

F.P., on behalf of N.P. & S.P., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF POINT : DECISION
 PLEASANT BEACH, OCEAN COUNTY, :
 RESPONDENT. :
 _____:

SYNOPSIS

Petitioning parent challenged Board’s determination that he was not domiciled in Point Pleasant Beach.

ALJ concluded that pursuant to *N.J.S.A. 18A:38-1(a)*, petitioner failed to prove by a preponderance of credible evidence that his sons, N.P. and S.P., were entitled to attend the Board’s schools for the 1997-1998 school year free of charge as he was domiciled in Brick Township. ALJ ordered F.P. to pay the Board for his sons’ tuition for the 1997-1998 school year in the amount of \$37,338.16. ALJ further concluded that for the 1998-1999 school year, it is probable that petitioner and his sons are domiciled within Point Pleasant Beach and, therefore, are entitled to continue attending the Board’s schools without charge for this school year. ALJ denied the Board’s counterclaim for attorney’s fees.

Commissioner adopted findings and determination in initial decision that petitioner failed to prove by a preponderance of the credible evidence that he was domiciled in Point Pleasant Beach for the 1997-1998 school year. However, Commissioner rejected the ALJ’s conclusion that petitioner’s domicile was Point Pleasant Beach for the 1998-1999 school year, finding that the record in this matter was not sufficiently developed to reach a conclusion that petitioner had changed his domicile back to Point Pleasant Beach for the 1998-1999 school year. The matter was, therefore, remanded to OAL for further proceedings to supplement the record on this issue and to calculate the amount of tuition owed for the 1998-1999 school year, in the event petitioner is not found, on remand, to be domiciled in Point Pleasant for the 1998-1999 school year. (*Cranford Bd. of Ed. v. A.McG. and L.McG.*) Moreover, because the record indicated that one of petitioner’s sons is a special education student, Commissioner directed reexamination of the any tuition owed by petitioner for the 1997-1998 school year, as well as any monies which may be owing for 1998-1999 be calculated, taking into consideration what impact, if any, the FAPE provisions of IDEA may have on the amount of tuition owed to the Board by petitioner.

Commissioner adopted ALJ’s order denying the Board attorney’s fees and also denied Board’s claim for interest.

April 13, 1999

F.P., on behalf of N.P. & S.P., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF POINT : DECISION
PLEASANT BEACH, OCEAN COUNTY, :
RESPONDENT. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Both parties filed timely exceptions pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner takes exception to the Administrative Law Judge's (ALJ) findings and conclusions that he has not met his burden of proof that during the 1997-1998 school year he and his children, S.P. and N.P., were domiciled in the Point Pleasant Beach house. Petitioner avers that the ALJ's determination is not based on any affirmative proofs offered by respondent as evidence in the case but, rather, are based upon the ALJ's finding that "it is probable that, since 1996, F.P. has provided a substantial amount of C.M.'s income****" (initial decision at p. 4) and that "[t]he absence of heating service at the Point Pleasant Beach house during that period [Spring 1998-Fall 1998] makes it more probable that the children were not domiciled there and that they were domiciled in the Brick [Township] house" (*id.* at p. 6). Further, petitioner argues that neither of these findings is even arguably sufficient, in the absence of other affirmative findings by the ALJ based upon evidence of record in the case to support the conclusion that he was not domiciled in Point Pleasant Beach during the 1997-1998 school year.

Petitioner points to Exhibits P-10 to P-12, P-16 to P-17, P-19 to P-22, P-28, P-30 and P-36 in support of his argument that

***These exhibits, both individually and in the aggregate, support the clear conclusion that Petitioner at all times during the 1996-1997, 1997-1998 and 1998-1999 school years intended his family's residence at 207 Curtis Avenue in Point Pleasant Beach to be his domicile as matter of both fact and law. The reported administrative and state court decisions in New Jersey which involve a domicile dispute within the public school context all utilize an analysis which takes into account this exact type of indicia of domicile in the form of licenses, correspondence, registration forms, tax and other legal forms and documents which support the respective contentions of the parties. Similarly, in this case the court has before it, Petitioner's asbestos removal certifications from New Jersey, New York, Pennsylvania, Massachusetts, Louisiana and Ohio, all of which have uniformly identified 207 Curtis Avenue, Point Pleasant Beach as Petitioner's permanent mailing address (P10, P11, P30) as well as his monthly E-Z pass billing statements from New York State Thruway Authority (P12). Petitioner's 1996 and 1997 W-2 earnings summaries set forth his address and are in fact received by Petitioner at Point Pleasant Beach (P16, P17). [He] receives his monthly automobile lease statement, his monthly utilities billing statements and his monthly disability insurance premium notices and bills at Point Pleasant Beach [P19-P22]. Significantly, as recently as May 1998 and continuing through the present, Petitioner has received all correspondence from the Board and the Point Pleasant Beach School District at 207 Curtis Avenue, notwithstanding the Board's ongoing contention that [he] and his sons are not actually living there. (Petitioner's Exceptions at pp. 3-4)

Petitioner's exceptions go on to reiterate his testimony before the ALJ regarding the temporary flooding of the Curtis Avenue home, averring, *inter alia*, that the family members had, for the most part, been able to inhabit several of the living portions of the house and recounting his efforts to repair or replace the furnace which had suffered water damage. As to this, petitioner argues that although counsel for respondent suggested his open skepticism of the "furnace problem" at the hearing, virtually no evidence was offered to contradict petitioner's testimony in this regard and, in fact, petitioner's account was fully corroborated by the testimony of C.M., his fiancée and the subpoenaed witness of respondent. Petitioner further avers

Moreover, the mere fact that the ALJ may have believed that either [he] or C.M. were “incredible” with regard to some of the details of their description of the facts surrounding the construction of C. M.’s home or the problems with [his] furnace, this type of bare skepticism, with no other factual support or evidential basis in the record cannot support the legal conclusion that Petitioners were not domiciled within Point Pleasant Beach during the 1997-1998 school year. (*Id.* at p. 6)

Petitioner’s exceptions recite at length arguments presented to the ALJ in his post-hearing brief which were considered by the ALJ in rendering the initial decision, and therefore, shall not be repeated herein. Petitioner does add, however, that it is not within the province or authority of the ALJ to second guess the manner in which he and C.M. have structured their personal relationship, averring that the plain fact is that there is no contradiction in the record upon which to discount their testimony regarding his domicile and that of his sons in the instant matter. (*Id.* at p. 15) Petitioner further argues, *inter alia*, that

Upon reviewing the nature and quality of the proofs in the record, it should be immediately apparent that [he] has sustained the burden of proof and has adequately demonstrated his domicile in Point Pleasant Beach***. In fact, even the temporary flooding and heating problem in the Point Pleasant home does not rise to the level of a change in domicile since there is absolutely no testimony that anyone in [his] family ever intended for a single day not to return to Point Pleasant Beach or to transfer their permanent home to C.M.’s house in Brick. This testimony was completely undisputed by the Respondent, and was not even addressed by a single witness for Respondent. (*Id.* at p. 17)

Lastly, petitioner supports the ALJ’s findings and conclusions that he sustained the burden of proof for domicile in Point Pleasant Beach during the 1998-1999 school year. However, he goes on to argue that “***[t]here is no basis in this case to disbelieve the proofs presented by Petitioners regarding their domicile during the 1997-1998 school year or upon which to find factual and/or legal support for assessing a tuition obligation against [them] for any portions of the [school years in dispute]. (*Id.* at p.17)

Respondent is fully supportive of the those portions of the initial decision in which the ALJ dismisses the petition and orders petitioner to pay \$37,338.16 for tuition for the 1997-1998 school year. It excepts, however, to the ALJ's failure to address the issue of interest and the award of attorney fees and his determination that because of petitioner's return to domicile in the District his children may continue in the Point Pleasant Beach school system.

Respondent avers that the ALJ correctly concluded in his opinion and decision that the relevant statute defining the proceeding in the instant matter is *N.J.S.A. 18A:38-1 et seq.* which imposes on petitioner the burden of proof by a preponderance of the evidence to establish that the F.P.'s children are residents of the Point Pleasant Beach School District.¹ Respondent also contends the ALJ correctly concluded that in 1997 the family unit defined as F.P. and C.M. had completed construction and took occupancy of a home in Brick Township to house the entirety of the family unit. It also avers, *inter alia*, that the ALJ correctly describes on page 4 of the initial decision the four-bedroom, two car garage home as being designed to house the entire family unit of petitioner and C.M. and that, given their testimony, they reasonably intended to be domiciled with all their children in the Brick Township home constructed by C.M. Respondent further avers, *inter alia*, that the ALJ accurately concluded that petitioner's testimony that he intended to be domiciled in Point Pleasant Beach was not credible, nor was C.M. in large portions of her testimony. Regarding the issue of petitioner's credibility, respondent emphasizes that F.P. intentionally misrepresented facts when, in sworn documents submitted to the Superior Court of New Jersey Chancery Division, petitioner claimed he lived in Brick, while simultaneously taking an inconsistent position in these proceedings that he and his two sons were domiciliaries of Point Pleasant Beach.

¹ The Commissioner notes for the record that the ALJ correctly determined that *N.J.S.A. 18A:38-1(b)2* is the statutory provision applicable in the instant matter and that the provision requires proof of *domicile*, not residency.

Respondent flatly rejects the ALJ's conclusion that petitioner changed his domicile back to Point Pleasant Beach by the start of the 1998-1999 school year, contending that the only factual basis for that conclusion was that Ms. Pritchard (one of respondent's witnesses) testified that petitioner was seen more often at the Point Pleasant Beach home after the Board took action against petitioner and that in October 1998, the heating system was repaired. Of this, respondent states:

***It is respectfully submitted that given the burden [of] proof upon the petitioner under the statutory criteria and given the Court's conclusion that the petitioner and his [fiancée's] testimony were not credible and that the admissions by FP and CM that they had lied to both the Superior Court Chancery Division and this Court that such limited factual conclusion by [the ALJ] was inadequate to meet the petitioner's burden of proof that he once again switched back the domicile from Brick Township to Point Pleasant Beach. The mere fact that once litigation is initiated, that someone tries to create an appearance for purposes of litigation, is not sufficient credible evidence to cause a major change of domicile of this family unit from the large recently constructed home in Brick Township to a small cape cod, totally inadequate for the family unit. Furthermore, any ambiguous inferences to be drawn from the facts should be resolved in favor of the Board of Education given the lack of credibility and truthfulness of this [petitioner's] testimony as determined by [the ALJ].

[Respondent] contends that nothing has changed with respect to the Brick Township residence. The home has not been sold or that FP and CM are not engaged to be married and living together as they were during the 1997-1998 school year. The absence of a finding of credible evidence found by the Court except in a short statement found on the bottom of page 8 of his report fails to meet the burden of proof required of the petitioner.*** (Respondent's Exceptions at p. 4)

Given the above, respondent argues that the sum for tuition owing to the Board should be recalculated and petitioner should immediately remove his children from the Point Pleasant Beach School District, or, if they are to remain to the end of the school year, the Commissioner should construct a per diem charge.

COMMISSIONER'S DETERMINATION

Upon careful and thorough consideration of the record before him, which it is noted does not include a transcript of the proceedings in the instant matter, the Commissioner concludes that the ALJ properly analyzed the law of domicile to mean

“Domicile” is defined as “1. A residence; a home 2. One’s legal residence.” Domicile has been described as “the place of [a person’s] abode where he has the present intention of remaining and to which, if absent, he intends to return.” *Mercadante v. City of Paterson*, 111 N.J. Super. 35, 39 (Ch. Div. 1970), *aff’d*, 58 N.J. 112 (1971). “A person may have several residences or places of abode. However, he can only have one domicile at one time.” *Collins v. Yancey*, 55 N.J. Super. 514, 520 (Law Div. 1959). Between residences, factors to identify the domicile include: (1) the physical characteristics of each residence, (2) the time spent and things done in each residence, (3) other persons found in each residence, (4) the person’s mental attitude about each residence, and (5) whether, when absent, the person has the intention to return. *Mercadante, supra*, *** at 39-40. Acts, statements and documents may be relevant in determining domicile. (Initial Decision at p. 11)

As indicated above and by the Courts in matters such as *Matter of Unanue*, 225 N.J. Super. 362 (Law Div. 1991) and *Kurilla v. Roth*, 132 N.J.L. 213, 215, 38 A.2d 862 (Sup. Ct. 1944), domicile, in a strict legal sense, “***is 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, and from which he has no present intention of moving.” Domicile is thus intrinsically identified with the concept of home. As stated by the *Unanue* court, “***identification of domicile with the concept of home continues to have vitality in New Jersey ‘[h]ome is the place where a person dwells and which is the center of his domestic, social and civil life.’” (*Unanue, supra* at 374) Moreover, the concepts of home and domicile “mean more than physical residence. They also embody the subject’s objective and subjective relationship to that residence.” (*Id.* at 375)

Establishing a domicile involves an act of volition, *i.e.*, a person has the right to choose his own domicile; moreover, a person's motive in doing so is immaterial "so long as the necessary ingredients for establishment of the new domicil are present." *Lyon v. Glaser*, 60 *N.J.* 259, 264, 288; *Unanue, supra* at 375.

Central to the issue of determining true domicile, particularly when multiple residences are involved in the dispute, is the concept of "indicia of domicile." The *Unanue* Court concluded "[it] is clear that a choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile. Thus, a person may not arbitrarily designate a given residence as his domicile. It is necessary that requisite subjective intent be present since domicile is 'very much a matter of the mind – of intention.'" (*Unanue, supra* at 376, citing *Lyon, supra*) Such indicia oftentimes are statements relative to domicile in such documents as tax returns, wills, trusts, or other formal documents and statements made by an individual to others as to his/her domicile. The *Unanue* decision indicates that such recitals are evidential of actual domicile but the Court concluded, they are not at all conclusive, rather "[t]hey are of value evidentially to the extent that they are not intended to deceive and other proofs support such domicile." (*Id.* at 377)

As correctly noted by the ALJ, a change in domicile is a matter of intention, *i.e.*, "[a] change of domicile*** is effected if a person actually moves to a new abode intending to remain there for an indefinite period of time and establishing it as a place of fixed present domicile, notwithstanding that he entertains merely a possibility, or floating intention, of returning to his former domicile at some later time." (*Unanue, supra* at 378, citations omitted)

The following passage from *Lyon, supra*, synthesizes well the concurrence of elements referenced above which one has to consider when determining which particular residence is a person's true domicile.

Domicil is very much a matter of the mind - of intention. One may be acquired, or changed to a new one, when there is a concurrence of certain elements, *i.e.*, an actual and physical taking up of an abode in a particular State, accompanied by an intention to make his home there permanently or at least indefinitely, and to abandon his old domicil. A person has the right to choose his own domicil, and his motive in doing so is immaterial. ***A very short period of residence in a given place may be sufficient to show domicil, but mere residence, regardless of its length, is not sufficient. It has been said that concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode, effects the change of domicil. And once established, the domicil continues until a new one is found to have been acquired through an application of the same tests. (*Lyon, supra* at 264)

The *Unanue* court identified three elements which must be considered when trying to ascertain if a change of domicile has occurred,

- 1) whether there had been an actual and physical taking up of an abode in a particular state;
- 2) whether the subject had an intention to make his home there permanently or at least indefinitely; and
- 3) whether the subject had an intention to abandon his old domicile. (*Unanue, supra* at 376)

One must evaluate all of the facts and circumstances of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home. (*Id.*, citations omitted) Furthermore, if there are sufficient objective proofs brought to the record to support the actual existence of domicile, a person's choice of domicile must be honored, even when the person has multiple residences. (*Id.*)

After a thorough and comprehensive review of the law on domicile and the record before him, the Commissioner concludes that the arguments advanced by petitioner are insufficient to disturb the findings and conclusions relative to domicile for the 1997-1998 school year reached by the ALJ, who as the trier of fact had the opportunity to assess firsthand the credibility of the witnesses as to the proofs offered by petitioner that his intention was to retain his residence in Point Pleasant Beach as his choice of domicile. While petitioner offers numerous

exhibits such as licenses, tax returns, billing, insurance, etc., as evidence that the Point Pleasant Beach residence continued to be his domicile, such documents unto themselves are not conclusive of domicile unless there are also sufficient objective proofs to bear out his claim, a burden which the ALJ concluded he failed to carry. That F.P. and his sons continued to be, on occasion, at the Point Pleasant Beach residence does not serve to render erroneous the ALJ's conclusion, upon consideration of all the facts, circumstances and testimony presented to him, that petitioner's domicile was the Brick Township residence during the 1997-1998 school year. That petitioner did not entirely abandon the Point Pleasant Beach *residence* does not unto itself, compel a conclusion that he retained it as his domicile. Such a conclusion must be based on the totality of the evidence presented, because, as stated above, a determination of domicile is very much a matter of mind and intention, intrinsically identified with the concept of home, the place which is the center of a person's life. *Lyon, supra; Unanue, supra; Mercadante, supra.*

The Commissioner further finds and concludes that respondent's arguments set forth above excepting to the ALJ's determination that petitioner was domiciled in Point Pleasant Beach for the 1998-1999 school year are persuasive. On page 8 of the initial decision, the ALJ finds

By the start of the 1998-99 school year, F.P. was faced with the BOE's determination and claim for tuition and this case had been filed in the OAL. Given these circumstances, it is probable that, to avoid liability on the BOE's claim for tuition, etc. F.P., S.P. and N.P. would have returned to domicile in the Point Pleasant House. This is corroborated by Ms. Pritchard's testimony that, after the BOE took action relative to S.P.'s and N.P.'s domicile, petitioners were around the Point Pleasant home more often and corroborated by the repair of the heating system there in October 1998. Given these circumstances, during the 1998-99 school year, it is probable that F.P. and the children were domiciled in the Point Pleasant house and F.P. would have no liability for tuition for that year. (Initial Decision at p. 8)

Upon consideration of these findings and conclusions of the ALJ, the Commissioner determines that insufficient factfinding has been reached by the ALJ to

substantiate the conclusion that petitioner changed his domicile back to Point Pleasant Beach. Rather, the findings and conclusions appear to be primarily speculative in nature, and so insufficient in the absence of further indicia to meet the established tests in law discussed above. The Commissioner, therefore, remands the matter to the Office of Administrative Law for further factfinding on this issue and to calculate any tuition owing for 1998-1999 in the event that petitioner, upon further factfinding, is not found to be domiciled in Point Pleasant Beach for the 1998-1999 school year. *Board of Education of the Township of Cranford v. A. McG. and L McG.*, 95 N.J.A.R. 2d (EDU) 74, aff'd 96 N.J.A.R. 2d (EDU) 140, rev'd and remanded, App. Div., February 10, 1998, A-4742-95T3, slip opinion at pp. 8-10. Furthermore, in examining the order for tuition payment for the 1997-1998 school year and the bases for the amounts calculated, it is noted that petitioner is being assessed the costs for the provision of special education and related services for his son, N.P. In light of the fact that under the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 *et seq.*, disabled students are entitled to a free appropriate public education (FAPE), the Commissioner, therefore, also directs that the calculation for N.P.'s tuition for the 1997-1998 school year be reexamined and that any tuition which may, on remand, be found owing for N.P. for the 1998-1999 school year be calculated, taking into consideration what impact, if any, the FAPE provisions of IDEA have in determining the amount petitioner must pay to the Point Pleasant Beach Board of Education.

Lastly, the Commissioner rejects respondent's position that interest must be awarded in this matter. Although the ruling herein does not support petitioner's claim that his choice of domicile was the Point Pleasant Beach residence and, notwithstanding petitioner's and C.M.'s lack of credibility relative to this claim during the hearing proceedings, the record does not demonstrate that F.P. acted in bad faith in his belief that Point Pleasant Beach was his domicile or that his actions were taken in deliberate violation of statute or law. *N.J.A.C 6:24-*

1.16 (c)1 The IEP (Exhibit P-1) developed for his son, N.P., on January 15, 1998 states on page 3 that the family was living between two residences. It also states that the information for that particular portion of the IEP was formulated for N.P.'s *April 16, 1997* IEP Annual Review. Thus, there does not appear to have been an intent of subterfuge on petitioner's part to hide information about dual residence from school personnel at least as early as the spring of 1997. Likewise, the Commissioner rejects respondent's arguments that he has the jurisdiction and legal authority to grant legal fees in this matter. The ALJ accurately sets forth the basis for such a conclusion on pages 11 and 12 of the initial decision. See also *Balsy v. North Hunterdon Regional High School*, 117 N.J. 434, 442-443 (1990) and *State, Department of Environmental Protection v. Ventron Corp.*, 94 N.J. 473 (1983).

Accordingly, the Commissioner affirms in part and rejects in part the initial decision issued by the OAL and, for the reasons set forth above, he modifies in part the order for payment of tuition.²

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 13, 1999

² This decision, as the Commissioner's determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.