Fact Sheet: When Kinship Children are Denied School Enrollment: Appealing the School Board's Decision

Requirements to Enroll

This fact sheet discusses appeals of school board decision denying school enrollment in public schools for children who are in the care of their kin, i.e., not their parents. In general, kinship children are eligible for a free public-school education. However, it is necessary to understand the relevant rules regarding enrollment. The NYS Kinship Navigator web pages on education provide information on who may enroll children in public schools for a tuition free education, what are the required circumstances that qualify for free tuition, what are documents needed, and what are the procedures.

In sum, the fact sheets inform that kinship caregivers do not need an order of legal custody or guardianship but must prove that a child lives with the caregiver, that the caregiver has assumed care and control of the child, and that there is an intention that the child will remain in the caregiver's home.

New York State has statewide rules for enrollment that all local school districts must follow. The NYS Department of Education (DED) provides a concise outline of enrollment requirements in its two-page pamphlet, DED Enrollment. The pamphlet is also available, In Spanish.

Each school district is required to provide information on enrollment to all parents and persons in parental relation or children (i.e., kinship caregivers) and to post such information at the District web sites. Information should be available on the local school enrollment procedures, how to appeal a denial of enrollment, and other related subjects.

Unfortunately, the quality of websites varies greatly, with some providing very useful information and others presenting the bare minimum or misleading or out of date information. It may be helpful to look not just at your local school board web site, but others that may be more informative. A good example is the New York City's web page on enrollments and appeals, at NYC Enrollment and at NYC Complaints/Appeals.

Caregivers should be aware that while school websites must provide information on enrollment, some may not accurately describe the requirements for enrollment. For instance, some appear to suggest that only legal guardians or legal custodians may seek to enroll. That is not the current law.

Please visit the Kinship Navigator education fact sheets for more information about how to enroll.

Appealing the Denial of School Enrollment

When a caregiver enrolls a child in a public school, the school district, i.e., the school board, or its designee must permit the child to attend school starting the next day, and then make a residency determination after reviewing the documentation submitted. The board or its designee must make its determination no later than the fourth business day after initial enrollment. If at the time of the enrollment request the child is determined not to be a resident of the district, the district need not enroll the child (8 NYCRR § 100.2(y)(3)). The denial means the child will not attend the school.

Recourse for a denial is to petition the Department of Education Commissioner via a formal petition process. The Petition may include a request for a "stay" that, if granted, will permit the child's attendance at school until the Commissioner's final decision.

Petition-Appeal of Local District's Denial of Enrollment

The DED's website provides excellent information about the appeal process, entitled "Instructions and Sample Forms for Filing an Appeal for Petitioners not Represented by an Attorney," DED Appeals. This Kinship Navigator fact sheet summarizes some of the most important facts provided by DED and strongly suggests that readers visit the DED website.

Appeals of DED decision are a valuable resource to understand how to make a successful appeal. Reading decisions, which usually deny appeals, are useful to understand how to draft a successful appeal. While the decisions are not indexed by subject, there is a search feature, Search DED Decisions. We have presented some typical decisions in an appendix to this fact sheet.

Appeals of local school district decisions clearly demand focus and effort to document the legally necessary facts that can defeat the district's denial and to follow the required legal procedures for the petition. While the work is demanding, it can be done!

Key Elements of Petitioning

- Appeals must be initiated within 30 days of the decision. If filed later, the appeal must include facts showing good cause for the late filing.

Who are the parties?

- The petition is the person in parental relations to the child, i.e., the parent or kinship caregiver.

- The respondent is the local Board of Education (school district).

The Petition Contains?

- The first page is the "Notice of Petition," Form 6.
- The Petition must be signed by the petitioner and "verified." Verification required notarization.
- A "caption" must be at the top of each page. A caption is formatted text that names the parties, etc. See Form 6 example
- All additional documents are exhibits and must be labelled A, B, C, etc.
- The petition must be typewritten, double spaced, and on white paper.
- The "claims" are what you assert are the facts. Claims are numbered paragraphs. Include what the school district decided, why the facts supporting why the decision was wrong.
- End the Petition with a 'demand" for relief, which is what you want the Commissioner to do.
- You can also request an opportunity for an "oral" argument before the Commissioner's representative.

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Request a "Stay"

The local school district's decision is effective immediately. But you can request a "stay." The stay request must state the facts and legal reasons why you believe a stay should be granted.

The "stay' request is included in the petition and must add a notice to the respondent, using specific language: "Please take further notice that the within petition contains an application for a stay order. Affidavits in opposition to the application for a stay must be served on all other parties and filed with the Office of Counsel within three (3) business days after service of the petition."

Serving the Petition on the Respondent School Board

The entire Petition, including any exhibits, must be served in person. Only certain representatives of the school district can be served, including, and limited to only the district clerk, a board member or trustee, or the superintendent or designated staff person in the superintendent's office.

The services must be verified, Form 2.

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All subsequent papers may be served by mail or personally upon the respondent's attorney.

After Services, File Original Petition with DED Commissioner
Within five days of serving the Petitioner, the originals must be sent to the Office of Counsel, Education Building, Room 148 EB, Albany, New York 12234.

Also, send a check for $20 which is the filing fee, payable to State Education Department.

Respondent's Answer
After service, the respondent has 20 days to "answer" by mail. But if a stay was requested, the respondent must provide an "affidavit in opposition" within 3 days of receipt of service.

Reply to the Answer
The Petitioner may reply, within 10 days of the answer.

Verification of serving the reply is required, see Form 2.

DED Checklist
The DED web site provide a check list for the Petition and the Petition procedure at the end of the instructions. The checklist should be reviewed as part of preparing a Petition, DED Appeals.

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Instructions and Sample Forms for Filing an Appeal for Petitioners not Represented by an Attorney | Office of Counsel (nysed.gov)

Updated August 2021. The above information is not legal advice. It is not a substitute for consulting an attorney. Up-to-date legal advice and legal information can only be obtained by consulting with an attorney. Any opinions, legal opinions, findings, conclusions or recommendations expressed in this publication or on the NYS Kinship Navigator website or by any person or entity to whom you may be referred are those of the Kinship Navigator, Catholic Family Center and/or the person or entity you are referred to and do not necessarily represent the official views, opinions, legal opinions or policy of the State of New York and/or the New York State Office of Children and Family Services (OCFS). NYS Kinship Navigator is a Catholic Family Center program, funded by the New York State Office of Children and Family Services. Catholic Family Center is the only agency authorized by New York State to provide a statewide information and referral service to kinship caregivers. The information herein is published by the NYS Kinship Navigator.

Appendix
Department of Education – Sample Enrollment Decisions

A. Transfer Must Be Complete

Decision No. 13,662

Appeal of SHIRLEY ANN WEST and WALTER GARY WEST, on behalf of SHIRLEY ANN KOELLE, from action of the Board of Education of the Oxford Academy and Central School District regarding residency.

Decision No. 13,662

(August 26, 1996)

Hogan & Sarzynski, LLP, John P. Lynch, Esq., of counsel

MILLS, Commissioner.--Petitioners appeal the determination of the Board of Education of the Oxford Academy and Central School District ("respondent") that their granddaughter is not a resident of the district. The appeal must be dismissed.

Petitioners are residents of respondent's district and the maternal grandparents of Shirley Ann Koelle. Petitioners state that Shirley moved in with them on or about March 31, 1996. Prior to that date, she resided with her parents in East Haven, Connecticut. Petitioners stated that the reasons for the move were the death of her paternal grandparents and the alleged high crime and illegal drug traffic in the city and schools of the area. On April 2, 1996, petitioners made a request for Shirley's admission to respondent's district. Respondent denied the student's admission by telephone on April 9, 1996 and by letter dated April 12, 1996. This appeal ensued.

Petitioners seek their granddaughter's admission to respondent's school. Respondent contends that Shirley is attempting to enroll in its school solely to take advantage of the district's educational program. It seeks dismissal of the petition.

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 and related services to students whose parents or legal guardians reside within the district (Appeal of Curtin, 27 Ed Dept Rep 446; Matter of Buglione, 14 id. 220).

A child's residence is presumed to be that of his or her parents or legal guardians (Appeal of Gwendolyn B., 32 Ed Dept Rep 151; Appeal of Pinto, 30 id. 374). To determine whether the presumption has been rebutted, certain factors are relevant, including a determination that there has been a total, and presumably permanent, transfer of custody and control to someone residing within the district (Appeal of Garretson, 31 Ed Dept Rep 542; Matter of Van-Curren and Knop, 18 id. 523). However, when the sole reason the child is residing with someone other than the parent is to take advantage of the schools of the district, the child has not established residence (Appeal of Brutcher, 33 Ed Dept Rep 56; Appeal of Ritter, 31 id. 24; Appeal of Pinto, 30 id. 374; Appeal of McMullan, 29 id. 310).

The record in this case indicates that the sole reason Shirley moved in with petitioners was to attend school in respondent's district. Furthermore, respondent argues that there has not been a total transfer of custody and control to the grandparents since Shirley's parents claim her as a dependent on their federal income tax returns for 1995 and Shirley is still covered under her father's health insurance. Although petitioners argue that they are attempting to add Shirley to their health insurance coverage and provide her with shelter, food and clothing, the record does not support a finding that a total transfer of custody and control to petitioners has occurred. Therefore, I find no basis to overturn respondent's determination that Shirley does not reside in the district.

THE APPEAL IS DISMISSED.

B. Grandparent Residency Not Enough

Decision No. 12,581

Appeal of SUSAN AQUILA, on behalf of CISCO MINTHORN, from action of the Board of Education of the Cheektowaga-Sloan Union Free School District regarding residency.

Decision No. 12,581

(September 13, 1991)

Michael A. Connors. Esq., attorney for respondent

SOBOL, Commissioner. – Petitioner appeals, on behalf of her son, from respondent's determination that her son is not a resident of the Cheektowaga-Sloan Union Free School District and from its refusal to admit him to the schools of that district on a tuition-free basis. The appeal must be dismissed.

Petitioner resides in the City School District of the City of Buffalo. Her son has lived with his grandparents in the Cheektowaga-Sloan Union Free School District for the last six years where he has attended school since 1985. In October, 1990, school officials determined that petitioner's son was not a resident of the Cheektowaga-Sloan school district, but, instead, was a resident of the Buffalo City School District where his mother lives. Petitioner appeals that determination.

Education Law "3202(1) provides that "[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." Generally, a student's residence is presumed to be that of his or her parents (Matter of Staulcup, 20 Ed Dept Rep 11; Matter of Schwartz, 12 id. 187), and a determination by a board of education that a child is not a resident of its school district will not be set aside unless it is arbitrary, capricious or unreasonable (Matter of Takeall, 23 Ed Dept Rep 475; Matter of Hill and Joyce, 23 id. 338; Matter of Buglione, 14 id. 220). However, the presumption that a child's residence is that of his parents may be rebutted (Matter of Takeall, supra; Matter of Hill and Joyce, supra). To determine whether the presumption has been rebutted, certain factors are relevant, including a determination of whether the parent has given up custody and control of the child. Where the parent continues to exercise custody and control of the child and continues to support him, the presumption is not rebutted, and the child's residence remains with his parent (See, Matter of Delgado, 24 Ed Dept Rep 279, Matter of Takeall, supra; Matter of Hill and Joyce, supra; Matter of Shelmidine, 22 id. 206).

Petitioner indicates that, although her son lives with his grandparents, she continues to provide financial support for him and to exercise control over him along with the grandparents. Petitioner specifically alleges that she has not surrendered parental control to her parents. In view of these statements, I find that for purposes of Education Law "3202(1), petitioner's son continues to reside with his mother.

Petitioner also alleges in a conclusory fashion that respondent has discriminated against her son because he is a Native American. However, no facts are alleged in support of her claims.

Therefore, upon my review of the record, I find respondent's determination reasonable, and find no basis to set aside its determination that petitioner's son is not a resident of the Cheektowaga-Sloan Union Free School District.

THE APPEAL IS DISMISSED.

C. Custody Order is Sufficient

Decision No. 15,556

Appeal of a STUDENT WITH A DISABILITY, by his parent, from action of the Board of Education of the Gates-Chili Central School District regarding residency.

Decision No. 15,556

(March 30, 2007)

Goldstein, Ackerhalt & Pletcher, LLP, Jay C. Pletcher, Esq. of counsel

MILLS, Commissioner.--Petitioner challenges a determination by the Board of Education of the Gates-Chili Central School District ("respondent") that her son (the "student") is not a district resident. The appeal must be sustained.

The student is 12 years old and has attended respondent's schools since September 1998, when he was enrolled in kindergarten. From the time of his birth, the student has lived with his maternal grandparents within the district. Petitioner also resided at the same address when she registered the student to attend school in the district. By letter dated August 31, 2006, petitioner informed respondent that she no longer resided within the district due to employment and transportation needs, but that the student continued to live with his maternal grandparents.

On September 13, 2006, respondent notified petitioner that the student was not a resident of the district and would be excluded from school effective September 22, 2006. On September 21, 2006, a petition was filed in Monroe County Family Court by the student's maternal grandparents seeking custody of the student. The appeal ensued.

On October 27, 2006, an Order of Custody was issued by Monroe County Family Court awarding custody of the student to his maternal grandparents. On October 31, 2006, I issued an interim order directing respondent to admit the student to its schools pending the determination of this appeal.

Custody may be legally transferred from a parent or guardian to a third party by obtaining a court order or letters of guardianship from a court of competent jurisdiction. Where a court of competent jurisdiction has legally transferred custody of a child, and the child actually lives with the court-appointed guardian, the Commissioner will accept the court's order as determinative for residency purposes, and will not look behind the court's decision to determine whether the custody transfer is bonafide (Appeal of D.R., 45 Ed Dept Rep 550, Decision No. 15,412). This approach recognizes that a change in custody is a serious, life-changing event for all involved based on factors not always apparent in the context of a residency appeal to the Commissioner. Any objection to the legitimacy of the transfer should be made before the court in a custody proceeding, not in a subsequent educational appeal to the Commissioner of Education (Appeal of D.R., 45 Ed Dept Rep 550, Decision No. 15,412).

I deny respondent's request to reject the Order of Custody issued on October 27, 2006 as a basis for establishing the student's residency. A valid court order was issued transferring custody of the student to his maternal grandparents, who reside within the district. That Court Order is determinative for residency purposes (see Appeal of D.R., 45 Ed Dept Rep 550, Decision No. 15,412). Therefore, petitioner has demonstrated that the student is a district resident entitled to attend respondent's schools tuition free.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that respondent permit the student to attend school in the Gates-Chili Central School District without the payment of tuition.

END OF FILE

D. Financial Assistance Defeats Enrollment

Decision No. 17,895

Appeal of a STUDENT WITH A DISABILITY, by her parent, from action of the Board of Education of the Cairo-Durham Central School District regarding residency.

Decision No. 17,895

(August 6, 2020)

Honeywell Law Firm, PLLC, attorneys for respondent, Michael W. Gadomski, Esq., of counsel

TAHOE., Interim Commissioner.--Petitioner appeals the determination of the Board of Education of the Cairo-Durham Central School District ("respondent") that her daughter ("the student") is not eligible to attend the district's schools tuition-free as a resident. The appeal must be dismissed.

According to the record, petitioner resides outside of respondent's district in Connecticut. On or about March 25, 2020, the student began living with her maternal grandparents, who reside in respondent's district. Thereafter, petitioner attempted to register the student in respondent's district by submitting a registration form dated March 27, 2020, on which she identified both herself and the grandparents as the student's legal guardians. Along with the registration form, petitioner submitted a document titled "Child Care Authorization," also dated March 27, 2020, which was executed by petitioner and purportedly granted "temporary authority" to the grandparents to take care of the student, including providing and overseeing all medical, healthcare, schooling, and educational needs. The authorization indicated that it would "remain effective until terminated" by petitioner. The authorization also granted the student's aunt "educational rights and authority to assist in making educational and medical decisions for [the student] ... to assist [the] grandparents[,] whose primary language is not English[,] and to provide advocacy as needed."

By letter dated March 30, 2020, respondent's director of special education and pupil personnel services (the "director") determined that the student was not a resident of the district and not entitled to attend the district's schools. The letter explained,

> [t]he childcare authorization submitted with [the student's] enrollment forms does not constitute a total and permanent transfer of custody to the ... grandparents ... because [petitioner] retains the power to terminate the transfer. Therefore, this temporary transfer of childcare authority is solely made to take advantage of [the

> district's] schools and does not constitute a legally cognizable basis for establishing the child's residency within our school district.

By email dated March 30, 2020, petitioner asked the director how she could enroll the student in respondent's district "without giving up [her] rights as a mother." Petitioner subsequently sent respondent an updated "Child Care Authorization" dated March 31, 2020. The updated authorization, which was executed by petitioner, purportedly granted the grandparents "the authority to have permanent custody and control" over the student. Although the authorization no longer granted petitioner the authority to terminate the transfer, it retained the language giving the aunt certain "educational rights and authority to assist" the grandparents. By email dated March 31, 2020, the director advised petitioner that the district had "made its determination regarding [the student's] residence" and that petitioner could appeal the decision to the Commissioner of Education. This appeal ensued. Petitioner's request for interim relief was denied on April 28, 2020.

Petitioner argues that the student resides with the grandparents in respondent's district "permanently" and should be entitled to attend its schools as a district resident. Although petitioner identifies herself in the petition as the student's "biological mother and custodial parent," she subsequently asserts that she has "surrendered parental control" of the student to the grandparents, who "provide food, shelter, and clothing" to the student and "exercise control over [the student's] activities and behavior." For relief, petitioner seeks a determination that the student is a district resident entitled to attend respondent's schools without payment of tuition.

Respondent asserts that its decision was not arbitrary or capricious because the record demonstrates that petitioner's "actions do not reflect a good faith attempt to permanently transfer custody ... but rather ... an inappropriate effort ... to take advantage of the [d]istrict's schools." Respondent notes that the grandparents have not been involved in either the application to register the student or this appeal. Furthermore, respondent asserts that petitioner's "claim of a transfer of custody" is "muddled" by the "coextensive authority" granted to the student's aunt.

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).

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).

Generally, if parents or legal guardians continue to provide financial support for room, board, clothing and other necessities, custody and control has not been relinquished (see Catlin v. Sobol, 155 AD2d 24, revd on other grounds, 77 NY2d 552 (1991); Appeal of M.V., 57 Ed Dept Rep, Decision No. 17,318). Similarly, where parents or legal guardians retain control over important issues such as medical and educational decisions, total control is not relinquished (Appeal of M.V., 57 Ed Dept Rep, Decision No. 17,318; 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).

On this record, petitioner has failed to meet her burden to prove that respondent's determination was arbitrary and capricious. Initially, it is undisputed that petitioner resides outside of the district. Thus, for the student to be considered a resident of respondent's district, petitioner must demonstrate that there has been a total, and presumably permanent, transfer of custody and control to a district resident. Although petitioner purported to "permanent[ly]" transfer custody and control of the student to the grandparents in her March 31, 2020 "Child Care Authorization," petitioner also delegated "educational rights and authority to assist" to the student's aunt.

Both the March 27 and March 31, 2020 childcare authorizations that petitioner submitted were executed solely by petitioner. Pursuant to Commissioner's regulations, a board of education "may not require submission of a judicial custody order or an order of guardianship as a condition of enrollment" (8 NCYRR §100.2[y][3][i][c][2]). Instead, the board

> may accept an affidavit of the ... person(s) in parental relation indicating ... that they are the person(s) in parental relation to the child, over whom they have total and permanent custody and control, and describing how they obtained total and permanent custody and control, whether through guardianship or otherwise.

(8 NCYRR §100.2[y][3][i][c][2]). Here, the authorizations submitted by petitioner do not constitute sufficient proof of residence under the regulations because they were executed unilaterally by petitioner, who purports to no longer have custody of the student, and who does not reside with the student.

Indeed, petitioner, rather than the grandparents, attempted to register the student in respondent's district and commenced this appeal. The grandparents are not parties to this appeal, nor is there any evidence in the record that the grandparents have communicated with the district. Moreover, petitioner refers to herself in the petition as the student's "custodial parent," and she has not submitted any evidence from the grandparents to lend support to her claim that they exercise exclusive custody and control of the student. On this record, therefore, I cannot find that respondent acted arbitrarily or capriciously in determining that the student is not a district resident.

While the appeal must be dismissed, petitioner retains the right to reapply for admission to the district on the student's behalf in the future should circumstances change – such as a complete transfer of custody and control to the grandparents – and to present any new information or documentation for respondent's consideration.

THE APPEAL IS DISMISSED.

E. Residency Proven

Decision No. 17,353

Appeal of EDWINA G. MOORE, on behalf of her children DAVID and BRIANNA, from action of the Board of Education of the Sewanhaka Central High School District regarding residency.

Decision No. 17,353

(March 20, 2018)

The Crawford Law Firm, PC, attorneys for petitioner, Mark A. Crawford, Esq., of counsel

Bernadette Gallagher-Gaffney, Esq., attorney for respondent

ELIA, Commissioner.--Petitioner appeals the determination of the Board of Education of the Sewanhaka Central High School District ("respondent") that her children, David and Brianna (the "students"), are not residents of the district entitled to attend its schools tuition-free. The appeal must be sustained.

Petitioner asserts that she and the students have resided within respondent's district for over three years. Petitioner states that her parents, who reside outside of respondent's district, assist her with the needs of her children and live within close proximity to the students' school and petitioner's house. According to the record, the students were enrolled in respondent's district prior to January 2015. After a residency investigation and hearing were conducted, petitioner was informed in December 2014 that the students were not district residents and would be excluded from respondent's schools on January 30, 2015. Petitioner appealed this determination pursuant to Education Law §310 and the appeal was dismissed as moot (Appeal of Moore, 57 Ed Dept Rep, Decision No. 17,352).

On February 23, 2015, petitioner re-registered the students in the district, submitting new documentation substantiating her residency within the district. Based upon this new evidence, the students were re-admitted to the district. The district subsequently initiated a new residency investigation, including surveillance on four weekday mornings at the in-district address and on seven weekday mornings at the out-of-district residence between September and November

2015. Neither the students nor petitioner were observed at the in-district address on any of the dates of surveillance; however, the students were observed leaving the out-of-district residence with their uncle and/or their uncle's vehicle on each date of surveillance.

By letter dated October 6, 2015, the administrative assistant to the superintendent informed petitioner that the students would be excluded from respondent's schools on the basis of "[a]ctual residence elsewhere" as of October 19, 2015. Petitioner requested an appeal of this residency determination. Respondent thereafter commenced a residency hearing on November 10, 2015. At the hearing, petitioner testified that construction at the in-district residence, which petitioner had previously asserted was a basis for her presence outside the district, was now complete. She further testified that she wakes her children up between 4:30 a.m. and 4:45 a.m. and that she and the students leave the house at 5:00 a.m. so that she can drop the students off at her parents' home, which is located outside the geographical boundaries of respondent's district (the "out-of-district address") as she has to be at work by 6:00 a.m. Petitioner further testified that her brother drives to the out-of-district address every morning, picks up the students and drives them to school.

After the hearing had concluded, but before a decision had been rendered, the district conducted additional surveillance of the in-district address on November 16, 2015 and attempted to visit the in-district address on November 17, 2015. The district also conducted additional surveillance of the out-of-district residence on the same day as the hearing, November 10, 2015. In an undated decision, the hearing officer concluded that the students were not residents of the district and ordered that they be excluded as of February 1, 2016. This appeal ensued. Petitioner's request for interim relief was granted on March 4, 2016.

Petitioner argues that the students live with her in the district and that she is a single parent with "chronic health conditions" and early morning work hours. Petitioner claims that because of these hardships, her family assists her with childcare, which includes the children eating breakfast at her parents' out-of-district address before school. Petitioner further argues that the students started spending "significantly more time" with petitioner's parents in the beginning of the school year as the in-district home petitioner lived in was undergoing construction. Petitioner claims that because the hearing officer made a residency determination based, in part, on evidence obtained after the hearing record was closed and without providing her the opportunity to respond to the additional evidence, she was deprived of a fair hearing. Petitioner also provides explanations to refute the dates of respondent's surveillance and the home visit. Petitioner further argues, for the first time on appeal, that the students spent

more time with her parents at the out-of-district residence during September 2015 because her father was hospitalized during that period of time.

Respondent argues that its determination regarding the students' residency was rational and supported by the record. Respondent contends that petitioner did not offer the explanations which she offers on appeal to refute the district's surveillance at the hearing; in any event, respondent argues that these explanations do not rebut its surveillance evidence. Respondent claims that it has a right to conduct investigations of all students and that formal rules of evidence do not apply in administrative hearings. Respondent also argues that neither the Regulations of the Commissioner nor the board's policy prohibit the use of evidence of surveillance conducted after the hearing.

First, I must address a procedural issue. Petitioner submitted a reply which is captioned as a "Reply Affirmation." The reply includes additional documentary evidence. 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). Therefore, to the extent the additional evidence submitted with the reply is responsive to new material set forth in the answer and the affirmative defenses therein, I have considered it pursuant to 8 NYCRR §276.5.

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).

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).

On this record, petitioner has met her burden of proving that she resides at the in-district address. Respondent enrolled the students in its schools in February 2015 based upon petitioner's submission of the following documents bearing the in-district address: (1) registration for a vehicle in petitioner's name; (2) an interim driver's license; (3) a car insurance card; (4) a bank statement; (4) a lease agreement identifying petitioner as the tenant of the in-district address; and (5) a property tax statement issued to petitioner's brother, who is the owner of the in-district address. Petitioner has submitted copies of these documents with her petition.

To rebut this evidence, respondent relies upon surveillance conducted at both the in-district residence and the grandparents' out-of-district residence over multiple dates spanning September 2015 through November 2015. As noted above, the district initially conducted surveillance prior to the November 10, 2015 residency hearing. Neither the students nor petitioner were observed at the in-district address on any of the pre-hearing surveillance dates, which took place on four weekdays at 6:00 a.m. Petitioner testified at the hearing that she was not present at the in-district address during the period of surveillance as she would have already left to drop the students off at their grandparents' residence prior to 6:00 a.m.

After the hearing had ended, but before the hearing officer rendered her decision, respondent surveilled the in-district address again on Monday, November 16, 2015 from 4:30 a.m. to 6:30 a.m.[1] Respondent did not observe the students, petitioner, or her brother at the in-district address on that morning. However, respondent did not conduct surveillance at the out-of-district address on that morning. Petitioner explains that she was away that weekend and, therefore, the students were staying with their grandparents at the out-of-district address that day. Respondent also conducted a home visit of the in-district residence on November 17, 2015 at 6:00 p.m. No one was home on this date. Petitioner explains on appeal that her son was playing basketball that evening. As noted above, respondent also conducted pre-hearing surveillance at the out-of-district address on seven weekday mornings. Every day the students were observed leaving with their uncle and/or in his vehicle from the out-of-district residence.

The evidence from respondent's surveillance corroborates petitioner's explanation that the students are dropped off at their grandparents' house early in the morning and are then taken by

petitioner's brother, the students' uncle, to school. On each date the out-of-district address was surveilled, petitioner's brother's car was observed pulling up to the grandparents' house or already parked there, and on all dates, the students were observed leaving with petitioner's brother in his car around the same time each morning.

On appeal, petitioner has presented additional evidence to refute respondent's surveillance evidence, including affidavits from her mother and father, the testimony of her brother at the residency hearing, and a patient discharge summary regarding her father's admission to a hospital in September 2015. Petitioner asserts on appeal that during part of the pre-hearing surveillance period, from September 18-30, 2015, her father was hospitalized, which resulted in petitioner spending time at the hospital and her children spending more time than usual with her mother at her parents' out-of-district residence. While petitioner did not submit all of this evidence to respondent prior to its residency determination, the Commissioner may consider evidence in a residency appeal, such as in a reply, even though it had not been previously submitted to the district (see Appeal of Mirza, 56 Ed Dept Rep, Decision No. 17,128; Appeal of a Student with a Disability, 56 id., Decision No. 17,061). In this case, petitioner presented at the residency hearing a detailed explanation regarding her specific morning routine with her children and presented the students' uncle's testimony that he drives the students to school from their grandparents' out-of-district residence, thereby refuting respondent's surveillance evidence. Respondent had the opportunity to cross-examine both petitioner and the students' uncle at that hearing, as well as conduct additional surveillance to refute her explanations, which it did. However, following the hearing, respondent only conducted one date of additional surveillance at the in-district residence, and attempted to visit the in-district address on a single occasion. As for additional explanations presented for the first time in the petition and reply, respondent, in its answer, has had an opportunity to, and did in fact, respond to petitioner's explanations and to submit rebuttal evidence (Appeal of Picton, 57 Ed Dept Rep, Decision No. 17,126).

Therefore, while I agree with the district that the evidence presented by petitioner does not directly refute the surveillance conducted by the district with respect to petitioner's lack of physical presence within the district, petitioner has presented reasonable explanations for the students' presence at the out-of-district address on the dates of surveillance. Moreover, the fact that petitioner and the students were not observed between approximately 6 a.m. and 8 a.m. at the in-district address during any of the pre-hearing surveillance dates is consistent with her explanation that she and the students leave the in-district address at 5 a.m.

Accordingly, on this record, petitioner has met her burden of proving that she and her children are district residents and respondent's determination to the contrary must be set aside. Nothing in this decision should be construed to limit respondent's authority to conduct additional investigation by collecting further evidence, should questions remain regarding petitioner's residency.

In light of the above disposition, I need not address the parties' other contentions.[2]

THE APPEAL IS SUSTAINED.

IT IS ORDERED that respondent shall admit the students to the schools maintained by the Sewanhaka Central High School District on the grounds that they are residents of said district.

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