57 Ed Dept, Decision No. 17152 (NYCOMMED), 2017 WL 3913167

New York State Education Department

Decisions of the Commissioner

Appeal of C.M., on behalf of her grandson, from action of the Board of Education of the Manhasset Union Free School District regarding residency.

Decision No. 17,152
Decided: August 16, 2017

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

Elia, Commissioner

Petitioner challenges the determination of the Board of Education of the Manhasset Union Free School District ("respondent") that her grandson (the ""student") is not a district resident. The appeal must be dismissed.

Petitioner is the student's grandparent and was appointed his legal guardian by order of the Family Court dated June 26, 2013. The student was thereafter enrolled in the district's schools in September 2014. At that time, petitioner indicated that the student resided with her at an address located within the district's geographical boundaries (the "in-district address").

On January 11, 2017, the district received information that the student was not residing within the district. The district proceeded to conduct surveillance, which revealed that, on five mornings, the student was driven to school in the morning by one or both of his parents from an address located outside of the district's geographical boundaries (the "out-of-district address").

On February 27, 2017, the district's deputy superintendent for business and finance ("deputy superintendent") hand-delivered a letter to the students' parents at the out-of-district address. The letter indicated that the district had received information suggesting that the student did not reside within the district and invited the student's parents to present evidence of the student's residency.

On March 6, 2017, petitioner and the student's parents attended a meeting with the deputy superintendent and the district registrar to discuss the student's residency. The parents stated that petitioner had legal custody of the student but did not offer any evidence regarding the student's physical presence at petitioner's residence. After this meeting, petitioner and the student's parents requested a second residency meeting.

On March 21, 2017, petitioner, the student's parents, an attorney representing petitioner, the superintendent, the district registrar, the deputy superintendent and the district's counsel attended a second meeting to discuss the student's residency. At this meeting, petitioner and the student's parents admitted that the student resided with his parents, but claimed that this was only a "temporary" arrangement.

In a letter dated March 22, 2017, the superintendent informed the student's parents of his determination that the student did not reside within the district, and that his last day of school would be April 7, 2017. This appeal ensued. Petitioner's request for interim relief was granted on April 26, 2017.

Petitioner contends that she is the legal guardian of the student, and that he resides with her at the in-district address. Petitioner states that, due to her physical disabilities, the student's parents "have taken a more active role in ensuring that

[the student] consistently and timely" attends school, and that the student has "spent more time" at the out-of-district address than he did previously. Petitioner further argues that her statements were not afforded sufficient weight at the March 6, 2017 and March 21, 2017 residency meetings. Petitioner additionally states that she did not receive a copy of the superintendent's March 22, 2017 residency decision. Petitioner requests a finding that the student is a resident of the district entitled to attend its schools tuition-free.

***2** Respondent contends that the appeal must be dismissed as petitioner failed to personally serve a copy of the petition as required by State regulations. Respondent further argues that petitioner has not met her burden of proof to demonstrate that the student physically resides at the in-district address. Specifically, respondent argues that petitioner has adduced no evidence which refutes respondent's evidence of the student's physical presence outside of the district.

The appeal must be dismissed for lack of personal service. Section 275.8(a) of the Commissioner's regulations requires that the petition be personally served upon each named respondent. If a school district is named as a respondent, service upon the school district shall be made personally by delivering a copy of the petition to the district clerk, to any trustee or any member of the board of education, to the superintendent of schools, or to a person in the office of the superintendent who has been designated by the board of education to accept service (8 NYCRR §275.8[a]; Appeal of Peterson, 48 Ed Dept Rep 530, Decision No. 15,939; Appeal of Naab, 48 id. 339, Decision No. 15,877).

Here, the petition contains an affidavit of service which indicates that a process server served a "Notice of Petition" on the district clerk on April 19, 2017. In an affidavit, respondent's district clerk avers that, on April 19, 2017, a process server handed her a single page captioned "Notice of Petition." The district clerk asked the process server if the single page was "all," and the process server responded in the affirmative. The district clerk further avers that she has not been served with a copy of the petition in the instant matter. While a petitioner is required to serve a notice of petition in order to secure jurisdiction over the intended respondent (see e.g. Appeal of Reis and Argus, 51 Ed Dept Rep, Decision No. 16,335), a notice of petition cannot substitute for service of the petition itself (see Appeal of Mazura, 33 Ed Dept Rep 548, Decision No. 13,144). Consequently, because service of the petition is defective, jurisdiction over respondent is lacking and the appeal must be dismissed (Appeal of Khan, 51 Ed Dept Rep, Decision No. 16,287; Appeal of McCarthy, 50 id., Decision No. 16,208; Appeal of Villanueva, 49 id. 54, Decision No. 15,956; Appeal of Mazura, 33 id. 548, Decision No. 13,144).

Even if the appeal were not dismissed for lack of service, it would be dismissed on the merits. Education Law §3202(1) provides, in pertinent part, as follows:

> 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 Polynice, 48 Ed Dept Rep 490, Decision No. 15,927; Appeal of Naab, 48 id. 484, Decision No. 15,924). "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 Naab, 48 Ed Dept Rep 484, Decision No. 15,924). 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 Polynice, 48 Ed Dept Rep 490, Decision No. 15,927).

***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 Polynice, 48 Ed Dept Rep 490, Decision No. 15,927; Appeal of Wilson, 48 id. 1, Decision No. 15,773). 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 Polynice, 48 Ed Dept Rep 490, Decision No. 15,927; Appeal of Wilson, 48 id. 1, Decision No. 15,773).

A residency determination will not be set aside unless it is arbitrary and capricious (Appeal of White, 48 Ed Dept Rep 295, Decision No. 15,863; Appeal of a Student with a Disability, 48 id. 171, Decision No. 15,828). 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 White, 48 Ed Dept Rep 295, Decision No. 15,863; Appeal of a Student with a Disability, 48 id. 171, Decision No. 15,828).

As a preliminary matter, respondent admits that petitioner is, and was at all times relevant to this appeal, the legal guardian of the student. However, petitioner still bears the burden of proof in this appeal to show that the student physically resides within the district and intends to remain therein (see Family Court Act §657[a][3]; Appeals of G.G., 52 Ed Dept Rep, Decision No. 16,397, Gill v. Bd. of Educ., Williamsville CSD, et al.; Supreme Court, Erie County; Decision and Order dismissing the petition; dated August 15, 2013; Appeal of Perry, 49 id. 190, Decision No. 15,995). Put another way, evidence of non-parental legal guardianship rebuts the presumption that a student resides with his or her parents, but does not relieve a petitioner of his or her burden of proving that the student actually lives in the same household as the legal guardian.

Respondent's surveillance evidence, conducted over 10 days between January 17, 2017 and February 3, 2017, revealed that the student left the out-of-district address with one or both of his parents and was driven to school on five separate mornings. Petitioner does not adequately explain or refute this surveillance evidence. The record also demonstrates that, at the March 21, 2017 residency meeting, the attorney representing petitioner stated that there "has been some grey area" as to whether the student physically resided with petitioner and "asked what happens if [the] student now start[ed] living with petitioner." Respondent also relies on hearsay statements attributed to petitioner which suggest that the student did not physically reside with her, and petitioner did not submit a reply or otherwise respond to this evidence. In light of this unrefuted evidence, I find that petitioner has not met her burden of proving that the student resides within respondent's district. [1]

***4** On appeal, petitioner states that the student has "spent more time" at the out-of-district address as of late due to limitations caused by her "physical disabilities" and the fact that the student's parents obtained a place "of their own" in or about November 2016. Petitioner does not explain how or why these physical disabilities preclude her from caring for the student. Although petitioner submitted a cover sheet for a decision issued by an administrative law judge with the Social Security Administration ("SSA") in support of her position, this document contains no evidence as to the nature of petitioner's claim submitted to the SSA. The record is otherwise silent as to petitioner's physical or medical condition. Therefore, petitioner's conclusory statement fails to establish that the student was temporarily located outside of the district based upon a medical need (cf. Appeal of Mirza, 57 Ed Dept Rep, Decision No. 17,128).

Moreover, the deputy superintendent avers that, at the March 21, 2017 residency meeting, petitioner stated that she had been "legally disabled for at least three years," which would mean that petitioner became legally disabled shortly after she assumed custody of the student. I find this statement relevant to the extent that it contradicts petitioner's suggestion in her petition that she was first deemed legally disabled in connection with the SSA administrative law judge's decision dated August 24, 2016. On this record, petitioner has not provided an adequate explanation for respondent's surveillance evidence or otherwise proven that the student actually lives with her. Therefore, the appeal must be dismissed.

Petitioner additionally poses two challenges to the process by which the district determined the student's residency. First, petitioner argues that her statements were not afforded sufficient weight during the district's residency investigation. The record reflects that petitioner attended two meetings to discuss the student's residency on March 6, 2017 and March 21, 2017. There is no evidence that petitioner was denied an opportunity to participate or to offer evidence as to the student's

residency at either of these meetings. Therefore, I find that respondent sufficiently afforded petitioner an opportunity to submit information concerning the child's right to attend school in the district (8 NYCRR §100.2[y][6]).

Petitioner also argues that the district did not send her a copy of the superintendent's March 22, 2017 residency determination. In response, the deputy superintendent avers in an affidavit that she sent this letter to petitioner, as well as the student's parents, via mail and e-mail. Petitioner did not respond to this contention in a reply. Therefore, on this record, petitioner has not demonstrated that the district failed to send her a copy of the March 22, 2017 letter. [2]

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 her grandson at any time, should circumstances change, and to submit any documentary evidence for respondent's consideration.

***5** THE APPEAL IS DISMISSED.

Footnotes

1 Respondent has also submitted posts from a social media account maintained by one of the student's parents, arguing that this evidence further supports its determination that the student does not physically reside with petitioner at the in-district address. The posts contain photographs and messages authored by the student's parent. It is not evident when the posts were uploaded to the parent's social media account, or from what location. Therefore, absent proof of the dates of the postings or where the photographs were taken, I do not find this evidence persuasive as to the student's residency.

2 Additionally, I note that petitioner does not argue that she did not eventually receive, or become aware of the contents of, the March 22, 2017 letter.