#349-07 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu00218-07_1.html)

A.M.S., ON BEHALF OF MINOR CHILD, A.D.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF MARGATE, ATLANTIC COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner – a single parent on active duty in the United States Army, who resided in Jackson Township prior to his enlistment – contested the Margate Board's determinations that his adopted son, A.D.S., is ineligible to receive a free public education at district expense because he does not meet the residency requirements provided by law. Petitioner, who claimed to be domiciled in Margate, had arranged for his parents, who are residents of Pennsylvania, to temporarily care for A.D.S. after the sudden death of his wife. About a year later, the grandparents became unable to continue providing physical care to A.D.S. – a classified special needs child – and they and his father placed him a private residential setting. Margate disclaimed responsibility for educating A.D.S., whom it contends is domiciled in Pennsylvania with his grandparents.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A:38-3b – which governs residency issues for students who are the children of members of the New Jersey National Guard or a reserve component of the U.S. military – does not apply in this case, as the petitioner is enlisted in the regular U.S. Army; petitioner is domiciled in the City of Margate as he took the steps necessary to manifest his intention to establish permanent residency there; petitioner is no longer domiciled in Jackson Township; and, based on the holding in *Board of Education of the Township of East Brunswick v. J.R. and the Board of Education of the Township of Edison* – wherein the judge held that the grandparents of a dependent child of an active duty military parent met the conditions for supporting the child gratis as set forth in *N.J.S.A.* 18A:38-1b(1) – A.D.S. is no longer domiciled with his father, but rather with his grandparents in Pennsylvania. Accordingly, the ALJ recommended that the petition be dismissed.

The Commissioner adopted the Initial Decision in part, and rejected it in part. The Commissioner concurred with the ALJ that: *N.J.S.A.* 18A:38-3b has no bearing on this matter as petitioner is an enlisted member of the regular U.S. Army; petitioner has severed his ties to Jackson Township by affirmatively establishing domicile elsewhere; and petitioner has established domicile in the City of Margate. The Commissioner did not agree, however, that A.D.S. had no entitlement to education in Margate, finding instead that the temporary arrangement with his grandparents did *not* shift his legal domicile from that of his father – a New Jersey domiciliary – to that of his grandparents. The Commissioner found, therefore, that the Margate Board of Education was responsible for providing a free public education to A.D.S. and directed that it take the steps necessary to do so.

September 7, 2007

OAL DKT. NO. EDU 218-07
AGENCY DKT. NO. 433-11/06

A.M.S., ON BEHALF OF MINOR CHILD, A.D.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF MARGATE, ATLANTIC COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions and the Margate Board of Education's ("Margate" or "the Board") replies thereto, both filed in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.8.[1] The Jackson Township Board of Education filed neither exceptions nor replies.

On exception, petitioner contends that the Administrative Law Judge (ALJ) erred in his conclusions regarding A.D.S.'s domicile and the in applicability of *N.J.S.A.* 18A:38-3(b) to this matter, and in failing to address petitioner's allegations of procedural deficiency in the Board's determination of A.D.S.'s ineligibility to attend school in the district.

[1] Pursuant to *N.J.A.C.* 1:1-18.4(d), Margate included cross-exceptions with its replies; these, however, were not considered by the Commissioner in rendering her decision herein. See Note 5 below.

With respect to A.D.S.'s domicile, petitioner argues that the ALJ misconstrued the Commissioner's decision in *East Brunswick, supra,*[2] wrongly reading it to compel the conclusion that A.D.S.'s domicile must be found to have shifted from that of his father to that of his grandparents. According to petitioner, the ALJ failed to recognize that *N.J.S.A.* 18A:38-1(b) – the sole basis upon which *East Brunswick* was decided – neither creates nor alters a student's domicile, but rather provides an alternative means of establishing an entitlement to free education in a school district for a student living with someone other than a parent/guardian under circumstances meeting the criteria of statute. Petitioner urges that there is nothing in *East Brunswick,* or in the facts of this matter, that would warrant – let alone require – deviation from the longstanding general rule that the domicile of a child follows that of his or her parent; to the contrary, petitioner stresses, A.D.S.'s residency with his grandparents was never intended to be permanent – as is necessary to establish domicile – but was in both fact and intent a temporary measure to provide care for the child until a more suitable arrangement could be made. Moreover, petitioner notes, both the statute itself and regulations promulgated by the State Board at *N.J.A.C.* 6A:22 clearly distinguish between domicile and "affidavit" status, so that if satisfying the criteria for the latter resulted in a finding of domicile, such distinction would be unnecessary.[3] (Petitioner's Exceptions at 2-9)

Petitioner further argues that *N.J.S.A.* 18A:38-1(b) does not even apply to this matter. According to petitioner, that statute of necessity must be understood to refer solely to New Jersey school districts, and A.D.S.'s grandparents are domiciled in

---

[2] The Initial Decision (at 19) gives an incomplete citation for this decision, which is found at 96 *N.J.A.R.*2d(EDU) 285..

[3]Petitioner references *N.J.A.C.* 6A:22 for general interpretive purposes, notwithstanding his belief that the regulations may be inapplicable to the present matter by their very terms, which exclude "children of military parents" at *N.J.A.C.* 6A:22-1.1(a). (Petitioner's Exceptions at 4, Note 3)

Pennsylvania; moreover, petitioner urges, no claim of entitlement as an "affidavit" student has been made herein, and there is no authority in law or case precedent to impose the "affidavit" provision of *N.J.S.A.* 18A:38-1 on a family that has not sought – and does not wish – to invoke its protection. Such imposition, petitioner avers, employs the statute as a tool to *prevent* a student from obtaining free education in a district, contrary to its clear purpose of *expanding* opportunities for students unable to reside with their parents. (Petitioner's Exceptions at 9-12)

Petitioner additionally disagrees with the ALJ that *N.J.S.A.* 18A:38-3(b) does not control in this matter, reiterating his argument that the spirit and intent of the law – to acknowledge the sacrifice of all service people forced to leave their children's school districts while they are on active duty – must prevail over its letter, which recognizes the service of only the New Jersey National Guard and U.S. reserve forces. This is particularly true, according to petitioner, in a case such as his – where placing form over substance will result in "the potential loss of all educational opportunities for his disabled son," whose ability to attend school in Pennsylvania could cease at any time because his grandparents' district allowed him to matriculate notwithstanding that he does not meet applicable requirements of Pennsylvania law. (Petitioner's Exceptions at 12-14, quotation at 14)

Finally, petitioner reiterates his contention that the Board's written notice of ineligibility failed to comport with *N.J.A.C.* 6A:22-4.2(b), in that it provided only conclusory statements with respect to the Board's substantive findings and none of the requisite information regarding appeal, interim attendance, and so forth. According to petitioner, such deficiency – although not addressed by the ALJ – is yet "another basis for

the Commissioner to find that Margate should bear responsibility for [A.D.S.'s] public education." (Petitioner's Exceptions at 14-16, quotation at 16)

Petitioner concludes by endorsing the ALJ's expression of regret at being compelled to find a soldier's child ineligible for free public education in the district where his parent is domiciled because the parent has been forced to leave his home while he serves in the field, thus penalizing the child for the parent's sacrifice for his country. While conceding that the facts of this matter "do not exactly match what the Legislature or the Department had provisioned for," petitioner contends:

> Nonetheless, the Commissioner is vested with broad powers to safeguard the educational interests of all children in New Jersey. Despite his short-term stint in Pennsylvania, there can be no doubt that [A.D.S.] is one of New Jersey's school-aged citizens. Petitioners call upon the Commissioner to reverse [the ALJ's] decision and ensure that [A.D.S.], like all other young New Jerseyans, receives the free public education to which he is entitled. (Petitioner's Exceptions at 17)

In reply to petitioner's exceptions, the Margate Board of Education urges the Commissioner to adopt the ALJ's finding that A.D.S.'s domicile must now follow that of his grandparents, in light of the clear evidence showing that he was sent to live with them and that they are legally vested with custody, guardianship and authority over his health, education and welfare. The Board points to stipulated facts (Exhibit J-1); testimony elicited at hearing;[4] the executed documents conferring power of attorney (Exhibit P-2); tax returns (Exhibits R-11A,B,C and R-12); and affidavits signed by A.D.S.'s grandparents upon enrolling him in Pennsylvania for 2005-06 and 2006-07 (Exhibits R-6, R-7), regarding their support of A.D.S., their assumption of responsibility for him in all matters related to school, and their intent to keep him continuously – all showing that the arrangement is *not* temporary and that A.D.S.'s grandparents are acting

[4] The record provided to the Commissioner did not include hearing transcripts.

in the place of a parent who intends to remain in the military until retirement, thus conferring their domicile upon A.D.S.

According to the Board, petitioner has failed to understand that the ALJ (properly) relied upon *East Brunswick, supra*, for "practical guidance" in allocating educational responsibility under facts similar to those herein. Pursuant to *East Brunswick*, the Board contends, where parents and grandparents establish an arrangement in which the grandparents are caring for and supporting the child, entitlement arises solely under *N.J.S.A.* 18A:38-1(b), since entitlement under *N.J.S.A.* 18A:38-1(a) is "no longer possible because the requirements of *N.J.A.C.* 6A:22-3.1(a) [are] not satisfied." According to the Board, the only difference here is that A.D.S.'s grandparents are domiciled in Pennsylvania, a fact from which no deprivation results since the record nowhere indicates that the school district in which the grandparents reside – and in which A.D.S. was previously enrolled – has refused, is refusing, or will refuse to educate A.D.S.; indeed, the Board contends, A.D.S. is entitled to "affidavit" status under provisions of Pennsylvania law that substantively parallel those of New Jersey at *N.J.S.A.* 18A:38-1(b). (Board's Reply at 2-9, quotation at 6)

The Board further argues that the Department of Education has adopted – in regulations first codified at *N.J.A.C.* 6A:28-2.1 *et seq*., then later recodified at *N.J.A.C.* 6A:22-1.1 *et seq*. – a specific standard for determining educational responsibility based upon a claim of domicile under *N.J.S.A.* 18A:38-1(a). The Board contends that these regulations – which apply to all students except as noted, with the provision excluding "children of military parents" clearly pertaining solely to children covered by *N.J.S.A.* 18A:38-7.8 – expressly require that, in order to be found domiciled

in a district, an unemancipated student must be *living* with a parent or legal guardian. (Board's Reply at 9-11)

As to the applicability of *N.J.S.A.* 18A:38-3(b) to the instant matter, the Board reiterates that where a statute is clear on its face, it is to be construed as written, in accord with its plain and ordinary meaning; the Board further notes that petitioner has proffered neither legislative history nor case law in support of the expansive interpretation he proposes as an alternative. (Board's Reply at 11-13)

Finally, with respect to the alleged deficiencies in its procedures, the Board contends that it provided petitioner with a sufficient statement of its decisions and the reasons for it, and that circumstances rendered several other provisions of *N.J.A.C.* 6A:22-4.2(b) inapplicable or premature. Additionally, according to the Board, to whatever extent its written notice did not specify appeal procedures or A.D.S.'s right to enrollment during the pendency of an appeal, these omissions caused no prejudice to A.D.S.; the Board observes that an appeal was timely filed on his behalf and that he was thereupon enrolled in the Margate school district (and has remained so since), and that he was given a full and fair opportunity to present the merits of his claim to the Commissioner. (Board's Reply at 13-15) [5]

Having carefully considered this matter based upon the record and the arguments of the parties, the Commissioner adopts in part, and rejects in part, the Initial Decision of the OAL.

---

[5] As indicated above (Note 1), the Board additionally filed "cross-exceptions" with its replies to petitioner's exceptions. These, however, are not addressed herein because they are in substance primary exceptions to the ALJ's finding that A.M.S. is domiciled in Margate and as such were required pursuant to *N.J.A.C.* 1:1-18.4(a) to have been filed within 13 days of the mailing date of the Initial Decision. Counsel for petitioner was advised, upon inquiry as to the time frame for replying to the Board's cross-exceptions, that applicable rule made no provision for such reply.

Initially, the Commissioner concurs with the ALJ that *N.J.S.A.* 18A:38-3(b) has no bearing on this matter, since petitioner is an enlisted member of the regular United States Army, and the statute is clear on its face in limiting its applicability to members of the New Jersey National Guard and the reserve component of U.S. armed forces. The Commissioner further concurs that petitioner has, by taking affirmative action to establish a domicile elsewhere, severed his connection to Jackson Township, where he was living – in a home owned by his wife's parents – at the time of his enlistment and would thus have been presumptively domiciled in accordance with *Wolf, supra*. Finally, the Commissioner concurs that petitioner has established domicile in the City of Margate, since the record is clear that the address on which his claim is based has at least occasionally served in the past – and is now intended to permanently serve – as petitioner's one consistent "home base;" moreover, in light of petitioner's ongoing military service and his parents' provision to him of an apartment owned and maintained by them, it is of no import that petitioner is seldom physically present in Margate, that the accoutrements of daily living are attached to the location of his current army assignment rather than to Margate, or that he himself pays no associated rent, taxes, fees, utilities, or insurance premiums on the apartment.

However, notwithstanding her agreement with the ALJ that petitioner is domiciled in Margate, the Commissioner cannot concomitantly agree that *East Brunswick, supra*, compels the conclusion that petitioner's son, A.D.S., is domiciled with his grandparents in Pennsylvania.

The ALJ is correct in stating that the domicile of a child ordinarily follows that of his or her parent unless circumstances warrant otherwise. The Commissioner

finds, however, that circumstances here do not so warrant because – although the daily care and supervision of A.D.S. was entrusted to his grandparents after his mother's death due to the physical absence of his sole surviving parent – that arrangement was from its outset clearly delineated as temporary in nature, a stopgap measure to provide for the child until appropriate long-term arrangements could be made (Exhibits P-25/R-6, P-26/R-7; Initial Decision at 11-13);[6] indeed, after less than one year, A.D.S.'s grandparents found that they could no longer care for him (Initial Decision at 13; Exhibit R-2). Moreover, petitioner has at all times retained guardianship and legal custody of A.D.S. and has never ceased to be actively involved in his welfare or to contribute to his support as means and circumstances allowed.[7] Thus, there is no basis on which to conclude that A.D.S.'s legal domicile has shifted from that of his father to that of his grandparents.

Nor is this outcome altered, as the ALJ felt regretfully compelled to find, by the Commissioner's decision in *East Brunswick, supra*, notwithstanding that the facts of that matter are in many ways similar to those herein.[8]

---

[6] While it is true that A.D.S.'s grandparents executed affidavits of custody and support to effectuate the child's attendance in their Pennsylvania district as noted by the Board in its reply exceptions (see page 4 above) and in the Initial Decision at 19, the form's standard attestations of ongoing care and support are clarified by handwritten elaborations that plainly state the nature and purpose of the family's arrangement, including the fact that their son was still providing support for A.D.S. and that the situation was to be temporary in nature.

[7] The record overall shows the support to A.D.S. provided by his grandparents to be part of a larger pattern of ongoing assistance to petitioner – their adult son – rather than assumption by them of the financial responsibility for rearing petitioner's child. This pattern continued even through A.D.S.'s placement in Bancroft, the contract for which was ultimately executed by petitioner as the "person to be served," with his father (A.D.S.'s grandfather) co-signing as the "responsible party" (Exhibit R-13, page 12).

[8] In *East Brunswick*, the student in question was also the disabled child of a military parent left with his grandparents due to the parent's inability to provide consistent on-site care, and the parent – who was domiciled in a different school district – had delegated to them all responsibility for the child's education and welfare notwithstanding that she contributed to the child's upkeep. Under these circumstances, the Commissioner concluded that the child was entitled to be educated in the grandparents' district of domicile because he met the criteria of *N.J.S.A.* 18A:38-1(b). (Contrary to the Board's assertion in Reply Exceptions

In applying *N.J.S.A.* 18A:38-1 to determine a student's entitlement to education in a particular district, the Commissioner cannot lose sight of the statute's larger purpose, which is to effectuate the provision of free public education to the school-age children of the state. (Cf., *N.J.A.C.* 6A22-2.1(b)) Because the Legislature has chosen to attach such entitlement to a particular school district based on domicile or residency in the district – as noted by the State Board in proposing implementing rules at 36 *N.J. Reg*. 2279(a) – the statutory and regulatory framework necessarily recognizes that: 1) New Jersey's children find themselves in a variety of living arrangements, and 2) a child's educational entitlement must be assigned in the way that makes the most sense under the circumstances. Thus, the law provides for school attendance in a district by children living with a parent; children living with someone other than a parent due to family/economic hardship or the parent's absence due to active duty in the National Guard or U.S. reserve forces; children residing temporarily with a parent in a district other than that of their legal domicile; children placed in a district by the Division of Youth and Family Services; children of homeless families; children placed in the district by court order (*N.J.A.C.* 6A:22-3.2(e), referencing *N.J.S.A.* 18A:38-2); children who previously lived in the district but were compelled to relocate due to the parent's absence for active duty in the National Guard or U.S. reserve forces (*N.J.A.C.* 6A:22-3.2(f), referencing *N.J.S.A.* 18A:38-3b); and children residing on federal property (*N.J.A.C.* 6A:22-3.2(g), referencing *N.J.S.A.* 18A:38-7.7 *et seq*.).

---

at 6, the Commissioner's determination in this matter did not rest – nor could it have rested – on failure to satisfy the requirements of *N.J.A.C.* 6A:22-3.1(a), since rules to implement *N.J.S.A.* 18A:38-1, including the predecessor to the cited rule, were not promulgated by the State Board of Education until 2001, six years after *East Brunswick* was decided.)

While this framework is comprehensive in intent, its method of allocation is, in fact, based on the presumption that in most cases a child will best attend school in the district where he or she is actually living;[9] the law plainly contemplates that students claiming domicile or temporary residence will most likely be living with a parent in the district, while those living with a caretaker due to legitimate family or economic hardship will likely seek to attend school in the caretaker's district rather than in the district of domicile, as was the case in *East Brunswick*.[10] This presumption, though, will not hold true in all cases, and certainly cannot be employed to preclude the child of a New Jersey domiciliary from entitlement to education in *any* New Jersey district because his or her circumstances do not exactly fit one of the situations enumerated in statute or rule. To the contrary, the ability of a child to attend school in a district other than that of his or her legal domicile is granted by the Legislature in the best interest of the *student* – not as a means by which a local district board of education can refuse to educate a domiciled child who, due to unique circumstances, neither resides in the district nor qualifies for education elsewhere in the state pursuant to *N.J.S.A.* 18A:38-1 and its attendant rules or related statutes.

Such is the situation presented by this matter. Here, petitioner is a New Jersey domiciliary, the single parent of a school-age child – also a New Jersey domiciliary – whose daily care and supervision must be provided by someone other than his parent because the parent is in the military and cannot keep the child with him on a regular basis; as a consequence, the child's grandparents agreed to provide such care and

[9] Provided, of course, that the living arrangement is not a subterfuge to attend school in a district other than that of the child's legal entitlement.

[10] Petitioner is correct in asserting that a finding of entitlement under *N.J.S.A.* 18A-38-1(b) does not equate to a finding of domicile in the district.

supervision on a temporary basis until alternative arrangements could be made. Clearly, these are circumstances that might ordinarily have shifted A.D.S.'s entitlement to attend school (at least for a time) to the grandparents' district pursuant to *N.J.S.A.* 18A:38-1(b), as it did in *East Brunswick.* In this case, however, because the grandparents reside in Pennsylvania, reading the statute to conclude that A.D.S. must be educated as an "affidavit" student effectively places him outside the purview of New Jersey law; so that, instead of acting to A.D.S.'s benefit, the law would then work to deprive him (and petitioner) of their rights as New Jersey citizens for no reason other than that petitioner's parents – who offered to assist their suddenly widowed son with the care of his adopted child – happen to live across the state border. Surely the statute and its implementing rules do not contemplate such an unjust result, or one so contrary to the purpose of the law, and the Commissioner declines to so interpret them. *Sydney J. Gunderson v. Board of Education of the City of Brigantine, Atlantic County*, 95 *N.J.A.R.*2d (EDU) 39, affirmed State Board 95 *N.J.A.R.*2d (EDU) 132 (In interpreting a statute, the Commissioner must look to the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the spirit of the law will control over its letter; to hold otherwise harms a party the Legislature never meant to penalize, unreasonably places form over substance and overlooks the substantial State interest in ensuring the education of all its children.)

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL is adopted as the final decision in this matter in so far as it finds petitioner to be domiciled in Margate, and as otherwise set forth herein;[11] but

[11] Like ALJ, the Commissioner makes no findings on A.D.S.'s status under Pennsylvania law.

rejected in so far as it finds that A.D.S. is not entitled to a free public education in the Margate school district pursuant to *N.J.S.A.* 18A:38-1. The Petition of Appeal is granted, and the Margate Board of Education is directed to continue A.D.S.'s enrollment and to take such steps as are necessary to provide him with the free public education to which he is entitled by law. [12] [13]

IT IS SO ORDERED.[14]

COMMISSIONER OF EDUCATION

Date of Decision: September 7, 2007
Date of Mailing: September 10, 2007

[12] In so holding, the Commissioner is not unmindful that A.D.S. – who is both disabled and in need of supervision because neither his parent nor his grandparents can provide for his physical care – is unlikely actually to live in Margate notwithstanding his entitlement to be educated there; indeed, all indications point to his being a candidate for residential placement by a State agency such as the Division of Developmental Disabilities or the Division of Youth and Family Services, the former of which has already been involved with A.D.S. (Exhibits P-18, P-19 and R-2). In this regard, the Commissioner stresses that her finding herein is not intended – and should not be construed – as a requirement for, or endorsement of, a residential educational placement at Margate's sole expense; rather both the appropriate educational program for A.D.S and the extent of Margate's responsibility for costs associated with his education if he is placed by a State agency must be determined in accordance with mechanisms provided by the Legislature and State Board for that purpose. *Cf., N.J.S.A.* 18A:46-1 *et seq., N.J.A.C.* 6A:14-1.1 et seq.; *N.J.S.A.* 18A:7B-1 *et seq., N.J.A.C.* 6A:23-5.2/3; *N.J.S.A.* 30:4C-26.

[13] Having thus ruled, the Commissioner does not reach petitioner's claims of procedural deficiency in Margate's notice of ineligibility, which would not in any event constitute a basis for entitlement to a free public education. However, the Board *is* reminded of its obligation to provide information regarding appeals and other matters required by *N.J.A.C.* 6A:22-4.2(b) to the extent possible under the circumstances.

[14] 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.*