OAL DKT. NO. EDU 11252-03
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AGENCY DKT. NO. 345-9/03

B.M.A., on behalf of minor child, C.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioner's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.

The Board's exceptions dispute the Administrative Law Judge's (ALJ) conclusion that petitioner has demonstrated that C.H.'s mother, B.H., is unable to care for C.H. due to family hardship. (Initial Decision at 6) In this connection, the Board first asserts that the underlying facts on this record do not support the conclusion that B.H. is *currently incapable* of supporting or providing care for her C.H., notwithstanding that she has "experienced scheduling inconveniences and difficulties in the past ***." (Board's Exceptions at 4) The Board additionally charges that the ALJ's analysis of B.H.'s scheduling conflicts fails to consider the fact that M.H., her older daughter, has now graduated from high school, and, therefore, B.H.'s current morning routine is no longer burdened by the need to drive M.H. to the bus stop before B.H. goes to work and may, indeed, be alleviated by the possibility that M.H. could watch C.H. and help her get ready for school in the mornings after B.H. leaves for work. (*Id.* at 5-6)

Next, the Board argues that the fact that B.H. has two other children in her Fort Lee home does not support the ALJ's finding of a family hardship or B.H.'s current inability to support or care for C.H. With respect to her son, although B.H.'s certification demonstrates that he has special needs which require extra attention and commitment, the Board avers that "this information in no way supports the conclusion that because of her efforts directed toward her son, she is therefore incapable of caring for C.H." (*Id.* at 8-9) As for M.H., the Board contends that the ALJ improperly relied upon B.H.'s characterization of her daughter as angry, defiant and belligerent since her separation from her husband, while ignoring the fact that the separation occurred approximately two years ago, yet M.H. has excelled academically, making honor roll every year in high school. (Board's Exceptions at 10) Furthermore, as to the "ugly divorce proceedings" which the ALJ finds to have resulted in "a hostile home environment," the Board argues that the record offers "no such assertions" and, indeed, "it strains credulity for the ALJ to have reached such a conclusion since the mother's seven year old son has lived in the Fort Lee home for his entire life, and the record makes no indication whatsoever that his welfare has at any point been threatened." (*Id.* at 18-19)

The Board also contends that the fact that B.H. experienced additional strains during the 2002-2003 school year does not support the ALJ's findings of a family hardship and *current* inability to support or care for C.H. The Board reasons that facts relating to B.H.'s emotional difficulties in the past cannot be used to draw conclusions about her current emotional state. Moreover, the Board notes that because M.H. has graduated from her private high school, her mother no longer has to make the $8,300 tuition payment. (*Id.* at 13)

Finally, the Board argues that the ALJ's conclusion that B.H. is incapable of caring for C.H. is inconsistent with case law and, essentially, rewrites the affidavit student statute to establish a dangerous precedent for a new standard of "inconvenience." (*Id.* at 19) The

proper legal standard, the Board attests, is one where a hardship determination is based upon unique and compelling circumstances rendering parents presently incapable of taking care of their children. (*Id.* at 20-21) The "scheduling conflicts" that otherwise allow B.H. to care for her daughter on weekends and during the summer, do not, the Board maintains, satisfy the family hardship standard required by law. (*Id.* at 23)

In reply, petitioner asserts that the ALJ applied the appropriate standard for determining whether a family or economic hardship exists under the pertinent statute. That is, the ALJ applied the standard endorsed by the Appellate Division in *P.B.K. on behalf of minor child E.Y. v. Board of Education of Tenafly*, 343 *N.J. Super.* 419 (App. Div. 2001), wherein the Court considered the purpose of the amendments to the residency statute, as discussed in *Gunderson v. City of Brigantine Bd. of Education*, 95 *N.J.A.R.* 2d (EDU) 39. "Clearly," petitioner asserts,

> the Appellate Division did not adopt the stringent standard [of incapability] advanced by the Board here, but interpreted the statute based on its purpose of protecting school districts from having to support students who either claim to be domiciled within a district and are not or have moved to a district solely for the purpose of attending school in that district. ***
>
> (Petitioner's Reply at 3)

Further, petitioner contends that the standard advanced by the Board would be contrary to sound public policy in that education laws should not "encourage or discourage particular living arrangements which may serve the interests of families and children." (*Id.* at 4) In this connection, petitioner also argues:

> To deny C.H. a free public education *** in this case where there is no question that she legitimately lives with her grandmother because of family and economic hardship, and not simply to attend the Englewood Cliffs public schools, would not be based on a bona fide residency requirement. In fact, such a requirement would surely run afoul of C.H.'s fundamental constitutional right to

> liberty, privacy and autonomy in matters related to the rearing of children. *** (*Id.* at 5-6) (citation omitted)

Finally, petitioner challenges the Board's argument regarding the relevance of the facts contained in B.H.'s certification, asserting that hardships are not neatly separated into categories, as the Board would urge, but, rather "must be considered as they would cumulatively impact the family ***." (*Id.* at 6.) Moreover, petitioner underscores that the petition in this matter challenged the Board's determination issued for the 2003-2004 school year and, therefore, the ALJ appropriately relied on facts relating to that year. To the extent the Board contends that facts are out of date, as with mother's past financial problems and nervous breakdown, petitioner argues that some problems are not easily resolved and may have lingering effects which would render them relevant to the within family's circumstances today. (*Id.* at 9)

Upon careful and independent review of the record, the Commissioner initially notes the Appellate Division's language in *P.B.K., supra*, with respect to the appropriate standard for review of "affidavit student" cases:

> The State Board correctly noted that the issue is to be determined by *N.J.S.A.* 18A:38-1(b)1, which requires a showing by the child's parent or guardian **that he or she is incapable of caring for the child due to "family or economic hardship"** and that the child is not residing in the district solely for purposes of receiving a free public education in the district.*** *P.B.K., supra* at 428. (citation omitted) (emphasis added) *Accord*, *J.B., on behalf of her grandchild, R.H. v. Board of Education of the Township of Ocean, Monmouth County*, State Board decision, September 3, 1997.

Thus, the Commissioner determines that a finding of "incapability" remains a condition of the statute and its interpreting case law.[1]

[1] The Commissioner notes that in applying the above standard, he carefully considers all relevant facts on a case-by-case basis, irrespective of whether such a review may be perceived as "measuring degrees of misery in domicile disputes." (*See*, Initial Decision at 9.)

Here, C.H. has undisputedly lived with petitioner, virtually since her birth, as "a matter of necessity" rather than to affect her eligibility for school attendance (Initial Decision at 10). Since that time, petitioner has undisputedly cared for C.H. gratis "as if she were her own." (*Id.* at 4) Notably, the Board does not challenge the fundamental declarations made by petitioner and B.H. in their respective certifications which evidence, in effect, a "single" mother who "is unable to juggle the conflicting responsibilities of caring for [C.H.] together with her two other children and earning her livelihood," (*id.* at 10), notwithstanding that the Board no doubt disagrees with the *conclusions to be drawn* from those factual attestations. Having so found, the Commissioner is satisfied, under the particular circumstances in this matter, that petitioner has demonstrated B.H. is incapable of caring for C.H. due to family or economic hardship.

Accordingly, for the reasons set forth herein, the Commissioner concurs with the ALJ that petitioner has demonstrated C.H.'s entitlement to attend school in the Board's district, free of charge, pursuant to *N.J.S.A.* 18A:38-1b(1).[2] The Board is hereby ordered to continue to admit C.H. into its public school system so long as there is no change in circumstances that would alter her entitlement.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: August 12, 2004

Date of Mailing: August 12, 2004

[2] For the record, it is noted that this matter was transmitted to the OAL on November 3, 2003 and stamped as received by that agency on November 19, 2003, rather than on January 6, 2004, as indicated in the Initial Decision at page three.

[3] This decision 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.*