

J.T., ON BEHALF OF MINOR CHILDREN, :
 J.T., A.T., AND B.T., :
 :
 PETITIONER, : COMMISSIONER OF EDUCATION
 :
 V. : DECISION
 :
 BOARD OF EDUCATION OF THE :
 TOWNSHIP OF SOUTH BRUNSWICK, :
 MIDDLESEX COUNTY, :
 :
 RESPONDENT. :
 _____ :

SYNOPSIS

In November 2016, *pro se* petitioner appealed the determination of the respondent Board that his children are ineligible for a free public education in respondent’s school district. Petitioner contended that he resides at an address in Monmouth Junction, which is within the South Brunswick school district. The Board contended that a residency investigation revealed that petitioner and his children actually reside in Franklin Township. The Board filed a motion to dismiss, asserting that the petition was late filed. An Initial Decision was issued in this matter on March 8, 2017, wherein the ALJ concluded that the petition was late filed pursuant to *N.J.S.A. 18A:38-1(b)*. The ALJ denied the petitioner’s appeal and ordered tuition reimbursement for the period of ineligible attendance. The Commissioner subsequently remanded the case to the OAL, finding that the ALJ had failed to include a factual discussion or make any factual findings in his decision, as is required under *N.J.A.C. 1:1-18.3*.

On remand: the ALJ laid out findings of fact related to the timeliness of the petition, and found that the facts of this matter were set forth in respondent’s brief in support of its motion to dismiss and in a certification from the Superintendent of Schools, both of which were incorporated in the decision as attachments; and the tuition cost per pupil for grades 6-8 was \$11,873 for the 2015-2016 school year, or \$66.00 per day. The ALJ concluded that: petitioner failed to timely file a residency appeal in accordance with *N.J.S.A. 18A:38-1(b)*; neither petitioner nor his children resided in respondent’s school district, and petitioner failed to sustain his burden of proof to establish that J.T., A.T., and B.T. were entitled to attend school in the South Brunswick school district; and the Board is owed tuition in the amount of \$66.00 per day, per child, for the period of ineligible attendance.

The Commissioner noted that the ALJ erred in determining that the petition should be dismissed as untimely; further, the ALJ again failed to make factual findings or include the factual discussion that is required under *N.J.A.C. 1:1-18.3*. Accordingly, the Commissioner summarized the facts of the matter in the final decision in order to provide support for the legal conclusion that petitioner was not domiciled in the school district, and therefore his children were not entitled to a free public education in South Brunswick schools. In addition, the Commissioner corrected the amount of tuition due, and ordered that petitioner owes the respondent Board tuition reimbursement in the total amount of \$35,462. The petition was dismissed.

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.

June 19, 2017

OAL DKT. NO. 05426-17
(EDU 19075-16 ON REMAND)
AGENCY DKT. NO. 298-11/16

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	:	
RESPONDENT.	:	
_____	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed – mindful of the Commissioner’s April 20, 2017 decision remanding this matter for inclusion of a factual discussion. The parties did not file exceptions.

While the Initial Decision contains some findings of fact, such findings relate solely to the timeliness of the petition. The remaining factual findings appear to have been incorporated through a 60 page attachment – including the Board’s entire brief in support of its motion to dismiss, the exhibits attached to the brief, and the certification of Gary McCartney and the exhibits attached thereto. As the ALJ did not make specific factual findings regarding the merits of whether petitioner resides in South Brunswick, the facts of this matter are summarized as follows.¹

Petitioner enrolled his three children in the District’s schools for the 2016-2017 school year, and provided a copy of a lease indicating that he lived at a South Brunswick rental

¹ The Certification of Interim Superintendent Gary McCartney is undisputed as the petitioner did not file opposition to the Board’s motion to dismiss, nor exceptions to the Initial Decision.

property. (Certification of Gary McCartney, ¶ 3-4) Upon discovering that petitioner did not live at the South Brunswick rental property, the Board initiated a residency investigation. (*Id.* at ¶ 5-6) The Board's investigator conducted surveillance between September 1 and October 24, 2016, at the South Brunswick rental property, as well as at petitioner's Franklin Township home. (*Id.* at ¶ 7-8) The investigator observed the South Brunswick rental property on 27 occasions and never saw petitioner or any activity at the home. (*Id.* at ¶ 10) By contrast, the investigator observed the Franklin Township home on 31 occasions and saw petitioner's cars parked outside and in the garage on 28 occasions, and the same cars were also seen dropping off the minor children at the bus stop near the South Brunswick property several times. (*Id.* at ¶ 11-12)

On October 13, 2016, the Board informed petitioner of a residency hearing before the Board to be held on October 24, 2016. (*Id.* at ¶ 13) By letter dated October 25, 2016, the Board informed petitioner of its determination that petitioner resides in Franklin Township and, therefore, the minor children are ineligible to attend the District's schools. (*Id.* at ¶ 14)

The Commissioner finds as a preliminary matter that the instant petition should not be dismissed as out of time. As the Commissioner previously noted in her April 20, 2017 decision, pursuant to *N.J.S.A. 18A:38-1*, when an appeal is filed within 21 days of the date of the district's decision, no child shall be removed from the school during the pendency of the proceedings before the Commissioner. Nevertheless, appeals may be filed after expiration of the 21-day period, but the student's right to attend school during the pendency of the appeal is not guaranteed by operation of statute. See *Attendance at School Based on Domicile or Residency in the School District: Sample Forms, Notices, and Informational Documents*, <http://www.state.nj.us/education/code/current/title6a/chap22sample.pdf>, p. 15.

Upon a comprehensive review of the record, the Commissioner notes that the Initial Decision did not contain any support for its legal conclusion except “See Certification of Gary McCartney and the investigator’s report attached thereto as Exhibit A.” (Initial Decision at 8). There is no explanation as to the facts on which the ALJ is relying for these conclusions of law, and indicating that the Commissioner should refer to a certification is not a substitute for written legal analysis. *N.J.A.C. 1:1-18.3(c)*. Nevertheless, the Commissioner agrees with the ALJ that petitioner failed to sustain his burden of establishing that he was a domiciliary of South Brunswick for the 2016-2017 school year. The Board’s investigation showed that – over nearly a two month period – on no occasion was petitioner present at his South Brunswick rental property, while on nearly every occasion, petitioner’s cars – the same cars that were observed dropping the minor children off at the bus stop in South Brunswick – were at the Franklin Township location. As such, the Board’s determination that petitioner did not reside in South Brunswick was not arbitrary, capricious, or unreasonable. The Commissioner further concurs with the ALJ’s conclusion that the minor children were, therefore, not entitled to a free public education in the District’s schools during the 2016-2017 school year.

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 South Brunswick. Therefore, the Board is entitled to tuition reimbursement in the amount of \$35,462.00² (\$11,873.00 each for A.T. and B.T. to attend middle school, and \$11,716.00 for J.T.

² It appears that the ALJ used the tuition rate for grades 6-8 (\$11,873.00) for all three students. The Certification of Gary McCartney indicates that A.T. and B.T. attended middle school and J.T. attended high school. (¶ 16-17). The per pupil tuition costs issued by the Department of Education on February 17, 2017 indicates that the annual tuition cost for grades 6-8 is \$11,873.00 and the annual tuition cost for grades 9-12 is \$11,716.00.

to attend high school – based on the tuition rates for the entire 2016-2017 school year, during which petitioner’s minor children were ineligible to attend).³

Accordingly, the recommended decision of the ALJ is modified as stated above and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.⁴

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 19, 2017

Date of Mailing: June 20, 2017

³ The Initial Decision does not indicate the number of days in which the children were ineligible for school during the 2016-2017 school year and does not calculate the total amount of tuition reimbursement owed. It appears from the record that the minor children are still attending school in South Brunswick, and have for the entire school year. As the school year will be concluded by the time the parties receive this decision, the Commissioner assumes that the children attended school in the district for the full 180 days; accordingly, her assessment of tuition owed is based on attendance for the full 180 day school year.

⁴ 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*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO.: EDU 05426-17

AGENCY REF. NO.: 298-11/16

**J.T. O/B/O MINOR CHILDREN J.T., A.T.
AND B.T.,**

Petitioners,

v.

ON REMAND

OAL DKT. NO.: EDU 19075-16

**BOARD OF EDUCATION OF THE
TOWNSHIP OF SOUTH BRUNSWICK,
COUNTY OF MIDDLESEX,**

Respondent.

J.T., Petitioner, pro se

Adam S. Herman, Esq., for Respondent (Adams, Gutierrez & Lattiboudere, LLC,
attorneys)

Record Closed: April 20, 2017

Decided: May 3, 2017

BEFORE THOMAS R. BETANCOURT, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The matter is before the undersigned on remand pursuant to the Decision of the Acting Commissioner of Education, dated April 20, 2017, requiring the undersigned to set forth a recitation of facts. (J-1)

Petitioner challenges Respondent Board of Education's residency determination.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on December 20, 2016, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13, bearing OAL Docket No. EDU 19075-16.

A prehearing conference was held on January 6, 2017. A prehearing order, dated January 6, 2017, was entered by the undersigned.

Respondent filed a motion to dismiss the petitioner's appeal with the Bureau of Controversies and Disputes on December 16, 2016, prior to the matter being transferred to the OAL, and before a decision on said motion was made. Respondent simultaneously filed its Answer and Cross Petition with the Bureau of Controversies and Disputes.

Pursuant to the pretrial Order entered on January 6, 2017, Petitioner was permitted ten days from the receipt of said motion to respond. No response was submitted.

On February 24, 2017, Respondent filed a certification of Gary McCartney, Superintendent of the South Brunswick Board of Education.

On March 3, 2017, Respondent's counsel provided a letter from the New Jersey Department of Education setting forth Tuition Costs per Pupil for the 2015-2016 school year.

ISSUES

1. Did Respondent err in its determination that Petitioner's three children did not reside in South Brunswick and were ineligible to attend school in the South Brunswick School District; and, is petitioners claim time barred?
2. Are Respondent's entitled tuition reimbursement?

FACTUAL DISCUSSION

The Preliminary Statement and the Factual Background set forth in Respondent's brief in support of its motion to dismiss, which are attached hereto and made a part hereof, are adopted herein as if set forth at length. (R-3)

The facts set forth in the Certification of Gary McCartney, which are attached hereto and made a part hereof, are adopted herein as if set forth at length. (R-4)

FINDINGS OF FACT

1. The residency decision of Respondent was adopted on October 24, 2016, which determined that petitioner's children did not reside with the District, and a letter setting forth the same was mailed to the petitioner on October 25, 2016. (R-4, pg. 3, paragraphs 13 and 14)
2. Petitioner was advised in said October 25, 2016 letter that should he disagree with the District's decision he had the right to appeal within 21 days of the notice. (Exhibit C of R-3)
3. Petitioner did not file an appeal until November 22, 2016.⁵ (P-1)

⁵ There are two identical residency appeals, one dated November 22, 2016 and one dated November 25, 2016. For purposes of this decision the November 22, 2016 filing date shall be used.

4. Petitioner's appeal was filed more than twenty-one days after notice of the District's decision.
5. The tuition cost per pupil for grades 6-8 is \$11,873 for the 2015-16 school year, or \$66.00 per day. (R-5)
6. Petitioner's children did not reside with the District, and have not so resided from the 2015-2016 school year to the present. (R-2, page 2, paragraph 4; R-3; and, R-4)
7. On February 9, 2016, the District determined that neither petitioner or his children resided within the District. (R-2, pg. 2, paragraph 4)
8. The District and petitioner had previously entered into a settlement agreement on August 31, 2016, wherein petitioner represented that he was in the process of renting an apartment in the District. (R-2, pg. 2, paragraph 5)
9. The District became aware that petitioner and his children were not residing in the District and commenced a residency investigation which determined that petitioner and his children did not reside in the District. (R-2, pg. 2, paragraph 6; R-4)

LEGAL ANALYSIS AND CONCLUSION

Standard of Review

N.J.A.C. 6A:3-1.5(g) states, "Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL."

In ruling on a motion to dismiss:

The judge considers whether all of the evidence together with all legitimate inferences could sustain a judgment in

favor of the party opposing the motion. The judge is not concerned with the weight, worth, nature or extent of the evidence. The judge must accept all evidence supporting the party defending against the motion and accord that party the benefit of all inferences that can and legitimately be deducted therefrom...

Myles Hart v. New Jersey State Board of Examiners, 2014 WL 3708621 (citing New Jersey Practice, Administrative Law and Practice, §5, 19, at 259-60).

Petitioner did not file a response to Respondent's motion to dismiss. N.J.S.A. 18A:38-1 provides that public schools shall be free to the following persons over five and under 20 years of age:

- a. Any person who is domiciled within the school district;
- b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may

contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim 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 resident in writing of his right to contest the board's decision to the commissioner within 21 days. No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the resident, parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.

In the instant matter, Respondent notified Petitioner of the residency hearing by letter dated October 13, 2016. The residency hearing was held on October 24, 2016. By letter dated October 26, 2016, Petitioner was advised of Respondent's determination that his children were not eligible to attend school in the Respondent School District. Petitioner was advised in said letter of his right to contest Respondent School District's decision within twenty-one days. Petitioner did not file the pro se residency appeal until November 22, 2016. Said appeal was dated November 20, 2016. The twenty-one day period in which to file expired on November 15, 2016.

Right to a Free Public Education

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

Public schools shall be free to the following persons over five and under twenty years of age:

- a. Any person who is domiciled within the school district[.]

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4(a),

(a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:

1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;

2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;

...

3. Court orders; State agency agreements; and other evidence of court or agency placements or directives;

4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location or to support the student;

...

6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent,

guardian, person keeping an “affidavit student,” adult student, person(s) with whom a family is living, or others as appropriate;

. . .

8. Any other business record or document issued by a governmental entity.

(b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.

(c) A district board of education shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

In S.S. ex rel. A.S. and A.S. v. Bd. of Education of the Township of Marlboro, Monmouth County, EDU 192-12, Initial Decision (August 26, 2013), <http://njlaw.rutgers.edu/collections/oal>, evidence submitted by an investigator hired by the Marlboro New Jersey School District to determine whether certain minor children who were enrolled in the school district in fact were domiciled therein within the meaning of N.J.A.C. 6A:22-3.1(a) was sufficient to establish that the children in fact were not domiciled in the district during the period in question and, instead, supported a conclusion that the minors resided at their grandmother's home in Edison New Jersey. Even though their mother had submitted documentation of the type described in N.J.A.C. 6A:22-3.4(a) that supported her claim that the minors were domiciled in Marlboro, the circumstances of the mother's employment, which included late hours, was such that the minors were properly found to be residing with their grandmother. On that basis, the administrative law judge recommended that the Department of Education find the mother liable for tuition for the minors.

In the instant matter, it is clear that neither Petitioner, nor his children, resided within Respondent's school district. (See Certification of Gary McCartney and the investigator's report attached thereto as Exhibit A)

N.J.A.C. 6A:22-6.2 states:

- (a) If an appeal to the Commissioner is filed by the parent, guardian, adult student, or school district resident keeping an "affidavit" student and the petitioner does not sustain the burden of demonstrating the student's right to attend the school district, or the petitioner withdraws the appeal, fails to prosecute, or abandons the appeal by any means other than settlement agreeing to waive or reduce tuition, the Commissioner may assess tuition for the period during which the hearing and decision on appeal were pending, and for up to one year of a student's ineligible attendance in a school district prior to the appeal's filing and including the 21-day period to file an appeal.

1. Upon the Commissioner's finding that an appeal has been abandoned, the district board of education may remove the student from school and seek tuition for up to one year of ineligible attendance pursuant to N.J.A.C. 6A:22-6.1(a) plus the period of ineligible attendance after the appeal was filed. If the record of the appeal includes a calculation reflecting the tuition rate(s) for the year(s) at issue, the per diem tuition rate for the current year and the date on which the student's ineligible attendance began, the Commissioner may order payment of tuition as part of his or her decision. In doing so, the Commissioner shall consider whether the ineligible attendance was due to a school district's error. If the record does not include such a calculation and the district board of education has filed a counterclaim for tuition, the counterclaim shall proceed to a hearing notwithstanding that the petition has been abandoned.

2. An order of the Commissioner assessing tuition is enforceable through recording, upon request of the district board of education pursuant to N.J.A.C. 6A:3-

12, on the judgment docket of the Superior Court, Law Division, in accordance with N.J.S.A. 2A:58-10.

Clearly, Petitioner has failed to sustain the burden of proof to demonstrate J.T., A.T. and B.T. have the right to attend the Respondent school, and Respondent is entitled to tuition reimbursement.

N.J.A.C. 6A:22-6.3 states in pertinent part: a) Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23A-17.1. The individual student's record of daily attendance shall not affect the calculation.

Tuition for the 2015-2015 school year is \$11,873.00, or \$66.00 per day.

I **CONCLUDE** that petitioner failed to timely file a residency appeal in accordance with N.J.S.A. 18A:38-1(b), and therefore the same is time barred.

I further **CONCLUDE** that petitioner's motion to dismiss should be **GRANTED**.

I further **CONCLUDE** neither Petitioner, nor his children, resided within Respondent's District during the 2015-2016 school year to the present and Respondent is entitled to the relief requested in its Answer and Cross Petition: reimbursement for tuition for the period of ineligible attendance for each child.

I further **CONCLUDE** that Respondent is entitled to an order excluding Petitioner's children from the Respondent school district.

ORDER

Based upon the foregoing it is **ORDERED** that Respondent's motion to dismiss Petitioner's residency appeal is granted: and,

It is further **ORDERED** that Petitioner's residency appeal is dismissed with prejudice; and,

It is further **ORDERED** that Petitioner's children, J.T., A.T. and B.T. are not entitled to attend school in the Respondent school district and are excluded therefrom; and,

It is further **ORDERED** that Respondent is entitled to tuition reimbursement from Petitioner in the amount of \$66 per day per child for each day J.T., A.T. and B.T. attended school in the Respondent school district up to one year in accordance with N.J.A.C. 6A:22-6.3.

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 3, 2017



DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Exhibits

For Petitioner:

- P-1 Pro se Residency Appeal dated November 20, 2016, and filed with the Bureau of Controversies and Disputes on November 22, 2016.

For Respondent:

- R-1 Notice of Motion to Dismiss dated December 15, 2016, and filed with the Bureau of Controversies and Disputes on December 16, 2016.
- R-2 Answer and Cross Petition dated December 15, 2016 and filed with the Bureau of Controversies and Disputes on December 16, 2016.
- R-3 Brief in support of motion to dismiss the residency appeal December 15, 2016 and filed with the Bureau of Controversies and Disputes with Directions for Appealing Local Board's Residency Determination to on December 16, 2016, together with Exhibits A through D.
- R-4 Certification of Gary McCartney, Superintendent of Respondent school district, with Exhibits A through D.
- R-5 Letter from the New Jersey Department of Education, dated February 17, 2017, with tuition costs per pupil for the 2015-2016 school year.