

DAVID CHEUNG, ET AL.,

Appellants

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 04-28

OPINION

In these consolidated appeals, Appellants challenge the local board's decision to open enrollment in the Chinese Immersion Program at Potomac Elementary School to students outside the Potomac Elementary School attendance area under certain procedures.¹ Appellants' various arguments include allegations that this action was taken in violation of local board policy FAA on Long Range Educational Facilities Planning without notice to the community and a public hearing and without regard to overcrowding and efficient utilization of an elementary facility. The local board has filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable, or illegal. Appellants have submitted replies and supplementary documents in opposition to the motion.

FACTUAL BACKGROUND

The Chinese Immersion Program began at Potomac Elementary School in September 1996. As originally conceived, the program operated for attendance area students who were interested in the immersion program. Students from outside the school's service area who desired to participate in the program had to follow the regular Montgomery County Public Schools ("MCPS") student transfer policy. From 1999 through 2000, fewer than five students transferred each school year from outside the school's service area into the Chinese Immersion Program.

The admission procedure for the Chinese Immersion Program is unlike the admission procedures for the other four language immersion programs in MCPS, in which enrollment is countywide and is based on availability. Transfers into those programs are permitted on availability of space, and on showing of hardship or older sibling in attendance at the school. If more students apply for those programs than there are available spaces, admission is by lottery.

In the fall of the 2001-2002 school year, Herbert Hoover Middle School opened a Chinese Immersion Program that allows students from the Potomac Elementary program to

¹Appellants include parents of students at Potomac who are in the regular school program and who are in the Chinese Immersion program, as well as Potomac area parents who plan to enroll their children in the regular school program and in the Chinese Immersion Program.

continue studies in the foreign language at the next school level. Interest in participation in the Chinese Immersion Program at Potomac Elementary has grown as a result of this opportunity to continue with Chinese language study at the middle school level.

Following consultation with community groups and administrators from Potomac and Hoover, and based on the recommendation of the superintendent, at its April 10, 2003 meeting the local board adopted a resolution which allowed the open slots in the Chinese Immersion Program at Potomac Elementary for kindergarten and grade 1 to be filled by a lottery based transfer process for the 2003-2004 school year to students outside the school's service area, and reserved two slots in kindergarten and first grade for such students. The resolution was adopted as an amendment to the superintendent's recommended FY 2004 operating budget.² The local board's decision to adopt the resolution was appealed to the State Board and upheld in *Janice Zink Sartucci v. Montgomery County Board of Education*, MSBE Opinion No. 03-31 (August 27, 2003).

Operation of the Chinese Immersion Program at Potomac Elementary was again a topic of discussion as part of the FY 2005 operating budget process. After presentation of the superintendent's recommended FY 2005 operating budget, the local board held public hearings on the recommended budget which included testimony from different individuals and organizations regarding the impact of various recommendations on educational programming. There was public testimony and discussion on the Chinese Immersion Program located at Potomac Elementary at the local board's public hearings on January 14, January 15, and January 21, 2004.

The public testimony generated discussion among the board members and further questions regarding the program. School system staff responded to these board member inquiries. In addition, a memorandum dated February 10, 2004, was generated by the superintendent in response to local board member Reginald Felton's request to evaluate two options presented during testimony on the operating budget. Option 1 proposed to open the current program to a countywide lottery with no preference given to the children from the Potomac Elementary attendance area. This option was the same as the admission process in place for other elementary language immersion programs in the County. Option 2 proposed to expand the existing program at Potomac Elementary or at another elementary school. The superintendent's memorandum analyzed the programmatic and budgetary aspects of the two options.

At its February 10, 2004 meeting, the local board took final action on its FY 2005 operating budget. Board member Reginald Felton moved to amend the operating budget to add

²The board also resolved that open slots at Herbert Hoover Middle School Chinese Immersion Program may be open based on recommendations of a study group to a lottery-based transfer process beginning in the 2004-2005 school year to students outside the Herbert Hoover Middle School service area. See Board Minutes 4/10/03, p. 26.

\$15,000 to the “Elementary Schools” budget to expand the Chinese Immersion Program at Potomac Elementary by adding an additional kindergarten and first grade class to be filled by lottery. He also moved to request that the local superintendent identify an alternative more centrally located placement for the Chinese Immersion Program giving preference to those currently enrolled for slots at the new location. Discussion of this motion included deliberations on the fairness of operating the Chinese Immersion Program differently from other elementary language immersion programs and the current and future impact of two additional classes on utilization at Potomac Elementary. Mr. Felton’s motion to add the two classes to accommodate more students from outside the Potomac Elementary service area failed. *See* Board Minutes 2/10/04, pp. 42-43.

A second resolution was then proposed which would open up the program to a lottery system. Discussion included concerns about additional cars transporting out-of-area students and the impact of utilization on Potomac Elementary. The local board adopted the following resolution to revise admission into the Chinese Immersion Program:

1. For school years 2004-2005 and 2005-2006, all twenty-five seats in the entering kindergarten class for the Chinese Immersion program shall be filled by lottery, open both to students from within the attendance zone of Potomac Elementary School and to students countywide by way of transfer.
2. Siblings of current students in the Program and those on the waiting list shall have first priority for placement in the Program.
3. For slots filled through the lottery by transfer into Potomac Elementary School, transportation is the responsibility of the family, as with all voluntary transfers.

The local board also resolved:

That the Board of Education direct the superintendent to identify no later than November, 2005 – in time for consideration during the Board’s capital budget deliberations – an alternative placement for the Chinese language program that is more centrally located than Potomac Elementary School and which can accommodate the expressed interest for expansion, recognizing that those currently enrolled would have preference for slots at any new location.

See Board Minutes 2/10/04, pp. 47-48.

ANALYSIS

Because this appeal involves a dispute regarding the rules and regulations of the local board, the local board's decision is considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.01.03E(1).

Local Board Policy FAA - Long Range Educational Facilities Planning

Appellants make various overlapping arguments opposing the local board's decision. We find that these arguments can be combined into general categories. The first argument alleges violations of local board Policy FAA - Long-Range Educational Facilities Planning, specifically, to Policy FAA's requirements for a public hearing and the consideration of facility utilization and impact on educational program.

The State Board has previously visited the issue of whether Policy FAA applies to changes in the admission policy for the Chinese Immersion Program. *See Janice Zink Sartucci v. Montgomery County Board of Education*, MSBE Op. 03-31. As stated in that case,

Policy FAA is the local board's policy on long-range facilities' planning which provides a framework for coordinating the planning of capital improvements. It pertains to matters such as school boundary changes and school closings and includes the procedural requirements and substantive factors involved in a school closing/redistricting process. Potomac Elementary School did not undergo a redistricting and the attendance area for the school remains the same. Thus, we do not believe that Policy FAA is applicable to a decision concerning a change in the admission policy for the Chinese Immersion Program. (*Id.* at 2-3).

Although the State Board noted in *Sartucci* that the local board heard testimony regarding the Chinese Immersion Program proposal during the public comment portion of the local board's meeting and school system staff met with stakeholder community groups prior to the superintendent's recommendation on the proposal, these facts did not alter the State Board's finding that Policy FAA was inapplicable to an admission policy change for the Chinese Immersion Program. Nonetheless, as further explained below, the record for the current consolidated appeal discloses that the local board did hear public testimony and did consider facility utilization and impact on the educational program prior to adopting the resolution at issue.

Due Process - Notice and Opportunity to be Heard

Appellants also allege that the public was not given notice or the opportunity to be heard regarding the resolution to change the Program's enrollment policy. Appellants indicate that the memorandum by the local superintendent to the local board in response to the Chinese Immersion Options was not made public until the time of local board meeting at which the vote on the resolution was taken. Appellant Hsu indicates that community superintendent, Mark Kelsch, spoke at the February Potomac Elementary PTA meeting and advised parents that he was unaware of any resolution to change enrollment procedures for the Program which was going to be considered at the local board's February 10 meeting. *See* 2/5/04 PES PTA Minutes; 2/2/04 PES PTA Exec. Bd. Minutes; and 4/19/04 letter from Potomac PTA president.

As already stated, we do not believe the notice and public hearing requirements of Policy FAA apply in this circumstance. Nor is there any constitutional due process right to notice and an opportunity to be heard in this case. Despite this, we note that some members of the public commented on the Chinese Immersion Program at several public sessions held by the local board.³ Thereafter the local board discussed the issue of expanding the Program at its February 10, 2004 meeting as part of the discussion on the FY 2005 operating budget. Some Potomac Elementary School parents spoke during the public comment portion of the February 10 meeting and addressed overcrowding and the need for a second Chinese Immersion Program. *See* Hsu reply to motion at 15. While the local board may have done more to involve stakeholder groups on the issue, we do not find that any due process rights have been violated.⁴

Operations Handbook Notice

Appellant Hsu contends that the local board had an obligation under the guidelines set forth in the MCPS Operations Handbook to list the Chinese Immersion Program resolutions on the agenda of the February 10, 2004 board meeting. Based on our review of the guidelines, we disagree with Appellant. Guideline #3 under Meeting of the Board of Education provides:

The advance agenda shall indicate if an item is intended for discussion (D), action (A), information (I), and/or recognition (R). Notwithstanding the designation, any member can introduce a resolution germane to an agenda item before the Board.

³Some of these individuals are members of a group entitled "Educational Opportunities Group: Parents for Equitable Access to Chinese Immersion." *See* 3/11/04 letter to State Board from Nick Petrick, et al.

⁴We believe that it is appropriate for the local board to receive public comment on the recommendation made by the local superintendent by November 2005 for an alternative placement for the Chinese Immersion Program pursuant to the February 10, 2004 board resolution.

We do not believe that there was any violation of this guideline. As previously noted, at the January hearing on the operating budget there was public testimony on the Chinese Immersion Program at Potomac Elementary. The February 10, 2004 local board meeting agenda listed as one of its items the “FY 2005 Operating Budget.” Discussion of the Chinese Immersion Program came up under this heading as it related to the budget and the resolution was introduced. We find no evidence that there was an affirmative effort on the part of the local board to conceal the proposals to change the program as suggested by Appellant Hsu.

Overcrowding and Utilization at Potomac Elementary

Appellants maintain that the local board’s decision is contrary to sound educational policy because it fails to consider the serious effect that permitting out-of-area lottery winning students to attend the Chinese Immersion Program will have on the already overcrowded school. Specific concerns were also raised concerning facility utilization, including the impact of the increase in vehicular activity at drop off and pick up.⁵ Appellant Hsu also included a breakdown of the bathroom fixtures in the school in order to demonstrate that the existing facilities at the school are inadequate for its current population, much less a population increase as a result of the new enrollment policy for the program.⁶

The record discloses nonetheless that enrollment and utilization were considered by the local board as part of its deliberations.⁷ The superintendent’s February 10, 2004 memorandum created in response to board member inquiries considers the viability of expanding the program in light of projected capacity overage. The memorandum states in part as follows:

Two additional classrooms will be available in FY 2004-2005 and FY 2005-2006. One is due to decreased enrollment, and the second is due to the movement of a Grade 5 immersion class to middle school. Therefore, in FY 2004-2005 and 2005-2006, an additional kindergarten and Grade 1 class could be added. Both classes would need to be placed in regular classrooms, as no

⁵Although Appellant Silva suggests that the overcrowding at Potomac may be responsible for the school’s decreasing standardized test scores and that this will only be exacerbated by adding more students to the school population, such allegations are mere speculation lacking any support or evidence.

⁶The survey of school bathroom facilities was conducted by a parent of a Potomac Elementary student who is an architect and not by MCPS staff.

⁷Appellant Hsu cites a myriad of State Board individual student transfer cases involving MCPS to demonstrate that MCPS consistently denies student transfers into overutilized schools. We find that these cases are distinguishable from the instant case in that none of the cases concerns a change in procedure to an admission policy of a special program.

additional kindergarten-sized room is available. Additional funding for expanding these two classes for FY 2005 is \$15,000 for software and staff training.

If more than two classes were to be added, additional relocatable classrooms would also be needed. Potomac Elementary School currently has nine relocatable classrooms. Additional relocatables would have to be placed on playground space. An additional consideration for expanding the student enrollment in the Partial Chinese Immersion Program at Potomac Elementary School is increased traffic during morning and afternoon dismissal. Traffic backs up on River Road as busses and cars transport students.

During discussion, board members also raised concerns regarding the implications for existing space at the school and the potential impact of cars transporting out-of-area students. *See* board minutes 2/10/04 at pp.41-46.⁸

We find that it is within the local board's discretion to weigh the impact of expanding the Chinese Immersion Program at Potomac Elementary against the benefits of providing a unique educational opportunity for students throughout the county. While Appellants would have preferred more in depth analysis of the utilization issues given the existing capacity of Potomac Elementary, we believe the issue is premature. No actual enrollment numbers existed at the time of the board resolution. Moreover, as just noted, the board did consider school capacity. We therefore find no basis to support the assertion that the board's action was arbitrary.

Reliance Theory

Appellant Hsu argues that some Montgomery County citizens chose their current residences relying on the fact that the Chinese Immersion Program was available only to Potomac Elementary area residents. She also argues that some citizens were advised that their children were guaranteed placement in the program based on a waiting list, but that this is no longer the case. The Appellant suggests that the local board should be estopped from altering the admission policy based on this reliance.

The Appellant's argument lacks merit. Individual citizens do not acquire an enforceable right to maintain the *status quo* as the result of relying on attending a particular program or particular school. If that were the case, local boards of education would never be able to successfully redistrict school attendance zones as permitted by law or change eligibility for local programs. As the Court of Appeals has ruled, there is no right to attend any particular school. *See Bernstein v. Board of Education of Prince Georges County*, 245 Md. 464, 472 (1967). Nor

⁸Chief Operating Officer Larry Bowers indicated that there would likely be an increase in vehicular activity but any such increase would not be significant. *See* meeting minutes.

is there any right to attend any particular 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); *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).

Political Motivation

Appellant Hsu also maintains that the resolution was motivated by the political aspirations of board member Reginald Felton who introduced the resolution and pushed it through because it was his “last-chance opportunity to garner broader political support for his next career.” Appellant Hsu indicates that there is a possibility the Mr. Felton may run for County Council in 2006 based on an article in the *Gazette* newspaper which quotes Mr. Felton as saying that there is “certainly a chance” and that he “had expressed some interest in doing that in this last election.” *See* Hsu’s 5/6/04 letter and attached article. In support of her theory, Appellant Hsu relies on Mr. Felton’s statements during the February 10, 2004 board meeting in which he stated, “I don’t care, I just want a two-year amendment.” Mr. Felton announced his resignation from the local board on April 26, 2004.⁹

We find the link between Mr. Felton’s proposal of the resolution and his alleged political motivations far too tenuous to make the connection, nor is there sufficient specificity in Appellant Hsu’s argument to support her theory. Furthermore, regardless of what Mr. Felton’s actual motivation may have been for introducing the resolution, the fact remains that the resolution was passed by a vote of the entire board and not by Mr. Felton alone.

Identifying New Central Location

Appellant Cheung opposes the local board’s decision to identify a centrally located alternative placement for the Program. Cheung believes that if the Program were housed at another location, the Program would be inherently different from the one that currently operates at Potomac Elementary. Specifically, Cheung speculates that the majority of parents would have their children drop out of the Chinese Immersion Program in order to remain at Potomac Elementary. Again, we find that this is sheer speculation. The Appellant has no way of knowing what would occur if the Program were moved to another location. Moreover, this issue is premature since the local board requested the superintendent to identify by November, 2005 – on time for consideration of the capital budget – an alternative site for the Chinese Immersion Program.

⁹Mr. Felton is moving out of the geographic boundaries of his district to a different district in Montgomery County.

Waiting List

Appellant Hsu has filed a supplemental appeal of the April 26, 2004 resolution of the local board clarifying the term “waiting list” as referenced in the February 10, 2004 resolution. Appellant Hsu disagrees with the board’s clarification.

We have reviewed the April 26, 2004 memorandum from Dr. Weast, Superintendent of Schools, to the local board regarding the Chinese Immersion Program as well as the recommended resolution that was adopted by the local board. Dr. Weast explains that the February resolution referenced a waiting list that existed at the time of the resolution, but does not now exist because waiting lists in language immersion programs are voided on April 1. The rationale for that is the perspective by the school system that it is counterproductive to place new students in the program at that time because their language skills will be at a lower level and they will have difficulty maintaining the pace of the rest of the class.

Dr. Weast further explains that staff intends to proceed with a lottery for all seats in next year’s kindergarten class that have not been assigned to siblings of current Chinese Immersion students. Kindergarten students for the 2004-2005 school year for the Chinese Immersion Program at Potomac Elementary would be selected from a countywide pool of applicants. The maximum kindergarten class size has been set at 25 students. The lottery would be rescheduled for early May. A waiting list would be established consisting of an ordered list of names of those students not selected for the 2004-2005 kindergarten class. As vacancies occur during the school year, students would be offered the opportunity to join the class until April 1, 2005, when the list would become null and void.

The resolution adopted by the Board reads as follows:

WHEREAS, Questions have been raised concerning the Board’s reference to a “waiting list,” and

WHEREAS, The Board’s intent of its February, 2004 resolution was to make available kindergarten immersion seats to Potomac Elementary School and countywide students on an equal basis, consistent with other elementary language immersion programs; now therefore be it

RESOLVED, That the Board’s reference to a waiting list in the February resolution referred to those students who were not selected during the spring lottery process, but were to be given priority in the event of seats becoming available after the beginning of the school year and no later than April 1.

Based on Dr. Weast's explanation of the procedure regarding waiting lists, we find that the April 26, 2004 resolution by the local board clarifying the term "waiting list" is a reasonable exercise of the board's authority.

CONCLUSION

For all of the above reasons, we do not find that the local board's decision is arbitrary, unreasonable, or illegal. Accordingly, we affirm the decisions made by the Montgomery County Board of Education regarding the Chinese Immersion Program at Potomac Elementary School.

Edward L. Root
President

JoAnn T. Bell
Vice President

Philip S. Benzil

Dunbar Brooks

Calvin D. Disney

Clarence A. Hawkins

Walter S. Levin, Esquire

Karabelle Pizzigati

Maria C. Torres-Queral

John L. Wisthoff

June 16, 2004