

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

EXETER-WEST GREENWICH	:
REGIONAL SCHOOL DISTRICT,	:
<i>Petitioner</i>	:
	:
v.	:
	:
T.A., as parent and next friend of	:
Students L. Doe and M. Doe,	:
<i>Respondent</i>	:

DECISION

Held: Seventh and second graders attending schools in regional school district whose single mother was forced by economic circumstances to temporarily move out of the district and into her mother’s over-crowded residence held to be “homeless” under McKinney-Vento Act and thus were entitled to remain enrolled in the district even though they resided in the same out-of-district residence for over two years without threat of eviction.

DATE: January 08, 2015

I. Jurisdiction, Standard of Review and Burden of Proof

Petitioner, Exeter-West Greenwich Regional School District (“EWG”), filed a request with the Commissioner for a “residency determination” on October 27, 2014, alleging that Respondent, T.A., as parent and next friend of Students L. and M. Doe, “has a permanent residence for school purposes . . . in Coventry, Rhode Island,” and therefore L. and M. Doe were not entitled to enroll as students in EWG, but rather must enroll in the Coventry Public Schools.¹

Jurisdiction is present pursuant to RIGL § 16-64-6, which provides that “[w]hen a school district . . . charged with educating children denies that it is responsible for educating a child on the grounds that the child is not a resident of the school district . . . the dispute shall, on the motion of any party to the dispute, be resolved by the commissioner of elementary and secondary education or the commissioner's designee who shall hold a hearing and determine the issue.” *Id.*; see also *Rhode Island McKinney-Vento Homeless Education Regulations* (the “McKinney-Vento Regs.” or the “Regs.”) at L-7-8 (“If a school district disputes a parent's best interest determination, the dispute may be appealed to the commissioner”).² In addition, there is no reason to believe that the *de novo* standard applicable to appeals under chapter 39³ would not also apply to appeals under chapter 64.

As to the burden of proof, RIGL § 16-64-3 provides that “[i]n any proceeding where it is alleged that a child's residence has been changed due to . . . the break-up of the child's family . . .

¹ A copy of EWG’s Petition was accepted into evidence without objection as Joint Exhibit 1.

² Unlike appeals to the Commissioner under chapter 39, one invoking the Commissioner’s jurisdiction under chapter 64 need not exhaust available administrative remedies, *id.*, and again unlike chapter 39, appeals from the Commissioner’s “final order” under chapter 64 may be made directly to the Superior Court. *Id.*

³ A hearing *de novo* is one which is heard as if for the first time, i.e., as an entity with original, as opposed to appellate, jurisdiction, would hear it. See Black’s Law Dictionary at 649 (West, 1979). See, e.g., *Alba v. Cranston School Committee*, 90 A.3d 174, 184-85 (R.I. 2014) (quoting rule); *Slattery v. School Committee of City of Cranston*, 116 R.I. 252, 262, 354 A.2d 741, 747 (1976) (“one who appeals to the commissioner is entitled to ‘a *de novo* hearing’ and not ‘merely a review of [the] school committee action’”); *School Committee of City of Pawtucket v. State Bd. of Ed.*, 103 R.I. 359, 364, 237 A.2d 713, 716 (1968) (commissioner’s jurisdiction “considerably broader than that of this court in reviewing an appeal” since “it is clear that § 16–39–2 and precursory legislation give the commissioner of education the right to make a *de novo* decision in examining and deciding the issue involved”).

the party alleging the existence of these circumstances shall have the burden of proof and shall make proof by a preponderance of the evidence.” *Id.*⁴ However, in cases involving application of the federal *McKinney–Vento Homeless Assistance Act* (the “McKinney-Vento Act,” or the “Act”), Pub.L. No. 107–110, Title X, § 1032, 115 Stat. 1989 (codified at 42 U.S.C. § 11301 *et seq.*),⁵ “the burden of proof is on the school district to show that the parent's decision is not in the best interest of the child or youth.” *McKinney-Vento Regulations* at L-7-10.

II. Facts and Evidence

An evidentiary hearing before a stenographer was conducted before the undersigned on December 3, 2014.⁶ EWG called L. and M. Doe’s father and step-mother (“Mr. L.” and “Mrs. L.”), as well as its Superintendent, James H. Erinakes, II (the “Superintendent”), as witnesses. T.A. testified herself and called her mother, Mrs. A., as a witness.

Unless expressly qualified, the following facts are not in dispute:

1. T.A. and Mr. L. are the biological parents of Students L. and M. Doe and until their separation in June of 2011, resided as husband and wife in West Greenwich, Rhode Island.
 2. L. Doe, a girl, is now in seventh grade and M. Doe, a boy, is in second grade.
- Both are attending and have attended schools in EWG since kindergarten, and for the last year have been doing so pursuant to a transportation sharing arrangement agreed to by EWG.

⁴This in in accord with the general presumption in administrative proceedings which “favors the administrators” and places the burden of proof upon the party challenging an administrator’s action “to produce evidence sufficient to rebut this presumption,” *see Gorman v. University of Rhode Island*, 837 F.2d 7, 15 (1st Cir.1988), and is contrary to T.A.’s assertion that the burden of proof is always placed upon the moving party. *See* T.A.’s Post-Hearing Mem. at 2.

⁵The Stewart B. McKinney Homeless Assistance Act, Pub.L. No. 100–77, § 102(b)(2), 100 Stat. 482, 485, was first enacted in 1987 to provide a broad range of services and assistance to homeless individuals and families. The McKinney-Vento Act was approved in 2001 as part of the Congressional reauthorization of the original 1987 act, and took effect in July, 2002. It has been amended and modified by the federal *No Child Left Behind Act of 2001*, 20 U.S.C. § 6301, *et seq.*, and the federal *Individuals with Disabilities Education Act*, 20 U.S.C. § 1401, *et seq.* Subtitle VII–B of the McKinney–Vento Act pertains to the education of homeless children and youths. 42 U.S.C. §§ 11431–11435.

⁶EWG was represented by Andrew Henneous, Esq. and T.A. by Veronika Kot, Esq. of Rhode Island Legal Services, Inc.

3. When the couple separated in June of 2011, T.A. moved with the children to an apartment, also located in West Greenwich. (The couple divorced in 2012 and sometime thereafter, Mr. L. married Mrs. L.).

4. In September of 2012, T.A. and her children moved in with her mother, Mrs. A., and her step-father, Mr. A., at a residence owned by Mrs. A. in Coventry, Rhode Island. *See* Respondent's Exhibit 8 (deed to the premises). According to T.A., they were forced to move because she had just given birth to a third child and could no longer afford the rent. Although Mr. L. testified that he provides T.A. with \$1,147 per month in child support, T.A. testified that she had not received child support in the "eight or nine months" prior to moving in with her mother and step-father.

5. T.A. also testified that she viewed the arrangement as temporary and was doing her best to find an affordable, and more permanent, home for herself and her children.⁷ She noted that although her step-father loves her and the children, he wants them to move out because the house simply is not big enough. Mrs. A. testified that since her daughter and grandchildren moved in, her house feels like "a storage unit."

6. Mrs. A.'s residence in Coventry is an antique, two-bedroom Cape with one and one-half baths and approximately 1,859 square feet of living space. In order to accommodate T.A. and the children, Mr. and Mrs. A. moved out of their bedroom and now sleep in the small dining room on the first floor. One of the two upstairs bedrooms is occupied by T.A. and the baby, with the other shared by L. and M. Doe. T.A.'s grandfather also is a part of the household, and lives in a room over the garage.

⁷ A letter dated November 19, 2014 was introduced into evidence attesting to the fact that T.A. attempted to lease certain property in West Greenwich which subsequently became unavailable. *See* Respondents' Exhibit 5. In addition, T.A. testified that Legal Services recently has put her in touch with subsidized housing authorities.

7. T.A. pays no rent and does not contribute to the cost of utilities. *See* Respondents' Exhibit 4 (assorted bills in Mrs. A.'s name).

8. T.A. introduced evidence suggesting that her total gross earnings from employment as a photographer in 2013 was \$4,935.59. *See* Respondent's Exhibit 2.⁸

9. After moving into her mother's residence, T.A. attempted to enroll L. and M. Doe in the Coventry Public Schools, but according to T.A., Coventry refused to allow her to enroll the children, initially due to a lack of proof of residency (all the usual evidence, i.e., bills or a lease or deed, were in her mother's name), and then due to a lack of documentation relating to vaccinations.⁹

10. T.A. contacted the Department of Education and learned of her children's rights under the McKinney-Vento Act, after which EWG allowed the children to remain at EWG for the 2013-14 school year, which was the preference of T.A. and the children.

11. However, the EWG Superintendent wrote T.A. on August 25, 2014 and informed her that she was no longer "McKinney-Vento eligible" since, in his words, "the family has been living in the same fixed, regular, and adequate nighttime residence for an extended period of time (roughly two years)," and "it appears this current arrangement is available to you for the long term and there is no threat of eviction or any other circumstances that would result in loss of residence." *See* Petitioner's Exhibit 2.¹⁰

⁸ No evidence was offered as to her income in any other year, nor as to whether Mr. L. is the father of the youngest member of the family or if not, whether the father pays any child support.

⁹ This despite the fact that the McKinney-Vento Regs. make clear that if a dispute arises between a school district and parents or guardians "over school selection or enrollment or other issues," the school district must "immediately enroll the child pending resolution by the Commissioner." *See* R.I. Admin. Code 21-2-43:L-7-24; *see also id.* at L-7-20 – L-7-23 (entitled "elimination of enrollment barriers").

¹⁰ When a dispute arises over school enrollment, the McKinney-Vento Act requires that the child be "immediately admitted to the school in which enrollment is sought, pending resolution of the dispute." *Id.* at § 11432(g)(3)(E)(i). Additionally, in the case of a dispute, the Act requires a local educational agency ("LEA") like EWG to provide "a written explanation of the school's decision regarding school selection or enrollment, including the rights of the parent, guardian, or youth to appeal the decision." *Id.* at § 11432(g) (3)(E)(ii).

12. The Superintendent also opined that it was not in the best interest of the children to remain enrolled in EWG since: (a) they would be attending school “in a different community away from neighborhood friends [in Coventry];” and (b) “the need for special busing arrangements presents barriers to the children’s participation in after school extra-curricular activities and/or after school support from teachers.” *Id.*¹¹

13. T.A., on the other hand, testified that her seventh-grade daughter (L. Doe) would be “devastated” if she were forced to leave EWG and her friends, some of whom have been in her class since kindergarten. She added that L. Doe has had no trouble returning to Coventry after participating in after-school activities since her cousin attends the same school, her aunt lives nearby, and T.A. and/or her mother (Mrs. A.) also can provide transportation when necessary.

14. As to her second grade son (M. Doe), T.A. introduced the twenty-three page report of a neuropsychological evaluation performed in June of 2014 by Jeffrey A. Brusini, MA, LMHC and J. Randy Kulman, Ph.D., which contained a diagnosis of “314.01 attention deficit hyperactivity disorder, combined.” According to T.A., the diagnosis confirms her son’s need for continuity, although the issue was not specifically addressed in the report. T.A. also suggested that in her opinion, the divorce and her ex-husband’s re-marriage—and the ensuing complications with M. Doe’s relationship with his father—contributed to M. Doe’s academic

¹¹ The Superintendent also referred in his testimony to T.A.’s “misrepresentation and deceit,” and to the fact that an anonymous caller evidently phoned the school and alleged that T.A. had approached her children and asked them to lie about the location of the family’s residence. *See* Petitioner’s Exhibit 1. Yet, the documentary evidence is ambiguous at best. In a “Student Registration Form” provided by EWG and signed by T.A. on August 27, 2012 she incorrectly listed her original West Greenwich address while married, rather than the more recent West Greenwich apartment. *See* Respondents’ Exhibit 3. However, as noted, she did not move into her mother’s residence in Coventry until September of 2012. *See* ¶ 4, *supra*. And while T.A.’s address for voter registration purposes remains her original address in West Greenwich while married, *see* Respondents’ Exhibit 6, she lists the Coventry address on her drivers’ license, *see* Respondents’ Exhibit 7, and with her employer. *See* Respondents’ Exhibit 2.

difficulties which, she believed, would be made worse if he were forced to change schools more than absolutely necessary.

15. After reading the report of L. Doe’s neuropsychological evaluation, the Superintendent, whose many areas of expertise include special education, said that nothing in the report changed his opinion (discussed at ¶¶ 11-12, *supra*).

III. Discussion

The McKinney–Vento Act provides that an LEA like EWG:

shall, according to the child's or youth's best interest—

- (i) continue the child's or youth's education in the school of origin for the duration of homelessness—
 - (I) in any case in which a family becomes homeless between academic years or during an academic year; or
 - (II) for the remainder of the academic year, if the child or youth becomes permanently housed during an academic year; or
- (ii) enroll the child or youth in any public school that non-homeless students who live in the attendance area in which the child or youth is actually living are eligible to attend.

42 U.S.C. § 11432(g)(3)(A); *see also* McKinney-Vento Regs. L-7-1 (when student becomes homeless during an academic year, student should be kept in the school of origin “to the extent feasible . . . except when doing so is contrary to the wishes of the student’s parent or guardian”).

The Act defines “homeless children and youths,” in relevant part, as:

- (A) individuals who lack a fixed, regular, and adequate nighttime residence ... and
- (B) includes—
 - (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardships, or a similar reason . . .

42 U.S.C. § 11434a(2)(A),(B)(i); *see also* McKinney-Vento Regs. L-7-1.

The plain language above makes clear that children “who are sharing the housing of other persons due to loss of housing [or] economic hardship,” do not, by definition, have a “fixed, regular, and adequate nighttime residence,” and therefore are “homeless” under the Act.

Here, the evidence is undisputed that L. and M. Doe “are sharing the housing of other persons,” (i.e., a residence owned by their grandmother) “due to loss of housing [or] economic hardship” (i.e., whether because of the “break-up” of the family within the meaning of RIGL §16-64-3, the fact that T.A. had just given birth to a third child, or the fact that T.A. could no longer afford the rent).

Thus, assuming without deciding that T.A. had the burden of proof with respect to the issue of her children’s “homelessness” under the McKinney-Vento Act, it is a burden that she has met. Contrary to EWG’s legal conclusions, *see* EWG’s Post-Hearing Mem. at 3, the applicable definition of homelessness does not have a time limit, nor does it require that there be a “threat of eviction,” that the premises be “unsafe or unsuitable,” or that there be some other circumstance evidencing the imminent loss of the current temporary residence. *See, e.g., L.R. v. Steelton-Highspire School District*, 2012 WL 1433146 (M.D. Pa. 2010) (student “homeless” despite temporary residence with guardian’s daughter for over a year since “the Act makes clear that there is no maximum duration for homelessness”) and *Narragansett School Committee II v. Family O.*, RIDE No. 0017-11 (August 30, 2011) (respondent found homeless despite “doubling up” with relatives due to an inability to obtain suitable “permanent housing”).¹²

As a result, as long as it is their “best interest,” L. and M. Doe have the right to remain enrolled in their “schools of origin”¹³ (i.e., in EWG) and to “receive the same education services

¹² Nor is there any legal support for EWG’s notion that some subjective concept as to the “adequacy” of the temporary housing should replace the plain language of the statutory definition, notwithstanding the casual use of the term in a pamphlet written by the National Association for the Education of Homeless Children and Youth. *See* EWG’s Post-Hearing Mem. at 4 and note 6. Moreover, EWG’s citation to *In the Matter of the Residency of Student H. Doe*, RIDE No. 009-06 (April 17, 2006) is not instructive. Unlike the more recent decision of the Commissioner in *Family O.*, *supra* (which EWG simply ignored), the facts of *H. Doe* are inapposite, and unlike the decision in *Family O.*, which was premised upon an analysis of the McKinney-Vento Act, the Act is not even cited in *H. Doe*.

¹³ *See id.* at L-7-2.

that other students [at EWG] receive,”¹⁴ until they have “permanent housing somewhere.” 42 U.S.C. § 11432(g)(3)(A); McKinney-Vento Regs. at L-7-7.

In addition, the McKinney-Vento Regs. make clear that: “Rhode Island allows the parents of a homeless child to decide, subject to school district challenge, whether it is in the best interest of the student to attend school in the town where the student is now living, or to attend the student’s school of origin.” *Id.* And as noted, EWG bears the burden of disproving T.A.’s conclusion that remaining in EWG a school is in the best interest of her children. *See supra* at 3, quoting Regs. at L-7-10. The Regs. also provide that:

[t]he following factors are to be considered in making a best interest determination:

- (a) special needs of the child
- (b) continuity of services
- (c) distance/travel time
- (d) involvement in special activities or sports
- (e) safety
- (f) other relevant information.

Id. at L-7-9.

As noted, T.A. testified that her seventh-grade daughter (L. Doe) would be “devastated” if she were forced to leave EWR and her friends, and that L. Doe had no trouble returning to Coventry after participating in after-school activities in West Greenwich. *See* ¶ 13, *supra* at 6. And as to her second grade son (M. Doe), T.A. introduced an expert’s report containing a diagnosis of “314.01 attention deficit hyperactivity disorder, combined,” a diagnosis which, she opined, confirmed her son’s need for continuity, suggesting further that his academic difficulties would be made worse if he were forced to change schools more than absolutely necessary. *See* ¶ 14, *supra* at 6-7.

¹⁴ *See id.* at L-7-12.

EWG argues that “the most important fact that came out of the hearing relative to the ‘best interest’ analyses was the mother’s own testimony that the children are not returning to Exeter or West Greenwich.” EWG’s Post-Hearing Mem. at 6. In fact, although the evidence suggests that there certainly is doubt as to whether T.A. will be financially able to return to EWG, EWG’s characterization of the relevant evidence is misleading. In fact, the evidence makes clear that T.A. desires to return to EWG, has been attempting to find suitable housing in the district, *see* note 7, *supra*, at 4, and finally, has been working with Legal Services to find ways to increase her income.

In addition, there was no evidence suggesting that T.A. was more likely to find suitable housing in Coventry than in EWG. Thus, if T.A. is able at some point to re-locate to more permanent housing outside of EWG, it is hard to see how forcing an additional interim move to schools in Coventry would be in the best interest of the children, unless T.A. happens to find suitable alternate housing in Coventry (and, again, there was absolutely no evidence suggesting that such housing was any more available in Coventry than in EWG).

EWG also attempted to rebut T.A.’s conclusions through the testimony of its Superintendent. However, as correctly noted by T.A., *see* T.A.’s Post-Hearing Mem. at 9-10, the Superintendent’s testimony amounted to speculation which, it should be added, was entirely lacking in foundation. The Superintendent’s *general* conclusion that students are better off living in the school district where they attend school did not constitute an effective rebuttal to T.A.’s *specific* conclusions concerning what would be in the best interest of her children under these unique circumstances.

In short, EWG failed to effectively rebut T.A.'s conclusion that remaining in EWG was in the best interest of her children and as a result, EWG failed to meet its burden of proof under the McKinney-Vento Regs. *See id.* at L-7-10 (quoted *supra* at 3).

IV. Conclusion

For all the above reasons:

- (a) EWG's request for a finding that L. and M. Doe have a permanent residence for school attendance purposes in Coventry, Rhode Island is denied;
- (b) T.A. and her family are declared to be "homeless" within the meaning of the McKinney-Vento Act and the state regulations promulgated thereunder; and
- (c) EWG is hereby ordered to continue to permit L. and M. Doe to remain as enrolled students at EWG, and to receive the same education services that other students at EWG receive until such time as they have permanent housing somewhere.

For the Commissioner,

Anthony F. Cottone, Esq.
Hearing Officer

Dated: January 08, 2015

Deborah A. Gist,
Commissioner