57 Ed Dept, Decision No. 17135 (NYCOMMED), 2017 WL 3437478

New York State Education Department

Decisions of the Commissioner

Appeal of a STUDENT WITH A DISABILITY, by his parent, from action of the Board of Education of the Oyster Bay-East Norwich Central School District regarding residency and transportation.

Decision No. 17,135
Decided: July 31, 2017

***1** Frazier 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 Oyster Bay-East Norwich Central School District ("respondent") that her son (the ""student"), is not homeless within the meaning of the McKinney-Vento Homeless Assistance Act (42 USC §11431 et seq. "McKinney-Vento") and, therefore, is not entitled to attend the district's schools or receive transportation. The appeal must be dismissed.

In September 2012, petitioner rented an apartment within the geographical confines of respondent's district and enrolled the student in the district using that address. In December 2012, petitioner enrolled her younger child [1] for pre-kindergarten in the district using the same address. In April 2014, petitioner notified the district that she and her children moved to another apartment within the district ("in-district address").

According to respondent, "initial concerns of non residency" occurred in August 2015, when the district registrar observed that mail, addressed to petitioner at her in-district address, was repeatedly being returned to the district as "undeliverable." In September 2015, the district registrar had a telephone conversation with the student's father [2] who indicated that petitioner and the children moved in with petitioner's parents in their home outside of the district ("out-of-district address").

By letter dated September 28, 2015, the district registrar notified petitioner that it had "come to [the district's] attention" that petitioner's children no longer resided at the in-district address, were not district residents and, therefore, were not entitled to attend respondent's schools. In October 2015, in response to the letter, petitioner advised the district that in June 2015 she had been evicted from the in-district address and had temporarily moved to the out-of-district address. The children were permitted to remain enrolled in the district as homeless students within the meaning of McKinney-Vento for the remainder of the 2015-2016 school year. [3]

In August 2016, based on petitioner's continued claim of homelessness, the student was permitted to continue his attendance at respondent's high school during the 2016-2017 school year. According to respondent, in March 2017, the student's father informed the school psychologist that petitioner and the student permanently lived at the out-of-district address and that the student continued to attend school in respondent's district because "it is a better school district." By letter dated March 9, 2017, the district registrar notified petitioner that she was not considered homeless under State or federal law because she and the student were living in housing that is fixed, regular and adequate. By letter dated March 30, 2017, the district registrar sent petitioner another determination to include an updated "Form Notice of Petition" which reflected recent amendments to McKinney-Vento. This appeal ensued. [4]

***2** Petitioner contends that the student is homeless and, therefore, should be allowed to continue attending school in respondent's district with transportation. She states that she and the student are "sharing the housing of other persons due to loss of housing, economic hardship or a similar reason."

Respondent argues that the appeal should be dismissed for failure to state a claim for which relief can be granted and because petitioner has failed to meet her burden of proof. Respondent also argues that petitioner's younger child attends the public school district where the out-ofdistrict address is located and, therefore, petitioner must have satisfied that district's residency requirements. Respondent further argues that its decision is based on credible evidence, complies fully with the law and district policy, and is within its lawful discretion and therefore, the decision was not arbitrary and capricious.

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; [5] 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).

Based on the record before me, I find that petitioner has not established that the student meets the definition of a homeless child under either State or federal law. Petitioner contends that she and the student are homeless because they lack a fixed, regular, and adequate nighttime residence and are sharing the housing of other persons due to a loss of housing, economic hardship or a similar reason. In the petition, petitioner describes the circumstances which caused her and her children to become homeless as being "evicted from our apartment on June 14th 2015 due to economic hardships caused by unemployment and financial losses caused by theft." While it is unfortunate that petitioner and her children were evicted from their in-district address, there is no evidence in the record that their current living arrangement is the type of temporary shelter or other accommodation described in Education Law §3209 (see Appeal of A.B. and J.M., 56 Ed Dept Rep, Decision No. 17,096; Appeals of T.C., 53 id., Decision No. 16,502).

***3** The petition does indicate that petitioner and the student live with her parents. She asserts that "[they] do not have bedrooms and sleep in the family room, as this is only temporary and until permanent housing is found." She also alleges that six individuals live with the student in the out-of-district address, including petitioner, the student's grandparents, the student's uncle and two of the student's brothers. An affidavit from respondent's homeless liaison avers that the out-of-district address "appears to be a spacious two-level residence with 3,325 square feet, several bedrooms and a full basement." Petitioner has provided no description of the living arrangement beyond her assertion that her children lack their own bedrooms. However, the fact that a student does not have his or her own bedroom does not, in and of itself, establish that the residence is not adequate (see Appeal of K.W., 48 Ed Dept Rep 451, Decision No. 15,912). Similarly, the fact that a family room or other room had to be converted to a bedroom does not establish that the living arrangement is inadequate. Petitioner has submitted no reply or other evidence to explain or otherwise refute respondent's assertions. On this record, I find that petitioner has not met her burden of proving that her current residence is inadequate.

Petitioner has also not established that her current residence with her parents at the out-ofdistrict address is of a temporary or transitional nature. The petition only contains conclusory statements by petitioner that her current residence is temporary. To the contrary, the record shows that petitioner and her family have been living in her parents' residence for two years (seeAppeal of a Student with a Disability, 52 Ed Dept Rep, Decision No. 16,404). While petitioner makes conclusory statements that the arrangement is temporary until she has "the financial resources to obtain housing [and] furnishing" and that she "intend[s] to move back to Oyster Bay this year," there is no evidence of actual attempts to relocate to respondent's school district. The fact that petitioner asserts that her family intends to move back to the district at some point does not establish that her current residence is temporary or transitional within the meaning of Education Law §3209 (Appeal of a Student with a Disability, 52 Ed Dept Rep, Decision No. 16,404). In addition, there is no evidence that petitioner needs to vacate her current residence or that there is a time limit as to how long her family can reside there (Appeal of S.L., 56 Ed Dept Rep, Decision No. 17,104; Appeal of R.D., 56 id., Decision No. 16,945; Appeal of A.W., 53 id., Decision No. 16,559).

Accordingly, based on the record before me, I cannot find respondent's determination that the student is not homeless to be arbitrary or capricious.

Although the appeal must be dismissed for the reasons set forth above, I note that petitioner retains the right to reapply for admission to respondent's schools on her child's behalf at any time, should circumstances change, and to submit any documentary evidence for respondent's consideration.

***4** THE APPEAL IS DISMISSED.

Footnotes

1 Petitioner does not assert that her younger child is homeless pursuant to McKinney-Vento.

2 The petition indicates that petitioner and the student's father are separated and that he lives outside of the district in Flushing, NY.

3 According to petitioner, in January 2016, petitioner's younger child transferred to the public school district zoned for the out-of-district residence.

4 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.

5 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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