

DAVID AND NINO K.,
Appellant

v.

ANNE ARUNDEL COUNTY BOARD
OF EDUCATION,
Appellee.

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION
Opinion No. 11-32

OPINION

INTRODUCTION

David and Nino K. (Appellants) appealed the residency decision of the Anne Arundel County Board of Education (local board). The local board filed a Motion for Summary Affirmance which the Appellants oppose. The local board responded to the Appellants' Opposition.

FACTUAL BACKGROUND

This case is the second round of a residency dispute.

In 2009, the local board ruled that the Appellants did not live at 1257 Baltimore-Annapolis Boulevard but rather lived at 2414 Crain Highway in Upper Marlboro, making them residents of Prince George's County not Anne Arundel County. The State Board affirmed the decision of the local board concluding that the Appellants had not met their burden to show that they were bona fide residents of Anne Arundel County. *David and Nino K. v. Anne Arundel County Board of Education*, MSBE Op. No. 09-43 (attached).

In this second round in 2010-2011, the local board has ruled that the Appellants live at neither the Baltimore-Annapolis Blvd. address nor at the Crain Highway address. The Appellants have three sons. It appears that, because of this residency dispute, the children have not attended any school for the last year.

The relevant facts are these.

Sometime in the summer of 2010, the Appellants attempted to demonstrate again to the school system that they resided at 1257 Baltimore-Annapolis Blvd. They submitted a signed lease for the property and a variety of other documents including affidavits, driver's licenses, bills, and bank records showing 1257 Baltimore-Annapolis Blvd. as their address.

In July 2010, the school system began a residency investigation. Staff observed the Baltimore-Annapolis Blvd. property and the Crain Highway property fifteen times in July and August.

Date & Time	Place	Observation
July 21, 2010 6:00pm-8:30pm	Baltimore-Annapolis Blvd.	Family arrives at 8pm
July 22, 2010	Baltimore-Annapolis Blvd.	Appointment with father at Baltimore-Annapolis Blvd.
August 2, 2010 10:00am-10:02am	Baltimore-Annapolis Blvd.	Mother's car (black BMW) parked there
August 3, 2010 6:30am-6:32am	Baltimore-Annapolis Blvd.	Black BMW parked in same spot
August 3, 2010 10:00pm-10:02pm	Baltimore-Annapolis Blvd.	Black BMW parked in same spot
August 4, 2010 6:45am and 8:30pm and August 5, 2010 6:45 am	Baltimore-Annapolis Blvd.	Black BMW parked in same spot
August 19, 2010 9:40am-9:50am and August 27, 2010 10:27am-10:40am	Baltimore-Annapolis Blvd.	Spoke to neighbor (Antinucci) who says family does not live there but sees the boys on the deck
August 23, 2010 8:00am-8:10am	Baltimore-Annapolis Blvd.	Spoke to landlord. Family not home
August 27, 2010 8:00am-8:10am	Baltimore-Annapolis Blvd.	Spoke to one of the sons. Parents not home.
August 27, 2010 1:14pm-1:45pm	Baltimore-Annapolis Blvd.	Arranged meeting with family, took pictures of rooms
August 28, 2010 8:00am-8:15am	Baltimore-Annapolis Blvd.	No one home
August 30, 2010 5:30am-8:30am	Baltimore-Annapolis Blvd. and Crain Highway	3 cars at Baltimore-Annapolis Blvd. including black BMW unknown person at Crain Highway
August 30, 2010 8:16am-8:25am	Baltimore-Annapolis Blvd.	Two sons at the address. Mother, father and other son in court for 9:00 hearing

Based on the investigation, on September 2, 2010, the school system deemed the residency documents that the Appellants submitted to be insufficient to establish residency. (Local Board Decision at 3; Letter of September 3, 2010 from Assistant Superintendent).

The Appellants appealed that decision to the local board.

During the pendency of the appeal, the school system continued its residency investigation for another three months conducting 29 additional observations of the Baltimore-Annapolis Blvd. and Crain Highway properties.

Date & Time	Place	Observation
September 8, 2010 5:30am-8:30am	Baltimore-Annapolis Blvd. & Crain Highway	No family vehicles present at Baltimore-Annapolis Blvd. or Crain Highway
September 13, 2010 8:05am-8:30am September 17, 2010 8:00pm-8:02pm September 19, 2010 8:15pm-8:17pm September 20, 2010 9:20am-9:22am September 21, 2010 7:30am-7:32am September 24, 2010 7:30am-7:32am September 26, 2010 8:45am-8:47am	Baltimore-Annapolis Blvd.	Black BMW parked in driveway
October 2, 2010	Crain Highway	Arranged meeting with family and owner of the house. Took pictures. No water; no electricity in home
October 7, 2010 9:59pm-10:02pm and October 8, 2010 6:18am-6:22am	Baltimore-Annapolis Blvd.	Black BMW parked at roadside
October 12, 2010 8:54pm-8:56pm	Baltimore-Annapolis Blvd.	No family car present
October 13, 2010 2:43pm-2:45pm	Baltimore-Annapolis Blvd.	Neighbor on Fox Run Way says "woman lives there alone."
October 14, 2010 8:09am-8:13am	Baltimore-Annapolis Blvd.	Spoke to neighbor (Antinucci) again who said he hasn't seen the parents or the boys lately
October 14, 2010 1:18pm-2:32pm October 15, 2010 6:18am-6:38am	Crain Highway	Saw white SUV and green Land Rover parked on property

November 3, 2010 10:25am-10:27am	Baltimore-Annapolis Blvd.	Black BMW parked there
November 5, 2010 8:50am-8:52am November 8, 2010	Crain Highway	White SUV parked (likely father's car)
November 8, 2010 11:40am-11:42am November 17, 2010 8:30pm-8:32pm	Baltimore-Annapolis Blvd.	Black BMW parked in driveway
November 17, 2010 9:15am-9:17am	Crain Highway	no lights/no cars
November 19, 2010 9:15pm-9:17pm	Baltimore-Annapolis Blvd.	Lights on in all rooms; black BMW parked
November 19, 2010 8:30pm-8:32pm	Crain Highway	No lights, one white van
November 21, 2010 1:00pm-1:02pm	Baltimore-Annapolis Blvd.	Black BMW parked
November 28, 2010 11:30am-11:32am December 6, 2010 9:00am-9:10am	Crain Highway	White Escalade SUV - father's white van Land Rover SUV
November 28, 2010 12:50pm-12:52pm	Baltimore-Annapolis Blvd.	White Escalade SUV - father's Black BMW parked
December 7, 2010 6:10am-7:10am	Baltimore-Annapolis Blvd.	Black BMW parked

Using the observation reports, Deborah Wooleyhand, a pupil personnel worker, testified at the hearing on appeal that the “matter of residency comes down to the fact that the K.’s family members have never been at the home or Baltimore-Annapolis Blvd. when the school system staff have gone to that property unannounced.” (Local Board Decision at 4).

Mr. Richard Moore, a residency verifier and the person who conducted most of the observations, concluded that the family did not live at the Baltimore-Annapolis Blvd. address because he never saw them there except on scheduled appointments and because the Black BMW owned by Mrs. K. was always parked in the same spot, which led him to believe it was never moved. (*Id.* 7-11).

Susan Farrell, another pupil personnel worker testified that she saw two of the K.’s sons at the Baltimore-Annapolis Blvd. address. (*Id.* at 5).

Mr. K. testified that he and his family live on Baltimore-Annapolis Blvd. "He submitted a number of photographs of the house on Baltimore-Annapolis Blvd. and testified to how these portions of the house are used by his family." *Id.* at 13.

The landlord for the property testified that she was friends of the K. family; that the K.'s pay \$2,000 per month in rent; that she assigned the black BMW owned by Mrs. K. to the "same space in her driveway because there is not enough parking for all the cars. . . ." *Id.* at 15.¹

In their decision, the local board concluded that the school system witnesses were credible but that the family and their witnesses were not. First, the local board wrote:

The property owners testified on behalf of Mr. & Mrs. K. but the evidence is not credible. The lease purports to be for the Baltimore-Annapolis Boulevard property, but it indicates that it applies only to the basement of the residence and is entered into only by Ms. Vayshelbaym, one of the two owners of the property.

(*Id.* 17-18).

Next the local board questioned the parent's ability to pay the rent. They said:

In addition, the rent is listed as \$2,050 per month but the parents' total income for tax year 2009 (See Appellants' Exhibit XX) is \$30,536. If Mr. and Ms. K. earn just over \$30,000 per year and spend more than \$24,000 of it on rent, how can they support themselves and their three teenage sons on the remaining \$6,000 per year (\$500 per month). Nor is the 2009 income figure unique. Appellant's Exhibit WW, the 2008 Maryland Tax Return, shows a total income of \$36,000 which, while better, still would not indicate what this Board considers to be an amount acceptable for a family of five.

(*Id.* 18).

Finally, the local board discounted the testimony of one of the son's because "he did not know what 'perjury' is." (*Id.* 18). For that reason alone, the Board did not give the son's testimony that he lived at the Baltimore-Annapolis Blvd. address any credence.

The local board concluded:

Ultimately, the Superintendent has proved that Mr. and Ms. K. and

¹The local board noted that Mr. Moore testified that 11-12 people used the Baltimore-Annapolis Blvd. address. (*Id.* at 9)

their sons do not reside at the Baltimore-Annapolis Boulevard residence. Mr. and Ms. K. have proved to the Board that they do not live at the Prince George's County address. But the burden of proof is on the parents to prove that they live in Severna Park High School attendance area. They failed to do so.

(*Id.* at 18-19).

This appeal ensued.

STANDARD OF REVIEW

Because this appeal involves a decision of the local board involving a local policy, the local board's decision is considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.03E(1).

ANALYSIS

The local board concluded that the Appellants had not met their burden of proof to establish their residency at the Baltimore-Annapolis Blvd. address. The term "burden of proof" includes two separate concepts. First, there is the burden of production. That burden often shifts from one party to another during the course of a case. *See generally, McLain, Maryland Evidence* §300:6. For example, if the Appellants meet their initial burden of production, the burden of production may shift to the local school system to produce evidence that contradicts the Appellants' evidence. Second, there is the burden of persuasion - - the standard of proof necessary to prevail. *Id.* at 300:1. In this case, the Appellants needed to persuade the local board by a preponderance of the evidence that they resided at 1257 Baltimore-Annapolis Blvd. The burden of persuasion never shifts away from the party who must prove his case.

Under Anne Arundel County School System policies, a parent can establish residence by providing the school system with documents:

- Mortgage papers/apartment lease
- or -
- Tenant residence verification form
- 2. One additional supporting document (examples below)
 - Utility/telephone/cable bill
 - Current bank statement
 - Current pay stub
 - Income tax notice
 - W-2 form
 - Social security check

- Domestic relations (child support)
- Passport
- Visa-entrance into US
- Voter's registration
- Car insurance bill
- Commercial driver's license

In this case, the Appellants furnished the tenant residence verification form, as well as a copy of their lease and sworn affidavits that their residence is 1257 Baltimore-Annapolis Blvd. They also produced the following documents all of which are addressed to Baltimore-Annapolis Blvd.:

- mobile telephone bill
- bank statements
- income tax returns
- Maryland drivers licenses for mother and one son
- letter from the Post Office that it delivers their mail to 1257 Baltimore-Annapolis Blvd.

We believe such documentation would, in most cases, be sufficient to establish residency, but apparently, because of the previous history involving the bona fide residence of the Appellants, the school system decided that that documentation was not enough. The local board did not review that part of the superintendent's decision.

In the context of burdens of proof, however, we consider that production of documentation to have met the Appellants' initial burden of production sufficient to require the school system to provide contradictory evidence to overcome the Appellant's evidence of residency.

At the hearing, the school system presented evidence of the results of its numerous observations of the residences at Baltimore-Annapolis Blvd. and Crain Highway. We agree with the local board that the investigation showed that the Appellants did not live at Crain Highway. As to whether the Appellant's lived at the Baltimore-Annapolis Blvd. address, the local board found the evidence of the school system staff credible and accepted the conclusion that the local school system employees drew from their observations - - that the K. family did not live at the Baltimore-Annapolis Blvd. address. The local board also concluded that the testimony of the K. family and their witnesses was not credible and, thus, they did not meet their burden of persuasion.

...[C]redibility is at issue in virtually every case, or at least in any case involving testimonial evidence. When [a trier of fact] decides, from the whole of the record, that one side has made the more persuasive argument, he is concluding that that party is more

“credible.” . . .

“Credibility has a much narrower meaning, however, if it is interpreted as synonymous to witness demeanor.

Shrieves v. Department of Health and Mental Hygiene, 100 Md. App. 283, 299 (1994)

Thus, credibility determination are of two kinds - - credibility determinations based on demeanor and credibility determinations based on derivative inferences drawn from the evidence itself. *Id.* In appellate review, great deference is given to demeanor credibility determinations because the trier of fact has had an opportunity to see, hear, and judge the witnesses' truthfulness as he/she testifies. *Id.* at 299-300.

Derivative inferences are not cloaked in the same deference as a demeanor based credibility conclusion. *Maryland Board of Physicians v. Elliott*, 170 Md. App. 369, 388-89 (2006). Derivative inferences fall into the category of “fact-finding.” *Id.* When considering derivative inferences drawn from the facts, “[a] reviewing court must abide by the [agency’s] derivative inferences, if drawn from not discredited testimony, unless the inferences are ‘irrational’ . . . ‘tenuous’ or ‘unwarranted.’” *Id.* at 389. That standard comports with the review standard that this Board applies in cases such as these. Here, under the applicable standard of review, we consider the local board’s decision to be *prima facie* correct, unless in is shown to be arbitrary, unreasonable or illegal.

As to demeanor, we have read the transcript. Admittedly, the Appellants could be considered difficult witnesses, the father often called the school system staff liars; he could be belligerent. Appellants’ own counsel said it best in closing argument:

As I’m sure the Board can tell, the K.’s are very outspoken people. They can be frustrating, even to me, no offense. However, I don’t think that shows that they don’t reside at B&A Boulevard. I think that they upset a lot of people, including members of this Board. They tend to be a little gruff. But that’s not the issue. The issue isn’t if they’re gruff, or if they filed complaints, or what they have done. It’s where do they live. That’s the whole entire issue.

(T. 307).

Suffice it to say that the local board could have used demeanor evidence to determine that the witnesses were not truthful. In the usual demeanor assessment, for example, the trier of fact explains the conduct of the witness on the stand, whether answers were straight-forward or evasive, or contradictory and thus provides a basis for the demeanor credibility determination. The local board could very well have pointed to Mr. K’ belligerence or the fact that the landlords were good friends of the K. family who might have supported their residency story just to help

them out. In this case, however, in evaluating the evidence, the local board did not describe the Appellants' or their witnesses' demeanor at all. Instead, it questioned the validity of the lease, the adequacy of the family income, and noted that the son did not know what perjury meant. From those three facts, it drew an inference that the K.'s were not credible. It is our view that those three facts do not support that inference.

First, it seems to us that a lease signed by one of the landlords is not necessarily an invalid lease or an indication that the witness is not credible. Second, it is our view that the board's conclusion that the \$30,000 - \$36,000 per year income of the Mr. K. would not be enough to support his family after paying the rent does not indicate that Mr. K. is not truthful. Third, the fact that the son did not know what perjury meant does not make him an untruthful witness. Yet, for those reasons, the local board chose not to believe the K. family's testimony that they lived at the Baltimore-Annapolis Blvd. address. Instead, the local board concluded that the "testimony of the school system's witnesses was credible and believable [because] [n]one of the witnesses appeared to have any personal and professional interest in this matter other than to reach a correct conclusion about the residency." Local Board Decision at 18.

We concur that the school system staff work diligently to reach a correct conclusion about residency. Their conclusion that the K. family did not live at the Baltimore-Annapolis Blvd. address was based on inferences drawn from their observations. The local board chose to accept the conclusion that the local school system employees drew from their inferences - - the K. family did not live at the Baltimore-Annapolis Blvd. address.

The facts that appear to support that conclusions are that the K.'s were never observed at the Baltimore-Annapolis Blvd. residence except at scheduled appointment times and that Mrs. K.'s black BMW was always parked in the same spot.

While it is accurate that several of school system witnesses testified that they never saw the family at the Baltimore-Annapolis Blvd. residence unless they scheduled an appointment, there are facts that contradict that testimony. On July 21, 2010, the family was observed arriving at the address at 8:00pm. On August 27, 2010, at 9:00am, Mr. Moore spoke to one of the sons at the address. On August 30, 2010, at 8:16am two sons were at the address and the mother and father were in court with the third son for a 9:00 hearing. Thereafter, the observations focused almost solely on the presence of cars.

Of the 44 observations of the Baltimore-Annapolis Blvd. property between July and December 2010, the mother's car (black BMW) was observed 19 of those times parked on the property. Much was made of the fact that it was always in the same spot. Mr. Moore, the residency verifier, concluded that that meant the car never moved and was apparently just a prop. He did not, however, attempt to verify whether the family was at the residence during those observations because "it is not Mr. Moore's job to knock on doors." (T. 70). Moreover, a review of the written observation reports shows that many of the observations were very brief. In fact, 25 of the 44 observations were between 2 and 5 minutes. The school system's timing would

have had to been serendipitous to observe a family coming or going in that brief window of time.

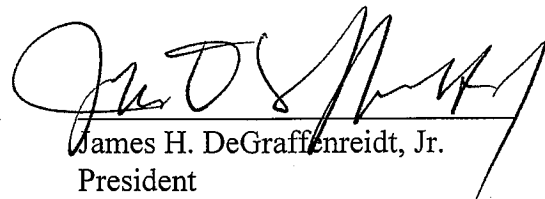
In this case, because the Appellants produced documents that met their initial burden of production, the burden of production shifted to the school system to produce sufficient evidence to contradict the documentary evidence. The evidence shows that, although the school system personnel did not observe the family in the residence each time they observed the house, they seldom knocked on the door to see who was at home. Many of the observations were for very brief periods of time. Moreover, the family or members of the family were observed at the home on three occasions. Finally, the black BMW owned by the mother consistently was parked at the address whether the observation occurred in the morning or evening. The fact that it was usually in the same spot was explained when the landlord testified that the car was given an assigned parking spot.

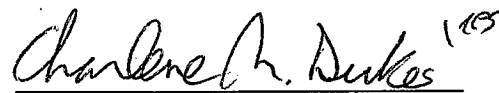
In our view, the school system's evidence was not sufficient to overcome the Appellant's documentary proof of residency. We reiterate here that the local board's finding that the K.'s and their witnesses were not credible was not based on witnesses' demeanor. The local board's findings, as written, were based solely on the inferences it drew from the facts that were testified to. While we would usually defer to that fact-finding under our standard of review, we need not do so if the facts do not support the inferences made and the ultimate conclusion reached. We find that they did not. It is our view that an ultimate conclusion based on tenuous inferences is arbitrary.

Finally, we come back to the fact that the three children caught up in this residency dispute have not been to school for a year. That is an unfortunate and unacceptable consequence of this protracted residency dispute. The three children should be enrolled forthwith.

CONCLUSION

For the reasons stated herein, we reverse the local board's decision and find that the K. family resides at 1259 Baltimore-Annapolis Blvd.


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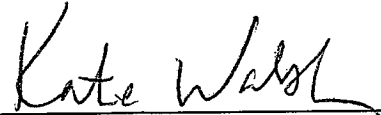
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July 19, 2011