

Y.I.S., ON BEHALF OF E.S.,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE	:	
NORTHERN VALLEY REGIONAL	:	
HIGH SCHOOL DISTRICT, BERGEN	:	DECISION
COUNTY,	:	
	:	
RESPONDENT.	:	
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SYNOPSIS

Petitioner challenged the Board’s determination that his son, who resided with his grandparents in the District, was ineligible to receive a free education.

The ALJ determined that petitioner had demonstrated that his son was entitled to attend school in the Board’s District as an “affidavit student” pursuant to *N.J.S.A.* 18A:38-1b(1).

Initially, the Commissioner held that, although the resident of the District where the pupil resided, not petitioner, was the person entitled to file a petition contesting the Board’s determination in this matter, fundamental fairness compelled a determination allowing petitioner to prosecute this appeal. The Commissioner affirmed the decision of the ALJ, finding that the limited support petitioner provided his son was consistent with that permitted by decisional law and newly adopted regulations.

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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The Board’s exceptions and petitioner’s reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

In its exceptions, the Board argues that, contrary to the Administrative Law Judge’s (ALJ) findings, E.S. was not entitled to a free education in its District as an “affidavit student,” pursuant to *N.J.S.A.* 18A:38-1(b). This is so, the Board reasons, because petitioner, in his motion and supporting certifications, failed to demonstrate either family or economic hardship. (Board’s Exceptions at 5) To the contrary, the Board contends that petitioner’s undisputed income was approximately \$55,500 in 1996 and, therefore, the ALJ’s finding of financial hardship is unsupported by the facts on record. (*Id.* at 9) Moreover, the Board asserts that although comfort and familiarity may have been the reason E.S. moved in with his grandparents in 1993,

[c]omfort and familiarity do not explain why petitioner's son was unable to reside with petitioner in 1997. In fact, petitioner claims that his "hectic" work schedule and his wife's incompatibility with his son prevented his son from residing with him in 1997. (citation omitted) The argument that comfort and familiarity created a family hardship are [sic] disingenuous. The ALJ's findings in this regard are unsupported by the record. The ALJ's findings in this regard are particularly troublesome in that she did not conduct a hearing, did not listen to witnesses, and did not receive affidavits from the petitioner's son, so it is difficult to understand the basis for these findings. (*Id.* at 10)

The Board further contends that petitioner has failed to satisfy his burden of proof since he "contributed significantly" to his son's upkeep, notwithstanding that his son was residing with petitioner's parents. (*Id.* at 11) Specifically, petitioner provided his son with an allowance of \$1,560 per year and maintained a medical insurance policy at the cost of \$509 per month. (*Ibid.*) The Board also questions how petitioner's parents supported themselves and E.S. on their income "without additional support from some other source." (*Id.* at 12)

In reply, petitioner underscores that there is no evidence on record that his son's move into his grandparents' home was motivated by bad faith. Rather, petitioner asserts, all credible evidence demonstrates that there was no other suitable alternative. (Petitioner's Reply at 7) Additionally, petitioner argues that the fact that he earned \$55,000 in 1996 is of no consequence, because it is undisputed that he could not adequately raise his son where his working schedule required his traveling "much of the time." (*Ibid.*) Rather than "hire a full time nanny at substantial cost that he could not afford to pay," petitioner opted to have E.S. move in with his parents. (*Id.* at 8) Petitioner suggests, "Perhaps the strongest evidence that there was no bad faith is that [E.] continues to live with his grandparents notwithstanding the fact that he no longer attends school. In fact, he has resided with them for approximately nine years." (*Ibid.*)

With respect to the allowance given to his son, petitioner finds this contribution to be irrelevant. (*Ibid.*) Indeed, petitioner asserts, “[I]t has been held that the law is not intended to dissuade parents who were otherwise unable to care for their children, from maintaining contact with them.\*\*\*” (*Id.* at 8-9) Moreover, petitioner notes that he has not provided health insurance for E.S. since 1998. (*Id.* at 9) Furthermore, as the affidavits of E.S.’s grandparents readily show, their income has fluctuated between \$40,000 and \$50,000 for the last five years, which is “more than sufficient” to sustain the monthly expenses of their home. (*Ibid.*)

Upon careful and independent review of the record in this matter, the Commissioner initially notes that under currently applicable standards, the father of E.S. is not permitted to appeal the Board’s decision where E.S. was admitted to school pursuant to *N.J.S.A.* 18A:38-1b(1), the “affidavit” student provision. Rather, as that statute provides, it is the *resident* of the district, the non-parent with whom the child is living, who is specifically authorized to bring such an appeal. Notwithstanding this technical defect, inasmuch as the within petition was filed over four years ago (November 10, 1997), its filing predates the promulgation of the regulation that specifically addresses this statutory filing restriction (*N.J.A.C.* 6A:3-8.1(b), effective April 3, 2000).<sup>1</sup> (*See, also, H.K. and G.K., on behalf of minor children, J.K. and C.K. v. Board of Education of the Township of Cherry Hill, Camden County, Commissioner Decision August 28, 1998, wherein the Commissioner found that the pertinent statute should not be read to confer upon parents and legal guardians the standing to appeal a board’s decision to remove a child from the district where that child was already admitted to the district as an affidavit student under N.J.S.A. 18A:38-1(b)1.*) Therefore, fundamental fairness dictates that petitioner not be

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<sup>1</sup> That regulation states, “Where an appeal is taken from a determination of ineligibility under N.J.S.A. 18A:38-1(b)1 (‘affidavit’ students), such appeal shall be filed by the resident making the claim of entitlement and shall not be filed by the parent or legal guardian.”

denied the opportunity to prosecute his appeal at this late stage of the proceedings, particularly where the Board failed to raise any objection to the same on the record.

Further, the Commissioner finds that the Board neither challenges nor contradicts the facts offered by the ALJ in the Initial Decision, notwithstanding that it objects to the *legal conclusions* drawn from those facts. (Board's Exceptions at 3-4) However, "disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment." *Contini v. Board of Education of Newark*, 96 N.J.A.R. 2d (EDU) 196, 215, *citing Lima & Sons, Inc. v. Borough of Ramsey*, 269 N.J. Super. 469, 478 (App. Div. 1994).<sup>2</sup>

The Commissioner concurs that petitioner has demonstrated that E.S. was entitled to attend school in the Board's District, free of charge, pursuant to *N.J.S.A.* 18A:38-1b(1). In so concluding, the Commissioner finds that the ALJ's analysis with respect to the limited support offered by petitioner to his son is consistent with both decisional law and newly adopted rules by the State Board of Education addressing this issue. *See N.J.A.C.* 6A:28-2.4(a)2.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.<sup>3</sup>

#### COMMISSIONER OF EDUCATION

Date of Decision: 1/28/02

Date of Mailing: 1/29/02

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<sup>2</sup> Notably, it is the Board that moved for summary decision in this matter, arguing that there were no outstanding factual issues to be decided in this matter. (Board's Motion for Summary Decision at 4)

<sup>3</sup> This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.