EDU # 4176-94
C # 152-95
SB # 70-95
APP. DIV. # A-653-95T5
EDU # 164-97
C # 633-97R
SB # 2-98
APP. DIV. #A-5978-98T2

WHASUN LEE, as parent and guardian of V.L., and ALBERT LEE, individually,	:
PETITIONERS-APPELLANTS,	:
V.	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	DECISION
RESPONDENT-CROSS/APPELLANT.	:

Decided by the Commissioner of Education, May 11, 1995

Decided by the State Board of Education, September 6, 1995

Remanded by the Appellate Division, October 9, 1996

Remanded by the State Board of Education, December 4, 1996

Decided by the Commissioner of Education, December 8, 1997

Decided by the State Board of Education, June 2, 1999

Remanded by the Appellate Division, August 7, 2000

For the Petitioners-Appellants, Kalac, Newman, Lavender & Campbell (Peter P. Kalac, Esq., of Counsel)

For the Respondent-Cross/Appellant, Reusille, Mausner, Carotenuto, Barger & Steel (Martin M. Barger, Esq., of Counsel)

This protracted case began in 1994 when Whasun Lee (hereinafter “petitioner” or “Mrs. Lee”) filed a petition of appeal with the Commissioner of Education challenging the

determination of the Board of Education of the Township of Holmdel (hereinafter "Board" or "Holmdel Board") that her children were not entitled to a free public education in the Holmdel district. The Board filed a counterclaim seeking reimbursement for tuition for the period from October 1987 through January 1994.[1]

The petitioner and her family had been domiciled in Holmdel until October 1987, when they moved to Colts Neck. However, they retained their house in Holmdel until 1989, when they sold it and bought a condominium in Holmdel. The petitioner alleged that she had purchased the condominium after she had been told by the superintendent of the Holmdel school district, Dr. Timothy Brennan, that ownership of property in Holmdel was sufficient to allow her children to continue to attend school in that district free of charge. The petitioner's children continued to attend public school in Holmdel, although the family was domiciled in Colts Neck during all times relevant to this case.

The petitioner contended that she was not obligated to pay tuition to the Holmdel district because school officials in Holmdel had been aware of the family's change in domicile in 1987. The petitioner maintained that when school officials were advised of the situation in 1989, they had led her to believe that purchasing a property in Holmdel would be enough to entitle her children to a free public education in that district. She further contended that school officials had not made it clear to her until January 1994 that ownership of the condominium was not alone sufficient to create such an entitlement. At that time, the petitioner and her children took up part-time residency during the week at the condominium.

[1] During the proceedings in the Office of Administrative Law, the Board increased its request to include tuition through June 1995.

On March 24, 1995, an Administrative Law Judge ("ALJ") concluded that equitable principles precluded the Board from collecting tuition from the petitioner for the period between October 1987 and the date when the petitioner sold her house in Holmdel in 1989.[2] The ALJ, however, concluded that the petitioner was responsible for tuition to Holmdel from the date when she sold her house until December 1993.

On May 11, 1995, the Commissioner adopted in part and modified in part the ALJ's recommendation. The Commissioner observed initially that the petitioner's children had not been entitled to a free public education in Holmdel since their domicile had been in Colts Neck during the entire period relevant to this litigation. However, he concluded that equitable estoppel applied so as to prevent the Holmdel Board from collecting tuition for the period between October 1987 and December 1989, finding that the Board had acquiesced to the situation during that period. The Commissioner concluded that equitable estoppel should not be applied to excuse the petitioner from her obligation to pay tuition to the Holmdel Board after that date, finding that the petitioner had been aware in December 1989 that her children were no longer entitled to attend school in Holmdel free of charge. Consequently, he assessed tuition for the period from January 1990 through June 1995.

On September 6, 1995, we affirmed the Commissioner's decision.

On October 9, 1996, the Appellate Division remanded for further proceedings. The Court found that this agency had not adequately resolved whether the petitioner had understood that owning property in Holmdel did not alone entitle her children to attend school in the district free of charge. The Court explained:

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[2] The record does not specify the exact date of the sale.

> Were the ALJ's conclusion that the Lees were "fully aware [as of December 1989]…they were no longer entitled to attend the schools in Holmdel free of charge" supported by her findings of facts and the record, we could not quarrel therewith or, more importantly, with the Commissioner's and the State Board's acceptance of that conclusion. [Citations omitted.]….
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> That conclusion, however, is supported by no more than the ALJ's factual finding that on December 12, 1989, after the Lees had sold their first Holmdel property, Dr. Brennan met with Mrs. Lee. According to him, he at that point "clearly articulated…his position that [the Lees] had to use the condominium [in Holmdel] as a residence in some meaningful fashion" and that "it would be 'proof positive' that they were not living there if he were to find out that the property was rented to someone else." [Footnote omitted.]
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> The difficulty with saddling the Lees with an unclean hands label premised upon this testimony of Dr. Brennan is not our disagreement with the ALJ's acceptance therewith, even though we might question that. Rather, it arises from the ALJ's simultaneous recognition of Mrs. Lee's very different version of that December 12, 1989 meeting.[5]
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> [5] It is undisputed that there was a decided language barrier between Dr. Brennan and Mrs. Lee, who speaks Korean and does not speak English fluently or even well. Mrs. Lee did bring with her to the meeting a friend, Mrs. Chu, whose native language is Chinese and who does speak English well. Dr. Brennan, however, acknowledged that the conversation between Mrs. Chu and Mrs. Lee during this critical meeting was not understandable to him. Mrs. Lee testified that she understood Dr. Brennan to tell her that she would have to "buy right away to own something….Then you could continue to the – the Holmdel – Holmdel school."

Appellate Division's Decision of October 9, 1996, slip op. at 6-10.

Finding that neither the ALJ, the Commissioner or the State Board had focused on the petitioner's understanding of what Dr. Brennan allegedly had told her at their December 1989 meeting, the Court observed that the petitioner could not have been a "wrongdoer" if she did not comprehend what Brennan allegedly had told her. The Court found that there was some support, beyond the petitioner's own testimony to that effect, "to suggest that lack of understanding, as well as her continued reasonable reliance

upon what she thought Brennan was telling her." Id. at 8. Consequently, the Court concluded that additional factual findings were required concerning the petitioner's understanding of the December 1989 meeting, adding that "If she did not comprehend that what she had previously been led to believe was sufficient, i.e., property ownership and payment of taxes, in fact was not sufficient, she cannot have 'unclean hands.' If she did, then the application of that concept would not be inappropriate." Id. at 10.

The Court therefore remanded this matter to the State Board for additional factual findings and for determination of whether the doctrine of "unclean hands" barred the petitioner from equitably estopping the Board from collecting tuition for the period from January 1990 to January 1994. The Court also remanded for consideration of whether equitable estoppel should preclude Holmdel from collecting tuition for the period from January 1994 to June 1995. The Court affirmed the State Board's determination that equitable estoppel applied so as to preclude Holmdel from collecting tuition for the period between October 1987 and December 1989.

Simply stated, the task on remand was to ascertain whether it would be fair under the circumstances to charge the petitioner tuition for the period after December 1989. On December 4, 1996, we remanded this matter to the Commissioner for such proceedings as might be required to fulfill the terms of the Court's decision.

The Commissioner transmitted the matter to the Office of Administrative Law. On October 21, 1997, following additional hearings on remand, which included the testimony of the petitioner and Julia Chu, the real estate agent who had assisted the petitioner in purchasing and renting out the Holmdel condominium, the ALJ determined that equitable estoppel would not apply so as to prevent the Board from collecting tuition for the period after December 1989. The ALJ explained that:

[The petitioner] finally testified that the first time Dr. Brennan told her she had to own property and be a taxpayer was the fall of 1989 when she sold the first house. I FIND Mrs. Lee's testimony in this regard incredible. Nothing Dr. Brennan ever said to Mrs. Lee could reasonably have caused her to believe that she could send her children to school wherever her children wanted to go. Mrs. Lee's testimony on November 2, 1994 reflected her understanding of Dr. Brennan's reasoning for permitting the boys to return to the district, i.e., the Lee's still owned their house in Holmdel. The fact that she withdrew the boys from respondent's district and enrolled the boys in the Colts Neck school system when she first moved there in 1987, and when the boys clearly did not wish to leave the Holmdel schools, also reflects that she did not believe she could send them wherever she wanted to regardless of where she lived. I FIND that when she sold the first Holmdel house sometime during 1989, at that point she knew that the boys were not entitled to continue to attend the Holmdel schools free of charge. After she sold the first house and for some period of time thereafter, she owned no property in Holmdel and was not a taxpayer in Holmdel. Nevertheless, as I have previously articulated, she did not remove her students from the district and she did not call Dr. Brennan for advice. She waited to see what, if anything, would happen and only when she received a call and a letter from the district in December 1989 advising that the children could no longer attend, did she seek Dr. Brennan's advice and purchase another piece of property in Holmdel. My statement that Mrs. Lee was "fully aware" that her sons were no longer entitled to attend school in Holmdel free of charge had nothing to do with Dr. Brennan's advice at the December 12, 1989 meeting. Mrs. Lee went into that meeting with "unclean hands." Dr. Brennan did tell her at that meeting or perhaps in a telephone conversation before the meeting that she had to purchase something else immediately. I also found as a fact based upon the testimony heard at the November 1994 hearing, however, that Dr. Brennan told her not to rent the condominium because that would be proof positive that she was not living there. Mrs. Lee denies that Dr. Brennan ever said that to her. Mrs. Chu denies having heard Dr. Brennan say that. Mrs. Chu was not a credible witness in this regard either, however. Mrs. Chu repeatedly testified that she could not remember a good portion of the conversation which took place on that day. She acknowledged that conversation took place between Dr. Brennan and Mrs. Lee in her presence, but she claims that she did not hear most of the conversation, and she also testified that, at the time in

> question, she had a hearing problem for which she has since had an operation. Although the Appellate Division has questioned my findings that Dr. Brennan advised Mrs. Chu and Mrs. Lee that the property could not be rented out, citing, inter alia, "the ALJ's recognition of Brennan's admission that Mrs. Lee may well have 'walked away from the conversation thinking that purchase and ownership was enough.'" The words, "may well have," were not Dr. Brennan's words, nor were they mine. Those are the Appellate Division's words, and in my opinion, they are not supported by the record.

Initial Decision on Remand, slip op. at 8-9.

The ALJ added that although "[a]nything is possible; it is not probable…that Mrs. Lee failed to understand Dr. Brennan's warning not to rent the property." Id. at 11. She therefore concluded that:

> Because Dr. Brennan advised Mrs. Lee not to rent out the condominium, and I am convinced she understood that instruction, and because notwithstanding the Lees rented out the condominium almost immediately and continuing until January 1994 when Dr. Le Glise advised them of the requirements of domicile, the equities do not weigh in favor of the Lees.

Id. at 12.

The ALJ continued:

> I have found as a fact Dr. Brennan said to Mrs. Lee, in Mrs. Chu's presence, that she had to use the condominium in some meaningful way and that it would be proof positive that she was not so using it if she rented it out. Mrs. Lee's English language difficulty manifested itself throughout the hearing with a heavy accent which makes it difficult for others to understand her. I saw little evidence that she had difficulty understanding others when they spoke to her in English. If Mrs. Chu had testified that she explained to Mrs. Lee at or after the meeting that she should not rent out the condo, that would also have been relevant evidence of Mrs. Lee's knowledge. Of course, Mrs. Chu did not so testify, but the…testimony she did give on that issue when I asked her the question directly was so evasive and unresponsive as to permit the conclusion that she did have such a conversation

> with Mrs. Lee wherein she advised Mrs. Lee that she should not rent the condo.

Id. at 14.

In sum, the ALJ found that it would be unfair under the circumstances to preclude the Board from collecting tuition from the petitioner for the period after December 1989. She therefore recommended that the petitioner be directed to pay tuition to the Holmdel Board for the period from January 1990 through June 1995.

On December 8, 1997, the Commissioner adopted in part and rejected in part the ALJ's recommendation. The Commissioner agreed that the petitioner had failed to meet her burden of showing that equitable principles should bar the Board from recovering tuition after January 1994. However, the Commissioner was "unwilling to ascribe bad faith, wrongdoing or fraudulent conduct to Mrs. Lee, in that such a label would presuppose that Mrs. Lee knew what the correct course of action would be." Commissioner's Decision on Remand, slip op. at 28. The Commissioner found that Dr. Brennan did not "possess an accurate understanding of the relevant law," id. at 25, and "did not appreciate the distinction between a residence and a domicile." Id. at 27. The Commissioner therefore directed the petitioner to reimburse the Holmdel Board for tuition only for the period from January 1994 through June 1995.

On June 2, 1999, we affirmed with clarification the Commissioner's decision on remand, concluding that the record did not permit a finding that the petitioner had understood prior to January 1994 that owning property in Holmdel did not alone entitle her children to attend school in the district free of charge. Under the circumstances, we were unable to conclude that the doctrine of "unclean hands" barred petitioner from applying equitable estoppel for the period from January 1990 to January 1994. We therefore affirmed the decision of the Commissioner directing the petitioner to reimburse

the Holmdel Board for tuition only for the period from January 1994 through June 1995. In so doing, we found that:

> The events pivotal to this issue occurred in December 1989 at a meeting between Dr. Brennan and petitioner, which was also attended by Julia Chu. Dr. Brennan testified during the initial hearing in this matter that he had misunderstood the requirements of domicile, believing that ownership of property in the district while "spending time there and living there in some sense," tr. 11/4/94, at 44, was sufficient. In essence, Dr. Brennan lowered the standard for "domicile." Indeed, he acknowledged the possibility that petitioner could have left their meeting with the understanding that owning a home and paying taxes in Holmdel would be sufficient to entitle her children to attend school in that district. Id. at 71-72.
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> Dr. Brennan, however, also testified that he had advised petitioner that she could not rent out the Holmdel property. Petitioner denied any awareness of such an instruction. The ALJ found in favor of the Board on the basis of the testimony of Chu, who had accompanied petitioner to the meeting with Dr. Brennan and had assisted petitioner in purchasing a condominium in Holmdel and renting it out. Although the ALJ found that Chu's testimony was so evasive as to "permit the conclusion that she did have a conversation with Mrs. Lee wherein she advised Mrs. Lee that she should not rent the condo," initial decision on remand, slip op. at 14, we find, upon further review, that the evidence in support of the ALJ's conclusion is simply too tenuous to permit such a finding. Although we agree with the ALJ that Chu appears to have been evasive in responding to questioning, in the absence of other evidence supporting the conclusion that petitioner had, in fact, understood that she could not rent out the Holmdel condominium, we are unwilling to ascribe such understanding to her.

State Board's Decision on Remand, slip op. at 6-7 (footnote omitted).

On August 7, 2000, the Appellate Division affirmed that portion of the State Board's decision which determined that the petitioner was responsible for tuition for the period from January 1994 through June 1995. However, the Court reversed the State Board's determination that the petitioner was not responsible for tuition for the period

from January 1990 through January 1994 and remanded for further proceedings. The Court indicated that:

> the State Board did not explain why it rejected the ALJ's acceptance of Dr. Brennan's testimony relating to the condominium rental. Instead, the Board, in essence, concluded that it could not accept Dr. Brennan's testimony concerning Mrs. Lee's understanding that she could not rent the condominium, without some corroborating evidence. Given the ALJ's strong credibility determinations, we question whether that conclusion was supported by sufficient credible evidence.

Appellate Division's Decision of August 7, 2000, slip op. at 13.

The Court stressed that:

> the Board must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments. Because of the manner in which the State Board chose to "clarify" the Commissioner's decision, we cannot conclude that the Board gave either adequate weight to the ALJ's credibility findings, or fully explained why the ALJ's credibility findings were unacceptable.

Id. at 14.

The Court remanded so that the State Board could "reconsider its decision in light of its obligation to give due deference to the ALJ's credibility determinations." Id. at 13.

By letter dated October 3, 2000, the Director of the State Board Appeals Office notified the parties that the Legal Committee had determined to provide them with the opportunity to submit briefs on this issue. Both parties filed timely briefs. In her brief, the petitioner contends that the State Board can give proper deference to the ALJ's credibility determinations and still find that equitable estoppel applies to the period from January 1990 through January 1994. The Board urges adoption of the ALJ's conclusions.

We have reviewed the supplemental briefs and carefully re-examined the record in light of the Appellate Division's directive. We are aware of our obligation to accord due consideration to the fact that the Administrative Law Judge had the opportunity to observe these witnesses. See Quinlan v. Board of Education of North Bergen Township 73 N.J. Super. 42, 50-54 (App. Div. 1962). However, we are not bound by the ALJ's assessments of the substance of the testimony or her evaluation of the factors bearing upon credibility. E.g., In the Matter of the Tenure Hearing of Barry Deetz, decided by the State Board of Education, November 7, 1984, aff'd, Docket #A-1264-84T5 (App. Div. 1985), certif. denied, 101 N.J. 321 (1986). Our responsibility as the ultimate administrative fact-finder and decision-maker in matters arising under the education laws, Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. denied, 121 N.J. 615 (1990); Dore v. Board of Educ., 185 N.J. Super. 447, 452 (App. Div. 1982), is to weigh the evidence and to make an independent finding of fact on the record presented, giving due regard to the opportunity of the ALJ to observe the witnesses and evaluate their credibility. In the Matter of the Tenure Hearing of Patrick Caporaso, Docket #A-2498-87T7 (App. Div. 1988), citing In re Masiello, 25 N.J. 590 (1958).

For the reasons that follow, evaluation of the testimony leads us to set aside the credibility determinations of the ALJ. Upon review of the record, we conclude, as we did in our previous decision, that the Board has not established that the petitioner understood prior to her meeting with Dr. LeGlise in January 1994 that owning property in Holmdel did not alone entitle her children to attend school in the district free of

charge. Consequently, we conclude once again that the petitioner is not responsible for tuition for the period from January 1990 to January 1994.[3]

Again, the limited issue before us is whether the petitioner understood after her December 1989 meeting with Dr. Brennan that owning property in Holmdel did not alone entitle her children to attend school in the district free of charge. Hence, our task on this remand remains the same as in the last remand.

Resolving that issue is complicated by the fact that the petitioner is Korean and, as even the ALJ observed, has an "English language difficulty [which] manifested itself throughout the hearing with a heavy accent which makes it difficult for others to understand her." Initial Decision on Remand, slip op. at 14. Although the ALJ indicated that she had seen little evidence that the petitioner had difficulty understanding others when they spoke to her in English, id., she acknowledged during the hearing on remand that "there were a number of places in the transcripts [from the 1994 hearing] where either [the petitioner] didn't understand [her counsel's] question and…it had to be rephrased or repeated, or mine and it had to be rephrased or repeated." Tr. 4/28/97, at 44-45. Consequently, the ALJ granted the petitioner's counsel's request to allow an interpreter to be used for the petitioner's testimony during the proceedings on remand.

During those proceedings, Julia Chu, the real estate agent who accompanied the petitioner to the December 1989 meeting with Dr. Brennan, testified that she spoke Chinese and did not speak Korean. Id. at 16. Consequently, her conversations with the petitioner were always in English, and they often had difficulty understanding each other. Id. at 16-17, 21-22. As a result, they had to repeat statements and sometimes

[3] We reiterate that the instant remand was limited by the Appellate Division to the period between January 1990 and January 1994.

used gestures and body language in order to be understood. Id. at 22. The petitioner also testified that she and Mrs. Chu conversed only in English. Tr. 11/4/94, at 124. Mrs. Chu did not recall Dr. Brennan using the phrase "proof positive" during their December 1989 meeting and, from her testimony at the hearing, it was apparent that she did not understand the meaning of that phrase. Tr. 4/28/97, at 23.

Furthermore, although Dr. Brennan testified that he was "absolutely sure – as sure as I can be" that the petitioner understood that it would be "proof positive" that her family was not living in Holmdel if they rented out the property, tr. 11/4/94, at 22, he also indicated that he had difficulty communicating with the petitioner, stating in a deposition that he had trouble understanding her 75% of the time. Id. at 20, 57. Brennan was also of the impression that the petitioner and Mrs. Chu were not always speaking to each other in English. The explanation for this impression might be that, as observed by the ALJ, "Mrs. Lee's accent is so heavy that when she speaks quickly it can sound like a foreign language." Initial Decision, slip op. at 8. The record reveals that both the ALJ and the counsel for the Board occasionally misunderstood the petitioner during the hearing. See, e.g., Tr. 11/4/94, at 124-28; Tr. 11/2/94, at 37, 90.

We find no basis for accepting as fact, on the basis of Dr. Brennan's belief, that the petitioner understood that she could not rent out the Holmdel condominium. In addition, our exhaustive review of the record casts doubts on the credibility of Brennan. Dennis Bye, the Director of Guidance in the Holmdel district, testified that it was common knowledge among the faculty that the Lees were not living in Holmdel and that he had informed Dr. Brennan on at least two separate occasions at administrative meetings that they were residing in Colts Neck. Tr. 11/3/94, at 25-32. He added that he was "surprised" that Dr. Brennan "didn't react more, you know, want to ferret out more

information." Id. at 30. Bye expected that Brennan would be more "vigilant perhaps about the way he reacted in terms of this is not right; we should do something about it. It was more a calm kind of response." Id. at 32.

Dr. Richard White, a high school principal in the district, confirmed that Dennis Bye had brought the issue to Dr. Brennan's attention at administrative meetings. He indicated that "Dr. Brennan's reply to that usually was well, that's a special case, or something. It was just put aside." Id. at 44. White testified that it was "a running joke with us because [Dr. Brennan] had just gotten through explaining residency and that sort of thing, yet here was a case that was obviously in contradiction to what he was saying." Id. He added that:

> So, frequently, you know, glances would be exchanged around the table, that sort of thing. Let me put it this way: If it had been anybody other than Dennis Bye asking questions, because Dennis Bye had a reputation among us as a very sincere kind of guy, if any one of the rest of us had asked that question, we would have know very well among each other that that person was doing nothing but baiting the superintendent on this one.
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> Dennis Bye was particularly concerned about this because his office was usually the one that made initial contact with new students. As they came in, they went and got registered and got assigned a counselor, that sort of thing. So, I think Bye brought this up very sincerely. He wanted to make sure that he — that his office came under no criticism for having missed a step at this kind of thing.

Id. at 44-45.

Dr. White recalled that Dr. Brennan had called him in 1987 or 1988 to inform him that the petitioner's children were returning to the district from Colts Neck and that Brennan had instructed him to re-register the petitioner's son with "no questions asked." Id. at 41. He indicated that Dr. Brennan had expressed pride in the fact that the petitioner's children wanted to return to the district. Id. at 42.

In contrast to the testimony of Dr. White, Dr. Brennan could not recall ever referring to the Lees as a special case, adding that he had never even thought of them that way. Tr. 11/4/94, at 30. Nor did he recall Dennis Bye ever telling him that the Lees were not living in Holmdel. Id. at 34-35. In addition, he had no recollection of speaking with Dr. White about re-registering the petitioner's children when they returned to the Holmdel district. Id. at 35-38. While testifying during these proceedings, Brennan avowed that he was just "beginning to think" that the petitioner had attempted to deceive him. Id. at 46-47.

Dr. Susan LeGlise, who began her employment as superintendent in Holmdel in July 1993, testified that Bye, White and another administrator had told her in October or November 1993 about the situation involving the Lees. Tr. 11/2/94, at 19. She subsequently called Dr. Brennan to find out whether there was "some arrangement" with the Lees so as to allow their children to attend school in Holmdel despite the fact that they were living in Colts Neck. Dr. Brennan assured her that there was "absolutely not" an arrangement. However, Dr. LeGlise asserted that, after reading a transcript of Brennan's deposition in this matter, she was convinced that he had not been truthful with her, stating that "there was definitely a difference in what was said to me and what I read in the transcript." Id. at 22.

Dr. LeGlise also disputed a number of Dr. Brennan's contentions regarding their phone conversation. LeGlise testified that, contrary to Brennan's testimony during his deposition in September 1994, he had not explained the law of domicile to her during that conversation, had not told her that there were several families with children attending school in the district who also had residences in other towns, and had not

asked her if she considered it "a big deal" that the Lees were not living in Holmdel. Id. at 22-25.

In addition, Dr. LeGlise indicated that during her meeting with the petitioner in January 1994, she had made it quite clear that the petitioner had to be legally domiciled in Holmdel in order for her children to receive a free public education in the district. LeGlise stated that she had "explained that at least three or four times in different ways, but using the terms legally domiciled and then explaining them." Id. at 25-26. The petitioner acknowledged that Dr. LeGlise had told her that she had to move into the condominium, and that she and her sons had started sleeping there during the week shortly thereafter. Id. at 55-56, 65-66.

We find particularly troubling the inconsistencies between Dr. Brennan's testimony and the testimony of Dr. White, Dr. LeGlise and Dennis Bye, as well as Dr. Brennan's apparent inability to recall pivotal events surrounding the petitioner and her children. We emphasize in that regard that White corroborated Bye's assertion that he had told Brennan on several occasions that the Lees were not living in Holmdel. Our concerns are compounded by LeGlise's assertion that she was convinced that Brennan had not been truthful with her when he told her that he did not have a special arrangement with the Lees.

Other evidence in the record further reinforces our conclusion. Although the petitioner did not in any way conceal the fact that she was living in Colts Neck, Dr. Brennan testified that he was not aware at any time during his superintendency, which lasted until January 1993, that the petitioner and her family were not domiciled in Holmdel. Tr. 11/4/94, at 49-50. We observe in that respect that, although Dr. Brennan insisted that he had told the petitioner in 1989 that she could not rent out the

condominium, he acknowledged that he did not make any effort thereafter to assure that she had not done so. Id. at 95. In that regard, Dr. Brennan conceded that, although he was in charge of administering the district's residency and domicile policy, had received several anonymous phone calls telling him that the Lees were living in Colts Neck, and had been informed by several administrators and a member of the Holmdel Board that the Lees were not domiciled in Holmdel, he had never checked the student files of the petitioner's children, which at all relevant times showed both an address and phone number in Colts Neck. Id. at 47-48. Nor, despite the information he was receiving, did he ever send out an investigator to verify that the Lees were living in Holmdel. Id. at 57. He indicated that the first time he learned that the Lees were domiciled in Colts Neck was when he received the phone call from Dr. LeGlise in 1993. Id. at 49-50. Brennan's explanation was that his "procedures did not handle this situation effectively." Id. at 50. At the same time, he was advising his administrators to be on the lookout for "angle-shooters," i.e., families sending their children to school in Holmdel even though they were domiciled elsewhere. Id. at 18-19.

The testimony of Bye, White and LeGlise, along with Dr. Brennan's acknowledged inaction regarding the Lees in the face of notification from administrators and a Board member that they were not living in the district, casts a shadow of such magnitude over Brennan's testimony that we cannot credit it. Our concerns are further heightened by the fact that the petitioner stopped renting out the condominium and started making use of it after Dr. LeGlise clearly explained to her in January 1994 that she had to live in Holmdel in order for her sons to attend school in the district. Tr. 11/3/94, at 58; Tr. 11/2/94, at 55. See infra, at 19-20. Moreover, the record reveals that Dr. Brennan permitted the petitioner's children to attend school in Holmdel after his

December 12, 1989 meeting with the petitioner on the basis of an agreement to purchase the condominium even though she did not yet own the property and settlement would not be for several months.[4]

Ordinarily, Dr. Brennan's conduct would preclude the Board from collecting tuition from the petitioner during that period. However, if the petitioner was told and if she understood that she could not rent out the Holmdel condominium, then, notwithstanding Dr. Brennan's apparent acquiescence to the situation, the petitioner would have "unclean hands" and the Board would be able to collect tuition from her.

The doctrine of "unclean hands" is an equitable defense which "embraces the principle that a court should not grant equitable relief to a party who is a wrongdoer with respect to the subject matter of the suit." Pellitteri v. Pellitteri, 266 N.J. Super. 56 (App. Div. 1993), citing Faustin v. Lewis, 85 N.J. 507 (1981). The burden of establishing "unclean hands" rests upon the complaining party. Piper v. Piper, 13 N.J. Misc. 68 (Ch. 1934).

As the Appellate Division pointed out in its decision of October 9, 1996:

> Mrs. Lee could not have been a "wrongdoer" if she did not comprehend what Brennan says he told her in December 1989. And there is some support, beyond her own testimony to that effect, to suggest that lack of understanding, as well as her continued reasonable reliance upon what she thought Brennan was telling her. For one thing, it is undisputed that on the day of this conversation, she immediately and without the usual cautionary measures a buyer would take, purchased a condominium in Holmdel and presented the contract to Mr. Brennan a few days later. He accepted it as sufficient to continue the children in the school district, despite the fact that the closing was some months in the future. Moreover, subsequently in January 1994 when the new Superintendent, Susan Le Glise, finally made clear to

[4] The record indicates that the Lees made settlement on the condominium on February 28, 1990, 2½ months after the petitioner's meeting with Dr. Brennan. Tr. 11/4/94, at 100.

> Mrs. Lee that simply owning property and paying property taxes was not enough,[6] she and her sons immediately commenced their residency of the Holmdel property. There is no reason to think that had Mrs. Lee been so clearly told in December 1989, she would not have done the same then.
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> [6] In response to whether she discussed what was required during that meeting, Ms. Le Glise said:
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> > Yes. I discussed it and kept going back to it a number of times during that. Because that was the point I wanted to make, that they had to be legally domiciled in Holmdel in order to attend the schools with a free and public education. So I kept going back to that. I would define it, explain it, explain what it meant to the taxpayers, not – you know, to have people from Holmdel attending the schools, the fact of overcrowding in our schools and what the State law said in that area. And I explained that at least three or four times in different ways, but using the terms legally domiciled and then explaining them.
>
> Implicit in her efforts to explain to Mrs. Lee the concept of domicile "at least three or four times," is, one might infer, a recognition that that concept was not, theretofore, understood.

Appellate Division's Decision of October 9, 1996, slip op. at 8-9.

The Court added that if the petitioner had left the meeting with Dr. Brennan believing that owning a property and paying property taxes in Holmdel was sufficient to allow her children to attend school in the district, then "we are hardpressed to agree that the concept of 'unclean hands' could fairly be applied to prevent the application of equitable estoppel beyond December 1989….If she did not comprehend that what she had previously been led to believe was sufficient, i.e., property ownership and payment of taxes, in fact was not sufficient, she cannot have 'unclean hands.'" Id. at 9-10.

As previously stated, we are not bound by the ALJ's assessment of the substance of the testimony or her evaluation of the factors bearing upon credibility. Dr. Brennan's conduct during the relevant period, when considered in conjunction with the testimony of Dr. LeGlise, Dr. White and Dennis Bye, casts significant doubts on his credibility. This, in turn, casts doubts on the veracity of his testimony that he had told

the petitioner that she could not rent out the Holmdel condominium. It also calls into question the accuracy of his testimony that he was "absolutely sure" that the petitioner understood that instruction. In this regard, we observe that Dr. Brennan did not at any point during his testimony articulate the basis for his belief that the petitioner understood that she could not rent out the property, indicating only that there was "absolutely no doubt in my mind that Mrs. Chu understood that" since "she seemed to have a – a great knowledge of real estate," tr. 11/4/94, at 95, and that there was "[j]ust something about the exchange in the office that day." Id. Brennan added, however, that the petitioner and Mrs. Chu "were speaking I think at – at times in the language other than English." Id.

We stress that the only direct evidence that Dr. Brennan told the petitioner that she could not rent out the Holmdel condominium came from Brennan himself. In addition, although Dr. Brennan testified that he was certain that the petitioner understood such instruction, he also acknowledged that he had difficulty communicating with her, id. at 20, had trouble understanding her 75% of the time, id. at 57, and didn't always understand the exchanges between the petitioner and Mrs. Chu during his December 1989 meeting with them, believing that they were not always conversing in English. Id. at 72, 95. Moreover, it is undisputed, as we pointed out in our decision of June 2, 1999, that Brennan had, in essence, lowered the standard for "domicile" for the petitioner and had permitted her sons to attend school in Holmdel even while the district's records reflected an address and phone number in Colts Neck.

Under the circumstances detailed herein, we find that exclusive reliance on Dr. Brennan's contention that the petitioner understood that she could not rent out the condominium would be untenable. We stress again in that regard that Brennan

acknowledged that it was "conceivable" that the petitioner had left their meeting with the understanding that owning property in Holmdel and being a taxpayer was sufficient to entitle her children to a free public education in the district. Given these circumstances, we are unwilling to ascribe to petitioner the understanding that she could not rent out the property.

Thus, even giving due weight to the ALJ's unique position to make demeanor-based judgments, we are unable to conclude on this record that the doctrine of "unclean hands" could fairly be applied so as to prevent the application of equitable estoppel for the period between January 1990 and January 1994. We therefore once again concur with the Commissioner's determination in his decision on remand of December 8, 1997 that the Board is precluded on equitable grounds from collecting tuition from the petitioner for that period.

Edward Taylor abstained.

July 2, 2002

Date of mailing _____