57 Ed Dept, Decision No. 17131 (NYCOMMED), 2017 WL 3314406

New York State Education Department

Decisions of the Commissioner

Appeal of C.M., on behalf of her children V.M. and N.M., from action of the Board of Education of the Manhasset Union Free School District regarding residency and transportation.

Decision No. 17,131
Decided: July 20, 2017

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

ELIA, Commissioner

Petitioner appeals the determination of the Board of Education of the Manhasset Union Free School District ("respondent") that her children (the "students") 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.

The record indicates that the students transferred from a private parochial school into respondent's schools in or about September 2010. At that time, petitioner indicated that she lived within respondent's district.

In April 2013, the district received information that petitioner was no longer living within the district. District personnel contacted petitioner and questioned her regarding her residence. The record indicates that petitioner admitted that she was not currently living at the in-district address and provided several different reasons for such move. Petitioner claimed that she was currently living at a friend's in-district address while her in-district house underwent renovations. The district investigated this claim, and petitioner eventually admitted that she lived with her parents at an address in XXXXXX, New York, which is located outside of the district's geographical boundaries (the "XXXXXX address").

The district subsequently conducted a residency investigation, which resulted in a finding that petitioner and her children resided at the XXXXXX address. By letter dated June 13, 2013, the students were deemed excluded from the district as of June 21, 2013. Petitioner did not appeal this determination.

In December 2013, petitioner re-registered the students in respondent's district, asserting that she had returned to the district and was living at an address within the district. The district subsequently re-enrolled the students.

In August 2014, petitioner told the district that she had moved in with her fiancé at another address located within the district's geographical boundaries. The students attended respondent's schools from December 2013 through June 2015.

The district received information in fall 2015 indicating that petitioner and the students were no longer living at petitioner's fiancé's residence within the district. In December 2015, the district's superintendent met with petitioner to discuss the students' residency. Petitioner asserted that her fiancé was now her former fiancé, and that she had been forced to leave the fiancé's residence because the fiancé committed a crime against one of petitioner's children.

***2** In January 2016, petitioner's brother contacted the superintendent and stated that petitioner was actively seeking residence in the district. On February 15, 2016, petitioner's father sent an email to the district that attached a letter dated February 3, 2016, addressed to the superintendent. The February 3rd letter explained that petitioner's parents and her brother and his wife support petitioner and her children and requested that the students be deemed homeless and, thus,

  

permitted to remain in the district's schools under McKinney-Vento. Petitioner's father also stated that the school in XXXXXX was ""unsafe" and had a "sub-par academic program." The district allowed the students to remain in its schools until the end of the 2015-2016 school year while the district determined the students' homeless status.

A meeting was held on May 9, 2016 to discuss petitioner's residency. The superintendent, deputy superintendent, petitioner, petitioner's father and petitioner's brother attended. Petitioner again asserted that she was compelled to leave the fiancé's in-district residence due to the alleged criminal activity and that she had moved to the XXXXXX address on December 3, 2015, but presented no evidence that she or the students were currently homeless. Petitioner further stated that she was seeking a rental in the district. The superintendent requested that another meeting take place at the end of June 2016, so that petitioner could present any evidence of her attempts to secure a rental within the district.

The superintendent met with petitioner on June 23, 2016. At this meeting, petitioner provided a document that she presented as an order of protection against her former fiancé. The document was incomplete and undated. Petitioner did not provide any other evidence regarding her need to vacate the in-district address or her attempts to secure a rental within the district.

By letter dated July 19, 2016, the superintendent informed petitioner that he had determined that the students were not homeless under McKinney-Vento and would be excluded from the district thirty days from the date of the letter. This appeal ensued. Petitioner's request for interim relief was granted on September 20, 2016.

Petitioner asserts that she and her children were "displaced" on December 3, 2015 from the in-district address at which they had been living with her former fiancé "after experiencing abusive behavior" by her then-fiancé. [1] Petitioner argues that her children became homeless on December 3, 2015, "since [she] could not afford to live in Manhasset on [her] own with [her] children" and that she has been unable to obtain housing within the district since that time. Petitioner claims that she had "numerous" conversations with an employee of the New York State Education Department ("SED") and that this employee agreed that the students were homeless. Petitioner states that she and the students live with her parents outside of the district in a one-family house with four bedrooms and three bathrooms. Petitioner claims that the students who are the subject of this appeal share a bedroom and that she sleeps on a couch in the basement of the house. Petitioner asserts that her cousin also lives in her parents' house. Petitioner claims that the house is "utterly cramped" and that the district failed to inspect the residence before reaching its determination that it was an adequate night-time residence.

***3** Respondent argues that the petition should be dismissed as untimely. Respondent also contends that petitioner has not met her burden to prove that the students are homeless under McKinney-Vento. Specifically, respondent argues that the record shows that the students are living outside of the district at their grandparents' house, which is a fixed, regular, and adequate night-time residence.

Initially, I must address the procedural issues. Petitioner submitted a reply in this matter. The purpose of a reply is to respond to new material or affirmative defenses set forth in an answer (8 NYCRR §§275.3 and 275.14). A reply is not meant to buttress allegations in the petition or to belatedly add assertions that should have been in the petition (Appeal of Caswell, 48 Ed Dept Rep 472, Decision No. 15,920; Appeal of Hinson, 48 id. 437, Decision No. 15,908; Appeal of Baez, 48 id. 418, Decision No. 15,901). Therefore, while I have reviewed the reply, I have not considered those portions containing new allegations or exhibits that are not responsive to new material or affirmative defenses set forth in the answer.

Following service of the reply, the parties submitted additional papers and sur-replies. Additional affidavits, exhibits and other supporting papers may only be submitted with the prior permission of the Commissioner (8 NYCRR §276.5). While this provision permits the submission of additional evidence, it cannot be used to add new claims against a respondent for which notice has not been provided (Appeals of Gonzalez, 48 Ed Dept Rep 405, Decision No. 15,898; Appeal of Marquette, et al., 48 id. 193, Decision No. 15,833). I will not accept materials that raise new issues and introduce new

exhibits that are not relevant to the claims originally raised in the appeal (Appeals of Gonzalez, 48 Ed Dept Rep 405, Decision No. 15,898; Appeal of Marquette, et al., 48 id. 193, Decision No. 15,833). The parties did not seek prior permission to submit these additional papers; therefore, I decline to accept them.

Respondent asserts that the petition is 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). 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).

The Commissioner has previously held that an appeal is timely when commenced within 30 days of receiving the determination (Appeal of C.S., 48 Ed Dept Rep 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 K.W., 48 Ed Dept Rep 451, Decision No. 15,912; Appeal of Bruning and Coburn-Bruning, 48 id. 325, Decision No. 15,872).

***4** Here, the superintendent determined that the students were not homeless under McKinney-Vento by letter dated July 19, 2016. Affording the usual five days for mailing, excluding Sundays and holidays, petitioner's appeal therefore needed to be served by August 24, 2016. The petition was not served until August 26, 2016, and petitioner has not set forth good cause, or any cause, for the delay in her petition. Therefore, the appeal is untimely. Although petitioner claims her appeal is timely because she filed it on August 8, 2016 with my Office of Counsel, she did not properly serve the petition on respondent pursuant to the Commissioner's regulations until August 26, 2016 (8 NYCRR §275.8). My Office of Counsel returned the petition to petitioner and informed her that the petition must be served upon the school district within the timeline prescribed by section 275.8 of the Commissioner's regulations. Therefore, the appeal is untimely and must be dismissed (see e.g. Appeal of K.B., 56 Ed Dept Rep, Decision No. 16,937).

The appeal must also 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).

Under the circumstances presented in this case, I find that the students do not meet the definition of "homeless" under State and federal law. Although petitioner asserts that the students do not have a fixed, regular, and adequate night-time residence, she has not provided sufficient proof to support this claim. Petitioner asserts that she and the students live outside of the district with her parents at the XXXXXX address, that the students who are the subject of this appeal share a bedroom, and that she has a place to sleep, as well.

***5** Petitioner's claims that the XXXXXX address has four bedrooms and three bathrooms, "one of which is in disrepair." Petitioner asserts that her father occupies the first bedroom; that her mother occupies the second bedroom; that a cousin who "permanently" lives with the family occupies the third bedroom; that the students who are the subject of this appeal occupy the fourth bedroom (where they have separate beds); and that petitioner sleeps on a couch in the basement. [3] While petitioner asserts that the home is "utterly cramped," the record does not support a finding that any such alleged overcrowding renders petitioner's living situation temporary or inadequate. Rather, the evidence supports a finding that the inhabitants have chosen to allocate the home's bedrooms in the manner described by petitioner. Therefore, while it is unfortunate that petitioner felt the need to leave the in-district residence due to issues with her fiancé, on this record, petitioner has not met her burden of proof to show that the students lack a fixed, regular and adequate night-time residence.

Moreover, petitioner has not established that her current residence is temporary or transitional. The record indicates that petitioner and her children have been residing in a home owned by petitioner's parents outside the district's geographic boundaries since December 2015, and it contains no evidence that they need to vacate their current residence or that there is a fixed time limit as to how long they may remain (see Appeals of S.R., 56 Ed Dept Rep, Decision No. 16,987; Appeal of A.N.Z., 53 id., Decision No. 16,537; Appeal of a Student with a Disability, 52 id., Decision 16,404).

Based on the record before me, petitioner has failed to demonstrate that she and the students lack a fixed, regular and adequate nighttime 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 petitioner is not homeless to be arbitrary or capricious.

Although the appeal must be dismissed for the reasons described above, I note that petitioner has 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 Petitioner also asserts that she continues to deal with "legal matters" concerning her separation from her ex-husband.

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.

  

3 Petitioner also submits eight photographs of the XXXXXX address, which appear to depict various rooms in the home including what appear to be five beds, a sofa, and two areas in which various belongings are stored.

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