

D.B.R., on behalf of minor child, N.R.L., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF MORRIS, MORRIS :
COUNTY, :
RESPONDENT. :

SYNOPSIS

Petitioner challenged the Board's determination that her granddaughter, N.R.L., was not entitled to a free public education in the Morris Township Schools, claiming entitlement pursuant to *N.J.S.A. 18A:38-1(b)1*. The Board answered that the parents of N.R.L. do not reside in the District, nor does any legal guardian, and that no family or economic hardship has been shown. The Board counterclaimed for tuition against petitioner for the period of time that N.R.L. attended Morris Township Schools from October 2004 onward.

The ALJ found that the only factual basis presented in support of the application to permit N.R.L.'s attendance in the District's schools as an affidavit student was that N.R.L. wanted to move back to the District and wanted to live with her grandmother, and that such reasons do not establish that her parents are not capable of providing care for her due to a family or economic hardship. The ALJ concluded that there is a no genuine issue of material fact in this case, and that the District is entitled to Summary Decision as a matter of law; the petitioner's appeal is dismissed and the petitioner is ordered to pay the District the sum of \$11,778.38 in tuition for the 2004-2005 school year.

Upon careful and independent review of the Initial Decision and the record in this matter, the Commissioner determines to adopt the decision of the OAL as the Final Decision. In so doing, the Commissioner finds that counsel for petitioner submitted exceptions that were both untimely filed and based on revised answers to interrogatories that cannot be submitted, incorporated, or referred to within exceptions. Therefore, the petitioner's exceptions and the Board's reply thereto were not considered in making the final determination in this case. The Commissioner dismisses the petition, and orders the petitioner to pay the Board \$11,778.38 for the 163 days of N.R.L.'s ineligible attendance during the 2004-2005 school year.

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.

OAL DKT. NO. EDU 12060-04
AGENCY DKT. NO. 364-10/04

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On July 8, 2005, the Initial Decision of the Office of Administrative Law (OAL) was mailed to the parties. Pursuant to *N.J.A.C.* 1:1-18.4, exceptions in this matter were, therefore, due on July 21, 2005. On July 27, 2005, the Morris Township Board of Education (Board) filed a reply to petitioner's exceptions, noting that it was unclear as to whether the submission it received from petitioner constituted her exceptions¹ and stating that:

We received the following from Mr. Jensen (sic) on July 21, 2005: (1) a July 21 letter addressed to John G. Geppert, Jr. of this office indicating "I have forwarded to the Commissioner exceptions to the Office of Administrative Law Decision dated July 8, 2005," (2) a July 18 letter containing a substitution of attorney, (3) revised discovery responses dated July 21, 2005 and (4) a July 21 letter to the Honorable Jesse H. Strauss, cc: to John G. Geppert, Jr., Esq. and D.B.R. We did not receive any correspondence or exceptions addressed to the Commissioner of Education.

When Mr. Jensen's July 21 submission to the Commissioner (referenced above) had not been received by July 28, a telephone call was placed to his office to ascertain what had happened to the copy of "exceptions" which Mr. Jensen had discussed in his letter to the Board,

¹ The Commissioner notes that petitioner was *pro se* when this matter was considered at the OAL.

and to arrange for the missing submission to be immediately faxed to the Bureau of Controversies and Disputes for the Commissioner's consideration. Mr. Jensen's secretary indicated that he was on vacation until August 1, 2005 and that she was unable to fax anything with respect to the instant matter because the file was empty. A message was left for Mr. Jensen to immediately fax whatever submission was sent to the Board to the Bureau of Controversies and Disputes upon his return from his vacation. When nothing was received, the Director of the Bureau of Controversies and Disputes faxed a letter, dated August 4, 2005, to Mr. Jensen again requesting that he fax whatever submission was sent to the Board with respect to this case, followed with a hard copy by mail, within five days of receipt of the faxed August 4 letter. Additionally, Mr. Jensen was advised that:

In that the time for the filing of exceptions has passed, you must also provide an explanation as to why the Commissioner did not receive your exceptions, along with proof that your submission was mailed and/or delivered for the Commissioner's receipt within the 13 days specified for receipt of exceptions.

Later that same day, August 4, the Bureau of Controversies and Disputes received from Mr. Jensen, by Federal Express, dated August 3, 2005: 1) an August 3, 2005 letter addressed to the Commissioner indicating that he was representing petitioner in this matter; 2) a copy of a letter of exceptions to Judge Strauss, dated July 21, 2005; and 3) a revised set of answers to interrogatories. On August 11, 2005, Mr. Jensen responded to the August 4 communication which requested the submission of proof that his submission was mailed and/or delivered for the Commissioner's receipt with the 13 days specified for receipt of exceptions, wherein he stated, in pertinent part:

I hereby certify that our exceptions were filed within thirteen days, however, they were inadvertently forwarded to Judge Strauss instead of the Commissioner of Education. I now understand that this was the incorrect procedure and I apologize

for this oversight. On August 3, 2005 I did in fact Federal Express the original letter dated July 21, 2005 along with all attachments to the Commissioner's office.
(Jensen Letter, dated August 8, 2005)

Upon consideration of Mr. Jensen's explanation, the Commissioner has determined that petitioner's exceptions were not timely filed and, thus, will not be considered. In so determining, the Commissioner points out that the instructions for the filing of exceptions are *clearly* set forth on the last page (page 13) of the Initial Decision in this matter:

Within thirteen (13) 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. (emphasis in text)

The Commissioner also points out that this is not a case where a clerical error occurred and the exceptions were simply placed in an incorrect envelope. By counsel's own admission, petitioner's exceptions were addressed and directed to the Administrative Law Judge (ALJ) and were not filed with the Commissioner until thirteen days after the due date. Moreover, even assuming, *arguendo*, that the exceptions were deemed timely filed, they would not be considered, in that a review of the two-page exception letter reveals that petitioner's exceptions are entirely based upon the revised answers to interrogatories submitted with the exceptions. Pursuant to *N.J.A.C. 1:1-18.4(c)*, "[e]vidence not presented at the hearing² shall not be submitted as part of an exception, nor shall it be incorporated or referred to within

² *N.J.A.C. 1:1-2.1* defines "hearing" as "a proceeding conducted by a judge for the purpose of determining disputed issues of fact, law or disposition" and "plenary hearing" as "a complete and full proceeding conducted before a judge, providing the parties with discovery, the opportunity to present evidence, to give sworn testimony, to cross-examine witness and to make arguments." In this matter, the parties were provided a "hearing" in that the ALJ provided a full opportunity to be heard through the submission of legal briefs and certifications and determined to decide this matter on a summary basis.

exceptions.” Accordingly, for the reasons set forth above, the Commissioner has not considered petitioner’s exceptions or the Board’s reply thereto in making his determination herein.

Upon a careful and independent review of the Initial Decision of the OAL and the record in this matter, therefore, the Commissioner concurs with the ALJ’s conclusion to grant the Board’s motion for summary decision in that there are no material facts in dispute and the Board is entitled to prevail as a matter of law. See *N.J.A.C. 1:1-12.5 (b)* and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121 (App. Div. 1995) (*citing, Brill, supra*). Moreover, the Commissioner finds that petitioner has failed to establish that N.R.L.’s parents are not capable of providing care for her due to a family or economic hardship within the meaning of *N.J.S.A. 18A:38-1(b)1* so as to entitle N.R.L. to a free public education as an affidavit student in the Morris Township School District. The Commissioner further agrees with the grant of the Board’s counterclaim for tuition in the amount of \$11,778.38 for the 163 days of N.R.L.’s ineligible school attendance in the Morris Township School District during the 2004-2005 school year.

Accordingly, the Initial Decision of the ALJ granting summary decision to the Board is adopted for the reasons expressed therein.

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 18, 2005

Date of Mailing: August 18, 2005

³ This decision, as the Commissioner’s final determination, 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.*