

**New Jersey Commissioner of Education**

**Final Decision**

J.A., on behalf of minor child, K.M.,

Petitioner,

v.

Board of Education of the Township of  
Middletown, Monmouth County,

Respondent.

**Synopsis**

*Pro se* petitioner challenged the determination of the respondent, the Board of Education of the Township of Middletown, that petitioner is not domiciled in Middletown Township and that K.M. is therefore not eligible to receive a free public education in the district. The Board asserted that petitioner has admitted she now lives in Keansburg but wanted to have K.M. continue his education in Middletown Township schools; the Board argued that the appeal is without merit and that petitioner’s request for relief has no basis in law. The Board filed a motion to dismiss the petition.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a), public school is free to children domiciled within the school district, and the domicile of a child follows that of the parent; in this case, it is undisputed that petitioner no longer lives in Middletown; petitioner is cognizant of the fact that K.M. is not eligible to continue his education in the District; petitioner failed to respond to the Board’s motion to dismiss, failed to appear on a scheduled conference call, and did not offer the OAL “an explanation for the nonappearance within one day” of the petitioner’s non-appearance within the meaning of *N.J.A.C.* 1:1-14.4(a). The ALJ concluded that a plain reading of *N.J.A.C.* 1:1-14.4(a) required the matter to be returned to the transmitting agency for appropriate disposition. According, the ALJ granted the Board’s motion to dismiss and ordered that the case be returned to the Department for appropriate disposition pursuant to *N.J.A.C.* 1:1-3.3(b) and (c).

Upon review, the Commissioner concurred with the ALJ’s finding that petitioner admitted she was not a domiciliary of Middletown for the 2019-2020 school year, and further concurred that K.M. was not entitled to a free public education in the district’s schools during that time. Accordingly, pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner directed petitioner to reimburse the Board in the amount of the district’s annual per pupil cost for the 2019-2020 school year. In so doing, the Commissioner noted that it was not necessary for the OAL to administratively return the file to the agency since the ALJ’s conclusions on the merits of the case were sufficient to grant the Board’s motion to dismiss.

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.

July 1, 2020

**New Jersey Commissioner of Education**  
**Decision**

J.A., on behalf of minor child, K.M.,

Petitioner,

v.

Board of Education of the Township of  
Middletown, Monmouth County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner admitted that she was not a domiciliary of Middletown for the 2019-2020 school year. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the school district during that time.<sup>1</sup>

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time-period during which the minor children were ineligible to attend school in Middletown. Therefore, the Board is entitled to tuition reimbursement equal to its annual per

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<sup>1</sup> Despite reaching this conclusion, the ALJ did not render a decision on the Board's motion to dismiss. Instead the ALJ based his determination on petitioner's failure to participate in the hearing process, and administratively returned the file to the agency pursuant to *N.J.A.C.* 1:1-3.3. However, it was not necessary for the OAL to administratively return the file to the agency since the ALJ's conclusions as to the merits of the case are sufficient to grant the Board's motion to dismiss.

pupil cost for the 2019-2020 school year, during which time petitioner's minor child was ineligible to attend school in respondent's district.

Accordingly, the Board's motion to dismiss the petition of appeal is granted. Petitioner is directed to reimburse the Board in the amount of the district's annual per pupil cost for the 2019-2020 school year, the time-period in which K.M. was ineligible to attend school in Middletown.

IT IS SO ORDERED.<sup>2</sup>

COMMISSIONER OF EDUCATION

Date of Decision: 7/1/2020

Date of Mailing: 7/2/2020

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<sup>2</sup> 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 GRANTING**  
**MOTION TO DISMISS**

OAL DKT. NO. EDU 00482-20

AGENCY DKT. NO. 321-12/19

**J.A. on behalf of minor child, K.M.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE  
TOWNSHIP OF MIDDLETOWN, MONMOUTH  
COUNTY,**

Respondent.

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**J.A. on behalf of minor child, K.M, pro se**

**Afshan Ajmiri Giner, Esquire, for respondent (Florio, Perrucci, Steinhardt and  
Cappelli, LLC, attorneys)**

Record Closed: May 14, 2020

Decided: May 22, 2020

BEFORE **DEAN J. BUONO, ALJ:**

**PROCEDURAL HISTORY AND STATEMENT OF CASE**

Petitioner, J.A. on behalf of minor child, K.M., challenges respondent, Board of Education for the Township of Middletown's, (Board/District) finding that petitioner does

not live within the District and is not domiciled in the District. As such, petitioner is required to reimburse the District for tuition.

On January 10, 2019, the Department of Education, Office of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL), where it was filed as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. In lieu of filing an answer to the petition, the Board filed a motion to dismiss. The undersigned conducted a telephone conference with the parties and instructed the petitioner to file a response to the motion to dismiss by March 20, 2020. I also instructed her that the response need not be formal, a simple letter would suffice. On May 14, 2020, the undersigned conducted another telephone conference in an effort to ascertain petitioner's position on the motion. Petitioner failed to appear for the telephone conference. However, petitioner indicated to my assistant that she is "essential personnel" and could not participate in the conference. My assistant offered petitioner, through e-mail, a time change for the conference call to 12 noon or another time in the morning of May 14, 2020, to accommodate petitioner, but no response was received from petitioner.

Interestingly, this case does not present divergent facts. Respondent argues that the Board properly investigated and determined domicile. Petitioner argues that they "moved out of the District" but would "like my son to continue his education in Middletown because of his IEP and recommendations of his therapist and child study team. Changing schools would be a detriment to his education and mental health." (Pro Se Residency Appeal.)

### **FACTUAL DISCUSSION**

Most of the salient facts surrounding this matter are not in dispute and represent the history of this case by their respective parties. Having reviewed the brief in support of the motion to dismiss, **I FIND as FACTS:**

Petitioner is a former resident of Middletown, New Jersey. On July 25, 2019, petitioner entered into a lease agreement for a term of three years for a property located

in Keansburg, New Jersey. (Exhibit B.) Keansburg is a borough in New Jersey, wholly separate from the Middletown educational district. Keansburg has its own school district, and students living in Keansburg are not eligible to attend school in the Middletown District as they are not domiciled in Middletown, New Jersey. Petitioner was notified of K.M.'s ineligibility to attend school in the District in October 2019 and then again in November 2019, as petitioner admittedly moved to Keansburg, New Jersey. (Exhibit C.) Nevertheless, petitioner insisted that K.M. remain in the District's schools and receive special education and related services; notably, the same services are available to K.M. in Keansburg. (Exhibit D.)

On November 1, 2019, the District sent petitioner a Notice of Initial Determination of Ineligibility, stating that petitioner was not domiciled in the District as her permanent address was in Keansburg, New Jersey. (Exhibit E.) The District further advised petitioner of her right to appear before the Board for a residency hearing.

On November 20, 2019, petitioner appeared before the Board for a residency hearing, during which, petitioner was again apprised of the residency requirements. The Board also gave petitioner the opportunity to share her position and considered her circumstances; following which, the Board made a determination that K.M. was not eligible to remain in the District's schools. A Notice of Final Determination of Ineligibility was issued and sent to petitioner finding that K.M. was not domiciled in the District, and therefore, ineligible to attend the District's schools. (Exhibit F.)

On or about December 11, 2019, petitioner filed a residency appeal, wherein she admitted that she moved out of the District but would like to keep K.M. enrolled in the District. See Exhibit A.

### **LEGAL ARGUMENT AND CONCLUSION**

"Specific pleading requirements are governed by the agency with subject matter jurisdiction over the case." N.J.A.C. 1:1-6.1(a). The rules require that a "petition shall include . . . a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws." N.J.A.C. 6A:3-1.4(a). When

deficient and inadequate petitions are presented to the Commissioner, at any time prior to transmittal of the pleadings to the OAL—in the Commissioner’s discretion or upon motion to dismiss filed in lieu of answer—the Commissioner may dismiss the petition on the grounds that the petitioner has not advanced any cause of action, even if the petitioner’s factual allegations are accepted as true. See N.J.A.C. 6A:3-1.10.

In fulfilling their quasi-judicial responsibilities, state agencies look to judicial principles for guidance. Hackensack v. Winner, 82 N.J. 1, 28-30 (1980). “[C]ourt-fashioned doctrines for the handling of litigation do in fact have some genuine utility and relevance in administrative proceedings.” Id. at 29. The New Jersey Supreme Court further held,

many principles and rules that govern judicial proceedings and determinations can be applied to an agency’s quasi-judicial or adjudicative function. Judicial rules of procedure and practice are transferrable to administrative agencies when these are conducive to ensuring fairness, independence, integrity, and efficiency in administrative adjudications.

[I/M/O Tenure Hearing of Onorevole, 103 N.J. 548, 554-55 (1986).]

Thus, the principles which govern a motion to dismiss for failure to state a claim under R. 4:6-2(e) apply equally to a motion to dismiss to advance a cause of action under N.J.A.C. 6A:3-1.10.

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted under R. 4:6-2(e), “the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim.” Rieder v. State, Dep’t of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (emphasis added). The court may not consider anything beyond whether the complaint states a cognizable cause of action. Id. For purposes of determining the motion, the court must “assume the facts as asserted by [petitioners] are true and give [them] the benefit of all inferences that may be drawn in [their] favor.” Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). If the complaint states no basis for relief and discovery would not supply one, dismissal is the appropriate remedy. Banco Popular N. Am. v. Gandji, 184

N.J. 161, 166 (2005). If the factual allegations are “palpably insufficient to support a claim upon which relief can be granted,” the court must dismiss the complaint. Rieder. Moreover, it “runs against the grain of public policy to force a public entity to incur the cost of defending an action that ultimately and undoubtedly will be dismissed on the merits.” Tryanowski v. Lodi Bd. of Educ., 274 N.J. Super. 265, 268-69 (Law Div. 1994) (emphasis added).

In New Jersey, a person between the ages of five and twenty years old is entitled to a free public education in the district in which they reside or is domiciled. See N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). Domicile is 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.” R.O.G., on behalf of minor children, G.G.G. and G.O.G. v. Bd. of Educ. of the Twp. of Union, Union County, OAL Dkt. No. EDU 05034-18, Comm. Dec. No. 236-18 (Aug. 9, 2018) (internal citations and quotation marks omitted). It is uncontroverted that a unemancipated child’s domicile is that of their parents. See Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), citing Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989); Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ., 283 N.J. Super. 505 (App. Div. 1995). Therefore, a child is deemed a resident of a school district if the child’s 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.” See S.F., on behalf of minor child, R.F. v. Bd. of Educ. of the City of Orange, Essex County, OAL Dkt. No. EDU 18797-17, Comm. Dec. No. 354-18 (Nov. 8, 2018) (internal citation omitted).

In an appeal of a residency determination by a local board of education, the burden of proof is on the petitioning parent or guardian, who must prove by a preponderance of the evidence that the child is eligible to attend school in the district. See N.J.S.A. 18A:38-1b(2) (“The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and . . . shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education. . . .”) (emphasis added.) The Commissioner has found that in



considering the merits of a residency appeal, the evidence must be reviewed “to determine whether it supports the claims of the parent or guardian.” See R.E. and S.M., on behalf of minor child, N.E. v. Bd. of Educ. of the Twp. of Union, Union County, OAL Dkt. No. EDU 04252-18, Comm. Dec. No. 238-18 (Aug 8, 2018). The Commissioner further explained that “[o]nce a board has reasonably determined that the parents/guardians do not reside in the district, the burden to establish domicile in an appeal of that decision is on the parents/guardian[.]” and therefore, “the query and subsequent findings should be centered on whether petitioners have supported their claims by a preponderance of the evidence.” Id. (emphasis added.)

Therefore, in order to prevail in this matter, petitioner must prove by a preponderance of the evidence that she is domiciled in the District and K.M. is eligible to attend school in the District. Petitioner is unable to establish that she is domiciled in the District. In fact, by her own admission, they no longer reside in the District. If one examines the three-year lease agreement from July 25, 2019, for a property located in Keansburg, New Jersey, it further corroborates that petitioner has been residing in a home in Keansburg, since the commencement of the 2019-2020 school year. Petitioner cannot prove by a preponderance of the evidence that she is domiciled in the District and that K.M. is eligible to attend the District’s schools.

It bears noting that the educational programming and services offered in a school district, is not a consideration when determining a student’s eligibility to attend school in said district. Furthermore, whether an ineligible student should be allowed to remain in a school district is not based upon the educational program/services available in that district. To find otherwise, would be contrary to law and would pose an undue burden on school districts to educate students who are not entitled to a free public education in those districts. The applicable statutes and regulations setting forth the requirements for school eligibility, and the exceptions thereof, do not take into account the specific programs and/or services in a school district as a factor in determining student residency. The query is clear and simple: whether you are domiciled or reside in the school district. Petitioner’s sole basis for seeking K.M.’s continued enrollment in the District—the educational program/services offered by the District—despite clearly having moved out of the District, is not appropriate for consideration in this matter.

Notwithstanding the irrelevance of the educational programming and services in the ultimate consideration of this matter, the Board notes that the Keansburg school district can offer the same program and services to K.M. See Exhibit D.

It is undisputed that petitioner does not live in Middletown, New Jersey. Petitioner is also cognizant of the fact that K.M. is not eligible to continue his education in the District. Despite such, and even after having admitted that petitioner no longer resides in Middletown and that K.M. is not entitled to attend the District's schools. Respondent argues that the residency appeal is without merit and petitioner's request for relief has no basis in law. Allowing petitioner to pursue this matter any further duly burdens the Board and goes against the grain of public policy. However, we are not able to pursue that or any opposing facts because petitioner failed to participate in the process.

Moreover, the respondent's Notice of Motion in Lieu of an Answer was filed seeking dismissal of the petitioner's petition pursuant to N.J.A.C. 1:1-14.4. Under N.J.A.C. 1:1-14.4:

(a) If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

(b) If the nonappearing party submits an explanation in writing, a copy must be served on all other parties and the other parties shall be given an opportunity to respond.

(c) If the judge receives an explanation:

1. If the judge concludes that there was good cause for the failure to appear, the judge shall reschedule the matter for hearing; or

2. If the judge concludes that there was no good cause for the failure to appear, the judge may refuse to reschedule the matter and shall issue an initial decision explaining the basis for that conclusion, or may reschedule the matter and, at his or her discretion, order any of the following:

- i. The payment by the delinquent representative or party of costs in such amount as the judge shall fix, to the State of New Jersey or the aggrieved person;
- ii. The payment by the delinquent representative or party of reasonable expenses, including attorney's fees, to an aggrieved representative or party; or
- iii. Such other case-related action as the judge deems appropriate.

(d) If the appearing party requires an initial decision on the merits, the party shall ask the judge for permission to present ex parte proofs. If no explanation for the failure to appear is received, and the circumstances require a decision on the merits, the judge may enter an initial decision on the merits based on the ex parte proofs, provided the failure to appear is memorialized in the decision.

Based upon the facts as detailed, **I CONCLUDE** that the petitioner was provided with appropriate notice of the motion to dismiss and how to reply as well as a scheduled proceeding, namely a telephone conference call which was to be held on May 14, 2020, at 3:00 p.m. The petitioner was provided written notice of the motion to dismiss and the scheduled telephone conference. Also, petitioner concedes in her communications with the OAL that she was aware of the scheduled call and reported that she is essential personnel and her boss would not let her participate in the scheduled conference. Despite receiving appropriate notice, of the motion and telephone call, neither the petitioner responded to the motion to dismiss nor appeared on the scheduled conference call. The petitioner has further been unresponsive to subsequent efforts by OAL staff to communicate with her regarding a follow-up telephone conference and her pending hearing date on August 19, 2020.

Although the OAL received a communication from the petitioner regarding her failure to appear on the scheduled conference call, the OAL did not receive "an

explanation for the nonappearance within one day” of the petitioner’s non-appearance within the meaning of N.J.A.C. 1:1-14.4(a). Having not received an explanation from the petitioner to explain her non-appearance on the conference call, N.J.A.C. 1:1-14.4 directs that this tribunal “shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).” As the respondent has not requested a decision on the merits of the matter be issued ex parte, no further proceedings pursuant to N.J.A.C. 1:1-14.4(d) are necessary. This tribunal, therefore, is left only with the mandate that the matter “shall” be returned to the transmitting agency for appropriate disposition. N.J.A.C. 1:1-14.4(a).

The use of the term “shall” in N.J.A.C. 1:1-14.4(a) is generally construed as mandatory as opposed to the statutory use of the term “may” which is permissive or directory. Franklin Estates, Inc. v. Edison, 142 N.J. Super. 179, 184 (App. Div. 1976). I **CONCLUDE** that the petitioner has been dilatory in prosecuting her appeal, effectively abandoning the prosecution of her petition, has been unresponsive to communications from the OAL regarding her pending matter, and failed to present good cause in a timely manner as to why her failure to appear for a scheduled conference should be excused pursuant to the provisions of N.J.A.C. 1:1-14.4(c). She has also failed to reply to a motion to dismiss. A plain reading of N.J.A.C. 1:1-14.4(a), therefore, requires that the matter now be returned to the transmitting agency for appropriate disposition. See also N.J.A.C. 1:1-3.3(b).

### **ORDER**

Based on the foregoing, the respondent’s motion to dismiss the petition is **GRANTED** and I **ORDER** that the clerk return the case to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

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, PO 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.



May 22, 2020  
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DATE

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**DEAN J. BUONO, ALJ**

Date Received at Agency:

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Date Mailed to Parties:

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**EXHIBITS:**

**For petitioner:**

None

**For respondent:**

Motion to Dismiss with attached exhibits