

62 Ed Dept, Decision No. 18276 (NYCOMMED), 2023 WL 4654966

New York State Education Department

Decisions of the Commissioner

Appeal of M. J., on behalf of her grandchild, from action of the Board of
Education of the Malverne Union Free School District regarding residency.

Decision No. 18,276

Decided: May 17, 2023

*1 Frazer & Feldman, LLP, attorneys for respondent, Bryan Georgiady, Esq., of counsel

ROSA., Commissioner

Petitioner appeals the determination of the Board of Education of the Malverne Union Free School District (“respondent”) that her grandchild (the “student”) is not a district resident. The appeal must be dismissed.

Petitioner enrolled the student in respondent's schools in early September 2022. In this paperwork, petitioner described herself as the “[t]emporary” legal guardian of the student. The record reflects that the student's mother resides outside of the district.

By letter dated September 16, 2022, respondent notified petitioner that, upon review of the enrollment paperwork, the student did not meet its requirements to attend school as a district resident. The letter explained that the student's mother did not effect a “complete and permanent” transfer of custody as the agreement was for only six months and could be revoked by petitioner at any time. A residency hearing was held, wherein petitioner confirmed that the transfer of custody was intended to be temporary. Based on this information, respondent excluded the student as a nonresident. This appeal ensued. Petitioner's request for interim relief was denied on November 28, 2022.

Petitioner asserts that she has “temporary guardianship” of the student. She requests a determination that the student is a resident of respondent's district entitled to attend its schools tuition-free.

Respondent contends that the petition must be dismissed because it was not properly verified. On the merits, respondent argues that petitioner failed to prove there was a complete and permanent transfer of custody from the student's mother to petitioner.

The appeal must be dismissed for lack of verification. Section 275.5 of the Commissioner's regulations requires that all pleadings in an appeal to the Commissioner be verified. A petition “shall be verified by the oath of at least one of the petitioners” (8 NYCRR § 275.5; *Appeal of Booker*, 40 Ed Dep Rep 447, Decision No. 14,523). When a petition is not properly verified, the appeal must be dismissed (*Appeal of Nappi*, 57 Ed Dept Rep, Decision No. 17,300; *Appeal of D.P.*, 46 *id.* 516, Decision No. 15,580). Here, the petition is verified by a third party rather than petitioner. Because petitioner has not personally verified the petition, I am constrained to dismiss the appeal for lack of verification. (*Appeal of Jones*, 60 Ed Dept Rep, Decision No. 17,981; *Appeal of Y.O.*, 59 *id.*, Decision No. 17,842; *Appeal of M.J.*, 59 *id.*, Decision No. 17,706).

Even if the appeal were properly verified, it would be dismissed on the merits. Education Law § 3202 (1) provides, in pertinent part, 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.” The purpose of this provision is to limit a school district's obligation to provide tuition-free education to students whose parents or legal guardians reside within the district, as a child's residence is presumed to be that of his or her parents or legal guardians (*Appeal of Powell*, 57 Ed Dept Rep, Decision No. 17,320; *Appeal of Polynice*, 48 *id.* 490, Decision No. 15,927; see *Catlin v Sobol*, 77 NY2d 552, 559-560 [1991]). “Residence” for purposes of Education Law § 3202 is established by physical presence as an

inhabitant within the district and intent to remain (*Longwood Cent. School Dist. v Springs Union Free School Dist.*, 1 NY3d 385, 389 [2004]; *Appeal of Powell*, 57 Ed Dept Rep, Decision No. 17,320).

*2 The presumption that a child resides with his or her parent or legal guardian can be rebutted upon a determination that the parent or guardian has executed a total, and presumably permanent, transfer of custody and control of the child to a third party (*Appeal of Powell*, 57 Ed Dept Rep, Decision No. 17,320; *Appeal of Polynice*, 48 *id.* 490, Decision No. 15,927). Although a formal transfer of custody and control through a guardianship or Family Court proceeding is not required to establish a child's residency for purposes of Education Law § 3202, the evidence must demonstrate that the child's permanent residence is within the district and that the individual exercising custody and control of the child has full authority and responsibility with respect to the child's support and care (*Appeal of Powell*, 57 Ed Dept Rep, Decision No. 17,320; *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 the 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 not established that the student's mother effectuated a total and permanent transfer of custody and control. Petitioner has submitted two affidavits purporting to transfer custody of the student. Neither of these documents, however, purports to make a complete transfer of custody to petitioner. One affidavit is captioned a "temporary guardianship affidavit" while the second indicates, in paragraph three, that the mother "temporarily entrust[ed]" petitioner with "the care" of the student. In the petition itself, petitioner indicates that the student "is expected to reside with [her] for at least one year [and] maybe longer if deemed necessary." These documents also contemplate the mother's right to revoke the transfer of custody at any time. The time-limited and conditional nature of the purported custody transfers prevents them from being considered a total transfer of custody and control (*Appeal of Suprunchik*, 61 Ed Dept Rep, Decision No. 18,074; *Appeals of Ward*, 60 *id.*, Decision No. 17,944; *Appeal of Menzer*, 59 *id.*, Decision No. 17,768).

While the appeal must be dismissed, the student's legal guardian(s) retain the right to reapply for admission to respondent's schools on the student's behalf at any time, should circumstances change, and to present any information for respondent's consideration.

THE APPEAL IS DISMISSED.