#315-08 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu01191-08_1.html)

K.L. and K.L. on behalf of minor children, M.L. and C.L. (Consolidated)	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners purchased a single family home in Kinnelon in May 2007 and – in July 2007 – executed an "Affidavit" document that was prepared by the school district attesting to their anticipated move into the home by October or November 2007, upon completion of extensive renovations. The document further provided that petitioners' children could attend Kinnelon schools for five weeks tuition free, but if petitioners were not residents of the borough before the five weeks elapsed, they would be responsible for tuition until such time as they became residents. The respondent Board issued a notice in October informing petitioners that their five week grace period was about to expire, and that they would be charged tuition from October 15, 2007 forward, until a Certificate of Occupancy was obtained for their Kinnelon house. The petitioners filed the instant appeals and the Board subsequently filed a motion to dismiss; respondent alleged that petitioners are not residents of Kinnelon, and that the matter arose from a contract dispute, which is outside of the Commissioner's jurisdiction.

The ALJ found that the Commissioner has jurisdiction over this matter as arising under the school laws. She further determined that the matter is ripe for summary decision, and accordingly converted the motion to dismiss to a motion for summary decision. Finding that petitioners are not domiciled in Kinnelon, and that their children are therefore not entitled to a free public education in the district's schools, the ALJ granted summary decision to respondent and dismissed the petitioners' appeals.

Upon a full and independent review, the Commissioner adopted the Initial Decision as the final decision in this matter, addressed the petitioners' exceptions, and dismissed the petitions.

July 23, 2008

OAL DKT. NOS. EDU 1191-08 & 1192-08
AGENCY DKT. NOS. 315-10/07 & 316-10/07

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The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), and the parties' exceptions have been reviewed. The Commissioner adopts the Initial Decision as the final decision in this case, for the reasons set forth therein.

For purposes of addressing petitioners' exceptions, the Commissioner offers the following abbreviated summary of the undisputed material facts, including those set forth in the verified petition and contained in the documents submitted and verified by both parties:

1. The petitioners bought a house in Kinnelon (4 S.) in May 2007, with the intent that it would be their domicile, but at the time of the OAL proceedings had never lived in it.

2. On July 3, 2007, petitioners lived in Butler, New Jersey, but sought to enroll their children – M.L. and C.L. – in the Kinnelon school district. Pursuant to the Kinnelon school district's Policy # 5111, petitioners signed an affidavit which stated that they planned to move into 4 S. in October or November 2007, and that they assumed liability for tuition assessed after five weeks of school if the children were not yet residents of Kinnelon.
   The affidavit further stated that petitioners submitted it to induce the respondent Kinnelon school district to accept enrollment of their children. The affidavit did not, as petitioners suggest on page 7 of their exceptions, include an agreement by respondent to provide M.L. and C.L. a free education for the 2007-2008 year. Rather, the language of the affidavit states that the children

were being enrolled pursuant to district Policy #5111, which requires tuition after a five week grace period for families awaiting the completion of construction on their homes.[1]

3. On October 8, 2007, respondent's business administrator sent petitioners a notice advising them that the five week grace period was about to expire and that they would be charged $998 for tuition beginning on October 15, 2007 and continuing until a Certificate of Occupancy was obtained for the house on 4 S.

4. Rather than instituting a challenge to the respondent board of education, petitioners filed appeals to the Commissioner on October 24, 2007. Paragraph 3 of the section of their petitions which demanded relief requested:

> an Order finding that M.L. [and C.L. had] been and continue[] to be domiciled in Respondent's school district, and thereby [have] been and continue[] to be eligible to receive [] public education[s] free of charge and that the Petitioners are not responsible for paying any monies for the cost of [their] education in the Respondent's school district retroactively or prospectively . . .

5. Petitioners articulated their reason for appealing to the Commissioner on page 14 of their brief in opposition to respondent's motion to dismiss the matter on jurisdictional grounds:

> By virtue of the letter dated October 8, 2007 from Respondent's school district to Petitioners, Respondent's school district is already denying these children their right to be educated in that district free of charge in violation of *N.J.S.A.* 18A:38-1 . . . . Clearly, Respondent's school district has made a determination that Petitioner's children are not domiciled in that district and, as such, are not entitled to an education free of charge, and all Petitioners want is their

[1] The following is the relevant section of Policy #511:

> A nonresident child otherwise eligible for attendance whose parent(s) or legal guardian(s) anticipates district residency and has entered a contract [sic] to buy, build, or rent a residence in this district may be enrolled without payment of tuition for a period of time not greater than 5 weeks prior to the anticipated date of residency. If any such pupil does not become a resident of the district within 5 weeks after admission to school, the situation will be reviewed and the need to assess tuition will be determined. (Emphasis added.)

proverbial "day in court" to oppose that determination.

6. Petitioners did not receive approval from Kinnelon for their renovations to 4 S. until January 8, 2008.

7. At the time of the Initial Decision – April 24, 2008 - petitioners still did not occupy 4 S.

Multiple arguments are advanced in petitioners' exceptions. First, petitioners object that by determining that their children were not domiciled in Kinnelon, the ALJ granted relief not sought by respondent in its motion to dismiss. This objection cannot be dispositive of the instant controversy. As mentioned above, in their petition, K.L. and K.L. asked the Commissioner for a finding that M.L. and C.L. were domiciled in Kinnelon during the 2007-2008 school year. Thus, the Administrative Law Judge (ALJ) validly exercised her discretion to find that the material facts of the case did not support such domicile. In short, petitioners are estopped from complaining that the ALJ issued a determination when petitioners themselves requested the determination. Nor does the Commissioner see any reason to allow administrative resources to be wasted by sending this matter back to the district – simply because respondent requested it in its motion to dismiss.

Additionally, the ALJ did not abuse her discretion to dispose of this matter summarily. As will be discussed, there were sufficient undisputed, material facts before the ALJ to support her determination about domicile. It was thus proper in her Initial Decision to recommend summary disposition in the interests of administrative economy. While there may be no specific rule in the New Jersey Administrative Code addressing the conversion of motions-to-dismiss into motions for summary disposition, it is allowed in the New Jersey Rules of Court, *see, R.* 4:6-2. And *N.J.A.C.* 1:1-1.3(a) allows ALJs to follow court rules where no specific administrative rule addresses a particular issue.

Petitioners are also estopped from protesting the lack of a hearing before the respondent board. It was petitioners who chose to forego local appeals and bring the matter to the Commissioner. Moreover, the Commissioner agrees with the ALJ that the petitioners were adequately noticed of their responsibilities regarding tuition, both by the affidavit they signed on July 3, 2007 – which included a copy of respondent's relevant policy – and by the letter sent to them on October 8, 2007. [2] The ALJ's finding that petitioners' children are not domiciled in Kinnelon does not preclude further local action concerning the parameters of petitioners' liability for tuition.

As to the merits of the claim that they are domiciled in Kinnelon, the petitioners reiterate the facts that were before the ALJ and have added a few more: 1) their driver licenses showing the 4 S. address; 2) their voter registrations showing the Kinnelon address; 3) an invoice for their property taxes in Kinnelon; and 4) an advertisement for the sale of their Butler house. Even if the Commissioner were to incorporate these facts – not offered below – into her analysis of the controversy, it would not change the result. The foregoing are indicia of petitioners' intention to eventually live in Kinnelon, an intention which is conceded. As the ALJ determined, however, intention alone does not constitute domicile.

The elements of "domicile" were thoroughly discussed in the Initial Decision. As the ALJ noted, it is petitioners' burden to prove by a preponderance of the evidence that their children are domiciled in Kinnelon. Of the multiple factors that show domicile, a crucial one is abode. A person's domicile "is the place where a person dwells and which is the center of his domestic, social and civil life." *In re Unanue*, 255 *N.J. Super*. 362, 374 (Law Div. 1991), *aff'd*, 311 *N.J. Super*. 589 (App. Div.), *certif. denied*, 157 *N.J*. 541 (1998), *cert. denied*, 526 *U.S*. 1051,

[2] Petitioners were not told in the letter that they must remove their children from respondent's district, but rather were advised that they would be responsible for tuition. This was in accord with the July 3, 2007 affidavit and district policy #5111.

(1999) (citations omitted). Acquiring another residence does not result in a person having multiple domiciles. *Id*. at 375.

The ALJ correctly explained:

> Although the person's intent with respect to domicile is very important, there needs to be objective indicia that a particular residence is that person's domicile. *Id.* at 376. In order for a residence to qualify as a new domicile there must be 1) an actual and physical taking up of an abode; 2) the subject's intention to make his home there permanently or least indefinitely; and (3) the subject's intention to abandon his old domicile. "The court must evaluate all of the facts 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." *Ibid.* Also important where a person has more than one residence are the following factors: "the physical characteristics of each [place], the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return." *Mercadante v. City of Paterson*, 111 *N.J. Super*. 35, 39-40 (Ch. Div. 1970), *aff'd*, 58 *N.J*. 112 (1971). Although petitioners may intend to make the residence in Kinnelon their permanent domicile, there has been no "actual and physical taking up of an abode." *Unanue, supra*, 255 *N.J. Super*. at 376. Petitioners have not eaten in, slept in, entertained in, or otherwise treated the Kinnelon residence as their domicile. Likewise, petitioners have not surrendered their current domicile outside of Kinnelon. Without demonstrating such objective indicia of domicile, petitioners cannot be said to reside in Kinnelon for the purposes of the children receiving a free public education. (Initial Decision at 8-9)

Petitioners' reliance on the Initial Decision in *A.P., Sr., on behalf of minor child D.K. v. Board of Education of the Bordentown Regional School District, Burlington County*, OAL Initial Decision December 5, 2006, Commissioner Decision January 18, 2007, is misplaced. In that case, the petitioner had purchased and lived in his house in the Bordentown school district before the time period at issue, and had moved out to stay with his mother due to extensive damage that was done to his house while he was on National Guard duty for a few weeks. There was some evidence that he and D.K. – his nephew and legal ward – moved back

into the dwelling about three months after the 2005-2006 school year began – while construction was ongoing – and there was unrebutted evidence supporting both his intent that the house be his permanent home and the expectation that the ongoing repairs to his home would be completed in the course of the 2005-2006 school year.

Thus, *A.P., Sr.*, is distinguishable from the present case by the fact that the petitioner had actually lived in his home before his domicile was challenged, and appeared to have moved back into the house to reside there – as his schedule would allow – within four months after the beginning of the 2005-2006 school year.[3] By way of contrast, petitioners in this case had never lived in Kinnelon before the 2007-2008 school year and do not appear to have lived in Kinnelon at any time during that school year. They lived in Butler and could have sent their children to the Butler public schools without payment of tuition. In short, the Commissioner finds petitioners' arguments concerning domicile to be unpersuasive.

In summary, the Commissioner concurs with the ALJ's decision to summarily decide the present controversy, and with her determination concerning domicile. The petition is hereby dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: July 22, 2008
Date of Mailing: July 23, 2008

[3] The other case upon which petitioners rely, *Borden v. Lafferty*, 233 *N.J. Super.* 634 (Law Div. 1989), is also inapposite. In that case a judge decided that a Board of Commissioners candidate's domicile had been in Bordentown for a year, even though for the first three months of the year the candidate owned – but did not regularly inhabit – her home in Bordentown. That case was not governed by the school law statutes or the local policies which control this matter.

[4] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.