#135-10 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu7362-07_1.html)

M.B. and C.B. on behalf of minor child, J.B.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the residency determination of the respondent Board that their child, J.B., was not entitled to a free public education in Kinnelon schools during the 2006-2007 school year. Petitioners contended that at the time they enrolled J.B. in school, they established domicile at a Kinnelon property they had purchased in 2005 and intended to occupy upon completion of renovations; however, delays in construction necessitated a move to an extended-stay residence until mid-August 2007, when they began residing at the Kinnelon property full time. The Board asserted that J.B. was not domiciled in Kinnelon during the school year in question, and sought reimbursement of tuition in the amount of $ 9,989.

The ALJ found that: credible evidence supports petitioners' contention that they fully disclosed their residency circumstances and provided truthful responses on the district's registration forms; unexpected construction delays prevented petitioners from moving into their Kinnelon residence by September 2006 and necessitated their move into temporary housing, but their clear intent was to occupy the Kinnelon house as their permanent home, though they did not occupy the residence until August 2007; respondent district had knowledge on May 31, 2006 that petitioners were not occupying the house in Kinnelon, but made no attempt to inquire about their occupancy status or present them with the district's "Policy 5111 – Eligibility of Resident/Nonresident Pupils" until February 2007, eight months after J.B. was enrolled in school. The ALJ concluded that petitioners had established domicile in Kinnelon for the purposes of J.B. receiving a free public education in 2006-2007, and dismissed the Board's claim for payment of tuition.

Upon a full and independent review, the Commissioner was constrained to reject the Initial Decision, finding that the petitioners failed to establish that Kinnelon was their domicile for purposes of *N.J.S.A.* 18A:38-1(a) during the 2006-2007 school year, and that the respondent Board had discretion, pursuant to *N.J.S.A.* 18A:38-3(a), to charge tuition for J.B. for his attendance in the district's schools during that period of time. Accordingly, the Commissioner dismissed the petition and granted respondent's counterclaim for tuition in the amount of $ 9,989.

May 4, 2010

OAL DKT. NO. EDU 7362-07
AGENCY DKT. NO. 171-6/07

M.B. and C.B. on behalf of minor child, J.B.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	
RESPONDENT.	:	

Petitioners challenge respondent's determination that petitioners had not been domiciled in respondent's school district during the 2006-2007 school year, that petitioners' child had consequently not been entitled to a free education in the district, and that petitioners therefore owe respondent tuition in the amount of $9,989. Upon review of the record of this matter, including the transcript of the February 4, 2009 hearing in the Office of Administrative Law (OAL), the Initial Decision finding in favor of petitioners, and respondent's exceptions,[1] the Commissioner is constrained to reject the Initial Decision.

A summary of undisputed facts – some, but not all of which were set forth in the Initial Decision – is appropriate. In 1998 petitioners moved to West Milford, New Jersey.

[1] Petitioners submitted no reply exceptions.

(T11)[2] In 2005, while living in West Milford, they bought the Kinnelon home of M.B.'s mother, with the intention to eventually reside therein. (Petitioner's Exhibit 1) They decided in the Spring of 2006 to have extensive renovations performed on the Kinnelon property (T18) – including the removal and rebuilding of walls and fireplaces, the replacement of windows and doors, the addition of rooms, closets, porches and decks (Petitioner's Exhibit 2), and extensive plumbing, electrical and fire protection renovations (Petitioner's Exhibits 5, 6, and 7) – before moving in.

On or about May 31, 2006, notwithstanding that the contemplated renovations had not commenced and the family was still living in West Milford, petitioners completed a registration form to enroll J.B. in the Kinnelon School District for September 2006. On the form petitioners listed their "current address" as "B.L.," Hewitt, N.J.[3] (Respondent's Exhibit 1) Petitioners filled in the address of the Kinnelon property on another line entitled "future address." (*Ibid.*) That line was provided for the enrollment of out-of-district students who would be transferring into the district prior to the upcoming school year.

It is undisputed that in September 2006, J.B. commenced school in the Kinnelon School District. On September 8, 2006, petitioner C.B. filled out and submitted to respondent an emergency reference card which affirmatively listed the Kinnelon property as J.B.'s residence, notwithstanding that J.B. and petitioners were admittedly still living in West Milford and J.B. had never resided in Kinnelon. (Respondent's Exhibit 2) Further, at the time C.B. filled out the emergency reference card, petitioners knew that renovations on the Kinnelon property had not begun and that the required construction permits had not even been obtained. In point of fact, petitioners did not enter into a contract for renovations of the Kinnelon property or obtain the

[2] T = Transcript of the February 4, 2009 hearing in the OAL.
[3] Hewitt is in West Milford Township.

construction permits until January 2, 2007, four months after the commencement of the school year. (Respondent Exhibit 13 at 3; Petitioner's Exhibits 3 through 7)

On October 28, 2006, M.B. and C.B. executed a contract for sale of the Hewitt/West Milford property, (Petitioner's Exhibit 8), but the closing/passing of title did not occur until May 2007. (Respondent's Exhibit 13 at 3). The record indicates that petitioners remained in their West Milford home until at least November 2006, and that when they moved therefrom, they did not move into the Kinnelon school district. (T 24-25) Rather, they resided in Wayne until they were able to occupy the Kinnelon house. (Interrogatory Answer # 11.)

On January 29, 2007, respondent received an anonymous letter from "An Utterly Agitated Couple in Kinnelon" claiming J.B. did not reside in respondent's district, but rather that the address where he supposedly resided was uninhabitable. (Exhibit 2, attached to Certification of Alice M. Robinson [Robinson] dated January 2, 2008) This – according to Robinson, Business Administrator and Secretary to the Kinnelon Board of Education – was the first notice respondent received that J.B. was not domiciled in Kinnelon. (T141) She went to the address herself on February 1, 2007, and saw that the property was "completely gutted." (T144 and Certification of Robinson dated January 2, 2008, ¶ 6)

Robinson sent petitioners a letter – to the West Milford address – asking them to call her about the residency issue. (Respondent's Exhibit 3) M.B. telephoned her the next day about the letter. The swiftness of the response suggested to Robinson that at that time petitioners were still using the West Milford premises. (T142) After hearing from M.B. on February 1, 2007, Robinson provided petitioners with Policy #5111, "Eligibility of Resident/Nonresident Pupils". (Respondent's Exhibit 4) That policy, which tracks *N.J.S.A.* 18A:38 and corresponding regulations, explains that to receive a free education in

Kinnelon a student must be domiciled in Kinnelon. Exceptions are allowed for students who become domiciled in the district within five weeks of the beginning of their school attendance in the district. Robinson testified that families are frequently delayed more than five weeks in moving into the district – due to construction delays or otherwise. (T134) In such cases they are sent a letter, followed by a tuition bill. (*Ibid.*)

Two telephone conversations occurred between Robinson and M.B. on February 1, 2007. (T142) Robinson recorded notes about them in her telephone log. (T143) In the first conversation Robinson explained that owning property in a district and paying taxes thereon, in and of itself, is not a sufficient basis for a free public education in that district. (*Ibid.*) Robinson testified that M.B. called her again, later in the day, expressing the view that his property taxes should be enough to cover J.B.'s school tuition. (T145)

On February 6, 2007, M.B. telephoned Robinson to ask that the matter be held in abeyance until the end of February while his wife underwent a medical procedure, and Robinson accommodated the request. (T148 and 153) At approximately the same time, petitioners' counsel apparently sent Robinson a letter, entered into evidence as Respondent's Exhibit 12, which stated that the Kinnelon property would be habitable in mid-March of 2007.[4] However, respondent subsequently hired an investigator, who advised in a March 15, 2007 report that the house was still "undergoing extensive renovations" and was "obviously, uninhabitable." (Respondent's Exhibit 6) In the report the investigator further explained that he spoke to one of the individuals who were working on the property, which individual confirmed that the house had been vacant for many months. (*Ibid.*)

[4] This exhibit has disappeared from the file, but is described via other evidence.

Having learned that the property had not been inhabited, T152, Robinson forwarded the investigator's report to respondent's attorneys and brought the matter to the attention of respondent's board of education (Board). (T153) When the Board indicated it wished to move forward on the matter Robinson sent petitioners a Notice of Initial Determination of Ineligibility, dated April 30, 2007. (*Ibid.*; Respondent's Exhibit 5)

On May 31, 2007, M.B. and petitioners' attorney appeared before the Board for a hearing on J.B.'s eligibility for a free education in Kinnelon. The Board decided that J.B. had not been eligible for a free education in Kinnelon and sent petitioners a final notice of ineligibility on June 7, 2007. (Respondent's Exhibit 7) The Certificate of Approval for the Kinnelon renovations was not issued until September 25, 2007, after which petitioners moved into the premises. (Petitioner's Exhibit 9) It is undisputed that, subsequent to the 2006-2007 school year, no tuition was charged for J.B.'s public education in Kinnelon.

After a hearing in the OAL and the submission of post-hearing briefs the Administrative Law Judge recommended that J.B. receive a free public education from respondent. This determination was based on the conclusion that petitioners had established domicile in Kinnelon. (Initial Decision at 10)

The following summarizes the statutory framework within which the instant controversy must be addressed. "Public schools shall be free to . . . persons . . . who [are] domiciled within the school district [.]" *N.J.S.A.* 18A:38-1(a). However,

> [i]f the . . . school district finds that the parent . . . of a child who is attending the schools of the district is not domiciled within the district . . . the superintendent . . . may apply to the board of education for the removal of the child. The parent . . . shall be entitled to a hearing before the board and if in the judgment of the board the parent . . . is not domiciled within the district . . . , the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the [C]ommissioner within 21 days of the

> date of the decision and shall be entitled to an expedited hearing before the [C]ommissioner 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 subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the [C]ommissioner. If in the judgment of the [C]ommissioner the evidence does not support the claim of the parent or guardian, the [C]ommissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district.
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> *N.J.S.A.* 18A:38-1(b)(2).

And "[a]ny person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe. [Emphasis added] *N.J.S.A.* 18A:38-3(a).

The State Board of Education has promulgated regulations to supplement and clarify the statutes. For example:

> A student is domiciled in the school district when he or she is living with a parent . . . 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. [Emphasis added.]
> *N.J.A.C.* 6A:22-3.1(a)(1).

It remains for the Commissioner to apply the foregoing legal framework to the instant matter. In so doing, the Commissioner notes that the facts of this case are similar to those in a decision rendered in favor of the respondent Kinnelon board of education in a case recently affirmed by the Appellate Division of New Jersey Superior Court, *i.e., K.L. and K.L. on behalf of minor children M.L. and C.L. v. Board of Education of the Borough of Kinnelon, Morris County,*

Docket No. A-5671-07T1, Superior Court of New Jersey, Appellate Division, decided January 4, 2010.

In that case, petitioners registered their children in the Kinnelon school district for the 2007-2008 school year. They had purchased a single-family home in Kinnelon and had represented that they planned to move in after the completion of renovations. In October 2007 the renovations were not completed and petitioners did not occupy the Kinnelon house. Nevertheless they petitioned the Commissioner to bar the district from charging them tuition for their children. In their view, the Kinnelon property was the family's true, fixed and permanent home, notwithstanding that they had never lived there.

The Kinnelon board of education moved to dismiss the petition in lieu of filing an answer. The Administrative Law Judge (ALJ) converted the motion to dismiss to a motion for summary decision and recommended that the petition be dismissed. After reviewing the applicable case law and administrative rulings, the Commissioner concluded that "petitioners . . . had never lived in Kinnelon before the 2007-2008 school year and d[id] not appear to have lived in Kinnelon at any time during that school year." She dismissed the petition, and the petitioners appealed – raising the same arguments before the Appellate Division that they had offered the Commissioner.

More specifically, petitioners urged that the Commissioner had erred in determining that their Kinnelon home was not their domicile for purposes of *N.J.S.A.* 18A:38-1(a). They relied, in particular, upon *In re Unanue*, 255 *N.J. Super*. 362 (Law Div. 1991), *aff'd*, 311 *N.J. Super.* 589 (App. Div.), *certif. denied*, 157 *N.J.* 541 (1998), *cert. denied sub. nom., Unanue-Casal v. Goya Foods, Inc.*, 526 *U.S.* 1051. Although not a case involving education law, *Unanue* contains a legal delineation of "domicile" that has been relied

upon by the Commissioner: "In a strict legal sense, the domicile of a person is the place where he 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." *Unanue, supra*, 255 *N.J. Super*. at 374 (quoting *Kurilla v. Roth*, 132 *N.J.L.* 213, 215 (Sup. Ct. 1944)); *accord D.L. v. Bd. of Educ. of Princeton Regional School Dist.*, 366 *N.J. Super*. 269, 273 (App. Div. 2004). Focusing on the portion of the description of domicile that refers to "intention," petitioners reasoned that since it was undisputed that they had planned to occupy the Kinnelon home as soon as possible, but were delayed by unforeseen construction delays and by the approval and permitting processes, it followed that the Kinnelon house should have been regarded as their domicile.

In evaluating petitioners' position the Appellate Division construed the holdings in *Unanue.* More specifically, it discussed the three elements set forth in *Unanue* that must be considered to determine whether 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 had an intention to make his home there permanently or at least indefinitely; and (3) whether the subject had had an intention to abandon his old domicile. [Emphasis added.] *Unanue, supra*, 255 *N.J. Super*. at 376 (citing *Lyon v. Glaser*, 60 *N.J.* 259, 264-65, (1972)). Thus, domicile is established where "there is the necessary concurrence of physical presence and an intention to make that place one's home." [Emphasis added.] *Ibid.*

The Appellate Division concluded that petitioners and their children had never been domiciled in Kinnelon, notwithstanding their undisputed ownership of property in Kinnelon. While they may have possessed an intention to reside on the property after the completion of the planned renovations, it was undisputed that they never did physically reside in

the district before or during the 2007-2008 school year. Therefore, their intention to do so was irrelevant. They had never established an actual and physical abode in Kinnelon, and therefore they lacked the necessary concurrence of physical presence and intention to make a place one's home, upon which the legal concept of domicile rests.

The fact pattern in the instant case is strikingly similar to the fact pattern in *K.L. and K.L.*, and the same legal principles apply. The record indicates that petitioners remained in their West Milford home – which was not conveyed to buyers until May of 2007 – for all of 2006 and possibly part of 2007. The petitioners in this case undisputedly owned the Kinnelon property but never physically occupied it before or during the 2006-2007 school year. Consequently, they failed to establish that it was their domicile for purposes of *N.J.S.A.* 18A:38-1(a) during that period of time. Thus, respondent had discretion under *N.J.S.A.* 18A:38-3(a) to charge tuition for J.B for the 2006-2007 school year.

The Commissioner may not disturb respondent's exercise of that discretion unless he finds that it was arbitrary, capricious, unreasonable or in bad faith. *Kopera v. Board of Education of the Township of West Orange, Essex County,* 60 *N.J. Super.* 288, 294-96 (App. Div. 1960). Here, the record provides no basis for such a finding. Further, the record supports respondent's contention that until the end of January 2007 – when it received an anonymous letter – it had no notice that petitioners were not domiciled at their Kinnelon address. Thus, the Commissioner rejects any contention that respondent acted in bad faith by not notifying petitioners of their liability for tuition until then.

In sum, petitioners have not met their burden to show that they and their children were domiciled in Kinnelon during the 2006-2007 school year. Accordingly, it was within respondent's discretion to charge tuition for the education the district provided to J.B. during that

period of time. The petition is dismissed and respondent's counterclaim is granted. Petitioners are liable to respondent for tuition in the amount of $ 9,989.00.

IT IS SO ORDERED. [5]

COMMISSIONER OF EDUCATION

Date of Decision: May 4, 2010

Date of Mailing: May 4, 2010

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