

New Jersey Commissioner of Education
Final Decision

T.C., on behalf of minor child, P.S.,

Petitioner,

v.

Board of Education of the Monmouth Regional
High School District, Monmouth County,

Respondent.

Synopsis

Pro se petitioner filed an appeal in April 2019 seeking emergent relief on behalf of her son, P.S., who was expelled from Monmouth Regional High School (MRHS) and placed on home instruction following an incident in which P.S. allegedly threatened a teacher during class in March 2019. Petitioner contested the Board's action and sought an order to return her son to the classroom to complete his classes for the 2018-2019 school year. Emergent relief was denied in May 2019, and the underlying petition appealing the Board's disciplinary action remained pending at the OAL.

The ALJ found, *inter alia*, that: subsequent to the denial of emergent relief, a prehearing telephone conference in this matter was scheduled for June 26, 2019; petitioner was provided with appropriate notice, but failed to answer her phone to participate in the scheduled call; the Board then filed a motion to dismiss for failure to appear at the prehearing conference; petitioner emailed the Board and the OAL after the filing of the motion to dismiss to say that she did not receive the phone call from OAL to initiate the prehearing conference on June 26, 2019; subsequent efforts to initiate telephone conferences to address the status of the pending case failed, as petitioner never answered her phone; petitioner made no further filing in opposition to the Board's motion to dismiss. The ALJ concluded that petitioner has been dilatory in prosecuting her appeal, effectively abandoning the prosecution of her petition. Accordingly, the Board's motion to dismiss was granted and the file was returned to the Department of Education.

Upon comprehensive review of the record, and for the reasons stated in the Initial Decision, the Commissioner concurred with the ALJ's determination that the petition of appeal should be dismissed for failure to appear and/or prosecute. Accordingly, the Initial Decision was adopted as the final decision in this matter and 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.

September 4, 2019

New Jersey Commissioner of Education
Final Decision

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Petitioner,

v.

Board of Education of the Monmouth Regional
High School District, Monmouth County,
Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that the petition of appeal should be dismissed for failure to appear and/or prosecute. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.¹

COMMISSIONER OF EDUCATION

Date of Decision: September 4, 2019
Date of Mailing: September 6, 2019

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING RESPONDENT'S

MOTION TO DISMISS

OAL DKT. NO. EDU 05628-19

AGENCY DKT. NO. 82-4/19

**T.C. ON BEHALF OF
MINOR CHILD P.S.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
MONMOUTH REGIONAL HIGH SCHOOL
DISTRICT, MONMOUTH COUNTY,**

Respondent.

T.C., petitioner, pro se

Samantha Dev, Esq., for respondent (Capehart Scatchard, attorneys)

Record Closed: July 8, 2019

Decided: July 30, 2019

BEFORE **DAVID M. FRITCH, ALJ**:

STATEMENT OF THE CASE

The petitioner, T.C., initiated the present action by filing a petition seeking emergent relief on behalf of her son, P.S., who was a student at Monmouth Regional

High School (MRHS). MRHS alleged that P.S. verbally threatened a teacher during class on March 21, 2019. Following an expulsion hearing before the MRHS Board (Board) on April 2, 2019, P.S. was expelled from MRHS and placed on home instruction pending placement at the Class Academy school beginning in the fall of 2019. On April 26, 2019, the petitioner appealed the Board's action and filed for emergent relief, seeking an order immediately returning P.S. to MRHS for the remainder of the school year to complete his classes.² The motion was transmitted to the Office of Administrative Law (OAL), where it was heard on April 30, 2019. The emergent relief motion was denied in an order dated May 1, 2019.

Following the denial of emergent relief to allow P.S. to return to MRHS pending the appeal of MRHS' disciplinary action, the underlying petition to appeal MRHS' disciplinary action remained pending before the OAL. The matter was scheduled for a telephone prehearing conference and, on June 18, 2019, the parties were given notice of a telephone prehearing conference on the matter to be held on June 26, 2019, at 3:30 p.m. The petitioner failed to answer her phone to participate in the scheduled prehearing conference call, and on June 28, 2019, the respondent filed the present motion to dismiss the petitioner's petition for her failure to appear on the prehearing conference call pursuant to N.J.A.C. 1:1-14.4. Later that day, the petitioner responded via email to the respondent and OAL that, while she was aware of and available for the scheduled telephone conference, she did not receive the phone call from OAL to initiate the conference call on June 26, 2019. The petitioner was unresponsive to subsequent efforts by the OAL on July 3, 2019, and July 8, 2019, to initiate telephone conferences to discuss the status of the pending case and made no further filing in opposition to the respondent's present motion.

² As found in the previous hearing on the petitioner's motion for emergent relief, the Board recommended that P.S. be transferred to the CLASS Academy, an alternative high school within the District, beginning in the fall of 2019. At the time of the hearing on the emergent motion in April 2019, P.S. was a junior in high school, but had only completed 25 of the 120 credits required to graduate. MRHS does not have a credit recovery program that would allow P.S. to complete these credits in time for him to graduate next year. CLASS Academy offers a credit recovery program that would allow P.S. to make up the credits he needs to graduate high school next year. Although P.S. and his mother indicated at the April 2019, hearing that they were willing to try CLASS Academy starting in the fall, they still wanted P.S. returned to MRHS to finish out his classes in the current school year. The current school year at MRHS ended on June 17, 2019.

PROCEDURAL HISTORY

On April 26, 2019, the New Jersey Department of Education received the underlying petition of appeal and motion for emergent relief. The matter was transmitted to the Office of Administrative Law, where it was filed on April 26, 2019. N.J.S.A. 52:14F-5(e), (f), and (g) and N.J.A.C. 1:6A-1 through 18.5. Oral argument on the motion for emergent relief was held on April 30, 2019, and the motion was denied in an order dated May 1, 2019. On June 18, 2019, the parties were given notice that a prehearing telephone conference on the underlying petition to appeal the school's disciplinary action was scheduled for June 26, 2019, at 3:30 p.m. The petitioner did not answer her telephone when called by OAL staff to participate in the scheduled telephone conference. On June 28, 2019, the respondent filed the present motion to dismiss the petitioner's petition pursuant to N.J.A.C. 1:1-14.4. Pursuant to N.J.A.C. 1:1-12.2, the record on the motion remained open until July 8, 2019, to permit the petitioner to file and serve responsive papers to the respondent's motion. The petitioner responded to the respondent's filing with an email communication directed to the respondent and OAL staff on June 28, 2019, but made no further filing in opposition to the respondent's motion. OAL staff attempted to reach the petitioner via telephone to set up a conference call with the parties on July 3, 2019. The petitioner did not answer her phone and did not respond to a voice mail message left for her by OAL staff seeking a return telephone call. The petitioner was also unresponsive to voice mail left for her by OAL staff on July 8, 2019, seeking to set up a conference call to discuss the status of the pending matter. As neither party requested oral argument and no other responsive papers were received from the petitioner, the record on the motion closed July 8, 2019.

FACTUAL DISCUSSION

A summary of the pertinent facts is undisputed and largely procedural, and I **FIND** the following **FACTS**:

1. The petitioner's motion for emergent relief was denied on May 1, 2019. Following denial of her emergent relief motion, both parties to this matter were contacted by OAL staff via email on May 21, 2019, seeking availability for a prehearing conference call on the petitioner's underlying petition. (Resp. Br. at Ex. A.)
2. On May 21, 2019, counsel for the respondent replied, via email, providing dates and times for their availability for a prehearing conference call. As late as June 18, 2019, however, the petitioner had not responded to provide her availability for a prehearing conference call. (Id.)
3. OAL staff followed up via telephone with the petitioner and secured her verbal confirmation of availability for a telephone call on June 26, 2019, at 3:30 p.m.
4. On June 18, 2019, the parties were notified by OAL staff, via email, of a telephone status conference to be held on June 26, 2019, at 3:30 p.m. (Id. at Ex. B.) The parties were informed that the OAL would initiate the conference call. (Id.)
5. On June 18, 2019, at 3:30 p.m., OAL staff called the parties to initiate the scheduled conference call. Respondent's counsel was reached via phone and waited on the call, however, despite numerous calls made to the petitioner's phone number, the petitioner did not answer the phone.
6. Because the petitioner did not answer the phone to participate in the call, the scheduled conference call could not take place.
7. Consistent with the requirements of N.J.A.C. 1:1-14.4, no action was taken on the matter following the petitioner's failure to appear on the June 26, 2019, status conference call. The petitioner did not attempt to contact the OAL staff or respondent's counsel to inquire if the scheduled conference call was proceeding on the designated date and time, and no communication was received by the

OAL from the petitioner in the twenty-four hours following the scheduled call to explain her non-appearance on the scheduled telephone call.

8. On June 28, 2019, at 1:04 p.m., two days after the petitioner's failure to appear on the scheduled conference call, the respondent filed the present motion, transmitting it via email to the OAL with a copy to the petitioner.
9. On June 28, 2019, at 1:45 p.m., the petitioner responded to the email from respondent's counsel transmitting the present motion to dismiss, relaying the following in an email to respondent's counsel and OAL staff:

To whom it may concern:

I waited by the phone from 3:00 pm till 3:45pm. No call came thru. It is not my fault.

That I did not received [sic] phone call. Don't know what happened under these circumstances.

The call did not come thru for some reasons as I mentioned I waited for phone call from the Court.

It's a phone system – they don't always work properly I guess.

For the most part, I don't need attorneys speaking on behalf of me and quoting – I did a nonappearance.

It's Friday and I will not be in the office till Monday. I have no idea why the call did not come thru as I have arranged the conference with your assistance [sic] on the phone so it is my belief that I never got the call.

I don't think you people understand The educational system hurt my son. If you don't want him in the school[.]

What's the argument about. I don't want this to get nasty because I am still disgusted by this whole thing.

Sincerely,

[T.C.]³

³ The petitioner in this matter is proceeding pro se, and it is unclear from the content of this email if her communications to the respondent and OAL on June 28, 2019, was intended to be a filing in opposition to the respondent's motion to dismiss or, in the absence of any other filing by the petitioner, the respondent's current motion is unopposed. For purposes of making a complete record, and in the absence of any further filing or communication from the petitioner, this tribunal shall regard this email as the petitioner's responsive filing to the respondent's motion and address the respondent's present motion on the merits.

10. On July 3, 2019, OAL staff attempted to contact the petitioner via telephone to set up a conference call with the parties to discuss the matter and to address any confusion the petitioner may have regarding the dismissal of her motion for emergent relief and proceedings on her underlying appeal of MRHS' disciplinary action against her son. The petitioner did not answer the phone and did not respond to a voicemail left for her by OAL staff asking her to contact the OAL regarding her case by the close of business on July 3, 2019.
11. On July 8, 2019, OAL staff again attempted to contact the petitioner via telephone to set up a conference call with the parties to discuss the status of the pending matter. The petitioner did not answer the phone and did not respond to a message left on her voicemail by OAL staff seeking her return telephone call by close of business on July 8, 2019.

LEGAL DISCUSSION

The respondent's motion was filed seeking dismissal of the petitioner's petition pursuant to N.J.A.C. 1:1-14.4. Under N.J.A.C. 1:1-14.4:

- (a) If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).
- (b) If the nonappearing party submits an explanation in writing, a copy must be served on all other parties and the other parties shall be given an opportunity to respond.
- (c) If the judge receives an explanation:
 1. If the judge concludes that there was good cause for the failure to appear, the judge shall reschedule the matter for hearing; or
 2. If the judge concludes that there was no good cause for the failure to appear, the judge may refuse to reschedule the matter and shall issue an initial decision explaining the basis for that conclusion, or may

reschedule the matter and, at his or her discretion, order any of the following:

- i. The payment by the delinquent representative or party of costs in such amount as the judge shall fix, to the State of New Jersey or the aggrieved person;
- ii. The payment by the delinquent representative or party of reasonable expenses, including attorney's fees, to an aggrieved representative or party; or
- iii. Such other case-related action as the judge deems appropriate.

(d) If the appearing party requires an initial decision on the merits, the party shall ask the judge for permission to present ex parte proofs. If no explanation for the failure to appear is received, and the circumstances require a decision on the merits, the judge may enter an initial decision on the merits based on the ex parte proofs, provided the failure to appear is memorialized in the decision.

Based upon the facts as detailed herein, I **CONCLUDE** that the petitioner was provided with appropriate notice of a scheduled proceeding, namely a telephone conference call which was to be held on June 26, 2019, at 3:30 p.m. The petitioner was provided written notice of this scheduled proceeding via email on June 18, 2019, (Resp. Br. at Ex. B) and the petitioner concedes in her email communications with the OAL that she was aware of the scheduled call and reported that she was waiting by the phone at the scheduled date and time for a call to initiate the scheduled conference. Despite receiving appropriate notice, neither the petitioner, nor her representative appeared on the scheduled conference call by answering any of the multiple phone calls placed to her by the OAL staff in an effort to participate in the scheduled conference call at the pre-determined date and time. As the petitioner herself conceded in her email communications to the respondent and OAL staff following the scheduled conference call, she "did a nonappearance." The petitioner has further been unresponsive to subsequent efforts by OAL staff to communicate with her regarding her pending matter on July 3, 2019, and July 8, 2019.

Although the OAL received email communications from the petitioner on June 28, 2019, regarding her failure to appear on the scheduled conference call on June 26,

2019, the OAL did not receive “an explanation for the nonappearance within one day” of the petitioner’s non-appearance within the meaning of N.J.A.C. 1:1-14.4(a). Having not received a explanation from the petitioner to explain her non-appearance on the June 26, 2019, conference call within a day of her non-appearance on the scheduled call, N.J.A.C. 1:1-14.4 directs that this tribunal “shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).” As the respondent has not requested a decision on the merits of the matter be issued ex parte, no further proceedings pursuant to N.J.A.C. 1:1-14.4(d) are necessary. This tribunal, therefore, is left only with the mandate that the matter “shall” be returned to the transmitting agency for appropriate disposition. N.J.A.C. 1:1-14.4(a).

The use of the term “shall” in N.J.A.C. 1:1-14.4(a) is generally construed as mandatory as opposed to the statutory use of the term “may” which is permissive or directory. Franklin Estates, Inc. v. Edison, 142 N.J.Super. 179, 184 (App.Div. 1976). I **CONCLUDE** that the petitioner has been dilatory in prosecuting her appeal, effectively abandoning the prosecution of her petition, has been unresponsive to communications from the OAL regarding her pending matter, and failed to present good cause in a timely manner as to why her failure to appear for a scheduled conference should be excused pursuant to the provisions of N.J.A.C. 1:1-14.4(c). A plain reading of N.J.A.C. 1:1-14.4(a), therefore, requires that the matter now be returned to the transmitting agency for appropriate disposition. See also N.J.A.C. 1:1-3.3(b).

ORDER

Based on the foregoing, the respondent’s motion to dismiss the petition is **GRANTED** and I **ORDER** that the clerk return the case to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

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.

July 30, 2019

DATE



DAVID M. FRITCH, ALJ

Date Received at Agency:

Date Mailed to Parties:

/dw