

ROBERT & JENNIFER N.,

Appellants

v.

CALVERT COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 06-21

OPINION

This is an appeal by Robert and Jennifer N., on my behalf of their daughter, L.N., contesting the decision of the Calvert County Board of Education (“local board”) denying L.N. admission to the Honors Program. The local board has filed a Motion to Dismiss or for Summary Affirmance. The Appellants have filed a Response to that Motion.

FACTUAL BACKGROUND

At the beginning of the 2005 - 2006 school year, L.N. was a 4th grade student at Mount Harmony Elementary School in Calvert County. Each elementary school in Calvert County Public School System (“CCPS”) conducts an Honors Program for students in grades 4 and 5. (Motion, Ex.1). Through the Honors Program, special reading/writing and math programs are provided to approximately 25% of the students in grades 4 and 5. (Motion, Ex. 1). To select students for the Honors Program, each school used a standard form to assess a student’s eligibility for the program. (Motion, Ex. 1).

The criteria for eligibility are:

- Ability Index on individual psychological results
- MSA Total Reading score
- MSA Total Math score
- Average of former math assessments (3rd grade)
- STAR Reading Assessment Total score
- Math and Reading grades
- Recommendation
- Work Ethics
- Behavioral Factors

The Appellants argue that L.N. is a gifted and talented student. Her IQ is in the 92nd percentile. Her verbal comprehension is in the 99th percentile. (Appeal at 2; Ex. 1). They assert that the Honors Program is not a gifted and talented program and the CCPS does not operate a gifted and talented program.

L.N. was assessed for the Honors Program, but was not in the top 25% in her school. The Superintendent explained why in his letter to the Appellants:

A review of these criteria reveals that [L.N.'s] grades in reading/language arts and mathematics as well as teacher recommendations were not at a level the staff thought commensurate with an Honors student. [L.N.] received three "outstandings" in reading and language arts out of a possible eight grades and zero "outstandings" in mathematics out of four total grades. Additionally, her third grade teacher reported that her work habits, study skills and quality of work were in the satisfactory range.

(Motion, Ex. 5). The Superintendent supported the school-level decision denying L.N. eligibility for the Honors Program.

The Appellants thereafter appealed the Superintendent's decision to the local board which held oral argument on the matter on January 12, 2006. On January 19, 2006, the local board issued a decision affirming the Superintendent's decision.

On January 26, 2006, the Appellants withdrew L.N. from the Calvert County Public Schools and enrolled her in the Anne Arundel County School System. (Response at 2).

STANDARD OF REVIEW

This case involves a decision of a local board involving local policy and a controversy and dispute concerning the rules and regulations of the local board. In these types of cases, the decision of the local board is considered prima facie correct. The State Board may not substitute its judgement for that of the local board unless the decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.05(A); *Antila v. Montgomery County Board of Education*, MSBE Opinion No. 06-01 (Jan. 25, 2006).

ANALYSIS

Mootness

Initially, the local board asserts that this case is moot because L.N. has been withdrawn from the Calvert County Public Schools. Therefore, the local board argues, there is no existing controversy between the parties and no effective remedy to provide. The local board seeks dismissal of this appeal outright.

The Appellants contend that a controversy continues to exist because the family resides in Calvert County, and they wish to re-enroll L.N. when the school system identifies L.N. as gifted and talented and provides her with gifted and talented services.

Given the fact that the Appellants want to send L.N. to CCPS and wants their daughter to receive some type of gifted and talented services at CCPS, we find that a controversy exists between the parties. Therefore, this case is not moot.

Due Process Rights

The Appellants claim that the local board's decision was illegal because it violated L.N.'s due process rights. They contend first that L.N. was entitled to an evidentiary hearing because she has a constitutionally protected liberty or property interest and because the Superintendent's decision was arbitrary. (Response at page 4).

The CCPS Rules of Procedure for Appeals and Hearings state that:

On appeals that are subject to Code §4-205(c)(3), the Board may consider the appeal based solely upon the documents and arguments submitted by the parties in writing, without holding an evidentiary hearing or oral argument, unless:

- (1) the appeal involves a constitutionally protected liberty or property interest,
- (2) the Appellant's written submission to the Board sets forth specific factual allegations of unlawful discrimination or arbitrariness, or
- (3) the Board, in its discretion, determines that an evidentiary hearing or oral argument is appropriate.

(Procedure for Appeals and Hearings, B3(f)).

Contrary to the Appellants' contention, this appeal does not involve a constitutionally protected interest. Specifically, although a student's right to an education is constitutionally protected - *see* MD Constitution Article 8; *Hornbeck v. Somerset County*, 295 Md 597 (1983) - this Board has consistently held that there is no constitutionally protected or legal right to participate in a particular school program. *See Marshall v. Board of Education of Howard County*, 7 Op. MSBE 596 (1997) (no entitlement to attend four-year communications program offered at Mount Hebron); *Slater v. Board of Education of Montgomery County*, 6 Op. MSBE 365 (1992) (denial of transfer to school alleged to better serve student's abilities and welfare); *Williams v. Board of Education of Montgomery County*, 5 Op. MSBE 507 (1990) (denial of transfer to program offering advanced German); *Sklar v. Board of Education of Montgomery County*, 5 Op. MSBE 443 (1989) (denial of request to attend school offering four years of Latin, note taking/study skills course, and piano).

Although we conclude that the Appellants were not entitled to an evidentiary hearing under the United States Constitution, we point out, however, that the Appellants did, indeed, have an opportunity to be heard in oral argument before the local board. *See* Motion to Dismiss, Hearing Transcript, January 12, 2006. Thus, the local board followed its own rules and, in our view, provided the Appellants with sufficient due process.

Next, the Appellants contend that L.N. was entitled to an evidentiary hearing because their expert in identifying gifted and talented children opined that the numerical scoring system that CCPS uses to identify students for the Honors Program results in an “arbitrary number that tells you little about a student.” (Appeal, Ex. 13). When allegations of arbitrariness are contained in the Appellant’s submission, the CCPS rules allow for oral argument. The Appellants had an oral argument before the local board. We conclude that this opportunity to be heard met any due process requirement that might attach to this case.

Finally, the Appellants assert that the local board, in violation of its own rules, failed to issue a written decision that included the rationale for upholding the Superintendent’s decision. We agree, as a fact, that the local board’s decision is indeed summary in nature and does not include a rationale. (Appeal, Ex. 10). Therefore, we assume for the moment that the local board violated its own rules. To correct that violation the Appellants requests an evidentiary hearing before this Board. This Board, however, conducts evidentiary hearings in a limited number of specific cases. Pursuant to COMAR 13A.01.05.07, the State Board will direct an evidentiary hearing be held at the Office of Administrative Hearings under the following circumstances:

- (1) An appeal of a school consolidation, school redistricting, or school closing pursuant to COMAR 13A.02.09;
- (2) An appeal of a certificated employee suspension or dismissal pursuant to Education Article, §6-202, Annotated Code of Maryland; or
- (3) An appeal upon review in which the State Board finds that there exists a genuine dispute of material fact.

This case does not fit into any of those categories. While it may have been the better course for the local board to explain its reasoning, the local board’s failure to do so does not give rise to a right to an evidentiary hearing before this Board.

Reasonableness of the Local Board’s Decision

The Appellants contend that there is no appropriate criteria for identifying gifted and talented students for the Honors Program. They assail the use of a single point score as

arbitrary.¹ They assert that selection for the Honors Program is not based on student ability but on a system that limits participation to 25% of the student body. They claim that the cognitive assessment fails to identify a student's strengths and weaknesses. (Appeal at 12-13). They also claim that the assessment process fails to follow the Master Plan. (Response at page 4).

All of those arguments represent a generalized attack on the CCPS Honors Program and on the CCPS admission criteria used to identify participants in the Honors Program. We point out, initially, that those criteria appear to be quite specific and encompass a multitude of factors. The criteria again are:

- Ability Index on individual psychological results
- MSA Total Reading score
- MSA Total Math score
- Average of math assessments (3rd grade)
- STAR Reading Assessment Total score
- Math and Reading grades
- Recommendation
- Work Ethics
- Behavioral Factors

While those criteria appear to be appropriate, we hold it is not within the jurisdiction of the State Board to change a school system's programs and admission policy through the appeal forum.

As recently as January 2006, this Board stated in *Antila v. Montgomery County Board of Education*, MSBE Opinion No. 06-01 (Jan. 25, 2006), that "to the extent that Appellants are attempting to change the admissions policies for two language immersion programs, the State Board has previously ruled that individuals may not use the administrative appeals process set forth in § 2-205(c) to force a change in local board policy." *See also Montgomery v. Howard County Board of Education*, MSBE Opinion No. 04-35 (Aug. 25, 2004) (appeal of local board's decision not to adopt age of entry waiver policy is an attempt to force policy change which is not appealable to the State Board); *Regan v. Montgomery County Board of Education*, MSBE Opinion No. 02-29 (June 26, 2002) (appeal challenging an instructional activity is not an appropriate vehicle for modifying the existing curriculum or adopting a new policy governing the teaching of the curriculum); *Astrove v. Montgomery County Board of Education*, MSBE Opinion No 02-14 (Apr. 24, 2002) (appeal challenging the format of CTBS test result reporting is an attempt to force a policy change and is not appealable).

¹ It seems to us that point values are often assigned in student assessments - it is the way that educators have historically ranked students. Whether it is the best way to do so or not, or whether it sometimes results in a less than individualized assessment does not, we believe, make the use of the point system arbitrary.

Consistent with those rulings, to the extent that the Appellants raise arguments challenging the substance of the school system's programs and policy on identifying students for the Honors Program and/or gifted and talented students, we dismiss such claims as attempts to challenge the quasi-legislative discretion of the local board through a quasi-judicial process.

CONCLUSION

For the foregoing reasons, the decision of the Calvert County Board of Education is affirmed.

Edward L. Root
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June 20, 2006