

T.S. and C.S., on behalf of minor child, S.S., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE BOROUGH : DECISION
 OF TOTOWA, PASSAIC COUNTY, :
 RESPONDENT. :
 _____ :

SYNOPSIS

In November 2017, petitioners T.S. and C.S. – the paternal grandparents of minor child S.S. – appealed the determination of the respondent Board that S.S. was not eligible for a free public education in the Totowa school district. Petitioners submitted certification that S.S. has been permanently domiciled with them in Totowa since September 12, 2017, and requested that S.S. be permitted to continue her education in Totowa schools. The petitioners filed a motion for summary decision. The Board asserted that a residency investigation revealed that S.S. resides with her mother, N.J., in Paterson, and is not entitled to attend Totowa schools.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(b)(2), petitioner has the burden of proof in a determination of residency; in the instant case, there was contradictory testimony presented by petitioners and respondent’s witnesses; the testimony of N.J., S.S.’s mother, was not credible; T.S., Jr. – the father of S.S. – indicated in the original school registration form that his daughter lived with her mother, N.J., seven days a week; T.S., Jr. provided as identification a driver’s license with a Paterson address; and N.J. collected food stamps for herself and her children, including S.S., at her Paterson address. The ALJ concluded that S.S. is not domiciled in Totowa, and affirmed the respondent Board’s determination to remove S.S. from the Totowa school district.

Upon consideration, the Commissioner rejected and remanded the Initial Decision of the ALJ. In so determining, the Commissioner found, *inter alia*, that the issue of domicile cannot be decided on the factual determinations and conclusions set forth in the Initial Decision; specifically, the contradictory nature of several facts that are material to the adjudication of this matter render it impossible for the Commissioner to ascertain S.S.’s domicile, and affirm the ALJ’s conclusion. Accordingly, the matter was remanded to the OAL for further proceedings.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

May 4, 2018

T.S. and C.S., on behalf of minor child, S.S., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH : DECISION
OF TOTOWA, PASSAIC COUNTY, :
RESPONDENT. :
_____ :

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and petitioners' exceptions – filed pursuant to *N.J.A.C. 1:1-18.4* – have been reviewed.¹

The Administrative Law Judge (ALJ) found that S.S. was not domiciled in Totowa because: her school registration form indicated that she would be living with her mother, N.J., seven days a week; S.S.'s father – T.S., Jr. – held a driver's license with a Paterson address; and N.J. collects food stamps for herself and her children, including S.S., at the Paterson address. Petitioners take exception to the ALJ's consideration of the facts and legal conclusions. Specifically, petitioners argue that the ALJ: failed to address the motion for summary decision filed by them; erred in making credibility determinations; and did not consider relevant facts such as T.S., Jr.'s residence in Totowa with T.S. and C.S. – the grandparents of S.S.

Upon review, the Commissioner rejects – for the reasons set forth herein – the ALJ's decision finding that S.S. is not domiciled in Totowa, and remands the matter for further proceedings.

¹ The Commissioner was not provided with a transcript of the hearings at the OAL.

As a preliminary matter, the Commissioner notes that ALJs are within their discretion to make credibility determinations of witnesses pursuant to *N.J.S.A. 52:14B-10(c)* and *N.J.A.C. 1:1-15.8*; consequently, the Commissioner considers the factual findings and determinations of the ALJ material – and relies on the ALJ’s credibility determinations of witness testimony – in rendering a final agency decision. In residency matters, where the adjudication of the issues are fact-specific, it is vital that the factual findings and legal analysis in the Initial Decision provide thorough deliberation of the evidence in the record and application of the facts of the case to the relevant laws. In this matter, the Commissioner finds that the issue of domicile cannot be decided on the factual determinations and conclusions as set forth in the Initial Decision. Specifically, the contradictory nature of several facts that are material to the adjudication of this matter renders it impossible for the Commissioner to ascertain S.S.’s domicile and affirm the ALJ’s conclusion.

With regard to factual discrepancies, testimony of the resource officer revealed that the District conducted surveillance of the Paterson and Totowa residences in February 2018, and observed S.S. at the Totowa residence. No further investigation was undertaken to confirm whether S.S. was in fact living in Totowa with her father and grandparents, or exactly when she moved there; nor did the ALJ attempt to ascertain same. The ALJ also disregarded, without making a credibility determination, relevant testimony from T.S. in which he stated that T.S., Jr. resides in Totowa with T.S. and C.S.; this assertion requires further exploration and analysis, as it implicates S.S.’s eligibility to attend school in the District. Relatedly, the ALJ did not examine pertinent statutes and regulations in this matter, including *N.J.A.C. 6A:22-3.1(a)(1)* and

N.J.S.A. 18A:38-1(b).² Lastly, the ALJ did not address the disposition of petitioners' outstanding motion for summary decision.

The record does not support the ALJ's conclusion that S.S. is not domiciled in Totowa. Nor is it possible to establish from the record that S.S. *is* domiciled in Totowa without further examination and clarification of the facts. Accordingly – for the reasons expressed herein – this matter is remanded to the OAL for further proceedings.

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 4, 2018

Date of Mailing: May 4, 2018

² The record does not indicate that petitioners sought to have S.S. enrolled as an affidavit student; nor have they taken any actions pertaining to same. Petitioners, however, appear to suggest that S.S. should be allowed enrollment pursuant to *N.J.S.A.* 18A:38-1(b), which is further evidenced by the fact that petitioners have filed this matter on behalf of S.S., as opposed to T.S., Jr. Petitioners also maintain that T.S., Jr. is domiciled in Totowa, thereby implicating *N.J.A.C.* 6A:22-3.1(a)(1). In the absence of clear facts relating to the aforementioned considerations, the Commissioner will not make a determination on the legal soundness of the filing of the petition and the arguments proffered by petitioners. The Commissioner does, however, deem it necessary for S.S.'s parents – particularly T.S., Jr. – to be joined as parties to the case for proper adjudication of this matter.

³ 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).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 17468-17

AGENCY DKT. NO. 258-11/17

T.S. AND C.S. ON BEHALF OF MINOR CHILD S.S.,

Petitioners,

v.

**BOARD OF EDUCATION OF THE BOROUGH
OF TOTOWA, PASSAIC COUNTY,**

Respondent.

Leonard S. Miller, Esq. for petitioners

Raymond B. Reddin, Esq., for respondent

Record Closed: March 12, 2018

Decided: March 28, 2018

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE

Petitioners T.S. and C.S. challenges the Board of Education of the Borough of Totowa's (respondent or Board) residency determination of S.S.

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) on November 28, 2017, for hearing as a contested case. The hearing was scheduled and heard on February 12, 2018. The parties submitted closing brief on March 12, 2018, at which time I closed the record.

FACTUAL DISCUSSION

Testimony

Patricia Capitelli

Patricia Capitelli (Capitelli) is the Superintendent of Totowa School District. On August 31, 2017, the mother of S.S., N.J., filled an incomplete registration form for S.S. to enter the school district. N.J., who resides in Paterson, was advised that the registration form was incomplete. Subsequently T.S. Jr., the father of S.S., filled out the registration forms. The parents were given a checklist as to what was needed to establish residency. Ms. Siok handled the registration for the district at that time. Siok was told that S.S. would live at her grandfather's house in Totowa.

A residency inquiry was begun at this time. John Sole (Sole) conducted residency checks on September 5 and 6, 2017. After the investigation Sole saw N.J. bringing her daughter to school.

On September 14, 2017, Capitelli and Lauren Terranova (Terranova) met with the parents of S.S. She first met with N.J. who did not want S.S. going to school in Paterson because 140 teachers had been laid off. In addition, N.J. believed that S.S. would do better in the Totowa school system. Capitelli later met with T.S. Jr., who gave a Totowa address. However, his expired driver's license listed a Paterson address. The enrollment form filed out by T.S. Jr. states that S.S. will reside with N.J. seven days a week in Paterson. T.S. Jr. did not provide any valid Totowa identification.

He was told that he needed proof that he resided in Totowa. These documents were not supplied. T.S. Jr. invited Capitelli and Terranova to come to his home to see that S.S. lived there.

The determination was that S.S. lived with her mother in Paterson and should be removed from Totowa School District. A notice of the recommendation of removal was sent to N.J. T.S. Jr. was copied on the letter. T.S. and C.S., the grandparents of S.S. were not listed with the registrar. The Board did not know that the grandparents were involved until N.J. stated that at the board meeting.

John Sole

John Sole is the resource officer for the Totowa School Board. He was assigned by Capitelli to do a residency investigation of S.S. On September 7, 2017, between 8:21 a.m. and 9:00 a.m. he went to the Totowa address given by T.S. Jr. He saw two vehicles at the residence. He did not see S.S. leave the premises. School starts at 9:00 a.m. S.S. was at school that day. On September 11, 2017, he again did surveillance at the Totowa address between 8:10 and 9:00 a.m. He saw two vehicles in the driveway. He waited to see if either vehicle left to take S.S. to school that day. Neither vehicle took S.S. to school that day, but S.S. was in school that day. On September 12, 2017, Sole waited at Memorial School, the school S.S. was going to and saw N.J. walk S.S. into the school. On September 13, 2017, Sole conducted surveillance on the Paterson address of N.J. from 8:11 a.m. to 8:25 a.m. at 8:25 a.m. he saw S.S. leave the premises with N.J. At 8:45 a.m. N.J. dropped S.S. off at school.

At the invitation of T.S. Jr., Sole and Debbie Barone went to the Totowa address. Once inside they were brought to the room that they were told belonged to S.S. It did not look like a child's room. There was nothing associated with children in the room. The clothes that were in the drawers appeared to be enough for an overnight visit—pajamas, underclothes, no shoes. He was told that S.S. was in the process of moving in.

On February 1, 2018, he did a surveillance on the Paterson property. He did not recognize anyone leaving the property. No children left the property. On February 2,

2018, he did a surveillance of the Totowa premises. At 8:25 a.m., he saw S.S. get on the school bus.

Debbie Barone

Debbie Barone (Barone) is a school counselor for the Totowa Board of Education. On September 17, 2017, she went with Sole to the Totowa residence regarding the residency investigation of S.S. The bedroom that she was told belonged to S.S. contained a double bed and two dressers. It did not look like a child's room. In the drawers she saw two t-shirts, leggings, and underwear. The other dresser contained papers. The backyard had a pool, but there were no child's toys in the backyard.

As the counselor, Barone introduces herself to the new students. On September 13, 2017, she introduced herself to S.S. S.S. told her that she had a baby brother that she shares a room with. She also said that she has two homes. S.S. said that her mother takes her to school and her grandmother picks her up from school, then her mother picks her up at 5:00.p.m.

Lauren Terranova

Lauren Terranova is the director of Special Education for the Board. She was asked to sit in on the meeting between N.J. and Capitelli regarding residency on September 13, 2017. On that day N.J. drove S.S. to school. N.J. was told if S.S. lived in Paterson, she had to go to school in Paterson. N.J. said S.S.'s grandparents lived in Totowa and she would use that address because the school in Paterson were terrible. After N.J. left T.S. Jr. arrived and stated that S.S. would live with him at his parent's house. T.S. Jr. produced his driver's license, which had a Paterson address. T.S. Jr. completed a registration form for S.S. On the form he stated that S.S. would be residing with N.J. seven days a week.

N.J.

N.J. is the mother of S.S. She testified that she became pregnant in March of 2017. She realized that she could not afford three children. She spoke to T.S. Jr. and suggested that S.S. stay with the parents of T.S. Jr. She registered S.S. in the Totowa School District. She listed a Totowa address for S.S. T.S. Jr.'s mother was listed as the contact person. N.J. stated that she was transitioning S.S. to living with her grandparents. She became aware that there was a residency investigation when she dropped S.S. off at the school. During the week of September 13, 2017, S.S. moved to her grandparent's home. N.J. does not pay for any necessities for S.S. She does not provide S.S.'s grandparents with any money. T.S. Jr. was supposed to take care of S.S. along with his parents. N.J. did not have any room for S.S. at her apartment because she has a three-year-old and an infant. S.S. visits her. N.J. was not asked to provide proof that S.S. lived in Totowa. She was never required to provide further documentation that S.S. lived in Totowa. N.J. was made aware on September 13, 2017, that Totowa's position was that S.S. did not live in Totowa. She later received a letter from Totowa's attorney.

There is no Court Order deciding custody of S.S. N.J. stated that she does not see S.S. during the week but she stated that she sometimes picks her up from school and drops S.S. off in Totowa. On September 7, 2017, and September 12, 2017, N.J. took S.S. to school. N.J. does not pay T.S. Jr. child support.

N.J. further testified that S.S. is currently on her health insurance and that she is also receiving food stamps for her children including S.S. in Paterson, New Jersey.

T.S.

T.S. is that grandfather of S.S. He did not receive a notice of the board meeting regarding the residency of S.S. He was not asked to bring any documentation to the meeting.

He testified that S.S. began living with him in September 2017 because N.J. was having financial difficulties. N.J. does not pay for anything for S.S. S.S. lives with him but visits her mother. T.S. Jr. has multiple sclerosis, so T.S. and his wife C.S. take care of S.S. His daughter or wife takes S.S. to school. He was not involved in registering S.S. for school. T.S. and C.S. do not intend to file for custody of S.S.

FINDINGS OF FACT

In light of the contradictory testimony presented by respondent's witnesses and appellant, the resolution of this matter requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-522 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I find that N.J.'s testimony was not credible. She stated that when she became pregnant in March 2017, she knew that she could not support three children. However, she stated S.S. did not move to Totowa until September 2017. In addition, she testified that S.S. does not live with her but she receives food stamps for herself and her children, including S.S.

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. Petitioners T.S. and C.S. are the grandparents of minor child S.S.
2. T.S. and C.S. reside in Totowa, New Jersey.
3. N.J. is S.S.'s mother and resides in Paterson, New Jersey.
4. T.S. Jr. is the father of S.S.
5. S.S. was enrolled in Memorial Elementary School in Totowa, New Jersey at the start of the 2017-2018 school year by N.J.
6. Totowa began an investigation to determine if S.S. was permanently residing at the Totowa address listed on her registration.
7. Sole conducted residency checks at the Totowa and Paterson addresses in September 2017.
8. On September 6, 2017, between the hours of 8:00 a.m. and 9:00 a.m. Sole did not see S.S. leave the Totowa residence; however, she did attend school.
9. On September 7, 2017, between the hours of 8:00 a.m. and 9:00 a.m. Sole did not see S.S. leave the Totowa residence. S.S. was in school on September 7, 2017.
10. On September 11, 2017, between the hours of 8:00 a.m. and 9:00 a.m. Sole did not see S.S. leave the Totowa residence but she was again present at school.
11. On September 12, 2017, Sole saw S.S. walking into the school with N.J.
12. On September 13, 2017, Sole conducted a residency check at the Paterson address and did witness S.S. leaving the residence at approximately 8:30 a.m. with her mother N.J. S.S. was present in school.
13. A meeting was scheduled with N.J. on September 13, 2017, upon her arrival, N.J. admitted, in front of witnesses, that she did not want her daughter to attend Paterson Schools. She was told that since S.S. lived in Paterson, she had to go to school in Paterson.
14. One hour after the meeting on September 13, 2017, T.S., Jr. arrived at the school and explained that S.S. would be living with him at his parent's house in Totowa.

15. On the same date, a home inspection was conducted at the Totowa address by Investigator Sole and Ms. Barone. Both of whom stated that the home lacked evidence that S.S. lived in the home.
16. Ms. Barone returned to school and introduced herself to S.S. S.S. voluntarily stated that she shares a room with her brother, she has two homes, her mother takes her to school, her grandmother picks her up from school, and her mother picks her up from her grandmother's home.
17. The Board attorney was notified on September 14, 2017, of the residency issue and it was recommended that S.S. formally be removed from the school district at the September 27, 2017, Board meeting. A notice of the recommendation of removal was sent to N.J. on September 14, 2017, T.S. Jr. was copied on the letter.
18. During the meeting the Board passed an official vote to affirm the decision to remove S.S. from its district.
19. T.S. Sr. and C.S. were not noticed of the Board meeting because he was not listed as the parent or guardian of S.S. on either registration of S.S.
20. N.J. receives food stamps in Paterson for herself and her children, including S.S.

LEGAL ANALYSIS

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "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). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J 238, 250 (1955). The domicile of

an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. ex rel. E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

In this matter, T.S. Jr. in the registration form stated that S.S. would live with N.J. seven days a week. He provided as identification a driver's license that had a Paterson address. N.J. collects food stamps for herself and her children including S.S. at the Paterson address.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that S.S. is not domiciled in Totowa.

ORDER

Accordingly, it is hereby **ORDERED** that respondent's determination to remove S.S. from its school district be **AFFIRMED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 28, 2018



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

March 28, 2018

Date Mailed to Parties:

ljb

APPENDIX

LIST OF WITNESSES

For Petitioners:

N.J.

For Respondent:

Trish Capitelli

John Sole

Debbie Barone

Lauren Terranova

LIST OF EXHIBITS

For Petitioners:

P-1 Letter to N.J. from board attorney Raymond B. Reddin

P-2 Enrollment Information

P-3 Letter to Petitioners' attorney from board's attorney, re: Removal of S.S.

For Respondent:

R-1 Enrollment Form

R-2 Check List for Proof of Residency