214-21

New Jersey Commissioner of Education

Final Decision

M.O. and H.O., on behalf of minor children, Z.O., A.O., J.O. and E.O.,

Petitioners,

v.

Board of Education of the Borough of Tenafly, Bergen County,

Respondent.

Synopsis

Petitioner appealed the determination of the respondent Board that their children are not entitled to a free public education in the Tenafly School District. Petitioners and their children moved from Maryland to Alpine, New Jersey, in December 2020, residing with family and enrolling the children in the Alpine school district for the remainder of the 2020-2021 school year. Petitioners subsequently purchased a home in Tenafly in March 2021 but did not move in immediately as the home needed substantial renovations, estimated to take six to eight months to complete. Petitioners attempted to register the children in the Tenafly district for the 2021-2022 school year but were denied as they were not yet living in the Tenafly house. Petitioners argue that they are legally domiciled in Tenafly and that domicile was established, *inter alia*, by the purchase of the home, the payment of the mortgage and utility bills on the property. The Board contended that it is the policy of the district that residency is not established until a family is physically domiciled in the home and filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the sole issue is whether petitioner's children are eligible to attend respondent's public schools free of charge in accordance with *N.J.S.A.* 18A:38-1; established case law has addressed the issue not only of intent to move to a location as evidence of domicile, but also the necessity of having already lived at the new location; the burden of proof is on the petitioner to show that they are legally domiciled in Tenafly; nothing in the petitioners' legal argument effectively counters the necessity that for domicile to be established, there must be an "actual and physical taking up of an abode". The ALJ concluded that: at no time relevant to this action were petitioners domiciled in Tenafly; the decision to deny enrollment of the children was not an unreasonable exercise of the Board's discretion; the children are not currently entitled to a free public education in Tenafly and will remain ineligible as long as they remain domiciled in a municipality other than Tenafly. The Board's motion for summary decision was granted, and the petition was dismissed.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. 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.

214-21
OAL Dkt. No. EDU 05938-21
Agency Dkt. No. 97-6/21

New Jersey Commissioner of Education

Final Decision

M.O. and H.O., on behalf of minor children, Z.O., A.O., J.O., and E.O.,

Petitioners,

v.

Board of Education of the Borough of Tenafly, Bergen 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.

In this matter, petitioners are challenging the Board's determination that they were not domiciled in Tenafly and their minor children were therefore ineligible to attend school in the district. Petitioners purchased a home in Tenafly in March 2021 but were unable to move in as the home needed substantial renovations which were estimated to take six to eight months to complete. When petitioners attempted to enroll their minor children in the district in May 2021, the Board denied their request on the basis that they did not yet live in Tenafly. The Administrative Law Judge (ALJ) found that petitioners did not meet their burden of demonstrating that they are residents of Tenafly because at no time relevant to their appeal were they domiciled in that municipality. Accordingly, the ALJ concluded that the minor children were not eligible to attend school in the district, and the Board was not arbitrary, capricious or

unreasonable in failing to admit the children under the policy that gives the Board the discretion to admit nonresident students.

Upon review, the Commissioner concurs with the ALJ, for the reasons thoroughly set forth in the Initial Decision, that petitioners are not domiciled in Tenafly and the minor children are therefore ineligible to attend school in the district. The Commissioner further concurs with the ALJ that the Board did not abuse its discretion by refusing to enroll the minor children.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 12, 2021
Date of Mailing: October 14, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5938-2021

AGENCY DKT. NO. 97-6/21

M.O. and H.O. ON BEHALF OF MINOR CHILDREN,
Z.O., A.O., J.O., and E.O.
Petitioner,
v.
BORO of TENAFLY BOE, BERGEN
COUNTY,
Respondent.

Julie Warshaw, Esq. for petitioners (Warshaw Law Firm, attorneys)

Steven R. Fogarty, Esq. for respondent (Fogarty & Hara, attorneys)

Record Closed: August 23, 2021 Decided: August 27, 2021

BEFORE: **MATTHEW G. MILLER,** ALJ

STATEMENT OF THE CASE

Petitioners, M.O. and H.O., the parents of minor children Z.O., A.O., J.O. and E.O., (Petitioners or family) have challenged the determination made by the respondent, Board

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of Education of the Boro of Tenafly, Bergen County, that their children are not entitled to a free public education in Tenafly because Petitioners and their children were not domiciled in the Tenafly School District (Respondent or District).

PROCEDURAL HISTORY

On or about May 26, 2021, Respondent notified Petitioners that their four children, Z.O., A.O., J.O. and E.O. (the children), were ineligible to receive free educations in the Tenafly due to non-residency. The Petitioners filed a Residency Appeal with the Department of Education on or about June 14, 2021. On or about July 6, 2021, respondent filed a Motion to Dismiss in Lieu of Answer. The Department of Education transmitted this matter to the Office of Administrative Law (OAL) on July 13, 2021, for hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

An initial conference was held on August 4, 2021 and it was agreed by the parties that this matter could be resolved by summary decision and at that time, per N.J.A.C. 1:1-12.5, the Motion to Dismiss was converted to a Motion for Summary Decision. The record remained open for the submission of additional documentation and legal argument, which was received on August 7, 2021 and August 11, 2021. Following oral argument on August 23, 2021, the record closed on that date.

FINDINGS OF FACT

The facts of the case are not in dispute:

1. On December 3, 2020, Petitioners, who had been residing and were domiciled in Maryland sold their only home and moved to Alpine, New Jersey into a home where H.O.'s parents resided. The children were enrolled in the Alpine school district and remained enrolled there through the conclusion of the 2020-21 school year.

2. On March 23, 2021, Petitioners purchased a home located at 11 Stanton Road in Tenafly. (Exhibit P-1). Petitioners' Residency Appeal certified that this is the address where the family is "located". (Exhibit P-2). This property is the only "home" owned by Petitioners.

3. Since purchasing the property at 11 Stanton Road, Tenafly, the children have registered in Tenafly-based youth sports programs, the family is paying utility bills for the Tenafly property and both H.O. and M.O. listed the Tenafly address on their newly issued New Jersey driver's licenses. Smoke detector and carbon monoxide alarm compliance certificates have also been issued for the property. (Exhibits P-3, P-4, P-5, P-6)

4. However, the home itself has "needed extensive renovations and was not habitable" and the family continues to reside in Alpine. (Petitioner's brief at 3). Per an email supplied to the District on or about May 11, 2021, it was estimated that the renovations "will take around 6-8 months to complete" from the time of the issuance of all necessary permits. (Exhibits P-7 and P-8).

5. On or about May 6, 2021, Petitioners reached out to the District expressing interest in enrolling the children in the Tenafly school system. In reply, the Interim Registrar of the Tenafly Public Schools responded that "district policy is firm in requiring that students be physically residing in Tenafly before they can be registered", given the circumstances, a further review would be undertaken. She requested that more specific information be provided, including information from the contractor as to a start date for the work and an estimated completion date and their current residential address. (Exhibits P-9 and P-10).

6. Tenafly School District Policy 5111 covers the "Eligibility of Resident/Nonresident Students". (Exhibit R-1).

7. After a substantial amount of back-and-forth between Petitioners and the Board, on May 12, 2021, Petitioners were advised by Shauna C. DeMarco, Superintendent of the Tenafly School District, that because they were not domiciled in Tenafly and since "there is no exception for a future residents (sic) who are renovating a home they have not lived in", the children would not be registered in the District until they were actually living at 11 Stanton Road. A follow-up email from Ms. DeMarco on May 13, 2021, noted that she had consulted with the Board attorney prior to making her decision. (Exhibits P-11 and P-12).

8. The colloquy between Petitioners and the District continued and on May 26, 2021, Jocelyn Schwarz, the President of the Tenafly Board of Education, wrote to Petitioners and advised them that on May 24, 2021, the Board "affirmed the Superintendent's denial of your request" and that "Policy 5111 does not permit your children to enroll in the District under the circumstances presented". (Exhibit P-13).

9. The parties have stipulated that there are only 2 issues in dispute;

    a. Whether the family was domiciled in Tenafly for the purposes of the children receiving a free public education.
    b. If the answer to a. is "no", then whether the District abused its discretion in failing to admit the children to the Tenafly public schools per Policy 5111.

LEGAL ARGUMENTS

Petitioners

Domicile

Petitioners argue that given the totality of the circumstances, they are legally domiciled in Tenafly and that domicile was established by the purchase of the home at 11 Stanton Road, the payment of a mortgage on the property, their payment of utility bills,

the issuance of New Jersey driver's licenses with the Tenafly address, the hiring of the contractor and the registration of their children in Tenafly-based sports activities. They also emphasize their roots in the community, with H.O. having been raised in Tenafly and attended District schools and that it is their intent to move into the home as soon as renovations are completed and to raise their children in Tenafly.

First and foremost, however, Petitioners argue that they are domiciled in Tenafly, citing to A.M.S. ex rel. A.D.S. v. Board of Educ. of City of Margate, 409 N.J. Super. 149 (App. Div. 2009) and N.J.A.C. 6A:22-3.1, citing the following paragraph;

> N.J.A.C. 6A:22-3.1(a)(1) HN9 provides that students "over five and under 20 years of age" are "eligible to attend school in a district if the student is domiciled within the district" and sets forth various living arrangements from which a student's domicile may be established, including:
>
> 1. A student is domiciled in the school district when he or she is living with a parent or legal guardian whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.
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> [Id. at 161.]

Petitioners argue that case law supports their contention that so long as the home is owned by them and they intend to live there, they should be considered domiciled in Tenafly. This is particularly true when N.J.A.C. 6A:22-3.3(a) states that a student's eligibility for a free public education in a particular district "shall not be affected by the physical condition of an applicant's housing" or if they were displaced "from the original residence…(due to occurrences) such as fire, flood, hurricane, or other circumstances that render the residence uninhabitable." N.J.A.C. 6A:22-3.2(h(1)(iii).

Abuse of Discretion

Assuming, *arguendo*, that it is found that Petitioners are not domiciled in Tenafly, it is argued that Respondent abused its discretion by failing to admit the children as permitted by Policy 5111, citing to the following passage;

> The admission of a nonresident student to school free of charge must be approved by the Board. No student otherwise eligible shall be denied admission on the basis of the student's race, color, creed, religion, national origin, ancestry, age, marital status, affectational or sexual orientation or sex, social or economic status, or disability. The continued enrollment of any nonresident student shall be contingent upon the student's maintenance of good standards of citizenship and discipline.

Petitioners also point to N.J.A.C. 6A:22-2.2, which, under a headnote that reads "Discretionary admission of nonresident students", states;

> Nothing in this chapter shall be construed to limit a district board of education's discretion to admit nonresident students, or the ability of a nonresident student to attend school with or without payment of tuition with the accepting district board of education's consent, pursuant to N.J.S.A. 18A:38-3(a).[1]

In addition, they cite to N.J.A.C. 6A:22-3.1(a)(1)(i)(ii)(1), which discusses the domicile of a student whose parents/guardians are located in different school districts and how it is determined.

Petitioners also reference the difficulties that the COVID-19 pandemic has effectuated not only on their children, but also on the educational system as a whole. Petitioners supplied multiple citations to publications from the New Jersey Department of Education, the New Jersey School Boards Association and like organizations detailing

[1] N.J.S.A. 18A:38-3(a). Any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe.

"strategies to support student engagement", how to enhance remote and hybrid learning experiences and how to avoid chronic absenteeism. Emphasized was a quote from the State's return to school plan, The Road Back, Restart and Recovery Plan for Education[2], in which it is noted that schools must be "prepared to accommodate students' unique needs during this unprecedented time". Id. at 8.

Continuing in that vein, Petitioners supplied a May 22, 2021 letter from a psychiatrist and a May 23, 2021 letter from a Licensed Social Worker, both of whom argue that not being permitted to enroll in the Tenafly schools would cause "unnecessary consequences" and has already "precipitated great angst and anxiety" and that given the "trauma" the children have suffered over the past year, the "mental health of these children" must be considered when considering whether they should be permitted to start the school year in Tenafly or have to transfer there later in the year. (See, 5/22/21 letter of Barry L. Feinberg, M.D. and 5/23/21 e-mail of Gwen Crystal, L.S.W., attached hereto as Exhibits P-9 and P-10).[3]

Petitioners also point to various circumstances, including their long-term affiliation with Tenafly, the affirmative steps that they have taken to demonstrate that they intend to move to Tenafly as soon as possible as well as the effects of the pandemic on both the educational system and their children in particular.

They further point to a variety of what they deem to be administrative errors made by Respondent in its denial of admission, including;

1. That the May 26, 2021, notice of ineligibility was deficient.
2. That statements made by the President of the Tenafly Board of Education were "false and misleading" concerning the definition of "domicile".

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[2] https://www.nj.gov/education/reopening/NJDOETheRoadBack.pdf

[3] Please note that these documents were not presented as "expert reports" and will not be considered as such. There is no indication that either of these licensed professionals conducted an examination of any family members, reviewed any documents or expressed their opinions to within a reasonable degree of probability. Further, neither of them cited to any academic or scientific support for their conclusions. See generally, Vitrano by Vitrano v. Schiffman, 305 N.J. Super. 572 (App. Div. 1997)

3. That the Superintendent "misled" the Petitioners concerning appellate timeframes.

It was argued that these administrative deficiencies, while not sufficient to warrant a finding of domicile or to compel the Respondent to be compelled to admit the children, are evidence that it failed to consider all relevant circumstances in denying admission and that it abused its discretion in doing so.

Respondent

Domicile

Respondent asserts that the case law is crystal clear that Petitioners are not domiciled in Tenafly since they have never lived in the 11 Stanton Road home. Without having lived there, they "are missing a necessary element of domicile; residence in Tenafly". (Respondent's brief at 3).

In support of its position, Respondent cites to In re Unanue, 255 N.J. Super. 263 (Law Div. 1991), 311 N.J. Super., 589 (App. Div. 1998), certif. denied, 157 N.J. 541 (1998), cert. denied sub. nom., Unanue-Casal v. Goya Foods, Inc., 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

Respondent further cites to K.L. and C.L. o/b/o N.L. v. Board of Educ. of Freehold, AOL Dkt. No. EDU 441-01 (Initial Decision June 26, 2001), adopted (Comm'r Aug. 13, 2001) and Board of Educ. of Twp. of Livingston v. H.L. and D.L. o/b/o K.L. and J.L., OAL Dkt. No. EDU 11593-96 (Initial Decision Apr. 3, 1998) where it was determined, in general, that since a house was not habitable during the school year, the family could not be considered to domiciled there.

Abuse of Discretion

Concerning Petitioners' "abuse of discretion" position, Respondent noted that;

> The Board denied (the) request based on a plain reading of the Policy, which disallows enrollment to nonresidents except those expressly contemplated therein. The Policy does not make exception for people who have purchased a house in Tenafly, but who have not yet moved into it due to it being uninhabitable, i.e., incapable of living in. Certainly, the Board's decision, rooted in the plain language of the Policy, had a legitimate, rational basis.
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> [Respondent's brief at 11.]

Respondent argues that case, administrative and statutory law all strongly support the position that a District has broad discretionary authority in deciding when to admit out-of-district students and that the considerations cited by it clearly demonstrate that the decision to deny admittance to the children was not "patently arbitrary", "without rational basis" or "induced by improper motives". Parsippany-Troy Hills Educ. Ass'n v. Board of Educ. of Parsippany-Troy Hills, 188 N.J. Super. 161, 167 (App. Div. 1983) (cit. omitted).

LEGAL ANALYSIS AND CONCLUSION

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The OAL summary decision rule is essentially the same as the summary judgment rule under the New Jersey Court Rules, which states:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

[R. 4:46-2(c).]

The New Jersey Supreme Court has modified and clarified the analysis required when considering a motion for summary decision/judgment. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the Court adopted the summary judgment standard utilized by federal courts:

> Under this new standard, 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. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." [Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).] . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Liberty Lobby, supra, 477 U.S. at 250, 106 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.
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> [Id. at 540.]

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). The critical question therefore is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Brill, supra, 142 N.J. at 533 (citation omitted). If the non-moving party's evidence is merely colorable, or is not significantly

probative, summary judgment should not be denied. See, Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

The sole issue in dispute is whether Petitioner's four children are eligible to attend respondent's public schools free of charge in accordance with N.J.S.A. 18A:38-1.

Any child between the ages of five and twenty years old is entitled to a free public education in the school district in which he is domiciled. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). 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).

Per N.J.S.A. 18A:38-1(b)(2), the resident "shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education". See, generally, D.L. v. Board of Educ. of Princeton Regional School Dist., 366 N.J. Super. 269 (App. Div. 2004).

A student is domiciled in a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1); State v. Benny, 20 N.J. 238, 250 (1955); 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, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999).

The domicile of an unemancipated child is that of his parent, custodian or guardian. 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); P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). A child may also be considered domiciled in a school district if he lives with an adult domiciled in that school district, as long as the child

is financially supported by that adult as if he were their own child, upon submission of a sworn affidavit to the board of education. N.J.S.A. 18A:38-1(b)(1).

This case hinges, obviously, on the definition of domicile, and this was addressed in tremendous detail in In re Unanue, 255 N.J. Super. 362 (Law Div. 1991), aff'd 311 N.J. Super. 589 (App. Div. 1998), certif. denied, 157 N.J. 541 (1998), cert. denied sub. nom., Unanue-Casal v. Goya Foods, Inc., 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999). While Unanue concerned a probate case, the concept of domicile was key to the dispute between the potential heirs to Goya Foods, Inc., a sizable food manufacturer and distributor. Ironically, the case also involved Tenafly and a question as to whether the decedent, Prudencio Unanue, was domiciled there or in Puerto Rico.

The Court provided a comprehensive review of the law, noting;

> When a man has acquired a domicile in a particular place, that place remains his domicile until he acquires another domicile". In re Dorrance, 115 N.J. Eq. 268, 274, 170 A. 601 (Prerog.Ct.1934), aff'd 13 N.J. Misc. 168, 176 A. 902 (Sup.Ct.1935), aff'd 116 N.J.L. 362, 184 A. 743 (E & A 1936), cert. den. 298 U.S. 678, 56 S.Ct. 950, 80 L.Ed. 1399 (1936), reh den. 298 U.S. 692, 56 S.Ct. 957, 80 L.Ed. 1410 (1936). In considering whether a change of domicile has occurred, three elements must be considered: 1) whether there had been an actual and physical taking up of an abode in a particular state; 2) whether the subject had an intention to make his home there permanently or least indefinitely; and (3) whether the subject had an intention to abandon his old domicile. The court must evaluate all of the facts of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home. Lyon v. Glaser, supra, 60 N.J. at 264-265, 288 A.2d 12. See also, Mercadante v. The City of Paterson, 111 N.J. Super. 35, 39-40, 266 A.2d 611 (Ch.Div.1970), aff'd o.b. 58 N.J. 112, 275 A.2d 440 (1971).
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> [Unanue, supra, 255 N.J. Super. at 376.]

The Court in Lyon, supra addressed the issue not only of intent to move to a location as evidence of domicile, but also the necessity of having already lived at that location;

> A very short period of residence in a given place may be sufficient to show domicil, but mere residence, regardless of its length, is not sufficient. It has been said that concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode, effects a change of domicil. And once established, the domicil continues until a new one is found to have been acquired through an application of the same tests. In re Fisher, supra; Cromwell v. Neeld, 15 N.J. Super. 296, 300-301 (App. Div. 1951); In re Dorrance, 115 N.J. Eq. 268, 274-275 (Prerog. Ct. 1934), aff'd per curiam sub nom. Dorrance v. Thayer-Martin, 13 N.J. Misc. 168 (Sup. Ct. 1935), aff'd o.b. 116 N.J.L. 362 (E. & A. 1936); Slater v. Munroe, 313 Mass. 538, 48 N.E. 2d 149 (1943); State ex rel. Orr v. Buder, 308 Md. 237, 271 S.W. 508 (1925); In re Appleby's Estate, 106 N.Y.S. 2d 294 (Sur. Ct. 1951), aff'd mem. 279 App. 993, 112 N.Y.S. 2d 493 (1952); Schillerstrom v. Schillerstrom, 75 N.D. 667, 32 N.W. 2d 106 (1948); 25 Am. Jur. 2d Domicil, §§ 16, 17, pp. 13-15 (1966); Restatement (Second) of Conflicts of Laws, §§ 15-19, pp. 61-79 (1971). Since the concept of domicil involves the concurrence of physical presence in a particular State, and an intention to make that State one's home, determination of a disputed issue on the subject requires an evaluation of all the facts and circumstances of the case.
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> [Id. at 264-65.]

Along those lines, the Court in In re Fisher's Will, 13 N.J. Super. 48 (App. Div. 1951) put it very succinctly;

> It is also settled that to effect a change in domicile "* * * the residence at the place chosen for the domicile must be actual; to the factum of residence there must be added the animus manendi; * * *." Harral v. Harral, 39 N.J. Eq. 279, 285 (E. & A. 1884). In other words, in order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, does not effect a change of domicile. See also Rinaldi v. Rinaldi, 94 N.J. Eq. 14, 20 (Ch. 1922); In re Gilbert, 18 N.J. Misc. 540, 548 (Essex Cty. Surr. Ct. 1940).
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> [Id. at 53.]

The case at bar practically mirrors the factual scenario in K.L. v. Board Educ, 2010 N.J. Super. Unpub. LEXIS 11 (App. Div. 2010). In K.L., the plaintiffs purchased a home in Kinnelon, New Jersey in May, 2007 and "anticipated establishing residency (there) as of October, 2007". The Kinnelon Board of Education had established a policy which permitted a student to enroll "not greater than 5 weeks prior to the anticipated date of residency" in the town when the family "has entered a contract to buy, build or rent a residence" in the district." Id.

When the Board requested "an update on [their] home renovations" in early October and advised that it would be charging monthly tuition beginning on October 15, the plaintiff filed the petition which led to a referral to the Office of Administrative Law. Id. at 1-2.

In the underlying OAL matter, the judge detailed a factual scenario similar to that in the case at bar.

a. Family lives outside of district.
b. Family buys home in district.
c. Family does not move into home due to need for renovations.

The judge determined that, largely because the family had never moved into the home (nor eaten in, slept in or entertained in it), even though they intended to do so in the future, that it was not domiciled in Kinnelon, and a summary decision was entered on behalf of the district. See, K.L. and K.L. on behalf of Minor Child M.L. v. Bd. of Educ. of Kinnelon, EDU 1191-08, Initial Decision (April 24, 2008).[4]

The judge's decision was upheld by the Commissioner of Education, largely for the reasons expressed in the underlying decision. Of, note, however, is that the Commissioner distinguished the case of A.P., Sr., on behalf of minor child D.K. v. Board

[4] This matter was consolidated with K.L. and K.L. on behalf of Minor Child C.L. v. Bd. of Educ. of Kinnelon, EDU 1192-08.

of Education of the Bordentown Regional School District, Burlington County, EDU 541-06, OAL Initial Decision (December 5, 2006), Comm'r Decision (January 18, 2007). In A.P., there was evidence that the petitioner had purchased and lived in the same home located in the district, had moved out when extensive damage had been done to it while he was away on duty in the National Guard and that he and D.K. had moved back into the home three (3) months after the school year had begun and while construction was ongoing. The Commissioner emphasized that in K.L.;

> By way of contrast, petitioners in this case had never lived in Kinnelon before the 2007-2008 school year and do not appear to have lived in Kinnelon at any time during that school year. They lived in Butler and could have sent their children to the Butler public schools without payment of tuition. In short, the Commissioner finds petitioners' arguments concerning domicile to be unpersuasive.
>
> See, K.L. and K.L. on behalf of Minor Child M.L. v. Bd. of Educ. of Kinnelon, EDU 1191-08, Comm'r Decision (July 23, 2008) at 7.

The court upheld the Commissioner's decision, citing to Unanue;

> Although not a case involving education law, Unanue, is instructive on the general issue of "domicile" as a legal concept. "'In a strict legal sense, 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.'" Unanue, supra, 255 N.J. Super. at 374 (quoting Kurilla v. Roth, 132 N.J.L. 213, 215, 38 A.2d 862 (Sup. Ct. 1944)); accord D.L. v. Bd. of Educ. of Princeton Regional School Dist., 366 N.J. Super. 269, 273, 840 A.2d 979 (App. Div. 2004).
>
>> In considering whether a change of domicile has occurred, three elements must be considered: 1) whether there had been an actual and physical taking up of an abode in a particular state; 2) whether the subject had an intention to make his home there permanently or least indefinitely; and (3) whether the subject had an intention to abandon his old domicile.

> The court must evaluate all of the facts of the case to determine the place in which there is the necessary concurrence of physical presence and an intention to make that place one's home.
>
> [Unanue, supra, 255 N.J. Super. at 376 (citing Lyon v. Glaser, 60 N.J. 259, 264-65, 288 A.2d 12, (1972)) (emphasis added).

[K.L. v. Board of Educ., supra at 4.]

The court found it "obvious" that the family was "never domiciled in Kinnelon" and that while "they may have possessed a present intention to reside there when renovations were complete", there was no dispute that they "never did reside in the district". It concluded;

> They had never established an "actual and physical abode" in Kinnelon, and therefore they lacked the "necessary concurrence of physical presence and an intention to make that place one's home" upon which the legal concept of domicile rests.

[Id. at 4.]

The cases cited by the Petitioners in their brief are either clearly distinguishable [A.P. v. Lower Merion Sch. Dist., 389 F. Supp. 3rd 322 (E.D.Pa. 2019) (domicile case where the petitioners were 'living' part-time in 2 different school districts)] or are entirely consistent with the cases cited above. For example, in S.H. and C.H. o.b.o Minor Children, C.H., S.H. and S.H. v. Township of Alloway Board of Education, Salem County, OAL Initial Decision (February 11, 2019), Comm'r Decision (March 26, 2019), the court largely adopted language from Unanue, supra and V.R. ex rel A.R., supra and includes the "intention of returning" language, while the facts of that case involved whether the plaintiffs had moved back to a residence where they had formally resided.

Further, concerning the aspect of Petitioner's argument that her roots in Tenafly should be considered in determining domicile, while not entirely on point (since the case involved a person who had moved away from her old hometown, but maintained a home

"so she could see her few remaining friends in New Jersey, when she wished"), the court in Lyon, supra, held, that;

> A mere sentimental attachment does not hold an old domicile.
>
> Lyon v. Glaser, 60 N.J. 259 at 272, cit., District of Columbia v. Murphy, 314 U.S. 441, 456, 62 S. Ct. 303, 86 L. Ed. 329, 338 (1941).

With that final finding, it is clear that nothing in the Petitioners' legal argument effectively counters the clear necessity that for domicile to be established, there must be an "actual and physical taking up of an abode". Unanue, supra, 255 N.J. Super. at 376.

That simply has not been established by Petitioners here.

Abuse of Discretion

The law is clear that a student may attend school in a district in which he is not domiciled, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2. A superintendent or administrative principal may also have a non-domiciled student removed from that school, on application to the board of education. N.J.S.A. 18A:38-1(b)(2).

Tenafly has adopted a specific policy concerning this issue, which reads as follows;

> **Nonresident Students**
>
> Effective December 6, 2004, the Board generally ceased accepting new nonresident tuition-paying students. This restriction does not apply to the special education program for autism, pre-school disabilities or language learning disabilities self-contained program, for students who successfully apply to the program.
>
> A. Exceptions to paying tuition by nonresident students may occur under the following situations:

1. Nonresident School Faculty and Staff. Children of full time Board of Education employees who work a minimum of 35 hours a week in one particular position may attend Tenafly schools at no tuition cost providing such accommodations place no hardships on school district resources such as, but not limited to personnel, facilities and program expenses. All stipulations and conditions listed above in this policy shall be applicable to the children of nonresident school faculty and staff seeking to attend or actually attending the Tenafly Public Schools. If such hardships should evolve, the student shall no longer be granted a waiver of tuition. Application for admission must be made to the Superintendent of Schools at least sixty calendar days prior to the anticipated enrollment dates. A new application must be submitted for each school year.
2. Special Students. American Field Service students and other students approved by the National Association of Secondary School Principals may be admitted at no tuition cost at the discretion of the Superintendent.
3. High School Seniors. A student who is a senior and whose family moves from Tenafly or a sending school district after January 1, may be allowed to complete the senior year without further tuition payment.

B. Annual Board of Education – Superintendent of Schools Review of Policy.

The Superintendent of Schools and the Board of Education will annually review the practical results of policy 5111 for the year in progress and discuss implementation of the policy for the coming school year. Particular attention will be given to anticipated enrollments, space and staffing needs. This annual review will be so scheduled that any conclusions reached may be appropriately reflected in the school budget for the coming school year.

The admission of a nonresident student to school free of charge must be approved by the Board. No student otherwise eligible shall be denied admission on the basis of the student's race, color, creed, religion, national origin, ancestry, age marital status, affectational or sexual orientation or sex, social or economic status, or disability. The continued enrollment of any nonresident student shall be contingent upon the student's maintenance of good standards of citizenship and discipline.

[Exhibit R-1 at 8-9.]

When a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal for the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner 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 section.

Similar policies have been upheld as within the discretion of school boards. See, M.M. and V.M. ex rel R.M. v. Bd. of Educ. of Hillsborough, EDU 6744-98, Initial Decision (Oct. 19, 1998), adopted, Comm'r (Oct. 29, 1998).

The Respondent also points to N.J.A.C. 6A:22-2.2, which is brief and to the point;

> Nothing in this chapter shall be construed to limit a district board of education's discretion to admit nonresident students, or the ability of a nonresident student to attend school with or without payment of tuition with the accepting district board of education's consent, pursuant to N.J.S.A. 18A:38-3.a.

N.J.S.A. 18A:38-3(a) reads;

> Admission for nonresident of school district; parent on active duty
>
> a. Any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe.
>
> b. Any person not resident in a school district, if eligible except for residence, and if that person previously was a resident of the district, shall be admitted to the schools of the district without payment of tuition if that person's parent or guardian is a member of the New Jersey National Guard or a member of the reserve component of the armed forces of the United States and has been ordered into active military service in any

> of the armed forces of the United States in time of war or national emergency, resulting in the relocation of the student out of the district. A school district admitting a student pursuant to this subsection shall not be obligated for transportation costs.

While Petitioners argue that the District abused its discretion in failing to admit the children, the burden it faces in attempting to demonstrate same is daunting. As noted in K.L. and K.L. on behalf of Minor Child M.L. v. Bd. of Educ. of Kinnelon, EDU 1191-08, Initial Decision (April 24, 2008);

> Although there is no explicit authority for a public school district to contract with parents to enroll their children within the district, neither is there explicit authority that denies them this authority. Local boards do possess this authority since they are given a great deal of discretion in determining whether to enroll out-of-district students.
>
> [Id.]

When combined with the statutory and administrative laws detailed above, it is clear that the District has the discretionary power to admit or deny admittance to a non-resident student.

The issue of discretion was discussed at length in Parsippany-Troy Hills Educ. Ass'n v. Board of Educ. of Parsippany-Troy Hills, 188 N.J. Super. 161 (App. Div. 1983), where the Court held;

> These statutory provisions and implementing code regulations leave little doubt that the choice of which courses to offer and, necessarily, the content of those courses, is a discretionary decision left to the local boards of education, subject only to the periodic review of the Commissioner and State Board of Education. In such a case "the decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Tp. Bd. of Ed., 89 N.J. Super. 327, 332 (App.Div.1965). An "action

> of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App.Div.1960).
>
> [Id. at 167-68.]

In explaining the decision not to discretionarily admit the children, Ms. DeMarco noted that Policy 5111 “makes clear that you must be residing in you Tenafly home prior to registering your children for school (and) that owning a home in Tenafly and paying taxes on it does not result in the right to enrollment in our schools.” She emphasized the difference between a resident that had been forced to move out of a temporarily uninhabitable residence where they had already been living and “future residents who are renovating a home they have not lived in”. (Exhibit P-11)

Ms. DeMarco also advised Petitioners that she consulted the Board attorney prior to making her decision;

> Kindly note that I did consult with the Board attorney prior to my recent response to you to be sure there were no avenues for enrollment that I was overlooking in my review of your documents. It was his shared interpretation that the highly strict enrollment policy in Tenafly did not support your children’s enrollment at this time based on the information you have shared with us. To assist President Schwarz with your appeal, I share (sic) the attorney’s opinion on this matter with her.
>
> [Exhibit P-12.]

Respondent further argues that if the Board were to make an ad hoc exception to the non-resident student policy, it would “lose integrity” and that it would be “opening the door” to additional non-resident children being enrolled “based on circumstances outside the Board’s control”. The integrity of the policy itself, “is a legitimate, rational basis to deny Petitioners’ request”.

I agree with Respondent. The decision to not enroll was clearly not arbitrary, capricious or unreasonable. The policy itself was very narrowly written, with an expressed position that since December 2004, "the Board generally ceased accepting new nonresident tuition-paying students". Then, it very carefully reviewed the Petitioners' situation, acknowledging that "(w)hile our district policy is firm…we recognize that your particular situation suggests further review". (Exhibit P-10).

It is clear from the correspondence with Ms. DeMarco that the matter was taken seriously, leading to a review not only by her, but by the Board attorney, whose opinion was shared with the Board of Education prior to its final decision to deny enrollment. Even assuming that Petitioners' allegations that there were some technical deficiencies in how the decision and subsequent filing deadlines were communicated are true, there is no basis to even suggest that the District's decision was arbitrary or capricious. Further, while a rational person may disagree with the decision to deny enrollment, that alone is certainly no indication that the decision was unreasonable.

As noted above, the policy was very narrowly written, with three limited exceptions, which themselves are limited by the language contained within the exceptions clauses. None of these exceptions can be said to apply to Petitioners' situation even tangentially (unlike Kinnelon's policy in K.L. and K.L. on behalf of Minor Child M.L., supra, where a five week "move-in window" was included). The decision to deny enrollment by the District was consistent with the policy elucidated in Policy 5111 and, even after considering the detailed factual scenario presented by Petitioners, was not unreasonable.

CONCLUSIONS

Given the totality of the evidence, I **CONCLUDE** that at no time relevant to this action were/are Petitioners domiciled in Tenafly.

I further **CONCLUDE** that in addition to being neither arbitrary nor capricious, the ultimate decision to deny enrollment to children was not an unreasonable exercise of discretion.

Given the above, I therefore further **CONCLUDE** that the children are not currently entitled to a free public school education in the Tenafly Boro School District.

I further **CONCLUDE** that Petitioner's children will continue to be ineligible to receive a free education in the Tenafly Boro School District as long as they remain domiciled in a municipality other than Tenafly, New Jersey.

ORDER

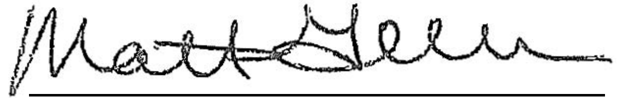
Based on the foregoing, Respondent's determination that petitioner's children re ineligible for a free education in the Tenafly Boro School District is hereby **AFFIRMED**.

It is hereby **ORDERED** that summary decision be **ENTERED** on behalf of respondent and that the Petitioner's appeals are **DISMISSED**.

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.



August 27, 2021	
DATE	**Matthew G. Miller**, ALJ
Date Received at Agency:	August 27, 2021
Date Mailed to Parties:	August 27, 2021

MGM/mm

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

P-1 May 23, 2021 deed to 11 Stanton Road, Tenafly, N.J.

P-2 June 14, 2021 residency appeal petition

P-3 Tenafly sports registrations

P-4 11 Stanton Road utility bills

P-5 Copy of driver's licenses issued March 25, 2021

P-6 11 Stanton Road, Tenafly, N.J. smoke detector and carbon monoxide detector certificate.

P-7 May 11, 2021 e-mail from petitioners to District, re: home renovations

P-8 Undated letter from contractor to District, re: home renovations

P-9 May 6, 2021 e-mail from Petitioners to District, re: Tenafly school enrollment

P-10 May 7, 2021 e-mail from District to Petitioners, re: request for home renovation information

P-11 May 12, 2021 e-mail from District to Petitioners, re: denial of request to enroll

P-12 May 13, 2021 e-mail from District to Petitioners, re: consultation with Board attorney

P-13 May 26, 2021 letter from District to Petitioners, re: confirmation of Board of Education decision to deny enrollment

For respondent:

R-1 Tenafly Board of Education Policy Guide 5111