58 Ed Dept, Decision No. 17441 (NYCOMMED), 2018 WL 3472258

New York State Education Department

Decisions of the Commissioner

Appeal of G.D.V., on behalf of his daughter N., from action of the Board of Education of the Malverne Union Free School District regarding residency.

Decision No. 17,441
Decided: July 10, 2018

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

ELIA, Commissioner

Petitioner appeals the determination of the Board of Education of the Malverne Union Free School District ("respondent" or "respondent board") that his daughter ("the student") is not a district resident. The appeal must be dismissed.

The student has attended respondent's district since she was in kindergarten based on the assertion that she lived with petitioner in a house owned by petitioner's mother located within the district (the "in-district address"). According to respondent, concerns about petitioner's residency arose in October 2017, when the district received a report from an administrator who indicated that petitioner and the student "had not been living in the district 'for a few months.'" Thereafter, respondent commenced a residency investigation and retained an investigator to conduct surveillance.

According to the investigator's report, two vehicles were registered to petitioner at an out-of-district address. Surveillance was conducted on eight days in October 2017, at both the in-district and out-of-district addresses. One of the vehicles registered to petitioner was observed at the out-of-district address on several occasions. The student was not observed leaving the out-of-district address but was observed exiting the in-district address on one morning before school, entering a white SUV registered to the student's grandmother at the in-district address and subsequently arriving at school. The investigator also observed the student being dropped off at and picked up from school in the SUV registered to the student's grandmother. Petitioner was not observed at the in-district address on any occasion.

By letter dated October 20, 2017, respondent's assistant superintendent notified petitioner that the district had "become aware" that he no longer lived at the in-district address and that he lives outside the district. The letter further advised that the student would be excluded from attending school in the district effective October 27, 2017. Petitioner requested a residency meeting. On October 27, 2017, petitioner met with the assistant superintendent for district operations ("assistant superintendent") and the district registrar. According to an affidavit from the assistant superintendent, at the meeting, petitioner "admitted in words or substance that he does not live in the [d]istrict" and he "claimed that he intends to purchase a home in the [d]istrict in the near future" and that he "occasionally spends time at the [d]istrict address." At the conclusion of the meeting, the assistant superintendent and the district registrar advised petitioner of their determination that he and the student were not district residents. Petitioner appealed the determination to respondent board. By letter dated November 15, 2017, respondent board notified petitioner that it upheld the district's determination that he and the student were not district residents and notified petitioner that the student would be excluded from school, effective November 17, 2017.[1] This appeal ensued. Petitioner's request for interim relief was denied on January 22, 2018.

***2** Petitioner asserts that he is temporarily living at the out-of-district address while he searches for a home in the district and that the student lives at the in-district address with her grandmother on school days. He further asserts that he sleeps

at the in-district address "[four] times during the [s]chool days when other days, [he] [is] at work at night" and that his mother is "in the process to receive" residential law guardianship of the student.

Respondent argues that the appeal should be dismissed as untimely, and that if it is not dismissed as untimely, it should be dismissed because petitioner has failed to meet his burden of proof. Respondent asserts that its decision is rational, supported by the record, and in compliance with applicable laws and regulations and, therefore, not arbitrary, capricious or unreasonable.

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 Saxena, 57 Ed Dept Rep, Decision No. 17,239; Appeal of Lippolt, 48 id. 457, Decision No. 15,914). According to the affidavit of service in the record, petitioner served respondent with the petition on January 11, 2018, nearly two months after respondent's November 15, 2017 determination. Although delays in residency cases have been excused where, inter alia, the facts suggest residency in the district, the delay is de minimus, and requiring the student to re-apply at the district level before appealing to the Commissioner would not promote judicial economy (Appeal of Kowalewski, 56 Ed Dept Rep, Decision No. 17,013; Appeal of Manfredo, 56 id., Decision No. 16,943; Appeal of Jean-Louis, 49 id. 400, Decision No. 16,062), those factors are not present here. Moreover, I note that petitioner failed to submit a reply and, therefore, did not respond to respondent's affirmative defense that the appeal is untimely. Accordingly, I find the appeal is untimely, warranting dismissal.

Even if the appeal were not dismissed on procedural grounds, it would be dismissed on the merits. Education Law §3202(1) provides, in pertinent part:

> A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition.

The purpose of this statute is to limit the obligation of school districts to provide tuition-free education to students whose parents or legal guardians reside within the district (Appeal of Powell, 57 Ed Dept Rep, Decision No. 17,320; Appeal of Polynice, 48 id. 490, Decision No. 15,927). "Residence" for purposes of Education Law §3202 is established by one's physical presence as an inhabitant within the district and intent to reside in the district (Longwood Cent. School Dist. v. Springs Union Free School Dist., 1 NY3d 385; Appeal of Powell, 57 Ed Dept Rep, Decision No. 17,320). A child's residence is presumed to be that of his or her parents or legal guardians (Catlin v. Sobol, 155 AD2d 24, revd on other grounds, 77 NY2d 552 (1991); Appeal of Powell, 57 Ed Dept Rep, Decision No. 17,320).

***3** The presumption that a child resides with his or her parents or legal guardians can be rebutted upon a determination that there has been a total, and presumably permanent, transfer of custody and control to someone residing in the district (Appeal of Powell, 57 Ed Dept Rep, Decision No. 17,320; Appeal of Polynice, 48 id. 490, Decision No. 15,927). While it is not necessary to establish parental custody and control through a formal guardianship proceeding, it is necessary to demonstrate that a particular location is a child's permanent residence and that the individual exercising control has full authority and responsibility with respect to the child's support and custody (Appeal of Powell, 57 Ed Dept Rep, Decision No. 17,320; Appeal of Polynice, 48 id. 490, Decision No. 15,927).

A residency determination will not be set aside unless it is arbitrary and capricious (Appeal of Powell, 57 Ed Dept Rep, Decision No. 17,320; Appeal of White, 48 id. 295, Decision No. 15,863). In an appeal to the Commissioner, the 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 (Appeal of Powell, 57 Ed Dept Rep, Decision No. 17,320; Appeal of White, 48 id. 295, Decision No. 15,863).

Petitioner has failed to meet his burden of proof. In a letter attached to the petition, petitioner admits that he is living in an apartment outside of respondent's district. Petitioner asserts that he is staying there only temporarily, until he "can find a house to move back in [the district]." A residence is not lost until it is abandoned and another is established through action and intent (Appeal of K.S., 57 Ed Dept Rep, Decision No. 17,229; Appeal of Lin, 48 id. 166, Decision No. 15,827). A person's temporary absence from a school district of residence does not necessarily constitute either the establishment of a residence in the district where one is temporarily located, or the abandonment of one's permanent residence (Appeal of K.S., 57 Ed Dept Rep, Decision No. 17,229; Appeal of Lin, 48 id. 166, Decision No. 15,827). To determine one's intent as to whether a living arrangement is indeed temporary, the Commissioner must consider evidence regarding the family's continuing ties to the community and their efforts to return (Appeal of K.S., 57 Ed Dept Rep, Decision No. 17,229; Appeal of Lin, 48 id. 166, Decision No. 15,827; Appeal of Hussain, 46 id. 108, Decision No. 15,456). The record indicates that petitioner moved out of the in-district address in October 2016. A claimed intent to return to the district is insufficient to establish residency, absent evidence of substantial progress toward meeting that objective or, at the very least, a concrete and realistic plan for doing so (Appeal of Cabrera, 54 Ed Dept Rep, Decision No. 16,645; Appeal of Schmitt, 49 id. 271, Decision No. 16,022; Appeal of J.V., 44 id. 421, Decision No. 15,218). A school district cannot be expected to allow students to continue to attend its schools indefinitely based on an expressed intent to return to the district (Appeal of Cabrera, 54 Ed Dept Rep, Decision No. 16,645; Appeal of Schmitt, 49 id. 271, Decision No. 16,022; Appeal of Weisberg, 39 id. 737, Decision No. 14,365, judgment granted dismissing petition to review, Weisberg v. Mills, et al., Sup. Ct., Albany Co., Special Term [Malone, J.], November 27, 2000, n.o.r.). Other than his conclusory assertion, petitioner submits no evidence to establish that he and the student intend to return to the district.

***4** Further, petitioner has not rebutted the presumption that the student lives with him at the out-of-district address. Petitioner asserts that his mother "exercises control over [the student's] activities and behavior" and that she is "assisting [him] to help [the student] and provides food, shelter, and clothing." However, he also states that he "has not surrendered parental control over [the student] to [his mother] but has plans for RESIDENTIAL LAW GUARDIANSHIP." Further, petitioner admits that the student stays with him on weekends and returns to the in-district address on school days. Where the sole reason the child is residing with someone other than a parent or legal guardian is to take advantage of the schools of the district, the child has not established residence (Appeal of Begum, 55 Ed Dept Rep, Decision No. 16,799; Appeal of Cheng, 47 id. 366, Decision No. 15,726).

On this record, petitioner has failed to meet his burden of proving that his daughter is entitled to attend the schools of respondent's district tuition free.

In light of this disposition, I need not address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

Footnotes

1 The petition indicates that the student has "been attending another school since" November 20, 2017.