#7-07 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu10085-06_1.html)

Y.E. on behalf of minor child E.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner contested respondent's determination that her son, E.E., was not entitled to a free public education in the Newark school district because he no longer resided in the district as of December 25, 2005. E.E. had been enrolled in Newark schools in September 2005 based on an affidavit which stated that E.E. lived in Newark with his aunt, J.H., who later filed affidavit that her nephew had been returned to his mother's custody as of December 25, 2005. Petitioner claims that – despite the fact that she owns property in East Orange – she and her son now reside in Newark, and she sought emergent relief to return E.E. to the school he attended during the 2005-2006 school year. Respondent filed a counterclaim for tuition reimbursement for the alleged period of ineligible attendance.

The ALJ found that: an affidavit submitted by J.H. in May 2006 established that E.E. had not lived with J.H. in Newark since December 2005; the lease presented by petitioner for an apartment in Newark was discredited by respondent district's contention that its investigation found the lease to be fraudulent and the petitioner to be domiciled in East Orange; petitioner's proofs and testimony as a whole were not credible; petitioner did not meet the requirements for emergent relief; and respondent presented credible evidence to support its contention that E.E. is domiciled in East Orange with petitioner Y.E. The ALJ denied petitioner's request for emergent relief, dismissed the petition, and granted respondent's request for tuition reimbursement contingent upon submission of a tuition calculation.

Adopting the ALJ's determinations in these regards, the Commissioner found, *inter alia*, that petitioner is not entitled to emergent relief and failed to meet her burden of showing that respondent was arbitrary and capricious in determining that E.E. was ineligible to attend Newark public schools. However, the Commissioner rejected the ALJ's conclusion that the proofs at the October hearing showed that petitioner's current domicile is not in respondent's school district, instead finding that petitioner presented unrebutted evidence suggesting that it is. Accordingly, the Commissioner ordered that: petitioner reimburse respondent in the amount of $4,478.88 for tuition for the period from January through June 2006; the matter be remanded to the OAL for a plenary hearing on E.E.'s current domicile; and that petitioner ensure that E.E. attends school pending the resolution of this matter.

January 8, 2007

OAL DKT. NO. EDU 10085-06
AGENCY DKT. NO. 322-9/06

Y.E. on behalf of minor child E.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
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To be determined in this controversy is a minor child's (E.E.'s) domicile and the school district responsible for his public education. The record provided to the Commissioner, including the audio tapes of the proceedings on October 2 and October 17, 2006, the Initial Decision of the Office of Administrative Law (OAL), and petitioner's exceptions have been carefully and independently reviewed. The Commissioner has also reviewed respondent's certification identifying the amount of tuition payable for the period of time that respondent alleges petitioner's son improperly attended school in its district.

The following summary of facts and procedure is taken from hearing testimony and documentary exhibits in the record:

1. On September 27, 2005, C.H. – E.E.'s father – filed with respondent an affidavit that he could not care for E.E., and that E.E. lived in Newark with his aunt, J.H. On the same day, J.H. filed with respondent a guardian affidavit certifying that E.E. lived with her at an address on Broadway in Newark, and that she was supporting him gratis.

Relying upon these affidavits, respondent approved E.E.'s school attendance in its district.

2. E.E., who had previously gone to school in East Orange, attended school in respondent's district for the 2005-2006 school year.

3. During the course of the school year, petitioner – Y.E. – introduced herself as E.E.'s mother, and had contact with respondent's staff on many occasions.

4. On March 3, 2006, respondent mailed petitioner a "Notice of Initial Determination of Ineligibility" (Initial Determination). The Initial Determination was mailed to an address on North 17th Street, East Orange. The basis for the determination was articulated as follows:

> Residence where student is domiciled is ____ North 17th Street, East Orange, New Jersey. The guardianship affidavit submitted by [J. E. H.] is no longer in force. [J. E. H.] has renounced further guardianship of [E.E.] and/or no longer resides at ____ Broadway, Newark, New Jersey.

5. At respondent's April 5, 2006 hearing, which petitioner did not attend, respondent determined – for the reasons articulated in the Initial Determination – that E.E. was not entitled to a free public education in Newark. Although respondent alleged that it sent petitioner notice of the April 5, 2006 hearing, it did not present any evidence to support that allegation.

6. On April 5, 2006, respondent sent petitioner a Notice of Final Ineligibility (Final Notice) – mailed to the above-referenced East Orange address – which reiterated the allegations set forth in the Initial Determination. More specifically, respondent stated that it made the final ineligibility determination based on the following:

> *The guardianship affidavit issued by the district on September 27, 2005 for guardianship of [E.E.] by [J.E.H.] residing at ____ Broadway, Newark, New Jersey is no longer in force due

> to the fact that Ms. [H.] has renounced further guardianship of [E.E.] and your son no longer resides with Ms. [H.].
>
> *The residence where student [E.E.] is domiciled is ____ North 17th Street, East Orange, New Jersey. The district has video and photographic evidence of you and your child leaving your East Orange residence on four consecutive days during the month of March. The car that you use to transport your child [E.] to Rafael Hernandez School is registered to you with an East Orange address.

7. Petitioner testified at the OAL hearing that she did not get the Final Notice until April 27, 2006, when she received it from her brother, to whom it had been given when he collected E.E. from school.

8. After receiving the Final Notice, petitioner apparently presented various documents to respondent, including a lease for a property on South 10th Street in Newark.

9. A letter dated May 8, 2006 was sent to petitioner from respondent advising that J.H. had denied, via a notarized statement [handwritten and dated April 28, 2006], that E.E. lived with her, and that the landlord of ____ South 10th Street, Newark, had told an investigator that the lease petitioner had presented for those premises was fictitious. Respondent's May 8 letter further stated that May 10, 2006 would be E.E.'s last day of school in Newark.

10. On or about May 11, 2006, petitioner sent the Commissioner a petition of appeal dated May 10, 2006, with a copy of a letter that she had written to three Newark School District employees "requesting an appeal regarding the school attendance of [her] son . . . as well as to explain the late response to the 'Notice of Final Ineligibility'." Her explanation for filing her appeal past the 21 day time period allowed for such appeals under *N.J.S.A.* 18A:38-1(b), was that she did not get the final notice "until April 27, 2006 In [sic] which it was handed to me by a family member." She argued that her

May 10, 2006, letter constituted a timely appeal in that it was sent within 21 days of her alleged actual receipt of the Final Notice. Also enclosed with the petition was a copy of the September 27, 2005 affidavit by J.H. certifying that E.E. lived with her in Newark and that she was supporting him. Petitioner's appeal made no claim that E.E. lived with her in Newark on ____ South 10th Street.

11. After sending her May 10th letter/petition to the Commissioner, petitioner was advised during a telephone call she had placed to the Bureau of Controversies and Disputes (the Bureau) that if she was contending that E.E. was supported by and living with a non-parent in Newark, it was that Newark resident who would have to file the petition challenging respondent's ineligibility determination.

12. On May 12, 2006, the Bureau received a petition of appeal, under J.H.'s signature, challenging respondent's final determination of ineligibility. This enabled E.E. to remain in respondent's school.

13. Petitioner's May 10, 2006, petition did not arrive at the Department of Education until May 16, 2006. It was not docketed because J.H.'s petition had already been received.

14. On May 19, however, a typewritten notarized statement by J.H. was submitted to respondent. Therein, J.H. stated that E.E. had lived with her in Newark until December 25, 2005, at which time she had "released him to the custody of his natural mother, [Y.E.]." J.H. further certified that she "was unaware of the language [in the May 12 petition] specifically stating that [E.] reside[d] with [her]." She advised that E.E. no longer lived with her, that she was not responsible for him, and that to the best of her

knowledge he lived with his mother in East Orange. Finally, she asked that her petition be withdrawn.

15. The Bureau of Controversies and Disputes accordingly marked the petition "withdrawn" on June 14, 2006.

16. During the summer of 2006, respondent's child study team evaluated E.E., found that he was eligible for special education services, and developed an individualized education program (IEP) for him. Further, respondent placed E.E. in its Martin Luther King, Jr. School (MLK), where he began receiving services in September 2006. More specifically, he started school in Newark on September 6 or 7, and was removed from school on September 8, 2006.

17. On September 11, 2006, petitioner faxed a petition of appeal to the Commissioner, stating simply that E.E.'s attendance in respondent's school had been denied due to "residence." Attached to the petition was a copy of an email circulated between school employees in respondent's district between September 6 and 8, 2006, advising that E.E. should not be enrolled and referring to the fact that a determination of E.E.'s non-eligibility had already been made during the prior school year.

18. In a letter dated September 14, 2006, respondent asserted that the petition should be dismissed as untimely, since a determination of non-eligibility had already been made in the Spring of 2006, challenged by J.H., and then withdrawn.

19. The Bureau advised petitioner by letter dated September 15, 2006, that it appeared that a challenge to respondent's ineligibility determination had already been made and withdrawn in May/June of 2006. It cautioned her that E.E. could not attend

school in respondent's district during the pendency of her most recent petition, unless she filed an emergent application and prevailed.

20. Petitioner accordingly filed requests for emergent relief on September 22 and 25, 2006, alleging – among other things – that she had not known that J.H.'s May 12, 2006 petition had been withdrawn. Her papers were transmitted to the OAL on September 25, 2006, as an emergent matter.

21. It appears from a certification filed on December 7, 2006, by Newark Public School Business Administrator, Ronald Lee, that E.E. actually attended classes in a special education program in Newark from September 11 through September 25, 2006.

22. On September 29, respondent answered Y.E.'s petition and counterclaimed both for tuition for January 2006 through the end of the 2005-2006 school year and for the time/services that had been provided to E.E. by respondent's child study team in the summer of 2006. On the same date, respondent moved before the OAL to dismiss the petition as untimely.

23. A hearing was scheduled at the OAL for October 2, 2006, at which both petitioner's request for emergent relief and respondent's motion to dismiss were to be heard. At the beginning of the hearing the Administrative Law Judge (ALJ) stated: "since Ms. E. is not represented by counsel we did have a discussion off the record where we reviewed some of the background information."

24. At the hearing, respondent's counsel made argument supporting its motion to dismiss the petition and opposing petitioner's motion for emergent relief appealing E.E.'s September 8, 2006 removal from respondent's MLK school, but presented no evidence.

25. Respondent's counsel argued that petitioner had presented no current lease and no credit card or checking account statements showing a Newark address, and cast aspersions on the driver's license petitioner produced that showed the ____South 10th Street address. He alleged that respondent's investigator could show that it was obtained on April 27, 2006, the same day that respondent sent petitioner a letter advising that E.E. could no longer attend school in Newark and that the East Orange Board of Education had been notified of its responsibility for E.E.'s education.

Counsel stated that respondent could produce an investigator who could verify that the ____South 10th Street address claimed by petitioner in her September 2006 papers was not being used by her, and contended that the man who had verified petitioner's residence at that address was no longer the owner of same.

26. Respondent's counsel also alleged that petitioner owns the property in East Orange to which respondent sent the notices described above, and had used the address during the 2005-2006 school year on some correspondence that she had sent to E.E.'s school. According to counsel, during that school year respondent's investigator had observed petitioner leaving the East Orange address and taking E.E. from there to school in Newark.

27. Respondent's position on the motion for emergent relief was that: a) under the circumstances alleged by respondent, petitioner had no likelihood of success on the merits; b) there is no settled law that would mitigate in favor of petitioner; c) that the availability of a public education in East Orange precluded irreparable harm to E.E.; and that d) considering E.E.'s alleged domicile in East Orange and right to go to school there, and respondent's assistance to E.E. in evaluating and qualifying him for special education

services, the equities did not mitigate against denying petitioner's application for emergent relief.

28. Following respondent counsel's argument, petitioner testified under oath. As regards respondent's motion to dismiss for untimeliness, petitioner testified that she never received the Initial Notice (sent to the East Orange address) or the alleged notice of the April 5, 2006 hearing (which notice has not been produced by respondent). As in her May 10, 2006 petition, she maintained that the first notice about the residency issue that she received was dated April 27, 2006, and was given to her brother when he picked E.E. up from school. Consequently, she argued that her May 10, 2006 petition to the Commissioner was timely and should preclude the dismissal of the matter.

29. As regards her motion for emergent relief, petitioner testified that although she owns ____ and ____North 17th Street, East Orange – the property that respondent claims is her residence – she left the premises because of threats on her life, and has tenants in the property. Petitioner contended that she has a lease or leases from her tenants that prove she has not been living in the East Orange property, but the Commissioner has found no such lease(s) in the record.

30. Attached to petitioner's application for emergent relief was a copy of a notarized statement dated September 24, 2006 from Frank Hodges, who identified himself as the owner of ____ South 10th Street in Newark and stated that petitioner resided there. Petitioner referred to that statement in her October 2, 2006 testimony. She also testified that she had shown employees at the Newark Board of Education her driver's license listing the ____ South 10th Street Newark address.

31. The Commissioner presumes that petitioner intended that the foregoing would constitute the basis for the requirement that she show a likelihood of success on the merits.

32. With regard to the requirement to show irreparable harm, petitioner argued that it was irreparable harm to remove E.E. "from the situation that they had allowed him to be in: he had gotten comfortable with the teacher; the teacher's gotten comfortable with him." Petitioner further contended that MLK is closer to home. E.E. could walk to and from school.

33. Finally, petitioner asked that respondent send someone to her home to verify that she and E.E. live in Newark. Respondent's counsel declined, stating that respondent's investigation had been completed. When petitioner requested a home visit the second time, the ALJ responded "They have completed their investigation."

34. Petitioner then represented that she did not understand the process of the hearing. When questioned by the ALJ, petitioner stated she would like an adjournment to get counsel. An attorney that she had contacted could not attend the October 2 hearing because it fell on a Jewish Holiday.

35. The ALJ opined that as a result of participating in real estate transactions and running a business, petitioner should have known to seek counsel, but allowed the adjournment nonetheless, with the understanding that E.E. would not be allowed to attend school in Newark in the interim. The proceeding was adjourned to October 17, 2006, at 1:30 p.m. The ALJ warned that the hearing would go ahead on October 17 whether or not an attorney appeared for petitioner, unless the attorney provided a compelling excuse. She also gave petitioner the opportunity to reply to respondent's motion to dismiss the

petition, which petitioner had not yet done, and cautioned that failure to respond to that motion could result in negative consequences.

36. After the first hearing, petitioner filed an answer to respondent's counterclaim on October 12, 2006. In her answer, she asserted both that E.E. was living with J.H. in Newark, and that she – Y.E. – was residing in an apartment on South 10th Street in Newark. To support the latter assertion, she offered copies of a lease showing her as the tenant at that address, a driver's license bearing the same address, and a copy of a September 27, 2006 letter addressed to her from an attorney advising her that the South 10th Street premises had changed hands, and that she would have to contact the new owner or be evicted.

37. In the answer to the counterclaim, she admitted receiving the Final Notice of Ineligibility on April 27, 2006, as well as respondent's May 8, 2006 letter to her confirming E.E.'s ineligibility to attend school in Newark.

38. Petitioner filed no response to respondent's motion to dismiss her petition.

39. The hearing resumed on October 17, 2006. The ALJ recited that it was the continuation of the hearing opened on October 2, 2006.

40. Petitioner appeared without an attorney. She offered – as proof of her Newark residency – a letter from the new owner of the South 10th Street property, advising that she must contact the new owner's lawyer or be evicted. This letter had been annexed to her answer to respondent's counter-claim.

41. Petitioner reiterated her argument that since E.E. had been evaluated and enrolled in a special education program at MLK in Newark, he would be harmed by

transfer to East Orange, and that a balancing of the equities consequently mitigated in favor of petitioner.

42. Petitioner also contended that: a) she had provided respondent with sufficient proof of her residency in Newark; b) she was a resident of ____ South 10th Street and would soon be its new owner; and c) she had consequently shown that she would succeed on the merits of her claims. No evidence to support her claim of impending ownership of the South 10th Street property was offered.

43. Further, petitioner complained that she had received no response to the petition she had sent to the Commissioner on May 11, 2006.

44. Respondent did not present any witnesses or produce any further documentary evidence. Counsel reiterated his position that petitioner had not produced a current lease or bank statements showing the South 10th Street address, and speculated that the letter from the new owner of the South 10th Street property to petitioner was a form letter sent to anyone who had ever had a lease on file at that address. He further stated that it was his "understanding" from respondent's investigation (which was often referred to but never produced) that the new owner would be evicting "any of the tenants in that area."

In the Initial Decision, disseminated on November 27, 2006, the ALJ denied Y.E. emergent relief, dismissed the petition, and ordered that tuition be paid by petitioner in the amount to be set forth by respondent in "appropriate documentation." Respondent accordingly filed with the Commissioner, on December 7, 2006, a certification setting forth: a) a regular tuition figure for January through June, 2006 in the amount of $4,478.88; and b) an LLD tuition figure for the ten days E.E. attended special education classes in Newark in September 2006.

The Commissioner agrees that petitioner's request for emergent relief must fail. Although Y.E. alleged in her exceptions that "E.E. was denied [enrollment] by East Orange," she did not present any evidence supporting that contention at the hearing. Consequently she did not meet the requirement that imminent harm be shown as grounds for an emergent relief application. In addition, although petitioner presented enough indicia of residence in Newark to warrant an evidentiary hearing, she fell short of proving a likelihood of success on the merits.

The Commissioner also adopts the ALJ's determination that petitioner did not meet her burden to show that respondent's ineligibility determination for January through June 2006 was arbitrary or capricious. In her October 12, 2006 answer to respondent's counterclaim, petitioner alleged that E.E. lived in Newark with his aunt – J.H. – from January through June 2006. However, respondent offered as evidence a notarized affidavit by J.H. to the contrary. The weight of the evidence was consequently against petitioner. Petitioner did submit a copy of a lease purporting to show that she had resided on South 10th Street in Newark during 2006.[1] However, considering petitioner's contradiction of J.H.'s above referenced certification, the Commissioner cannot fault the ALJ for determining that petitioner's credibility was poor regarding the circumstances of E.E.'s domicile from January through June 2006, and for finding in favor of respondent. *See, D.L. and Z.Y. on behalf of minor children T.L. and K.L. v. Board of Education of the Princeton Regional School District,* 366 *N.J. Super.* 269, 273 (App. Div. 2004) (we generally defer to credibility determinations made by the ALJ who had the opportunity to hear the testimony and observe the demeanor of the witnesses). *See also State v. Locurto*, 157 *N.J.* 463, 470, (1999).

[1] The ALJ declined to give the lease evidentiary weight because "the District's investigation determined that lease was 'fraudulent'," and "the document was not notarized and bore no seal." (Initial Decision at 5) The Commissioner notes that it is not unusual for leases to be without notarizations and seals, and – more importantly – whatever investigation respondent may have conducted was not presented through sworn testimony or as documentary evidence at the OAL.

However, as to E.E.'s current domicile – *i.e.* since September 7, 2006 – and the district responsible for his current education, the Commissioner rejects the Initial Decision. In her papers and at the October hearing, petitioner not only presented the lease indicating her residence on South 10th Street, Newark, from August 2005 to August 2006, but also produced: a notarized letter dated September 24, 2006 from the previous owner of those premises stating that she resided there; her driver's license showing the South 10th Street address; and a letter dated September 27, 2006 from the new owner of those premises asking that she contact its representative or be evicted. She further testified that she would soon be the owner of the premises, although she produced no corroborating evidence.

By way of contrast, at the October 2006 hearing respondent's counsel – who is unable to testify about the actions of respondent's employees or investigators – referred to a district investigation from the 2005-2006 school year which allegedly rebutted petitioner's evidence, but did not produce it, or any sworn testimony about it. In turn, the ALJ relied on this non-produced evidence to conclude that "the underlying issues of petitioner's claim, [*i.e.*] domicile, has [sic] been settled by the evidence presented." (Initial Decision at 7) The ALJ wrote:

> Petitioner's evidence that she is domiciled in Newark is rejected as incredible. Indeed, the District presented credible evidence that E.E. no longer resides in the home of J.H. In addition to the Affidavit of J.H., the District investigated the alleged leased premises where petitioner claimed to reside and discovered her residence there is non-existent. The District provided further support for its determination through video and photographic evidence of petitioner and E.E. leaving the East Orange residence on four consecutive days during the month of March [2006]. The car that petitioner used to transport E.E. to Raphael Hernandez School is registered to petitioner with an East Orange address.
>
> (Initial Decision at 7-8.)

Unfortunately, there is no indication in the audio tapes of the October 2 and 17, 2006 hearings that any of the "credible evidence" referenced by the ALJ was presented at the hearing, either by way of the testimony of an investigator, or by way of authenticated documentation. Nor is said "evidence"– which in any event pertains only to January through June 2006 – in the record provided to the Commissioner.

It is undisputed that respondent performed an evaluation of E.E. over the summer of 2006, and enrolled him in special education classes at MLK on September 6, 2006. E.E.'s subsequent removal from MLK was timely challenged, pursuant to *N.J.A.C.* 6A:3-1.3(i), by Y.E.'s petition dated September 11, 2006. The Commissioner finds that while petitioner is not entitled to emergent relief, she did present evidence at the OAL hearing which suggests that she may reside in Newark. Since respondent did not rebut petitioner's proofs with competent evidence, the Commissioner remands the matter to the OAL for a plenary hearing on petitioner's current domicile.

The Commissioner reminds the parties that unless someone other than petitioner has legal custody of E.E., it is petitioner's domicile that defines E.E.'s domicile. *See Mississippi Band of Choctaw Indians v. Holyfield,* 490 *U.S.* 30, 48, 109 *S. Ct.* 1597, 1608, 104 *L. Ed*. 2d 29, 46 (1989); *Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ.*, 283 *N.J. Super*. 505, 521-22 (App. Div.1995), *certif. denied,* 143 *N.J.* 325 (1996); *V.R. on behalf of A.R. v. Bd. of Ed. of Hamburg*, 2 *N.J.A.R.* 283, 286; 25 *Am.Jur.*2d Domicil § 42 (1996); *Restatement (Second) Conflict of Laws* § 22 (1971). Consequently, it is the district of petitioner's domicile that shall educate E.E. *E.A.E. on behalf of minor child S.N.W. v. Board of Education of the Township of Bloomfield, Essex County,* OAL Dkt. No. EDU 3893-06, Agency Dkt. No. 101-3/06, decided December 19, 2006; *M.L.P. on behalf of minor child C.L.P. v. Board of Education of the*

Township of Bloomfield, Essex County, OAL Dkt. No. EDU 1420-06, Agency Dkt. No. 395-12/05, decided September 19, 2006; *J.M. on behalf of minor child S.C. v. Board of Education of the Township of West Orange, Essex County*, OAL Dkt. No. EDU 1061-00, Agency Dkt. No. 347-11/99, decided May 24, 2001.

In summary, the Commissioner: 1) adopts the ALJ's conclusion that the petitioner did not prove that respondent was arbitrary and capricious in determining that E.E. was ineligible to receive a free public education in Newark during January through June 2006; 2) adopts the ALJ's determination that petitioner is not entitled to emergent relief; and 3) rejects the ALJ's conclusion that the proofs at the October hearing showed that petitioner's current domicile is not in respondent's school district.

The Commissioner accordingly directs that: 1) petitioner pay respondent $4,478.88 for E.E.'s tuition for the period from January through June 2006; 2) the matter be remanded to the OAL for a plenary hearing on E.E.'s current domicile, including the issues of petitioner's custody of E.E. and petitioner's current domicile; and 3) petitioner ensure that E.E. attends school pending the resolution of this matter.

IT IS SO ORDERED. [2]

COMMISSIONER OF EDUCATION

Date of Decision: January 8, 2007

Date of Mailing: January 9, 2007

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*