

S.B., ON BEHALF OF MINOR :
CHILD, R.B., :
 :
 PETITIONER, :
 : COMMISSIONER OF EDUCATION
V. :
 : DECISION
BOARD OF EDUCATION OF THE :
TOWNSHIP OF EWING, :
MERCER COUNTY, :
 :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioner contested respondent's determination that her nephew, R.B., was not domiciled in respondent's district, claiming that R.B. was in fact residing with her in Ewing Township. Respondent asserts that R.B. is domiciled with his mother in Trenton, and filed a counterclaim seeking reimbursement of tuition. Petitioner failed to appear at hearing scheduled for October 5, 2006; however, the case file includes a copy of a fax sent by petitioner to the OAL on October 6, 2006, advising that petitioner had been unable to attend the hearing because of a death in the family and requesting another court date.

The ALJ found that petitioner did not appear at the hearing, and that – as of October 6, 2006, the date of the Initial Decision – no written excuse had been provided by S.B. for her nonappearance at the scheduled hearing on October 5, 2006. Accordingly, the ALJ dismissed the petition, and ordered petitioner to pay tuition in the amount of \$10,015.35 to respondent Board.

The Commissioner notes that the Initial Decision makes no reference to petitioner's October 6, 2006 fax (which was stamped as received on October 10th, the next business day following the transmittal date on the fax), and observes that there is no indication that the ALJ was aware of this document when rendering his decision. The Commissioner therefore remands this matter to the OAL so that the ALJ may take account of petitioner's explanation for her failure to appear – and make the determination required by *N.J.A.C. 1:1-14.4* – before turning to any recommendation on the merits.

<p>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.</p>

OAL DKT. NO. EDU 4412-06
AGENCY DKT. NO. 201-6/06

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner cannot agree with the Administrative Law Judge (ALJ) that petitioner's appeal must be dismissed at this juncture due to her failure to appear at the hearing scheduled for October 5, 2006, and that tuition may be concomitantly assessed based upon the *ex parte* proofs offered by the Board.

OAL rules provide that in the event a party does not appear at a scheduled hearing, the ALJ shall hold the matter for one day to allow for receipt of a written explanation of nonappearance; after according the other party(ies) an opportunity to respond to any explanation filed, the ALJ shall then either reschedule the hearing with such conditions as are deemed appropriate, or refuse to do so because the nonappearing party was found to have intentionally attempted to cause delay. Where the hearing is not rescheduled, an Initial Decision on the merits may be entered based on *ex parte* proofs

from the appearing party, provided that such decision either memorializes the nonappearing party's failure to file an explanation or sets forth the basis for the ALJ's conclusion that the nonappearance was an intentional attempt to cause delay. *N.J.A.C. 1:1-14.4*

In the instant matter, the Initial Decision – issued on October 6, 2006 based upon a record closed the same day as the scheduled hearing (October 5) – states that no written explanation had been received from petitioner “to date” (at 2). However, the record forwarded to the Commissioner includes a fax from petitioner stating, in full, that “per your conversation with [me,] we had a death in our family and requested for another court date because the service was on Thursday [October 5]. Thank you very much for your understanding.” The document’s transmittal registry shows it to have been faxed on October 6, 2006 at 4:19 p.m., although OAL did not stamp it as received until the morning of the next business day, October 10, 2006 (Monday, October 9 being a State holiday). The Initial Decision makes no mention of this document, nor is there any indication that the ALJ was aware of it when rendering his decision.¹

Consequently, the Commissioner finds it necessary to remand this matter to the OAL so that the ALJ may take account of petitioner’s explanation and make the determination required by *N.J.A.C. 1:1-14.4* before turning to any recommendation on the merits. The Commissioner stresses that, in so holding, she makes no inference as to what the result of such determination should be; rather, she simply recognizes that this matter cannot be fairly decided in its absence.

¹ It is not possible to tell from the document – a single page without identification of intended recipient(s) – whether petitioner also faxed, or otherwise provided, a copy to the Board. *N.J.A.C. 1:1-14.4(b)*

Accordingly, for the reasons expressed herein, this matter is remanded to the OAL for further proceedings consistent with applicable rule.

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: November 2, 2006

Date of Mailing: November 3, 2006

² This decision may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*