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THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

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*1) Some decision
on Kevin Seaman
acc to co!*

August 23, 2017

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Re: Appeal No. 20568 / Decision No. 17161

Dear Sir/Madam:

Enclosed is a copy of the decision of the Commissioner of Education in the above-referenced appeal.

In a case where the decision must be filed with the school district clerk, a duplicate original is being provided to the district's counsel for that purpose.

Sincerely,

Tina Urbaitis
Tina Urbaitis
Appeals Coordinator

Enclosure



No.17161

The University of the State of New York

The State Education Department

Before the Commissioner

Appeal of D.S., on behalf of her daughter S.S., from action of the Board of Education of the Rocky Point Union Free School District regarding residency.

Ray, Mitev & Associates, attorneys for petitioner, John Ray, Esq., of counsel

Kevin A. Seaman, Esq., attorney for respondent

Petitioner appeals the determination of the Board of Education of the Rocky Point Union Free School District ("respondent") that her daughter, S.S. (the "student"), is not homeless within the meaning of the McKinney-Vento Homeless Assistance Act (42 USC §11431, et seq., "McKinney-Vento") or a district resident and, therefore, is not entitled to attend the district's schools or receive transportation. The appeal must be sustained.

In August 2016, petitioner relocated from an address within the geographical confines of respondent's district into the home of her boyfriend at an address outside of the district ("out-of-district address"). On August 31, 2016, petitioner "withdrew" her other child, the student's sister, from the district and stated that the child was going to attend the school district of the out-of-district address. Petitioner did not withdraw the student. While the record is not entirely clear, it appears that at that time, the student was living with her father within the geographical confines of respondent's district.

By letter dated September 22, 2016, respondent's executive director for educational services ("director") notified petitioner that she contacted the student's father to confirm that the student was living with him and was

informed by the student's father that the student "was not permitted to stay with him as per Child Protective Services ["CPS"]."¹ The letter advised that the student was not a legal resident of the district, was not entitled to attend its schools on a tuition-free basis and therefore, would be excluded from attending school after September 30, 2016. The letter also notified petitioner of her right to seek review of the decision by respondent or its designee.

By letter dated September 30, 2016, petitioner wrote to the superintendent and requested that the student be "considered to remain a student [of the district] for free...." She stated that the student was living with a "close family friend" ("Ms. T.") within the district. Petitioner also requested that if the student was unable to continue her attendance in the district for free, that respondent consider admitting her as a tuition-paying student.

By letter dated October 28, 2016, the director notified petitioner that her request was denied and that the student would be excluded from the district effective October 31, 2016. Thereafter, petitioner's boyfriend retained counsel "to pursue [the student's] interests." An affidavit submitted by respondent's homeless liaison and social worker ("liaison") states that she was informed by the attorney for respondent that petitioner, by and through her attorney, was commencing a federal court action against the district alleging that the student "should be considered homeless."² The liaison held a meeting with petitioner and the student on November 9, 2016, and reviewed "the entire history of the child's education within the [d]istrict; her living arrangements; etc." By letter dated November 10, 2016, the superintendent notified petitioner that the student is not homeless as defined by federal or State law because she is "not sharing the housing of other persons due to loss of housing, economic hardship or a similar reason" and because she "does not

¹ The parties do not dispute that sometime between August and September 2016, an incident occurred which resulted in CPS filing a neglect petition and an Order of Protection against the student's father. Therefore, the student was no longer able to live with her father at his in-district address.

² Respondent's attorney asserts that no such federal court action has been commenced.

lack a fixed adequate and regular nighttime residence." This appeal ensued.³

Petitioner contends that the student is homeless because she is "sharing the housing of other persons due to loss of housing, economic hardship or a similar reason" and therefore, should be allowed to continue attending school in respondent's district with transportation. Petitioner states that she and the student have a "long standing exceedingly volatile, hostile, aggressive, alienated, dangerous relationship," therefore, they are unable to live together or "be in close proximity" to one another. Petitioner argues that if the student is not found to be homeless, that the student meets the general conditions listed under "the [c]riteria for [a]dmission under [s]pecial [c]ircumstances" in respondent's policy on school admissions and residency ("Policy No. 7130"). Petitioner further argues that, not only is the student an emancipated minor pursuant to Policy No. 7130, but also "as that term is defined via New York law and cases...."

Respondent argues that the student has a fixed, regular and adequate nighttime residence and that the "personal difficulties" described by petitioner do not constitute a basis for homelessness. Respondent also argues that the student is not sharing a residence "as a result of the physical loss of her home or as the result of an economic hardship...." Respondent asserts that the student "prefers to be educated as a matter of school selection within [the district]...."

Respondent also argues that it has "respected and implemented all terms of its Policy No. 7130 ..." and that the student has not established that she is an emancipated minor. Finally, respondent argues that it was not arbitrary and capricious in its determinations.

I will first address a procedural matter. The purpose of a reply is to respond to new material or affirmative defenses set forth in an answer (8 NYCRR §§275.3 and 275.14). A reply is not meant to buttress allegations in

³ Effective October 1, 2016, §11432(g)(3)(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.

the petition or to belatedly add assertions that should have been in the petition (Appeal of Caswell, 48 Ed Dept Rep 472, Decision No. 15,920; Appeal of Hinson, 48 id. 437, Decision No. 15,908; Appeal of Baez, 48 id. 418, Decision No. 15,901). Therefore, while I have reviewed the reply, I have not considered those portions containing new allegations or exhibits that are not responsive to new material or affirmative defenses set forth in the answer.

Turning to the merits, 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 placement⁴;
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

⁴ 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.

- (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....

"Unaccompanied youth" was defined in 8 NYCRR §100.2(x)(1)(vi), at the time this appeal was brought, as a homeless child or youth not in the physical custody of a parent or legal guardian.⁵ Under this definition, the youth must be homeless, as well as not in the physical custody of a parent or guardian.

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 established that the student meets the definition of a homeless unaccompanied youth under either State or federal law.

The record indicates that the student is not in the physical custody of a parent or legal guardian. Petitioner submits an affidavit in which she states that she and the student's father are estranged and that the student is not able to live with him because he "was indicated for child neglect by CPS in February 2016, and was determined by Suffolk County Family Court to have neglected [the student]," which issued an Order of Protection against him. Further, petitioner's affidavit indicates that she moved in

⁵ Section 100.2(x) was amended effective July 1, 2017, and the definition of an unaccompanied youth now appears in 8 NYCRR §100.2(x)(1)(iii)(6). The term continues to be defined to include a homeless child or youth not in the physical custody of a parent or guardian.

with her boyfriend to the out-of-district address, that her boyfriend owns the house and that he "adamantly refuses to allow [the student] to live there." This is confirmed by an affidavit from petitioner's boyfriend in which he states that he "would not allow" the student to live in his home, and suggests that violence would be imminent if the student resided with her mother. Petitioner's affidavit characterizes the relationship between petitioner and the student as "intolerable" and indicates that they "persistently end up in confrontations, angry exchanges and the threat of violence." The record also includes an affidavit from the student stating that she is not allowed to live with her father because an Order of Protection prohibits any contact with him except for five hours of visitation per week. She also states that she "cannot and will not ever live with" petitioner. She characterizes their relationship as dangerous, bitter and hostile and states that if they are in each other's presence, it results in violence.

Petitioner's affidavit and that of her boyfriend clearly state that the student is not allowed to live with her mother at the boyfriend's residence. Residing with her father is not possible because of the Order of Protection from Family Court. Therefore, I find that the student is not in the physical custody of her parents.

The record as a whole indicates that the student does not have a fixed, regular night-time residence. The petition describes the student's living situation as "a temporary bed in the home of [a] friend." An affidavit from the student indicates that she was "abandoned" by her parents and "found a temporary bed in the home of [her] friend...." In response to the district's answer, which asserts that the student resides "each night within the T. household," petitioner submits a reply affidavit from the student in which she states:

Many nights I have not slept in the T. household. I do not ever "reside" there. I occasionally sleep in a bed there, temporarily, because I've nowhere to sleep, next to my friend. This is not fixed, nor adequate, nor regular, nor a residence. It is not my home. It is not my residence.

Temporarily, randomly sleeping there is not residing there.⁶

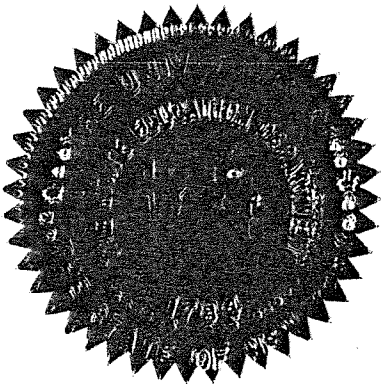
Under these circumstances, it is apparent that the student's current housing is temporary and transitional housing and, therefore, she cannot be said to have a fixed, regular, and adequate night-time residence. Accordingly, the student is a homeless unaccompanied youth. It appears from the record that the student was attending the schools of respondent's school district when circumstances arose which caused the student to become homeless, which means that the student is entitled to attend respondent's school district as the "school district of origin" as defined in Education Law §3209(1)(c).⁷

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that respondent allow the student to attend school in the Rocky Point Union Free School District as a homeless student in accordance with this decision without the payment of tuition and provide transportation to the student.

IN WITNESS WHEREOF, I, MaryEllen Elia, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 22nd day of August 2017.



MaryEllen Elia

Commissioner of Education

⁶ I note that respondent did not object to the reply affidavit.

⁷ If the district were not the school district of origin, it would be the "school district of current location" as defined in Education Law §3209.