#44-12 (OAL Decision: http://lawlibrary.rutgers.edu/collections/oal/html/initial/edu4590-07_1.html)

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner claims that respondent Board is obligated to share its cost of educating A.M. and M.M. – disabled twin brothers who have been in a residential placement since 2001 at Bancroft Neuro-Health – because their parents are separated and the twins' father has continuously resided in Bergenfield since 2004, while the mother remains at the family home in Howell. Cross motions for summary decision were filed by the parties.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:38-1 provides children between the ages of five and twenty with an entitlement to a free public education; domicile is the primary criteria for determining which school district will pay the costs of this education; the existing regulatory scheme attributes a child's rightful domicile to the home of one or the other parent; where parents live apart, the regulations favor single-district responsibility for education costs; costs are generally borne by the district of domicile of the children, but in this case the twins do not reside with either of their parents; *N.J.A.C.* 6A:22-3.1(a) provides that separated or divorced parents living in different communities can – by written agreement – designate a district for school attendance; although no such written agreement exists in this case, the intent of the twins' parents is clear – through their conduct and depositions – that they want the house in Howell to serve as the twins' home since it is where they grew up and continue to spend the majority of their time when not at Bancroft; and it appears that the twins' mother is the parent most actively engaged in the boys' care. Accordingly, the ALJ denied petitioner's cross-motion for summary decision and granted respondent's cross motion, thus determining that the petitioning Board must bear the full cost of education for A.M. and M.M.

Upon full and careful consideration, the Commissioner adopted the Initial Decision as the final decision in this matter as he concurred that – given the undisputed facts – summary disposition was appropriate, respondent's motion for summary disposition was properly granted and petitioner's motion for summary disposition was properly denied – for the reasons stated in the ALJ's decision, as amplified in the within final decision.

February 6, 2012

OAL DKT. NO. EDU 4590-07
AGENCY DKT. NO 143-6/07

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	
RESPONDENT.	:	

This controversy concerning financial responsibility for the education of two disabled students, twin brothers A.M. and M.M.,[1] comes to the Commissioner by way of cross motions for summary disposition. Upon review of the record, Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions and respondent's replies thereto, the Commissioner concurs with the Administrative Law Judge (ALJ) that, given the undisputed facts of this case, summary disposition was appropriate, respondent's motion for summary disposition was properly granted and petitioner's motion for summary disposition was properly denied.

The parties agree that it is the domicile of students that determines which district will be obliged to provide their free public education, *N.J.S.A.* 18A:38-1; *N.J.A.C.* 6A:22-3.1(a),

[1] The Commissioner notes that the two students whose educations are addressed herein "aged out" of the right to a free public education in 2009, when they reached the age of 21. Thus, the educational costs at issue are retrospective.

and that the domicile of minor – or unemancipated – children is the domicile of their parents, legal custodians or legal guardians. *See, e.g. N.J.A.C.* 6A:22-3.1(a)(1.). The disagreement in this case flows from the fact that in 2004, when the twins were 16 years old, their parents separated. (At this point in time the twins had been living at Bancroft NeuroHealth – a residential facility – for four years.) Their mother remained domiciled in the family home in Howell, a municipality covered by petitioner's regional high school district, and their father moved to Bergenfield, respondent's district.

Petitioner maintains that the father's move to Bergenfield made him a domiciliary of Bergenfield which, in turn, mandated respondent's participation in the payment of the twins' educational expenses – as of 2004. According to petitioner, "the plain language of [*N.J.A.C.* 6A:22-3.1(a)(1.)] compels the conclusion that A.M. and M.M. are domiciled in both [parents'] districts." (Petitioner's Exceptions at 4) The Commissioner disagrees.

The domicile of the twins' father is not determinative of whether there will be shared responsibility for the education of the twins. As the ALJ found, and as the record reveals, notwithstanding that the twins live at Bancroft NeuroHealth, the Howell home in which they were raised, and in which their mother resides, still serves as the hub of their family life.[2] For most of their family outings, both with their mother and their father, they are brought to the Howell home. Both parents intend that the twins enjoy the continuity derived from keeping the Howell residence as their home. The twins have never lived in Bergenfield, and they rarely visit their father there. Further, while the twins' parents are legally co-guardians of their sons, the

[2] Although the twins' father lives in Bergenfield, he is still married to the twins' mother, pays the Howell home mortgage, uses the Howell address for his voting registration, drivers license and tax returns – which he files jointly with the twins' mother, and maintains his bank accounts in Howell – which are joint accounts with the twins' mother.

record shows that it is the mother who attends meetings at Bancroft, hosts holidays for the entire family, and is the *de facto* primary custodian of the twins.

Nothing in *N.J.A.C.* 6A:22-3.1(a)(1.) compels a finding that the twins are domiciled in both Howell and Bergenfield, simply because their father lives in the latter municipality. That regulation provides that:

> A student over five and under 20 years of age pursuant to *N.J.S.A.* 18A:38-1, or such younger or older student as is otherwise entitled by law to **free public education,** is eligible to attend school in a school district if the student is **domiciled** within the district.
>
> (*N.J.A.C.* 6A:22-3.1(a))

And it explains that:

> A student is domiciled in the school district when he or she is the child of a parent or guardian whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.
>
> (*N.J.A.C.* 6A:22-3.1(a)(1.))

While the foregoing language bestows entitlement to a free public education upon a child in a district where his or her parent is domiciled, it does not mandate that a child whose parents are domiciled in separate districts must receive a free public education in both districts. To the contrary, *N.J.A.C.* 6A:22-3.1(a)(1.)(i) instructs that the domicile of a student with parents in separate school districts lies in "the school district of the parent or guardian with whom the student lives for the majority of the school year, regardless of which parent has legal custody" (emphasis added.) That provision contemplates that normally one, not both, of the parents' districts of residence will provide the free public education. It further contemplates that the free

education will be provided by the district of the parent with the most jurisdiction over and contact with the student. In the present case it is the twins' mother.

By way of contrast, *N.J.A.C.* 6A:22-3.1(a)(1.)(ii) addresses situations where separated parents accept truly equal responsibility for the physical care of their children, and the children spend an equal amount of time in the parents' respective districts of residence:

> ii. Where a student's physical custody is shared on an equal-time, alternating week/month or other similar basis such that the student is not living with one parent or guardian for a majority of the school year, and where there is no court order or written agreement between the parents designating the school district for school attendance, the student's domicile is the present domicile of the parent or guardian with whom the student resided on the last school day prior to October 16 preceding the date of the application.
>
> (1) Where such a student resided with both parents or guardians, or with neither parent or guardian, on the last school day prior to the preceding October 16, the student's domicile is the domicile of the parent or guardian with whom the parents or guardians indicate the student will be residing on the last school day prior to the ensuing October 16. Where the parents or guardians do not designate, or cannot agree upon, the student's likely residence as of that date, or if on that date the student is not residing with the parent or guardian previously indicated, the student shall attend school in the school district where the parent or guardian with whom the student is actually living as of the last school day prior to October 16 is domiciled.

Those provisions of the regulation are not at play in this case, since the twins' dominant parent is their mother, who is domiciled in Howell.

Nor can *N.J.A.C.* 6A:22-3.1(a)(1.)(ii)(2) be construed to support petitioner's contention that respondent must retroactively reimburse petitioner for a portion of the twins' expenses at Bancroft. That provision directs that:

> [w]here the domicile of a student with disabilities as defined in *N.J.A.C.* 6A:14 cannot be determined pursuant to this section, nothing in this section shall preclude an equitable determination of

> shared responsibility for the cost of such student's out-of-district placement.

As the ALJ determined, the foregoing provision is permissive. It advises that the Commissioner is not precluded from making an equitable determination that two domiciles exist and that those districts should share responsibility for the student's education. Conversely, the Commissioner is not obliged to make such a determination.

The two cases relied upon by petitioner for the proposition that the Commissioner should divide the costs of the twins' educations between petitioner and respondent do not support petitioner's cause because they are not apposite to the instant controversy. The fact patterns in *Somerville Bd. of Educ. v. Manville Bd. of Educ.*, 332 *N.J. Super*. 6 (App. Div. 2000), *aff'd*, 167 *N.J.* 55 (2001)[3] and *Cumberland Reg'l High Sch. Dist. Bd. of Educ. v. Freehold Reg'l High Sch. Dist. Bd. of Educ.*, OAL Dkt. No. EDS 2994-02 (July 27, 2005), *aff'd* 2007 U.S. Dist. LEXIS 44212 (June 18, 2007), *aff'd unpub. opinion* 293 *Fed. Appx.* 900 (3d Cir. September 29, 2008), disclose histories of equal legal and physical custody, with no clear evidence that one parent and/or home was dominant, or that the parents in those cases had manifested the intent that one parent would have primary custody or control. In this case the facts show not only that the twins' mother was the dominant parent, but that both parents intended her home to be the twins' home, and Howell to be the twins' domicile. Moreover, the facts as a whole not only show that the twins have had virtually no connection with Bergenfield, but also that their father has maintained the kind of significant connections with Howell that are often examined in the course of determinations about domicile.

For the above stated reasons, as well as those articulated by the ALJ, the Commissioner adopts the Initial Decision as the final decision in this case. Accordingly,

[3] This case was superseded by regulatory amendments in 2010.

petitioner's motion for summary disposition is denied and respondent's motion for summary disposition is granted.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 6, 2012

Date of Mailing: February 6, 2012

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c*. 36. (*N.J.S.A.* 18A:6-9.1)