57 Ed Dept, Decision No. 17127 (NYCOMMED), 2017 WL 3314398

New York State Education Department

Decisions of the Commissioner

Appeal of D.D. and G.D., on behalf of their children D.D., D.D. and S.D., from action of the Board of Education of the Cold Spring Harbor Central School District regarding residency and transportation.

Decision No. 17,127
Decided: July 19, 2017

***1** Frazer and Feldman, LLP, attorneys for respondent, **Christie** R. **Jacobson**, Esq., of counsel

ELIA, Commissioner

Petitioners appeal the decision of the Board of Education of the Cold Spring Harbor Central School District ("respondent board") that their children are not homeless within the meaning of the McKinney-Vento Homeless Assistance Act (42 USC §11431 et seq., "McKinney-Vento") and, therefore, are not entitled to attend the district's schools or receive transportation. The appeal must be dismissed.

Petitioners' children, D.D., D.D., and S.D. (the "students"), enrolled in respondent's schools in December 2014. At that time, petitioners indicated that they lived at an address within the district ("in-district residence"). In or about October 2016, petitioners' landlord advised the District Registrar that petitioners and the students were going to be evicted from the in-district residence. In an email dated December 5, 2016, the landlord confirmed that the eviction was about to occur, possibly on December 7th. Petitioners allege that the in-district residence was without heat and not fit or adequate. Petitioners further allege that following receipt of a 72 hour eviction notice, the landlord "placed an economic flag" on petitioners' credit "for a money judgment to make it impossible for [them] to find a home...." Petitioners claim that, thereafter, the family stayed briefly with family members and then the students' uncle assisted the family "in moving into an apartment that the uncle leased/cosign [sic]." Petitioners describe the apartment as having 3 bedrooms and as being "temporary until the family can find another home." The petition indicates that 10 people live in the 3 bedroom apartment. Petitioners further assert that the uncle "is not willing to provide an apartment indefinitely."

Respondent's assistant superintendent for student services and human resources ("assistant superintendent") attests in an affidavit that he had several telephone conversations with petitioners in which they confirmed that they had moved into an apartment located in XXXXXXXX, New York, which is outside of the district ("XXXXXXXX address"). In the petition, petitioners allege that they reside at a different address located in XXXXXXXXXX XXXXXXX, New York, also outside of the district ("XXXXXXXXXX XXXXXXX address"). This is denied by respondent. Following several conversations with petitioners regarding their residency status, by letter dated December 23, 2016, the assistant superintendent notified petitioners of her determination that the students were not district residents and that they would therefore be excluded from school effective January 3, 2017. The letter informed petitioners that they may appeal the decision to the superintendent. Thereafter, by letter dated December 29, 2016, petitioners notified the assistant superintendent of their intent to appeal the determination to the superintendent. As a result, a residency meeting was scheduled for January 3, 2017.

***2** The record indicates that, at the January 3, 2017 residency meeting, petitioners met with the assistant superintendent, the superintendent, and the district's homeless liaison. Respondent states that, at that time, petitioners provided no additional evidence to support their claim that their current residence is inadequate or temporary. Following the residency meeting, by letter dated January 3, 2017, the superintendent informed petitioners of his determination that the

out-of-district address was fixed, regular and adequate, and that the students were not considered homeless pursuant to McKinney-Vento. This appeal ensued. [1]

Petitioners contend that they and their children are homeless within the meaning of McKinney-Vento and that the students are therefore entitled to continue enrollment in respondent's district. Petitioners allege that their current residence is temporary and transitional housing because the family's uncle will not provide the apartment indefinitely and they intend to move back to the district.

Respondent asserts that the appeal is untimely and that, nevertheless, petitioners fail to demonstrate a clear legal right to the relief requested or that respondent's actions were arbitrary, capricious or an abuse of discretion. Respondent maintains that petitioners and their children are not homeless within the meaning of McKinney-Vento.

The appeal must be dismissed as untimely. An appeal to the Commissioner must be commenced within 30 days from the making of the decision or the performance of the act complained of, unless any delay is excused by the Commissioner for good cause shown (8 NYCRR §275.16; Appeal of Lippolt, 48 Ed Dept Rep 457, Decision No. 15,914; Appeal of Williams, 48 id. 343, Decision No. 15,879). Together with the petition in this case, petitioners submitted an affidavit of service from respondent's homeless liaison indicating that she accepted personal service of the petition on February 14, 2017. The Commissioner has previously held that an appeal is timely when commenced within 30 days of receiving the determination (Appeal of Connelly and Keegan, 56 Ed Dept Rep, Decision No. 16,963; Appeal of C.S., 48 id. 497, Decision No. 15,929; Appeal of M.H. and E.H., 47 id. 274, Decision No. 15,694). When the record does not indicate when petitioner actually received the determination, the date of receipt is calculated by affording the usual five days for mailing, excluding Sundays and holidays (Appeal of Connelly and Keegan, 56 Ed Dept Rep, Decision No. 16,963; Appeal of K.W., 48 id. 451, Decision No. 15,912; Appeal of Bruning and Coburn-Bruning, 48 id. 325, Decision No. 15,872). Respondent's determination that the students were not homeless was made in a letter dated January 3, 2017. Applying the usual five days, and excluding Sunday, January 8, petitioners' date of receipt was January 9, 2017. Because service occurred more than 30 days after receipt of respondent's January 3, 2017 determination and petitioners have provided no excuse for the delay, petitioners' appeal must be dismissed as untimely (see Appeal of H.D. and S.D., 56 Ed Dept Rep, Decision No. 17,020).

***3** Even if the appeal were not dismissed as untimely, it would be dismissed on the merits. At all times relevant to this appeal, Education Law §3209(1)(a) defined "homeless child" as:
(1) a child or youth who lacks a fixed, regular, and adequate nighttime residence, including a child or youth who is:
(i) sharing the housing of other persons due to a loss of housing, economic hardship or a similar reason;

(ii) living in motels, hotels, trailer parks or camping grounds due to the lack of alternative adequate accommodations;

(iii) abandoned in hospitals;

(iv) awaiting foster care placement; [2]
or

(v) a migratory child ... who qualifies as homeless under any of the provisions of clauses

(i) through (iv) of this subparagraph or subparagraph two of this paragraph; or

(2) a child or youth who has a primary nighttime location that is:
(i) a supervised publicly or privately operated shelter designed to provide temporary living accommodations ...; or

(ii) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings ...

In an appeal to the Commissioner, a petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which petitioner seeks relief (8 NYCRR §275.10; Appeal of Aversa, 48 Ed Dept Rep 523, Decision No. 15,936; Appeal of Hansen, 48 id. 354, Decision No. 15,884; Appeal of P.M., 48 id. 348, Decision No. 15,882). On this record, the students do not meet the definition of a homeless child under either State or federal law because petitioners have failed to demonstrate that the students currently lack a fixed, regular and adequate night-time residence and are homeless.

The record indicates that, as a result of an eviction from their in-district residence, petitioners moved into an apartment outside the district. Petitioners claim that their current apartment is temporary because a family member co-signed for the apartment, but they provide no evidence to support such claim. Petitioners also allege that 10 people live in their 3 bedroom apartment, but have provided no affidavits or other documentation to support such claim and no details about the children's sleeping arrangements. While it is conceivable that petitioners could make a case that the apartment is inadequate due to overcrowding (see Appeal of V.C.B., 56 Ed Dept Rep, Decision No. 17,038), proof that overcrowding exists is lacking. Without proof, petitioners' conclusory statements are insufficient to meet their burden of proof on this issue (see Appeal of P.B., 55 Ed Dept Rep, Decision No. 16,804; Appeal of a Student with a Disability, 53 id., Decision No. 16,621). On this record, petitioners have failed to meet their burden of proving that the residence is inadequate (see Appeal of D.W., 55 Ed Dept Rep, Decision No. 16,812; Appeal of S.T., 53 id., Decision No. 16,619; Appeal of T.B., 48 id. 4, Decision No. 15,774).

***4** Moreover, petitioners have not established that the current residence is temporary or transitional. Petitioners make a blanket assertion that the living situation is temporary because a family member who co-signed for the apartment is not willing to provide the apartment indefinitely, but petitioners provide no evidence to support such claim. There is no evidence that petitioners need to vacate the apartment or that there is a fixed time limit as to how long they may remain (see Appeal of A.N.Z., 53 Ed Dept Rep, Decision No. 16,537; Appeal of a Student with a Disability, 52 id., Decision 16,404; Appeals of L.B., 50 id., Decision No. 16,129). Further, there is no evidence of intent to relocate into the district in the future.

Based on the record before me, petitioners have failed to demonstrate that the students lack a fixed, regular and adequate night-time residence or that they are living in the kind of shelter or other accommodation described in Education Law §3209(1)(a) and §100.2(x) of the Commissioner's regulations. Accordingly, I cannot find respondent's determination that the students are not homeless to be arbitrary or capricious.

Although the appeal must be dismissed for the reasons described above, I note that petitioners have the right to reapply for admission on behalf of the students at any time, should circumstances change, and to submit any documentary evidence for respondent's consideration.

THE APPEAL IS DISMISSED.

Footnotes

1 Effective October 1, 2016, §11432(g)(3)(E)(i) of the McKinney-Vento Homeless Assistance Act, as amended by the Every Student Succeeds Act, now requires that if a dispute arises surrounding a child's eligibility, school selection or enrollment, such student shall be immediately enrolled pending final resolution of the dispute, including all available appeals (42 U.S.C. §11432[g][3][E][i]). Therefore, no application for a stay in this appeal was necessary.

2 Effective December 10, 2016, children or youth awaiting foster care placement are no longer included in the definition of "homeless children and youths" under the McKinney-Vento Homeless Assistance Act, as amended by the Every Student Succeeds Act (42 U.S.C. §11434a). Effective April 20, 2017, children or youth awaiting foster care placement are no longer included in the definition of "homeless child" in Education Law §3209(1)(a), as amended by Part C of Chapter 56 of the Laws of 2017. However, those changes are not relevant to a determination in this appeal.

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