

New Jersey Commissioner of Education

Decision

C.B., on behalf of minor child, C.B.,

Petitioner,

v.

Board of Education of the City of Elizabeth,
Union County,

Respondent.

Synopsis

Pro se petitioner challenged the determination of the respondent Board that C.B. and her minor child were not domiciled in Elizabeth for the 2019-20 and 2020-21 school years. The Board became aware of inconsistencies in petitioner's residency in November 2019 when petitioner requested that bus service for her minor child be changed to an address in Newark. C.B. has been in an out of district placement for special services at the Developmental Learning Center in New Providence since 2018, and the Board requested tuition reimbursement based upon the cost of C.B.'s out of district placement.

The ALJ found, *inter alia*, that: children aged five to twenty years are entitled to a free public education in the district in which their parent or guardian are domiciled; petitioner in this case failed to provide any documentation that she resided at the Elizabeth address provided to the district; petitioner's testimony was not credible; petitioner did not call family members as witnesses on her behalf, even though she claimed to sign annual leases with her mother on the second floor of the premises she purported to reside in; and evidence from surveillance over a period of four months by the district's residency investigator shows that C.B. never entered the house which petitioner claimed to reside in, but instead waited outside the home for a ride to an address in Newark. The ALJ concluded that the petitioner was not domiciled in Elizabeth during the 2019-20 and 2020-21 school years; accordingly, the respondent Board is entitled to tuition reimbursement in the amount of \$96,972.24 for the cost of C.B.'s education through November 9, 2020, plus \$391.22 per school day for the remainder of the school year.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that petitioner failed to establish that she and her minor child were domiciled in Elizabeth from the 2019-20 school year to the present, and therefore C.B. was not entitled to a free public education in the district's schools during that time. The Commissioner, however, disagreed with the ALJ's calculation of tuition owed to the Board and instead found that the Board's ability to recover tuition is limited pursuant to *N.J.S.A. 18A:38-1(b)*, which does not specify that the assessed tuition be equal to the actual costs incurred by the district for educating the student at issue; rather, it uses the measure of annual per pupil cost, which is based on the district's overall costs and enrollment and is not specific to any individual student. As the Commissioner was unable to discern the per pupil cost from the record, the matter was remanded to the OAL for recalculation 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.

March 8, 2021

New Jersey Commissioner of Education
Decision

C.B., on behalf of C.B.,

Petitioner,

v.

Board of Education of the City of Elizabeth,
Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C. 1:1-18.4*, and the Board's reply thereto.

In this matter, petitioner challenges the Board's determination that she does not reside in the Elizabeth school district. After a hearing on the merits, the Administrative Law Judge (ALJ) found that petitioner was not domiciled in Elizabeth for the 2019-20 and 2020-21 school years. The minor child attends an out of district placement at the Developmental Learning Center (DLC) in New Providence for special services; DLC has charged the Board tuition costs in the amount of \$80,541 for the 2019-2020 school year and \$391.22 per day for the 2020-21 school year. Accordingly, the ALJ found that the Board is entitled to tuition reimbursement from petitioner in the amount of \$96,972.24 for the 2019-20 school year and 42 days of the 2020-21 school year (through November 9, 2020), plus \$391.22 per day for each day that the minor child receives services from the district after November 9, 2020.

In her exceptions, petitioner disagrees with the Initial Decision's factual findings and the conclusion that she does not reside in Elizabeth. She argues she was home when the Board's investigator came to her door but did not answer. She also contends that her electric bill, pictures taken from her home, and statements from her minor child's after-school respite care provider demonstrate that she lives in Elizabeth. She further maintains that the person seen by the investigator picking up the minor child on the steps of her home was a family friend who would take the child to her own house to care for him after school.¹

Upon review, the Commissioner concurs with the ALJ's finding that petitioner failed to sustain her burden of establishing that she and her minor child were domiciled in Elizabeth from the 2019-20 school year to the present. The Commissioner further concurs with the ALJ's conclusion that the minor child was, therefore, not entitled to a free public education in the district during that time. The Commissioner does not find petitioner's exceptions to be persuasive, as she simply expresses her disagreement with the ALJ's decision. The ALJ addressed the evidence submitted by petitioner in detail and explained why it fails to demonstrate that she resides in Elizabeth. The ALJ also found that petitioner was not a credible witness, a finding which cannot be overturned unless it is found to be arbitrary, capricious, unreasonable, or unsupported by sufficient, competent, and credible evidence in the record. *N.J.S.A.* 52:14B-10(c). The Commissioner finds no reason in the record to disturb the ALJ's credibility assessments or the factual findings based thereon.

With respect to the assessment of tuition, the Commissioner disagrees with the ALJ's calculation of tuition owed to the Board, and instead finds that the Board's ability to recover

¹ In reply, the Board argues that petitioner's exceptions should not be considered because they were filed one day late and fail to set forth specific findings of fact and conclusions of law to which exception is taken. The Commissioner will nevertheless consider petitioner's exceptions. *N.J.A.C.* 6A:3-1.16.

tuition from petitioner is limited. *N.J.S.A.* 18A:38-1(b) provides that if a parent loses a residency appeal, the Commissioner shall assess 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.” The statute does not specify that the assessed tuition be equal to the actual costs incurred by the district for educating the student at issue. Instead, it uses the measure of annual per pupil cost, which is based on the district’s overall costs and enrollment and is not specific to any individual student. *See N.J.-B., on behalf of minor child, I.T. v. Board of Education of the Township of Union, Union County*, Commissioner’s Decision No. 112-20, decided April 24, 2020 (finding that tuition reimbursement is limited to 1/180 of the per pupil cost and does not include the assessment of special education and related costs). The Commissioner is unable to discern the annual per pupil cost from the record. The Commissioner, therefore, is constrained to remand this matter for determination of the annual tuition cost and a calculation of tuition that is consistent with *N.J.S.A.* 18A:38-1(b).

Accordingly, this matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 8, 2021
Date of Mailing: March 9, 2021



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO. EDU 17292-19

AGENCY REF. NO. 301-11/19

C.B. o/b/o MINOR CHILD, C.B.,

Petitioners,

v.

**BOARD OF EDUCATION OF THE CITY
OF ELIZABETH, UNION COUNTY,**

Respondents.

C.B., on behalf of minor child C.B., petitioner pro se

Christina M. DiPaola, Esq., for respondent (LaCorte, Bundy, Varady & Kinsella,
attorneys)

Record Closed: November 11, 2020

Decided: December 8, 2020

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner C.B., (petitioner) appeals the residency determination that petitioners do not reside in Elizabeth, and the tuition due associated with it, by the respondent, Board of Education of the Township of Elizabeth, Union County (respondent or BOE).

Petitioner filed a pro se residency appeal with the Department of Education, Bureau of Controversies and Disputes, which transmitted this matter to the Office of Administrative Law (OAL), where it was filed on December 9, 2019 as a contested case, pursuant to N.J.A.C. 6A:3-1 et seq. and N.J.S.A. 52:14B-1 to -15. A hearing was held on November 2, 2020, and the record left open for post hearing submissions until November 11, 2020 at which time the record closed.

FACTUAL DISCUSSION

Testimony

Diana Pinto Gomez

Diana Pinto Gomez (Gomez) is the Director of Special Services for the BOE. As such she has presided over the implementation of 3700 IEPs in the past four years.

The petitioner's son, C.B. is autistic, and as such, has been placed "out of District" since December 2018 at the Developmental Learning Center (DLC) in New Providence. The BOE uses their own transportation to bus children to and from their homes and the DLC.

In September, Ms. Gomez learned of a problem with the bus transportation of C.B. The bus drivers had reported that there was no one accompanying the minor child at the place of home pickup in the morning and home drop off in the afternoon. The bus company decided to suspend services until this condition was corrected.

Ms. Gomez said that on November 12, 2019, the petitioner sent her an email requesting that C.B. be picked up and dropped off at xxxxx Street, Newark, NJ. (Newark address) Ms. Gomez quickly replied to petitioner that C.B. cannot be transported to and from a residence in Newark, only to a residence in Elizabeth. The petitioner in turn sent

another email to Ms. Gomez, stating “This will serve as my notice of an Address Change.” The email further stated that “Circumstances have unfortunately limited my options and I am afraid that, for the time being, the address that I have provided will be my new residing address.” Owing to this information, Ms. Gomez immediately undertook a residency check.

Victor Tropeano

Victor Tropeano (Tropeano) is employed by respondent as a residency inspector within the legal department, a position he has held for three years. Prior to that employment he was an Elizabeth police department detective for 26 years.

On November 12, 2019, just two hours after Ms. Gomez received the second email from the petitioner, Tropeano went to xxxx Street in Elizabeth, (Elizabeth address) the same which had been previously provided to the BOE by the petitioner as her address. He rang the front doorbell which was responded to by a woman’s voice. Tropeano asked if the petitioner and her son C.B. lived at this address. The voice responded that she “could not help” him and refused to come to the door

On November 14, 2019, the BOE sent a Notice of Initial Determination of ineligibility to both the Newark and Elizabeth addresses. The UPS sent to the Newark address came back return to sender, however the UPS delivery to the Elizabeth address was signed for by “C.B.”. Later, the petitioner sent an email to Ms. Gomez and other school officials saying that her 16-year-old son had signed that USP for her but didn’t open it, because he was not an adult of age at least 21. On November 20, petitioner sent another email to Ms. Gomez and other BOE officials saying that petitioner was on active military service but residing in Elizabeth. That same day, when the bus attempted to drop off C.B. at the Elizabeth address no adult was there for pick up and C.B. had to be transported back to the Special Services school until he could be picked up.

On November 22, 2019 Tropeano conducted surveillance of the Elizabeth address beginning approximately at 3 PM. He saw a woman dropped off by a vehicle. The woman sat on the front porch and remained there until C.B. was dropped off by the School bus. The woman and C.B. remained on the porch until picked up by what appeared to be (after a license plate check) an UBER or Lyft vehicle. A tax search revealed that xxx Street, Elizabeth was owned by the petitioner's mother, and C.B.'s grandmother.

On November 26, 2019, Tropeano conducted afternoon surveillance of the Elizabeth address. He observed a woman dropped off by an UBER or Lyft vehicle at 3:20 p.m. At 3:30 p.m., the school bus dropped C.B. off. He remained on the porch with the woman until another UBER/Lyft vehicle picked them up at 3:52 p.m. Significantly, C.B. and the woman never entered what was supposedly C.B.'s home. Tropeano drove to the Newark address and saw the woman and C.B. enter the home at the Newark address.

Tropeano conducted similar surveillances of the Newark address in the afternoons in January and February 2020. Again, the same pattern would occur. In the afternoon, soon after the school bus drop off of C.B., he observed the Uber/Lyft vehicles drop the woman and C.B. off at the Newark address. He also observed the woman being dropped off at the Elizabeth address wait for C.B. to arrive, and then wait for another car to pick them up. On at least one occasion the woman and C.B. remained outside the Elizabeth house for 45 minutes before being picked up. After waiting, another vehicle would bring the two to the Newark address home.

Tassian Winkley

Tassian Winkley (Ms. Winkley) was called to testify by the petitioner. She is a friend of the petitioner. She has lived at the Newark address with her brother and mother for the last 3-4 years. The apartment is leased by all three of them. In addition to being the petitioner's friend, the petitioner's adult brother who lives at the Elizabeth address is Ms. Winkley's boyfriend. She works as a home health aide with shifts of either 9AM to noon or 9:00 a.m. to 5:00 p.m. She provides these health aid services at the homes

belonging to those in need of her care. However, In November 2019 she was between jobs (she works through an agency) and agreed to help provide “services” for C.B., namely she would pick up C.B. at the Elizabeth address and bring him home to her house until petitioner came home from work. (P-5) She received no pay, but the petitioner paid for the transportation of Ms. Winkley from Newark to Elizabeth and for C.B. and Ms. Winkley back to Newark. Ms. Winkley said she would bring C.B. to her house in Newark rather than wait for the petitioner to come home to the Elizabeth house because there are other children at her house C.B. could play with.

As documentary proof that Ms. Winkley herself resides at the Newark address, she provided a letter from a company that provides extended warranties for servicing vehicles. The letter is undated but talks about a price increase effective August 27, 2020. Ms. Winkley did not know why this letter was sent to her as she doesn’t own a vehicle. She said the petitioner did ask her to provide documentary proof of her residency at the Newark address, and this was her proof. She stated she leases an apartment at the Newark address along with her mother and sister. Her name is on the lease and on the utilities. She also has children of her own enrolled in Newark school. She did not provide any proof of the lease, the utilities, or the enrollment to show she resides at the Newark address.

Ms. Winkley did not say why she never entered the Elizabeth address house where C.B. lived, during all these pick-ups. She is aware that in addition to petitioner and C.B., the petitioner’s brother, her boyfriend, lives there, along with C.B.’s mother and C’.B’s 16-year-old brother.. She said she stopped providing these services for C.B. after December because it was too complicated a situation. She explained that as part of taking care of C.B. she had to log onto a computer and report to C.B.’s mother.

The Petitioner

She testified that what precipitated the residency investigation was her problem of getting aftercare for C.B. She had run out of FMLA, and was working in NYC. She did

not provide a specific explanation for the times that no one was present to pick up C.B. at the Elizabeth address, forcing the bus to return C.B. to Special Services. Regarding the arrangement she made in November with Ms. Winkley, it made sense to her to leave C.B. at Ms. Winkley's house in Newark, rather than her house in Elizabeth, until she got home from work, as she had to drive through Newark to get to Elizabeth and could pick C.B. up on the way.

She stated that on the date of the email exchanges when she notified Ms. Gomez of the address change, she was aware that the BOE was concerned that C.B. did not reside in Elizabeth. Nevertheless, she did not expect an Investigator to come to her door that day. She said she was the female voice that responded to Mr. Tropeano when he asked for information through the front door intercom at the Elizabeth house. She said she told him as a response to whether she and/or C.B. lived there that "I don't know how I could help you." She did not identify herself. She refused to open the door. While Mr. Tropeano had identified himself as being an investigator for the BOE, and while she had just had two email exchanges regarding a residency inquiry, she did not accept the man at the door as a BOE agent. She is aware of many people who come to her door saying they are with agencies when they are really not. She said, "I think it was a threat."

When she got the letter of Initial determination of Ineligibility via UPS, which she said her 16 year old son had signed for her at the Elizabeth address, she refused to open it even though she knew it was from the BOE and that there was a residency investigation. She said she "did not want to admit" that she received anything from the BOE.

Eventually she received an email from the BOE attaching the same Notice of Determination of Ineligibility and associated documents that had been sent via UPS to both addresses. The Notice, included a "Statement of Compliance with Compulsory Education Law "My student, C.B. is being denied enrollment in the Elizabeth School District because it has been determined he is not entitled to attend the schools free of charge pursuant to N.J.S.A. 18A:3801. The "Notice of Initial Determination of Ineligibility" (R-2) stated their review indicated the petitioner's "Domicile/Residency not in the district"

and therefore ineligible to attend schools of the Elizabeth Public School District. It further stated that if she did **“not accept these reasons”** you may request **a hearing before the Board of Education,”** (emphasis supplied) by contacting the BOE on or before November 21, 2019. The petitioner testified that by the time she read the email the date was past November 21. She acknowledged, however, receiving many emails and other attempted communication phone calls made by Mr. Tropeano and emails sent by the BOE, including his secretary, and that she responded to none of them.

Petitioner said the reception on her cellphone was weak and that she did not understand why the BOE did not attempt to call her at her office in NYC. She did not, however attempt to explain why she did return any messages left on her cellphone. She admitted she thought the Board would afford her a hearing if she requested it, however she did not want to open the UPS parcel containing the appeal documents because she was afraid to “admit anything” by opening it up. Even after she got the email again with all the appeal forms, but she “refused” to provide any proof of residency to the BOE, “other than my word.” She referred to an email (P-2) she sent the BOE on November 20, 2020 which stated in pertinent part:

My son and I reside in Elizabeth, NJ. **We have occupied and have not relocated** from the premises in which we are currently residing as I consider this to be our home. **I have occupied these premises to which I am referring to, following my return from a two year deployment in Iraq to the year 2013,** when my son [C.B.] was born. I am not currently deployed and the status of my occupancy of the premises where I live in in Elizabeth NJ remains the same **I have Not, Nor have I ever in fact Moved from these premises or Provided Verbal or Written Confirmation Pursuant to a Specified date for which I have given notice would be a date I intend to move.**
[emphasis and capital letters in original]

The email went on to explain that her November 12 “Notice” to the BOE only referred to her “hardship and the limitation on foreseeable options” referred to her “FEAR that I might need to move” when in fact she had no such intention.

Petitioner entered as an exhibit (P-7) photographs that she said showed her son getting on the bus at the Elizabeth address on November 26, 2019, the date of one of Mr. Tropeano's surveillances; however when pointed out to her, she acknowledged that Mr. Tropeano testified he did no surveillance at all in the morning, and referred only to his surveillance in the afternoon.

Petitioner said her brother, age 38, resides at the Elizabeth address, as does her 17-year-old son, and her mother, age 65. She rents the upstairs floor from her mother who owns the two-family house. She signs a lease every year with her mother and did so on January 1, 2019 and on January 1, 2020. She provided a PSEG bill sent to her from "my account@pseg.com" to her Yahoo email address. That account shows a balance owed for the Floor 2 unit at the Elizabeth house of \$3,688.63 which was due on January 15, 2020. It did not show current usage of the utilities for that floor nor how the bill accumulated such a total.

When asked why she did not produce the lease or other documentary proof of her address being the Elizabeth address, petitioner had no reply. When asked why she did not ask her mother, her brother or her 17 year old son to testify as proof of her residency, petitioner said she did not wish to "drag them into this," notwithstanding she knows the BOE is seeking in their counterclaim, approximately \$100,000 a year as reimbursements for these services provided for C.B.

Petitioner also provided a document from Neuropath Behavioral Health that she began using once "services" were provided to her which show they are providing "In Home Respite care for C.B." on January 13, 2020, and January 14, 2020. The employees "Time in/Time Out" on January 13 was 2:31 A.M-8:31 P.M. and on January 14, 2:36 p.m. and 8:07 P.M. This she said "contradicted" Mr. Tropeano's surveillance on those days. Actually, the documents do not contradict his testimony.

FINDINGS OF FACT

In light of the contradictory testimony presented by respondent's witness and petitioner, the resolution of this matter requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I **FIND** Ms. Gomez and Mr. Tropeano to be credible. They were truthful and accurate. They testified clearly and directly, without any a bias against petitioner. I found petitioner and her witness Ms. Winkley to be less credible. First, it appeared that because she was petitioner's friend, she performed these pick-up services gratis, with petitioner paying for the Uber/Lyft rides. However soon after starting she found she was having to log into a computer, to, apparently report to the petitioner, about the pick-ups, which proved too difficult for her. Second while she claimed she stopped picking up J.B. in December, surveillance by Mr. Tropeano in January and February 2020 showed Ms. Winkley as in November and December, again picking C.B. up at the Elizabeth address, waiting for any Lyft/Uber ride. I found it not credible that while she claimed petitioner asked her to bring proof of Ms. Winkley's residence being in Newark, she only thought to produce a piece of "junk" mail about a car she didn't own, rather than, for example her own lease of the

Newark apartment, her utilities bills (which she claimed were in her name) or proof of enrollment of her own kids who attended according to her Newark public schools. I find her testimony in general to be not credible and tainted by bias, by being a friend of the petitioner, the girlfriend of her brother and perhaps an employee for caretaking services for C.B.

Further I did not find it credible that she and C.B. would never knock on the door of the Elizabeth house and seek entry when her boyfriend lives there. Even if her boyfriend was at work and if petitioner's mother was at work, it appears the 17 year old son would have answered the door and let them in, assuming petitioner didn't entrust Ms. Winkley, with a housekey. IAs testified to by Mr. Tropeano, and unchallenged by petitioner, C.B.'s drop off was approximately at 3:15 p.m.

Exhibit P-3 contained a picture of a man holding a UPS parcel. On the same page as the picture preceding it was a Nov 21, 3:49 PM email by petitioner to Ms. Gomez and other school officials which said "Please inform the Gentleman... that I was visited yet again from another person who described themselves as having affiliation with the Elizabeth Board of Education. For some reason he was under the impression that my 6-year-old son was left outside...and that he was checking to make sure everything was ok....it is most certainly something that did not occur nor would it ever".

Yet, it was well documented that the Bus transit employees had a continued problem with no one being at the drop off site at the appointed time and that C.B. had to be transported back to Special Services. They had threatened to discontinue the drop off. This was the problem that had been brought to the petitioner's attention, to which she personally acknowledged as being a problem which she asked to resolve by dropping off C.B. at the Newark address. So, her comment that this never occurred was untruthful or certainly evasive.

Further who took the picture of the gentleman on the porch? The photo was followed by another email again on November 21 by the petitioner to the BOE which

recounted how her then 16-year-old son signed a UPS package a day or two ago at the Elizabeth address. If the son signed the UPS and took the picture from the house, why wouldn't he also be available on all the days of the afternoon surveillance to let his autistic younger brother in the house while he and Ms. Winkley waited for another car? It is undisputed that C.B.'s drop off time was supposed to be 3:15 P.M. And if the petitioner herself was the one who took the picture of the "gentleman" or was there on in Elizabeth on November 21 (her email said "I was visited...") again, why wouldn't she answer the door? There was no evidence that she even spoke to this gentleman that day which is why she had to write to the BOE to ask them to "inform him...that all is well." Her email does not say she answered the door or communicated directly in any way to this gentleman. So, if she was there, and took the picture, what was she hiding from?

In fact, I believe it not credible that the arrangement would be for Ms. Winkley to watch C.B. at her home in Newark rather than C.B.'s own home in Elizabeth, if C.B. really lived there. As noted by petitioner's exhibit of time logs by Neuropath Behavioral Healthcare, they described C.B.'s behavior as either "aggravated" or "very aggravated" with C.B. hitting the caregiver, throwing shoes and cursing. It's unlikely that this child would be better behaved at Ms. Winkley's house in Newark than in his own house among his own family in Elizabeth if that were the case. Ms. Winkley never indicated in any way it was a hardship to do the caregiving at her boyfriend's house and C.B.'s home, and its her profession to do caregiving at other people's homes rather than her own.

None of petitioner's documentary evidence matched or supported her contentions. The JCP&L bill looked like a collection notice for an unpaid bill for many months. It was for nearly \$4,000 and did not show any current use or when the services were incurred. It was not mailed to the Elizabeth address but only emails. This "proof" suggests that it was more likely that petitioner had once lived at the Elizabeth address but had left, possibly because she couldn't (or wouldn't) pay her bills, than proof that she lives there currently.

Similarly, the documents (P-8) from Neuropath Behavioral Health shows a healthcare professional employee providing “In Home Respite care for C.B.” on January 13, 2020, and January 14, 2020. The employee’s “Time in/Time Out” on January 13 was 2:31 a.m.-8:31 p.m. and on January 14, 2:36 p.m. and 8:07 p.m. This, petitioner claimed “contradicted” Mr. Tropeano’s surveillance on those days. However, the documents show only the time in/time out of the employee. They do not state that C.B. was there all that time. As noted, on those days Tropeano followed the car from Elizabeth to Newark. The Uber/Lyft car would get to Newark around 3:45 p.m. It’s entirely consistent that the hours of actual car giving began at that time rather than when the employee clocked in at 2:30 p.m. It would not be unusual for a caregiver to get paid an hour for waiting time. Further it is interesting that again, these documents which were obtained to help her case, were not sent to a street address but again by email. Nowhere does a street address appear on the document, nor does it state at what address the services were performed. Finally, the photos (P-7) taken from what I will presume was the Elizabeth address on November 26, 2019, do not in fact show, as petitioner contended, C.B. getting on or walking toward a bus. None of the pictures show a school bus. One of the four pictures shows two to four people who could be students walking in the same direction; but none of them appear to be even close to the figure of a six-year-old boy or anyone with a six-year-old.

Respondent’s Counterclaim for Reimbursement

The tuition for C.B. who receives special services contracted for by the BOE. for the 2019-2020 school year was \$80,541. The daily rate for C.B.’s tuition for the 2020-2021 school year is \$391.22 per day. 42 school days had elapsed by the close of the record on November 9, 2020 for \$16,431.23. The yearly rate for 2020-2021 is \$70, 419.00 (R-4)

Based on the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. C.B. is a 6-year-old autistic child who was enrolled for Special Services education for the 2019-2020 and continues to attend there despite having been determined to be ineligible to attend for free public education there.
2. Soon after the 2019-2020 school year began, there were multiple incidents reported by the Bus transportation unit of long waits for adult, parent or guardian to appear for pick ups with C.B. This resulted in the child having to be returned by the bus company to the Special Services school and a warning that busing would have to be suspended.
3. As a result of inquiries made by the BOE, the petitioner, C.B.'s mother first asked to have C.B. picked up and dropped off at an address in Newark. When told this was not possible, the petitioner replied that she was notifying the district of her change of address to xxxx Street in Newark, and that this would be the "new residing address."
4. None of the proofs offered by petitioner credibly overcame her own admission that the Newark address was her "new residing address" as she had advised the BOE of in writing on November 12, 2019, but instead re-enforced and supported that C.B. and petitioner, if they ever did live at the Elizabeth address, had moved to the Newark address.

LEGAL ANALYSIS

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

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. ex rel. minor child E.Y. v. Board of Educ. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001).

Where 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 to 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.

In this matter, petitioner provided no documentation that she resided at the Elizabeth Address. There was offered no mail to her sent to that address, although there was a past due bill reproduced from her online account for nearly \$4000 by JCP&L which at best indicated she once lived at that her address. She did not provide a copy of her driver's license with the Elizabeth address, although she does drive a car. C.B., her six year old autistic child, while under surveillance for a period of four months was not seen entering what petitioner claimed was his own house, but rather would wait outside sometimes for up to 45 minutes for another ride to the Newark house.

The petitioner did not act like a credible person who had nothing to hide about her current place of residence. Instead she was deceptive and evasive. If we believe this part of her story at all, the first thing she did when confronted with the BOE's concern that she was not residing at the Elizabeth address, and asked if she lived at the Elizabeth address was to refuse to answer the door to the person who identified himself as being an investigator with the BOE, and further refusing to identify herself and saying "there is nothing I can do to help you." Although petitioner claimed she didn't file for a hearing because it was too late to do so, she had the parcel containing the Notice and all

documentation needed to file for a hearing but “refused” to open it because to her mind it constituted an admission. Besides, even had she wanted to ask for a hearing, she “refused” to provide any proof of her residency to the BOE other than her own word. These are not the actions of one who has nothing to hide about her address.

In this hearing, the petitioner has essentially done the same thing, by just demanding her word alone be believed. She had ample opportunity to present a variety documentary evidence of residency, e.g. the annual leases she said she signs to her mother but chose not to. Similarly, even though acknowledging that the BOE was seeking over \$100,000 in reimbursed tuition from her she chose not to call her 38 year old brother, 65 year old mother or 17 year old son, who supposedly live with her at the Elizabeth address because she “did not want to drag them into this thing.” That is not the behavior of an innocent and credible witness.

I agree with the comments in the post hearing submission of respondent that, in accordance with the test in State v. Hill, 199 NJ. 545 (2009) there is a specific adverse interest to be drawn from failure to call her mother-also her alleged landlord-as her witness, as well as other family members. In particular; 1) her mother as her landlord has a special relationship with her as a party to these proceedings and the petitioner has superior knowledge of the identity of this witness and the testimony the witness might be expected to give (petitioner named her as a person having knowledge of the subject matter of the dispute in answers to interrogatories). 2) The witness was available both practically and physically (she described her mother as 65 and very active working well over 40 hours every week) 3) The testimony of her mother would elucidate relevant and critical fact issues (her mother owned the Elizabeth house and supposedly leased the second floor to her daughter the petitioner for use by her and her two sons) 4) Her mother/landlord’s testimony would appear superior to evidence already utilized in respect of the facts to be proven. Here, the evidence of daily transportation from the Elizabeth address to the Newark address over a period of months was strong evidence that C.B. and petitioner no longer lived at the Elizabeth address if they ever did. Petitioner’s only other witness, Ms. Winkley was vague; she did not communicate an authentic real sense

of being familiar with the Elizabeth address by, e.g. not describing the inside the house.. She was generally not credible and potentially biased, and knew nothing about the lease arrangement between petitioner and her mother. In fact, she didn't even provide competent evidence that she lived at the Newark address. Further, petitioner's documentary evidence was woefully inadequate and tended to prove the opposite of what petitioner said it would prove. Again, it would appear petitioner believes her word must be believed, regardless of credibility. Therefore, her failure to call her mother as a witness without a reasonable explanation leads to the natural inference that her testimony would be unfavorable to petitioner and to her story.

As noted, tuition for C.B. for the 2019-2020 school year was \$80,541. The daily rate for C.B.'s tuition for the 2020-2021 school year is \$391.22 per day. 42 school days had elapsed by the close of the record on November 9, 2020 for \$16,431.23. The yearly rate for 2020-2021 is \$70, 419. (R-4)

The Board asserts that it is entitled to be reimbursed for tuition for the 2019-2020 and 2020-2021 school years for C.B.'s ineligible enrollment. Whereas here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A: 38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioners were not domiciled in the Elizabeth School District for the 2019-2020 and 2020-2021 school years and that respondent is entitled to reimbursement from the petitioner for the costs of tuition in the amount of \$96,972.24 and for \$391.22 per day for every day he continues thereafter to receive services from the school district for the remainder of the 2020-2021 school year.

ORDER

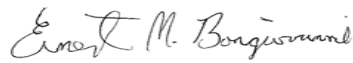
Based on the foregoing, it is hereby **ORDERED** that respondent's determination that petitioner C.B. and her minor child C.B. were not residents or domiciles of Elizabeth New Jersey and were not domiciled within its school district during the 2019-2020 and 2020-2021 school years, is hereby **AFFIRMED**. It is further **ORDERED** that the respondent's counterclaim for tuition is also **GRANTED**. It is further **ORDERED** that respondent be reimbursed tuition from petitioner in the amount of \$96,972.24 for the 2019-2020 and 2020-2021 school year as of November 9, 2020, and to be further reimbursed at the rate of \$391.22 per school day for the remainder of the school year until and unless petitioner transfers C.B. for public or private education to another district or becomes domiciled in Elizabeth.

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, 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.

December 8, 2020



DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency:

December 8, 2020

Date Mailed to Parties:

EB/id

APPENDIX

LIST OF WITNESSES

For Petitioner:

C.B., petitioner
Tassian Winkley

For Respondent:

Diana Pinto Gomez
Vito Tropeano

LIST OF EXHIBITS

For Petitioner:

- P-1 Petitioner's Answers to Interrogatories
- P-2 Comments and summary by petitioner
- P-3 Email of November 21, 2019, indicating petitioner's address in Elizabeth, and associated emails.
- P-4 Not entered as evidence
- P-5 Statement of witness Tassian Winkley, dated August 31, 2020
- P-6 PSEG bill of January 1, 2020
- P-7 Photos of December 11, 2019 alleged to show C.B. getting on bus
- P-8 Letters from Neuropath Behavioral HealthCare

For Respondent:

- R-1 Memo/Summary of File by Vito Tropeano, (undated)
- R-2 Notice of Initial Determination of Ineligibility, dated November 14, 2019
- R-3 Notice of Final Ineligibility dated November 22, 2019

- R-4 Purchase Order between Elizabeth BOE and Morris Union Jointure Commission for services at the Developmental Learning Center, for 2019-2020, dated April 16, 2019.
- R-5 Respondent's Answers to Interrogatories with attached emails of petitioner, C.B.