

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

<p>C.O., on behalf of minor child, J.S.,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>Board of Education of Lenape Regional High School District, Burlington County,</p> <p style="text-align: center;">Respondent.</p>
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**Synopsis**

*Pro se* petitioner, a resident of Medford, New Jersey, challenged the determination of the respondent Board that his nephew, J.S., a non-resident student, is not eligible to attend school within the Lenape Regional High School District (LRHSD). Petitioner C.O. and his sister, M.L. – a resident of Sioux City, Iowa – filed affidavits in support of J.S.’s application for enrollment in the LRHSD as a non-resident student. Prior to February 2021, J.S. resided in Iowa with his mother, M.L. The Board filed a motion for summary decision, contending that, pursuant to *N.J.S.A. 18A:38-1* and *N.J.A.C. 6A:1-1 et. seq.*, J.S. did not meet the eligibility criteria to attend the LRHSD as an affidavit student; further, the Board sought tuition reimbursement for the period of J.S.’s ineligible attendance.

The ALJ found, *inter alia*, that: there are no material facts at issue here and the case is ripe for summary decision; children aged five to twenty years are entitled to a free public education in the district in which their parent or guardian is domiciled; the domicile of a person is the place where he has his true, fixed, permanent home, to which – whenever absent – he has the intention of returning, and from which he has no present intention of moving; in this case, J.S.’s mother, M.L., stated in her affidavit that she was sending her son to New Jersey to complete his education, that he would return to Iowa upon graduation, and that she has the economic means to support him in Iowa; petitioner failed to establish that M.L. is incapable of supporting or providing care for J.S. due to family or economic hardship, and further failed to establish that Iowa is not J.S.’s permanent home. The ALJ concluded that petitioner failed to satisfy his burden of proof that J.S. is legally domiciled with petitioner at his Medford address and is not entitled to a free public education in the LRHSD. Accordingly, the ALJ granted summary decision in favor of the Board and ordered petitioner C.O. to pay tuition in the amount of \$99.44 per day for each day during the 2020-21 school year on which J.S. was enrolled in the LRHSD.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that petitioner failed to establish that his nephew, J.S., was a domiciliary within the LRHSD and that J.S. met the criteria to be enrolled as an affidavit student. The Commissioner further concurs with the ALJ’s conclusion that J.S. was, therefore, not entitled to a free public education in the District’s schools, and that C.O. is responsible for the payment of tuition for the period of J.S.’s ineligible attendance. As the Commissioner was unable to discern the number of days that J.S. attended LRHSD during the 2020-21 school year, the matter was remanded to the OAL for calculation of tuition pursuant to *N.J.S.A. 18A:38-1(b)*.

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.

187-21

OAL Dkt. No. EDU 02698-21

Agency Dkt. No. 31-3/21

## New Jersey Commissioner of Education

### Final Decision

C.O., on behalf of minor child, J.S.,

Petitioner,

v.

Board of Education of Lenape Regional  
High School District, Burlington County,

Respondent.

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

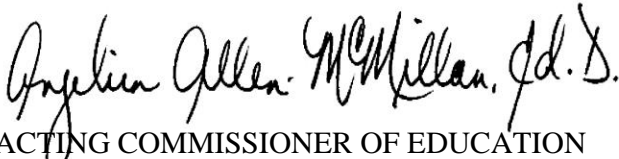
Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) findings that petitioner failed to sustain his burden of establishing that his nephew, J.S., was a domiciliary of a municipality in the Lenape Regional High School District (District), and that J.S. met the criteria to be enrolled as an affidavit student. The Commissioner further concurs with the ALJ's conclusion that J.S. was, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A. 18A:38-1b*, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in the district. The statute specifically provides that the Commissioner may order tuition "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.*" *N.J.S.A. 18A:38-1b* (emphasis added.) The record reflects

that the cost of tuition in the district is \$99.44 per day, but is devoid of any evidence of the number of days of ineligible attendance. Furthermore, the lack of any evidence in the record of the date on which J.S. began attending school in the district, or any findings by the ALJ on that topic, make it impossible for the Commissioner to compute the number of days of ineligible attendance.

Accordingly, this matter is remanded to the Office of Administrative Law for further proceedings to calculate the number of days of ineligible attendance, as required by *N.J.S.A. 18A:38-1b*.

IT IS SO ORDERED.

  
ANGELINA ALLEN McMILLAN, J.D.  
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 7, 2021  
Date of Mailing: September 10, 2021



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DOCKET NO. EDU 02698-21

AGENCY REF. NO. 31-3/21

**C.O. on behalf of minor child J.S.,**

Petitioner,

v.

**LENAPE REGIONAL HIGH SCHOOL DISTRICT**

**BOARD OF EDUCATION, BURLINGTON COUNTY,**

Respondent.

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**C.O.** on behalf of minor child **J.S.**, petitioner, pro se

**R. Taylor Ruilova**, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: May 27, 2021

Decided: July 21, 2021

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

**STATEMENT OF CASE**

Petitioner C.O. on behalf of J.S. challenges the decision of respondent, Lenape Regional High School (LRHS) Board of Education, Burlington County (Board) that minor child J.S., a non-resident student, is not eligible to attend school within the LRHS District (District), pursuant to N.J.S.A. 18A:38-1, and its accompanying regulations, N.J.A.C. 6A:1-1 et. seq.

## **PROCEDURAL HISTORY**

On January 29, 2021, petitioner filed a petition with the Commissioner of the New Jersey Department of Education pursuant to N.J.S.A 18A:6-9. On March 12, 2021, respondent filed a motion to dismiss in lieu of an answer. This motion was not decided by the Commissioner and was transmitted with the petition on March 16, 2021, to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

By letter dated April 30, 2021, a briefing schedule was issued and on May 28, 2021, petitioner responded to the motion to summary decision. On June 8, 2021, respondent submitted a reply brief and the motion is now ripe for review.

## **FACTUAL DISCUSSION AND FINDINGS**

The material facts in this matter are not in dispute. Based on the statements made by C.O and M.L. in their affidavits supporting J.S.' application to attend LRHS District as a non-resident student, the statements of C.O. in the petition he filed to appeal the Board's decision to deny J.S.' application, C.O.'s May 28, 2021 letter, and the certification of Matthew Webb, I **FIND** the following **FACTS**:

1. LRHS District is a regional public school district serving eight towns in Burlington County, New Jersey. The District operates four high schools, including Shawnee High School, Medford Township (Shawnee HS).
2. C.O. is a resident of the District, residing in Medford Township.
3. J.S. is C.O.'s fifteen-year old nephew. Prior to February 3, 2021, J.S. resided with his mother, M.L., in Sioux City, Iowa.
4. On February 4, 2021, C.O. submitted an application to respondent for J.S. to attend Shawnee HS in the LRHS District as a non-resident pupil ("affidavit student"). Br. In Support of Respondent's Motion for Summary Disposition (March 15, 2021), Ex. A

[LRHS District Affidavit Application of C.O. on behalf of J.S. (January 28, 2021)]. In this application, C.O. stated that J.S. would reside with him in the District for the duration of the calendar year and “indefinitely [sic].” Id., Ex. A at 2, 4.

5. M.L. submitted an affidavit in support of J.S.’s application in which she stated that J.S. would remain in C.O.’s home “until completion of high school,” and would return to her home upon graduation. Id., Ex. B [LRHS District Affidavit of M.L., Non-Resident Parent, on behalf of J.S. (January 29, 2021), at 1, 3].
6. In her affidavit, M.L. states that J.S. is not residing with her due to “schooling, behavior, counseling.” Id., Ex. B at 1, 2. Further, she states that she is able to support her son economically. Id., Ex. B at 2.
7. On February 9, 2021, during a telephone conversation with District Assistant Superintendent Matthew Webb (Webb), C.O. stated that in school in Iowa, J.S. was “falling through the cracks”; that school in Iowa was still all-remote [due to COVID-19 emergency measures]; J.S.’ Iowa teachers had not kept him up-to-date, he had fallen behind in school and was at risk of repeating ninth grade; and C.O. wanted J.S. to have a good education in New Jersey. Certification of Matthew Webb in Support of Respondent’s Motion for Summary Decision (March 12, 2021), at ¶¶ 12, 13.
8. In a letter to the undersigned, C.O. elaborated on the reasons J.S. left his mother’s home in Iowa to live with C.O. and his family in New Jersey, stating that J.S. “is not here for an education, [rather J.S.] is here to be held accountable to get an education.” Ltr. of Petitioner in Opposition to Respondent’s Motion to Dismiss (May 27, 2021) (by electronic mail only).<sup>1</sup> Further, by living with C.O., J.S. will get “the discipline he needs to thrive.” Ibid.

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<sup>1</sup> It is noted here that the regulations require an affidavit in response to a motion for summary decision, N.J.A.C. 1:1-12.5(b), and that the regulations permit the judge latitude to take “actions as are necessary for the . . . fair conduct of the . . . proceeding.” N.J.A.C. 1:1-14.6(p). C.O.’s undated, unsigned letter in lieu of an affidavit does not prejudice respondent here as the non-corroborated hearsay statements in C.O.’s letter do not raise issues of material fact that must be determined in an evidentiary proceeding.

9. During the February 9, 2021 telephone conversation, Webb informed C.O. that he would not recommend approval of J.S.'s application as he did not meet the legal requirements for eligibility as an affidavit student. Webb Cert., at ¶ 15. In response, C.O. asked Webb to ignore relevant law. Id. at ¶ 16.
10. C.O. requested and was provided a phone conference with District Superintendent Dr. Carol Birnbohm (Dr. Birnbohm). During a telephone conversation on February 10, 2021, Dr. Birnbohm stated that her administration would recommend that J.S. was not eligible as an affidavit student and explained to C.O. the process for appealing the Board's final decision on the matter. Id. at ¶ 25.
11. To date, C.O. has not provided respondent (or this tribunal) proof that he and/or his wife, L.O., have been named temporary or permanent guardian(s) for J.S. by court order.<sup>2</sup> Id. at ¶ 28. C.O. stated that it is his intention to assume full legal custody of J.S. and that he would meet with an attorney on June 1, 2021, to begin the legal process. Ltr. of Pet'r, at 1.
12. On February 17, 2021, the Board adopted the recommendation of the District administration and denied C.O.'s application for J.S. to attend Shawnee HS as an affidavit student and, on February 18, 2021, formal written notice of this decision was sent to C.O. Webb. Certif., Ex. E.
13. The Board's February 18, 2021 notice included the statement that C.O. is responsible to pay tuition for J.S. for any period of ineligible attendance, including the duration of an appeal of the Board's decision. Ibid. Further, C.O. was notified that the approximate rate of tuition at the District's schools for the 2020-2021 school year is \$99.44/day. Ibid.

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<sup>2</sup> After his telephone call with Dr. Birnbohm, C.O. submitted to respondent a temporary guardianship agreement signed by M.L. on February 12, 2021. Webb Cert., ¶ 26; Br. of Resp't, Ex. C.

14. On February 23, 2021, C.O. filed an appeal with the Commissioner of Education. Pursuant to N.J.S.A. 18A:38-1, this appeal was filed within twenty-one days of the Board's decision and therefore, J.S. is currently attending Shawnee HS.
15. In this matter, C.O. asks the Commissioner to permit J.S. to attend Shawnee HS as an affidavit student. In his petition, he acknowledged the statements of his sister, M.L., and in his letter to the undersigned, C.O. states his understanding that M.L. "may have worded the affidavit for the school incorrectly." Ltr. of Pet'r., at 1.

## **LEGAL ANALYSIS AND CONCLUSION**

### **Standard for Deciding Motion to Dismiss**

Respondent's motion was filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. Respondent argued that the "Board is entitled to summary disposition as a matter of law," and then presented arguments for an order granting summary decision under N.J.A.C. 1:1-12.5(b). Br. in Support of Respondent's Motion for Summary Disposition (March 12, 2021), at 6. Therefore, respondent's motion to dismiss was treated as a motion for summary decision under N.J.A.C. 1-12.5(b), and petitioner was provided references to the OAL website for guidelines on preparing a response.

### **Standard for Deciding the Motion for Summary Decision**

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides as follows:



[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

[Id. at 540.]

In explaining the standard to be applied in summary motion practice, the Brill Court explained:

The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.

[Id. at 536-3.7.]

As discussed above, I **CONCLUDE** that the parties raise no dispute with respect to material facts and the following issues can be decided as a matter of law:

1. Whether J.S. is eligible to attend Shawnee HS as a non-resident affidavit student, pursuant to N.J.S.A. 18A:38-1.
2. Whether the District is entitled to tuition reimbursement from C.O. for the costs of J.S. attending school in the District and if so, the amount due.

C.O. contends that J.S. is entitled to a free education in the District under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See, V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom., Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education). J.S. is fifteen years old and, therefore, I **CONCLUDE** he meets the age requirements to be entitled to a free public education.

A person who meets age requirements and is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have many residences but only one domicile, and a child's domicile is normally that of his or her parents. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051 (1999).

The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent, or in this case, petitioner C.O., has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

Here, the evidence as to J.S. being domiciled in the District is mixed. J.S. has moved, physically, from Iowa to Medford, and is currently attending Shawnee HS. J.S.' mother and C.O. took steps to register J.S. in the District, including the completion of registration documents and affidavits to support J.S.' enrollment in the District. C.O. is adamant that he and his wife always intended for J.S. to completely transfer his domicile to New Jersey and from the beginning, C.O. has taken that position. But, prior to June 1, 2021, C.O. did not start the process required to obtain legal temporary or permanent custody of his nephew (even though he had notice of this requirement since February 2021).

On the other hand, however, J.S.'s mother does not appear to intend for her son to stay in New Jersey indefinitely. In her sworn affidavit, M.L. stated that she was sending her son to New Jersey to complete his education, that he would return to Iowa upon graduation, and that she has the economic means to support him in Iowa. Even in the temporary guardianship document M.L. signed after learning of the deficiencies in her original affidavit, M.L. states that she is giving legal custody of J.S. to C.O. both "from December 31, 2020 to graduation" and "for as long as necessary." Br. of Resp't., Ex. C (emphasis added).

In this regard, N.J.A.C. 6A:22-3.2, provides in pertinent part as follows:

(a) A student is eligible to attend the school district pursuant to N.J.S.A. 18A:38-1.b if he or she is kept in the home of a person other than the student's parent or guardian, and the person is domiciled in the school district and is supporting the student without remuneration as if the student were his or her own child.

1. A student is not eligible to attend a school district pursuant to this provision unless:

- i. The student's parent or guardian has filed, together with documentation to support its validity, a sworn statement that he or she is not capable of supporting or providing care for the student due to family or economic hardship and the student is not residing with the other person solely for the purpose of receiving a free public education; and
- ii. The person keeping the student has filed, if so required by the district board of education:

(1) A sworn statement that he or she is domiciled within the school district, is supporting the child without remuneration and intends to do so for a time longer than the school term, and will assume all personal obligations for the student pertaining to school requirements[.]

M.L. gave a sworn statement that she is capable of supporting J.S. and noted no economic or family hardship that keeps her from caring for him. While she did not call the education J.S. would receive "free," M.L. essentially swore that she was sending J.S. to New Jersey for the education he would receive. While C.O.'s intention to care for his nephew is clear, including offering J.S. a permanent home, to date C.O. has failed to provide sufficient proof that J.S. is domiciled in the District and/or was so domiciled at the time he was first registered in the District. Petitioner failed to establish that M.L. is incapable of supporting or providing care for J.S. due to family or economic hardship, notwithstanding C.O.'s criticism of M.L.'s parenting. Petitioner failed to establish that Iowa is not J.S.'s permanent home, the place where his mother resides and where he intends (and she expects him) to return.

Accordingly, in light of all of the facts and circumstances, I **CONCLUDE** that J.S. is not entitled to a free public education in the LRHS District. I **CONCLUDE** petitioner failed to satisfy his burden of proof that J.S. is domiciled with petitioner at his address in the LRHS District. I **CONCLUDE** that summary decision in favor of respondent is appropriate.

N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition:

[F]or 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.

The record reflects that the actual cost of J.S.'s attendance in-District was \$99.44 per day for the 2020-2021 school year, and that J.S. enrolled at Shawnee HS on or about February 23, 2021. Neither party presented evidence of the exact date on which J.S. enrolled or the last day of the 2020-2021 school year, which has certainly passed, and respondent appears to rely on the tribunal to calculate the total number of days for which C.O. will be assessed tuition. See, Ltr. Reply Br. in Support of Respondent's Motion for Summary Disposition (June 8, 2021), at 7-8.

N.J.A.C. 6A:22-6.3(a) provides that,

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.

Therefore, I **CONCLUDE** that petitioner is responsible to pay tuition for J.S.' attendance at Shawnee HS in the amount of \$99.44/day from the date on which such attendance began, for each day school was in session without regard for days on which J.S. may have been absent, through the end of the 2020-2021 school year or the last day of J.S.' enrollment, whichever is later.

**ORDER**

I **ORDER** that the motion of respondent **LENAPE REGIONAL HIGH SCHOOL BOARD OF EDUCATION** for summary decision in its favor is **GRANTED** and the pro se residency appeal of petitioner C.O. on behalf of J.S. is **DISMISSED**.

Further, I **ORDER** that petitioner **C.O.** shall pay respondent **LENAPE REGIONAL HIGH SCHOOL BOARD OF EDUCATION** tuition in the amount of \$99.44/day for each day during the 2020-2021 school year on which J.S. was enrolled in the Lenape Regional High School District.

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 initial 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, P.O. 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.

July 21, 2021  
\_\_\_\_\_  
DATE

  
\_\_\_\_\_  
TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

TMC/nd