D.-R. is entitled to a free public education in Burlington schools, and 2) T.O. is not a party to this case, and therefore tuition may not be assessed against her. However, the Commissioner rejected the ALJ's determination that A.B. is not liable to the Board for L.M.D.-R.'s tuition, finding that A.B. – as the court-ordered residential custodian of L.M.D.-R. – was in fact her grandson's guardian as defined in *N.J.A.C. 6A:22-1.2*; further, pursuant to *N.J.S.A. 18A:38-1(b)(2)*, the Commissioner must assess tuition against A.B., prorated to the time of L.M.D.-R.'s ineligible attendance in Burlington Township schools. Accordingly, the Commissioner dismissed the petition and assessed petitioner tuition in the amount of \$18,381.34.

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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Before the Commissioner is a residency dispute pertaining to L.M.D.-R., a child whose grandmother, A.B., lives in respondent’s district and whose mother, T.O., admittedly resides in the home she owns in Philadelphia, Pennsylvania. Petitioner and T.O. represented to respondent that, due to T.O.’s family and economic difficulties, L.M.D.-R. lives with A.B. in Burlington Township. Petitioner also provided a copy of a custody order, approved by the Honorable John L. Call, P.J.F.P., designating A.B. as L.M.D.-R.’s “parent of primary residence.”

However, as a result of remarks which L.M.D.-R. made to his teacher, respondent suspected that he was not actually domiciled with petitioner in Burlington Township. A residency surveillance was ordered and the results supported respondent’s belief that – notwithstanding the above-referenced custody order – L.M.D.-R. actually lived with T.O. in Philadelphia and was driven from there to school each morning.

Upon consideration of the record, the Commissioner concurs with the Administrative Law Judge (ALJ)¹ that the evidence presented at the hearing in the Office of Administrative Law (OAL) supported respondent’s determination that L.M.D.-R. has not been

¹ Neither party filed exceptions to the Initial Decision of the Office of Administrative Law.

residing in Burlington Township with A.B. In such cases, where the facts in evidence are discrepant with the terms of a custody order, the Commissioner will look behind the terms of the order, find that the child is not domiciled in the subject district, and affirm the Board of Education's determination that the child is not entitled to a free public education in its district. *See, e.g., I.B. on behalf of minor child, M.A., III, v. Board of Education of the Township of Belleville, Essex County, State Board Dkt. No. 51-05, decided December 6, 2006; D.M. on behalf of minor child, B.N. v. Board of Education of the Township of Ewing, Mercer County, State Board Dkt. No. 20-02, decided November 5, 2003, where the school districts presented overwhelming evidence that the respective children were not actually living with the individual who had been granted custody.*

The Commissioner is also in accord with the ALJ that, since T.O. is not a party to this case, tuition may not be assessed against her. However, the Commissioner disagrees with the ALJ's determination that A.B. is not liable to respondent for tuition covering the period during which L.M.D.-R. attended respondent's schools while living in Philadelphia.

The ALJ correctly recites the portion of *N.J.S.A. 18A:38-1(b)(2)* which states: "[i]f in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district." However, the ALJ's conclusion – that A.B. was not a guardian of L.M.D.-R. and could therefore not be assessed damages for tuition – is incorrect.

N.J.A.C. 6A:22-1.2, one of many regulations promulgated for implementation of *N.J.S.A. 18A:38-1(b)(2)*, defines "Guardian" as:

a person to whom a court of competent jurisdiction has awarded guardianship or custody of a child, provided that a residential custody order shall entitle a

child to attend school in the residential custodian's school district unless it can be proven that the child does not actually live with the custodian . . .

[Emphasis added.]

Thus, as a court-ordered residential custodian of L.M.D.-R., A.B. was a guardian for purposes of *N.J.S.A.* 18A:38-1(b). Since the Commissioner finds that the evidence does not support the claim of A.B., the petitioner herein, the Commissioner must assess A.B. tuition for L.M.D.-R., prorated to the time of his ineligible attendance in respondent's schools. Were this not so, for each of the unfortunately frequent instances in which relatives or friends agree to assume custody of children who actually do not live with them, school districts would have to participate in a hearing before the Commissioner to establish liability and then another hearing in Superior Court to collect tuition.

Accordingly, the petition is dismissed, respondent's determination that L.M.D.-R. is not eligible for a free public education in its district is affirmed, and petitioner is assessed tuition in an amount found by the ALJ to be \$18,381.34.

IT IS SO ORDERED.²

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 2, 2014
Date of Mailing: May 2, 2014

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).