

#498-08A

AGENCY DKT. NO. 395-12/05; OAL DKT. NO. EDU 1420-06;
STATE BOARD DKT. NO. 39-06;
APPELLATE DIVISION DKT. NO. A-4265-06T2;
COMMISSIONER DKT. NO. 10-7/08A

M.L.P., on behalf of minor child, C.L.P., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF BLOOMFIELD, :
ESSEX COUNTY, :
RESPONDENT. :

Decided by the Commissioner of Education, September 19, 2006
<http://www.nj.gov/education/legal/commissioner/2006/sep/325-06.pdf>

Decided by the State Board of Education, March 7, 2007
<http://www.nj.gov/education/legal/sboe/2007/mar/sb39-06.pdf>

Decided by the Superior Court, Appellate Division, July 8, 2008

For Petitioner-Respondent, No Appearance

For Respondent-Appellant, Katherine A. Gilfillan, Esq.
(Schwartz, Simon, Edelstein, Celso, & Kessler, LLC)

The above-captioned matter came before the Commissioner of Education by way of a July 8, 2008 decision of the Superior Court, Appellate Division, wherein the court remanded the matter – before the court on appeal from a decision of the State Board of Education – to the State Board with the directive that the State Board and Commissioner consider and apply the provisions of *N.J.A.C. 6A:22-3.1(a)1* to the facts on record, since they had not done so in their respective prior decisions. On July 14, 2008, the matter was transferred from the State Board to

the Commissioner pursuant to *P.L. 2008, c. 36*,¹ and on August 20, 2008 – the record of the matter by that time having been received and reviewed by the Commissioner – the parties were afforded an opportunity to submit any further argument they wished the Commissioner to consider prior to determination on remand. On September 12, 2008 a letter memorandum was filed on behalf of the Respondent-Appellant Board of Education by newly appointed Board counsel;² neither a primary submission nor a reply to the Board’s memorandum was received from Petitioner-Respondent M.L.P.

The matter originated with M.L.P.’s December 29, 2005 appeal to the Commissioner of the decision of the Bloomfield Board of Education (Board) disenrolling her child, C.L.P., as a student in the district based upon the Board’s determination that C.L.P. was domiciled with her grandmother in East Orange rather than with M.L.P. (her mother) in Bloomfield. The matter was transmitted to the Office of Administrative Law (OAL) for a hearing, during which M.L.P. – without explanation – failed either to appear or to respond to the Board’s certification; consequently, the Administrative Law Judge (ALJ) concluded that M.L.P. had failed to carry her burden of proving C.L.P.’s entitlement to attend district schools during the 2005-06 school year pursuant to *N.J.S.A. 18A:38-1* and directed that she remit \$8,824.00 in tuition to the Board. The Commissioner (then the Acting Commissioner) accepted the ALJ’s findings of fact – which showed that C.L.P. stayed with her grandmother during the school week and was driven to Bloomfield each day to attend school – but rejected the ALJ’s concomitant conclusion that C.L.P. was not entitled to free public education in the Bloomfield district. Instead, the Commissioner held that the Board’s own facts proved C.L.P. to be domiciled in

¹ The referenced law, enacted on July 7, 2008 and implemented through July 8, 2008 promulgation of rules at *N.J.A.C. 6A:4*, eliminated the role of the State Board of Education in deciding appeals.

² Prior counsel withdrew and was succeeded by the named counsel through the filing of a duly executed Substitution of Attorney on September 3, 2008.

Bloomfield, since her parent, M.L.P. – on whose legal custody there was nothing in the record to cast doubt – was undisputedly domiciled in the district, and the domicile of a minor child follows that of its parent regardless of where the child may actually be living, since a child cannot establish his or her own domicile.³

On appeal to the State Board of Education, the Board argued that the Acting Commissioner erred in holding that the parent’s domicile determines the domicile of a child regardless of where the child actually resides, contending that the Acting Commissioner relied upon non-binding case law⁴ and ignored the clear language of *N.J.A.C. 6A:22-3.1(a)1* which states that “[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.” (*emphasis supplied* by the Board) The Board asserted that the cited regulation is precisely on point, unambiguous and consistent with the underlying statute, as well as entitled to substantial deference as a duly promulgated agency rule; consequently, according to the Board, when applied to the facts of this matter, *N.J.A.C. 6A:22-3.1(a)1* unequivocally dictates that C.L.P. cannot be entitled to attend school in Bloomfield, since the record clearly shows her to have been living with her grandmother in East Orange. Notwithstanding the Board’s argument, the State Board affirmed the decision of the Acting Commissioner without further comment.

In appealing the State Board’s decision to the Appellate Division, the Board reiterated its reliance on *N.J.A.C. 6A:22-3.1(a)1*, arguing that both the Acting Commissioner and

³ Commissioner’s Decision No. 325-06.

⁴ The Acting Commissioner had cited, by way of example, *J.M., on behalf of minor child, S.C. v. Board of Education of the Township of West Orange, Essex County*, OAL Dkt. No. EDU 1061-00, Agency Dkt. No. 347-11/99, Commissioner’s Decision No. 165-01, decided May 24, 2001. According to the Board, this decision is of no import, because it did not address application of *N.J.A.C. 6A:22-3.1(a)1* and was not appealed to the State Board – the ultimate administrative interpreter of education statutes and regulations. (For clarity, the Commissioner notes that – as recognized by the Board in its September 12, 2008 letter memorandum – the referenced decision was, in fact, appealed to the State Board, but the appeal was dismissed as untimely filed. See State Board Decision dated August 1, 2001.)

the State Board had committed reversible legal error by ignoring the cited rule. The Board contended that, in the school law context, a child's domicile cannot be reflexively determined by the domicile of the parent; rather, the Board asserted, the emphasis of the overall statutory and regulatory scheme – which the Commissioner and State Board were obliged to effectuate but did not – is clearly on where the child lives, as it should be because any other result would wreak havoc on school district operations in light of requirements such as transportation of remote students and placement of special education students as close to home as possible. The court did not reach the Board's arguments, electing instead – as a matter of comity – to remand the matter to the administrative agency so that the Commissioner and State Board would have the opportunity to consider and apply the referenced rule in the first instance.

Now before the Commissioner on remand, the Board substantially renews these arguments, adding that: 1) the Commissioner has recently recognized⁵ that custody or guardianship of a child may raise a presumption of domicile, but does not conclusively establish it; and 2) the Acting Commissioner and State Board's ruling that a child may retain the domicile of a parent with whom the child does not actually live invites circumvention of the very law it claims to uphold, permitting one parent to obtain an address in a particular district for purposes of school attendance while the other resides with the family elsewhere, thus encouraging the very ill – contrivance to attend school in a district in which the student and family do not live – addressed by the “affidavit” provision of *N.J.S.A.* 18A:38-1(b).

The Board further asserts that *N.J.A.C.* 6A:22-3.1(a)1 – adopted by the Department of Education to clarify and delineate the term “domicile” in recognition of “the

⁵ *L.T., on behalf of minor child, P.T. v. Board of Education of the Township of Ewing, Mercer County*, Commissioner's Decision No. 94-08, decided February 28, 2008. (Appeal dismissed by State Board of Education for failure to perfect, Decision No. 19-08, decided May 21, 2008.)

realities of today’s family life dynamics” – states on its face that a child must be *living with a* parent or legal guardian whose permanent home is in the district; had the Department meant for a child’s domicile to be automatically determined by where the parent is domiciled, the Board continues, it would have said so instead of adopting rules that consider the actual living arrangement between the child and the custodial individual in recognition of the fact that a child may not be living with the parent who is domiciled in a particular district.

Finally, according to the Board, prior decisional law repeatedly relies on where a child actually lives as determinative of entitlement to attend school; for example, children living with one parent were found domiciled for school purposes despite the other having legal custody,⁶ the other’s domicile in a different district,⁷ or the existence of a joint custody agreement.⁸ The Board posits that, while these cases generally deal with divorce situations, their reasoning properly effectuates the intent of the residency laws and is fully applicable herein, so that the determining factor in this matter must be the domicile of the custodial individual, not the legal relationship between the child and such individual; the Appellate Division, too, the Board adds, has endorsed this “totality of the circumstances” approach, holding in a prior matter⁹ that domicile was determined by where a family spent the majority of its time, *i.e.*, where its

⁶ *R.A.R., on behalf of minor child, R.D.R. v. Board of Education of the Black Horse Pike Regional High School District, Camden County*, Commissioner’s Decision No. 102-08, decided March 5, 2008; *Roxbury Township Board of Education v. West Milford Board of Education and Wallington Board of Education, et al.*, 283 N.J. Super. 505 (App. Div. 1995).

⁷ *A.O.L., on behalf of minor children, A.L. et al. v. Board of Education of the Township of Bloomfield, Essex County*, Commissioner’s Decision No. 128-05, decided April 8, 2005 (Affirmed State Board of Education, Decision No. 37-05, decided May 3, 2006); *W.A., on behalf of minor child, B.A. v. Board of Education of the Borough of South Plainfield, Middlesex County*, Commissioner’s Decision No. 271-01, decided August 27, 2001.

⁸ *Board of Education of the City of Summit, Union County, v. Board of Education of the Township of Millburn, Essex County*, 95 N.J.A.R.2d (EDU) 506. The Board also cites *V.S.-L., on behalf of minor child, Z.M.M v. Board of Education of the City of Garfield, Bergen County*, Commissioner’s Decision No. 281-07, decided July 9, 2007, in which legal custody was shared by the child’s mother and grandmother.

⁹ *D.L. and Z.Y., on behalf of minor children, T.L. and K.L., v. Board of Education of Princeton Regional School District*, 366 N.J. Super. 269 (App. Div. 2004).

members slept and performed their daily activities. Consequently, the Board asserts, the Commissioner must reject her prior reasoning and rule that C.L.P. – who was found to have spent all of her time with her grandmother in East Orange – is not domiciled in Bloomfield.

Upon review, the Commissioner cannot agree with the Board that *N.J.A.C. 6A:22-3.1(a)1* precludes a finding that C.L.P. is domiciled in Bloomfield, notwithstanding that – taken alone – it may appear to do so on its face. Rather, in order to be properly applied to the facts of this matter, the rule must be viewed in light of the totality of statutory, regulatory and decisional law pertinent to determining a child’s domicile for school attendance purposes.

In implementing the constitutional imperative for provision of a thorough and efficient system of free public education, the Legislature has provided, through *N.J.S.A. 18A:38-1(a)*, that the fundamental entitlement of a child to attend school attaches to a particular local school district based on the domicile of the child – which under common law and decades of decisional precedent has consistently been held to be the domicile of the child’s parent, custodian or guardian, since an unemancipated child cannot establish his or her own domicile. *P.B.K., on behalf of minor child, E.Y. v. Board of Education of the Borough of Tenafly*, 242 *N.J. Super.* 419, 427, citing *Summit, supra*, *Clifton Bd. of Educ. v. Sauro*, 96 *N.J. Admin.2d* (EDU) 497, 500 (1996), and *Mansfield Twp. v. State Bd. of Educ.*, 101 *N.J.L.* 474, 478, 129 *A. 765 (Sup.Ct.1925)*.¹⁰

However, in recognition that children do not always live in the district of their legal domicile, the Legislature has additionally provided, through enactment of *N.J.S.A. 18A:38-1(b), (d), (e) and (f)*, that entitlement to attend school shall extend to a limited number of “non-domicile” situations where attendance at school in the district of domicile may

¹⁰ Indeed, the court itself has so recognized in the present matter (Slip Opinion at 4-5).

not be appropriate or practicable. Thus, to the extent that the statutory scheme focuses, as claimed by the Board, on where a child *is actually living*, it is to *expand* the child’s entitlement beyond the district of legal domicile when exceptional circumstances warrant, *not* to remove, replace or preclude exercise of the child’s fundamental right to attend school in such district – a right which must be honored where the protections of the statute’s “exceptional” provisions are not invoked by the child’s parent or guardian. *A.M.S., on behalf of minor child, A.D.S. v. Board of Education of the City of Margate, Atlantic County, and Board of Education of the Township of Jackson, Ocean County*, Commissioner’s Decision No. 349-07, decided September 7, 2007, affirmed State Board of Education, Decision No. 26-07, decided March 19, 2008.

In their 2001 effort to effectuate the statutory scheme and provide clarity and consistency through adoption of implementing regulations – as suggested by the court due to the difficulties inherent in attempting to apply *N.J.S.A. 18A:38-1* in the absence of such rules¹¹ – the Commissioner and State Board were expressly mindful of the law’s larger purpose and beneficial intent, as they were upon the rules’ readoption in 2004. *See*, 33 *N.J. Reg.* 2790(a), 33 *N.J. Reg.* 4331(a), 36 *N.J. Reg.* 2279(a), and 36 *N.J. Reg.* 4448(a); *see also* *N.J.A.C. 6A:22-2.1(b)*, previously *N.J.A.C. 6A:28-2.3(b)*. Specifically, as the Commissioner has previously observed in *A.M.S., supra*, at 9, the regulatory framework proposed by the Commissioner and adopted by the State Board in response to the statute¹² necessarily recognized – because the Legislature chose to attach entitlement to attend school to a particular school district based on domicile or residency in the district – that New Jersey’s children find themselves in a variety of living arrangements, and that a child’s educational entitlement must be

¹¹ *J.A. v. South Orange and Maplewood Bd. of Ed.*, 318 *N.J. Super.* 512 (App. Div. 1999).

¹² Although the 2001 rules were reorganized and recodified in 2004, their substance in regard to the issues raised in this matter remained unaltered.

determined in the way that best serves the child under the circumstances. Thus, the rules provide for school attendance in a district by children living with either or both of their parents in a variety of situations, or with a legal guardian;¹³ students who have reached the age of 18 or are emancipated from the care and custody of a parent or guardian;¹⁴ children living with someone other than a parent or legal guardian due to family/economic hardship or the parent/guardian's absence due to active duty in the National Guard or U.S. reserve forces;¹⁵ children residing temporarily with a parent/guardian in a district other than that of their legal domicile;¹⁶ children placed in a district by the Division of Youth and Family Services;¹⁷ children coming from outside the state and living with a district domiciliary who will be applying for legal guardianship upon expiration of the required six-month "waiting period;"¹⁸ children of homeless families;¹⁹ children placed in the district by court order;²⁰ children who previously lived in the district but were compelled to relocate due to the parent's absence for active duty in the National Guard or U.S. reserve forces;²¹ and children residing on federal property.²²

Thus, in promulgating *N.J.A.C. 6A:22* and its predecessor *N.J.A.C. 6A:28-2*, the Commissioner and State Board sought to provide rules that were comprehensive in their scope of coverage, attempting to address every type of situation with which the Department had

¹³ *N.J.A.C. 6A:22-3.1(a)1* and 4, implementing *N.J.S.A. 18A:38-1(a)* and (d).

¹⁴ *N.J.A.C. 6A:22-3.1(a)2*, implementing *N.J.S.A. 18A:38-1(a)*.

¹⁵ *N.J.A.C. 6A:22-3.2(a)* and (b), implementing *N.J.S.A. 18A:38-1(b)*.

¹⁶ *N.J.A.C. 6A:22-3.2(c)*, implementing *N.J.S.A. 18A:38-1(d)*.

¹⁷ *N.J.A.C. 6A:22-3.2(a)5*, implementing *N.J.S.A. 18A:38-1(e)*.

¹⁸ *N.J.A.C. 6A:22-3.2(a)3*, implementing *N.J.S.A. 18A:38-1(a)*.

¹⁹ *N.J.A.C. 6A:22-3.2(d)*, implementing *N.J.S.A. 18A:38-1(f)*.

²⁰ *N.J.A.C. 6A:22-3.2(e)*, implementing *N.J.S.A. 18A:38-2*.

²¹ *N.J.A.C. 6A:22-3.2(f)*, implementing *N.J.S.A. 18A:38-3b*.

²² *N.J.A.C. 6A:22-3.2(g)*, implementing *N.J.S.A. 18A:38-7.7 et seq.*

previously been confronted in interpreting the applicable statutes.²³ However, as circumstances in *A.M.S.*, *supra*, revealed, difficulties can occasionally arise because the rules, like the statute, are rooted in the presumption that a child will generally seek to attend school in the district where he or she is actually living: Put another way, the entitlement provisions of *N.J.A.C.* 6A:22 assume that students claiming domicile in a district will be living there with at least one parent or with a legal guardian, while those living with a caretaker will likely seek to attend school in the caretaker’s district rather than in the district of legal domicile; they simply do not contemplate situations where a child living with a caretaker elsewhere might seek to attend school in the district of legal domicile, and thus do not expressly provide for that circumstance. Notwithstanding this (clearly inadvertent) omission, however, nothing in the rules or their attendant agency statements²⁴ suggests any intent whatsoever – on the part of either the Commissioner or the State Board – to “redefine” through regulation the traditional concept of domicile as attaching to a child’s parent or legal guardian, or to foreclose attendance in the schools of a district by a student otherwise eligible under the statute and the common law; indeed, such restriction would be both contrary to legislative intent and unwise as a matter of public policy, as well as violative of the rules’ own provision (*N.J.A.C.* 6A:22-2.1(b), previously *N.J.A.C.* 6A:28-2.3(b)) requiring liberal construction so as to effectuate a student’s right to free public education.²⁵ Consequently, the Commissioner cannot accept the Board’s position in this matter, which relies on *N.J.A.C.* 6A:22-3.1(a)1 as its basis for denying C.L.P. – the child of a

²³ See the historical citations to the *New Jersey Register*, *supra*.

²⁴ See *New Jersey Register* citations, *supra*.

²⁵ It is noted in this regard that C.L.P. arguably might not have been eligible to attend school in East Orange even if she sought such attendance, since she may not have satisfied the facial requirements of *N.J.S.A.* 18A:38-1(b) with respect to “affidavit” status. If this were so – a finding which, the Commissioner stresses, it is neither possible nor appropriate to make on the present record – a strictly literal reading of *N.J.A.C.* 6A:22-3.1(a)1, as advocated by the Board, would have the effect of depriving C.L.P. of entitlement to free public education in *any* district, since she is living with neither a parent nor a legal guardian as stated in the rule.

district domiciliary who has not relinquished legal custody notwithstanding the child's residence with her grandmother in East Orange – her statutory right to attend the public schools of Bloomfield.

In so holding, the Commissioner is unpersuaded by the decisional law cited by the Board in support of its contention that where a child actually lives must be the determining factor in establishing the child's domicile, since all but two of the cases referenced arise from either disputes about which of a child's *parents* establishes the child's domicile under the circumstances – since a person can have only one domicile²⁶ – or disputes about whether a child is entitled to attend school as an “affidavit” student pursuant to *N.J.S.A.* 18A:38-1(b),²⁷ and as such are not applicable to claims that a child's domicile for purposes of *N.J.S.A.* 18A:38-1(a) is attached to an individual other than the parent or legal guardian. Further, of the remaining two cases cited, *D.L., supra*, is inapplicable because it pertains to a family in transition between old and new homes in two different districts, while *V.S.-L., supra* – the facts of which are closest to those herein – is distinguishable because the child's mother and grandmother, unlike their counterparts in this matter, shared legal custody of the child.

The Commissioner is likewise unpersuaded by the Board's concerns regarding out-of-district transportation, conflict with special education law, and the potential for parents to live in two different districts so as to circumvent the statute. In the first instance, to the extent a child lives in one district but attends school in another pursuant to *N.J.A.C.* 6A:22-3.1(a), the child's entitlement to transportation is expressly limited to transportation to the residence of the parent or guardian who is domiciled in district (*N.J.A.C.* 6A:22-3.1(a)(1)(ii)(2)); in the second, a rule intended to protect students from unnecessarily distant special education placements carries

²⁶ *R.A.R., supra; W.A., supra; A.O.L., supra; Roxbury, supra; Summit, supra.*

²⁷ *L.T., supra.*

no weight when invoked solely for the purpose of thwarting a student's ability to attend school in the district of his or her fundamental legal entitlement; and in the third, "split" parental living arrangements are sufficiently addressed by the provisions of *N.J.A.C.* 6A:22-3.1(a) so as to ensure to the greatest extent possible that a child is assigned for school purposes the domicile of the parent with whom he or she is most regularly living.

Accordingly, for the reasons expressed in her prior decision and herein, the Commissioner again finds C.L.P. to have been domiciled in the Bloomfield school district during the 2005-06 school year, so that she was entitled to a free public education there and no tuition is owed by M.L.P. to the Bloomfield Board of Education. The Commissioner will further recommend to the State Board of Education, in considering *N.J.A.C.* 6A:22 for readoption upon the chapter's scheduled expiration in 2009, that amendments be made to clarify the issues raised by this matter.

IT IS SO ORDERED.²⁸

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 29, 2008

Date of Mailing: December 30, 2008

²⁸ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.