

AMBER WONG HSU,

Appellant

v.

MONTGOMERY COUNTY  
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 05-11

### OPINION

In this appeal, Appellant challenges the local board's decision to uphold the lottery system used by the Montgomery County Public Schools to determine enrollment in the Chinese Immersion Program at Potomac Elementary School. Appellant contends that the use of a lottery by popsicle sticks is arbitrary and unreasonable because it is subject to human bias. The local board has filed a motion for summary affirmance maintaining that its decision is not arbitrary, unreasonable, or illegal and that the lottery method at issue has been used effectively for eight years for all immersion lotteries. Appellant has submitted replies in opposition to the motion.

### FACTUAL BACKGROUND

Potomac Elementary School is home to Montgomery County's Chinese Immersion Program. Prior to the 2003-2004 school year, the program was open only to those students who lived in its attendance area. On April 10, 2003, the local board adopted a resolution which allowed the open slots in the Chinese Immersion Program at Potomac 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 attendance 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. 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).

On February 10, 2004, the local board revised the admission process to the Chinese Immersion Program by directing that "all twenty-five seats in the entering class...be filled by lottery, open to both students within the attendance zone of Potomac Elementary School and to students countywide by way of transfer" for the 2004-2005 and 2005-2006 school years. That decision was appealed to the State Board by a number of individuals, including Appellant. The State Board upheld the local board's decision, finding that it was "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". See *Cheung, et al. v. Montgomery County Board of Education*, MSBE Opinion No. 04-28 (June 16, 2004).

On appeal before the Circuit Court for Montgomery County, the court found that Ms. Hsu was prejudiced by a failure of the local board to follow its own procedures. The court therefore reversed and remanded to the State Board for further action consistent with the court's decision. Accordingly, the State Board remanded the matter to the local board and directed that board to admit Ms. Hsu's child to be Chinese Immersion Program no later than the beginning of the 2005-2006 school year. Although the admission of Ms. Hsu's child will not be impacted by the lottery process, we believe the issues raised by Ms. Hsu regarding the lottery process may recur. For this reason and for guidance to the school and community members, we are issuing this opinion.

Appellant submitted a Request for Change of School Assignment on February 23, 2004, requesting that her daughter W.H. be enrolled in the Chinese Immersion Program. Because the number of requests for transfer to the program exceeded the number of slots available, a lottery was held on May 17, 2004. W.H.'s name was not drawn to be admitted and her name was placed on a waiting list.

Appellant and another parent appealed the results, claiming that the resolution opening the program to countywide admission was illegal and that the methodology used in the lottery was not random.

The matter was assigned by Mr. Larry Bowers, the Chief Operating Officer and superintendent's designee, to hearing officer Elaine B. Lessenco for review. Ms. Lessenco wrote Appellant informing her that absent demonstrated hardship, the lottery results would govern admission to the Chinese Immersion Program. On June 29, 2004, Ms. Lessenco provided a report and recommendation to Mr. Bowers. She found that there was an absence of hardship and that the lottery methodology was sound:

Lotteries for all of the language immersion programs have been conducted in the presence of administrators and representatives from the Parent-Teacher Association (PTA) and have been considered random and fair. Popsicle sticks are considered age appropriate, given the age of the applicants. There is no evidence to believe that the process is flawed.

(Memorandum of June 29, 2004, p. 2.) By letter dated July 1, 2004, Mr. Bowers agreed with the findings and recommendations of Ms. Lessenco.

Ms. Hsu and another parent appealed Mr. Bowers' decision to the local board.<sup>1</sup> They alleged that the lottery was "an outrage and [an] embarrassment..."(Letter of appeal, 7/8/04).

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<sup>1</sup>Although the local board's decision involved another student, R.C., whose name was also placed on the waiting list, this appeal to the State Board is signed only by Appellant.

The superintendent of schools defended the lottery method and described how each applicant's name is written on a popsicle stick, the sticks placed face down, shuffled, and then randomly selected. The superintendent noted that this method is just as random as a computer generated lottery program and had been used successfully without complaint for the past eight years. He also noted that fairness was assured because the entire process is conducted in front of witnesses, school administrators, and representatives of the Parent-Teacher Association. (Memorandum to local board, July 19, 2004).

On July 29, 2004 the local board unanimously affirmed the superintendent's decision and issued a formal written opinion on August 24, 2004. The local board concluded that the appellants had "not presented any evidence that would demonstrate that the process was flawed" and that while the appellants would prefer that their daughters attend the program, such a preference does not constitute a hardship that would justify a transfer. This appeal followed.

### 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).

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 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).

If there is no right to attend a particular school or program, we find that there is no right to dictate the method by which lottery admission to a program is determined, so long as the method is fair. Moreover, the choice of a particular method of admission lottery is a purely local decision. As such, the burden is on the Appellant to prove by a preponderance of the evidence that the local board's decision to do the lottery through random selection of popsicle sticks containing students' names was arbitrary, unreasonable, or illegal. COMAR 13A. 01.05.05A and D.

Here, the Appellant has provided no evidence whatsoever in support of her allegations. She posits that the popsicle sticks may not be uniform and that a person who may have a special interest in the admission might be able to memorize the characteristics of certain sticks to effectuate the selection of popsicle sticks containing the names of certain students. However, Appellant provides no evidence that such speculation actually occurred. Although other lottery

methods exist, such as use of slips of paper or lottery balls, there is simply no evidence in this record that the random selection of popsickle sticks was not fair or that it was flawed in any way.

CONCLUSION

For all of these reasons, we do not find that the local board's decision is arbitrary, unreasonable, or illegal. Accordingly, we uphold the lottery admission process used by the Board of Education of Montgomery County.

Edward L. Root  
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April 20, 2005