LUCINDA AND JEFFREY MILLER,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
HOWARD COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 06-02

OPINION

This is an appeal of a denial of Appellants' request that their son, K.M. be granted a waiver of the one year prohibition on interscholastic athletic participation after receiving a voluntary transfer from Mt. Hebron High School to Centennial High School in the Howard County Public School System ("HCPSS"). The local board has filed a motion for summary affirmance, maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellants have filed a response to the motion claiming that the local board's decision was illegal because the local school policy is discriminatory and the denial was arbitrary and unreasonable.

FACTUAL BACKGROUND

Appellants live in a neighborhood that was redistricted for the 2005-2006 school year. The redistricting is being phased in with only 9th and 10th graders moving to Mt. Hebron. Thus, K.M. was to attend Mt. Hebron High School beginning with the 2005-2006 school year. Appellants' older son is a junior at Centennial and thus was not affected by the redistricting.

HCPSS Policy No. 3211 and 3211- PR on Pupil Assignment contain a provision for the transfer of students in limited circumstances and sets certain conditions upon those transfers: the parents must provide transportation; the student is ineligible to participate in interscholastic sports for one year and the transfer is conditioned upon good attendance and behavior. The local board has also adopted Administrative Guideline for Administrative Transfers that permit transfers in the following cases: (1) children of school system employees; (2) reassignment for disciplinary reasons; (3) new home purchased within the new school attendance district; (4) safety reasons; and (5) participation in JROTC. The only other circumstance that justifies a student transfer is a documented hardship based upon the family's individual and personal situation, that is, in circumstances that are not common to many families.

On January 1, 2005, Appellants filed an Administrative Transfer of Pupils Form asking that K.M. be permitted to transfer to Centennial. Their request was based upon their assertions that it was unfair to split the family between two different high schools, that the two schools are seven miles from their home in opposite directions; that it would be a hardship to support booster clubs, PTA and the like at two different schools and that K.M. preferred to attend the same

school as his older brother. The Transfer form includes conditions on transferring, including the condition that students that are transferring *not* under the five approved categories but for "hardship", cannot participate in interscholastic sports for one school year.

On February 14, 2005, Mr. Roger Pluckett, the superintendent's designee, denied the request for transfer. He indicted that K.M. did not fall within the five categories justifying a transfer and did not meet the criteria for an exception to the transfer policy based upon hardship. He noted that Appellants' older son could transfer to Mt. Hebron so that the two sons could attend the same school.

On May 5, 2005, Appellants filed a second transfer request. In this request they contended that is was unfair to expect their older son to transfer during his last two years of high school and that K.M. needs to be motivated by his older brother both academically and athletically. They also reiterated that it would be a hardship to have two students at two different high schools, their commute would be more difficult and that K.M. needs the support of his older brother. On May 27, 2005, Mr. Pluckett again denied the transfer request.

Appellants appealed to the local board. In addition to the reasons set forth in their earlier requests, Appellants provided the local board with a letter from K.M.'s primary care physician. That letter asked that the school system reconsider its decision to deny the transfer, citing that attending high school with his older brother would be a "significant intangible factor" to help K.M. is his studies and would be less taxing on the family's time and energies.

In a letter dated June 21, 2005, Mr. Pluckett acknowledged receipt of Appellants' additional information and approved the transfer request. He noted that the transfer would be subject to the customary conditions imposed on all out-of-district transfers; that parents provide transportation to and from school; that students voluntarily transferring are not eligible for interscholastic sports for a period of one year; that placement is subject to an annual review; and that excessive absences or disciplinary actions may cause a student to be returned to his home school. This approval mooted the appeal to the local board.

Three days after the grant of the transfer request, Appellants returned, requesting a waiver of the transfer condition prohibiting participation in interscholastic athletics for one year. Appellants included a letter from a different doctor who indicated that participation in sports activities would help relieve stress and be helpful to the student's asthma condition.

In response to Appellants' latest request, Mr. Pluckett noted that one condition of accepting an out-of-district transfer is that the student is ineligible for interscholastic athletics for one year. However, the student could remain at his home school and participate, if he wished. This was the family's option. (Memorandum of 8/1/05).

On August 1, 2005, Appellants submitted yet another memo in support of their request for athletic participation. They asserted that Mr. Pluckett granted the request to transfer based

upon hardship to the student and also asserted, for the first time, that K.M. was *entitled* to athletic participation based upon his disability as a Section 504 student.[1] HCPS replied that athletic participation was not a requirement on K.M.'s 504 plan.

The local board reviewed Appellants' athletic waiver appeal on August 2, 2005. The local board's counsel informed Appellants by telephone that day that the local board denied the appeal. This appeal was filed with the State Board on August 4, 2005. Local board counsel also informed Appellants that the written decision would follow within 10 to 14 days. The local board decision was issued and sent by facsimile to Appellants on August 11, 2005.

By letter dated August 8, 2005, Board Chairman Courtney Watson addressed Appellants' Section 504 concern. Chairman Waston noted that if Appellants believed that their son requires a particular accommodation, service, or program under Section 504, they could request that the school convene the Section 504 Committee to address the issue.

On August 30, 2005, the Section 504 Committee was convened to discuss K.M.'s needs. The Committee did not add athletic participation to K.M.'s 504 plan as he was making acceptable academic progress.[2]

Appellants requested reconsideration of the local board's decision which was denied on September 9, 2005.

STANDARD OF REVIEW

Because this case involves a local policy or dispute regarding the rules and regulations of a local board, the standard of review is that the decision of the local board shall be 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), *Bellote v. Anne Arundel County Board of Education,* MSBE Op. No. 03-08 (February 26, 2003).

ANALYSIS

Appellants first assert that HCPSS Policy Nos. 3211 and 3211-PR on Pupil Assignment was applied to their son in a discriminatory manner in violation of federal regulation 34 C.F.R. §104.37.

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[1]Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of a disability and permits school districts to provide services and/or adjustments to programs to accommodate a student's disability.

[2]At the end of the August 20, 2005 meeting, Appellants offered an Addendum to the meeting minutes which noted that Policy 3211 was discriminatory in that it did not address students with special needs. This proposed Addendum was rejected by the Section 504 team.

However, contrary to Appellants' assertion, HCPSS Policy Nos. 3211 and 3211-PR on Pupil Assignment apply equally to all students, whether disabled or non-disabled. As stated by the local board, federal regulation, 34 C.F.R. §104.37, requires only that:

> all students with disabilities be given an equal opportunity to participate in nonacademic services. The pertinent regulation prohibits discriminatory treatment of a student on the basis of his disability. The emphasis is on equal treatment and affording disabled students the same equal opportunity to participate in nonacademic activities. The board finds that [K.M.] is not being treated differently because of his disability. His transfer is made subject to the same conditions that apply to the transfers of nondisabled students who likewise are ineligible for athletic participation for one year.

(Local board decision, p. 5).

Next, Appellants assert that because the transfer was granted based upon their son's disability of Attention Deficit Disorder ("ADD"), the local board's denial of his request for a waiver of the one year ineligibility rule is unreasonable. However, the record reflects that the transfer was not granted because K.M. had a disability. Appellants repeatedly asked that the transfer be granted based on the fact that having two students at two different high schools would be a hardship on the family. They cited the difficulty of commuting on crowded roads in two different directions, the hardship of having to support two separate PTA booster clubs and K.M.'s need to be motivated by his older brother. Under the administrative guidelines, "hardship" depends on a family's individual and personal situation. It was the doctor's note demonstrating that K.M. needed to be with his brother to be motivated academically and athletically and the family strain that would be caused by having two students at two different schools that led to the grant of the transfer. The transfer was based upon overall family hardship, not K.M.'s ADD.

The local board's decision also addresses Appellants' Section 504 concerns. The local board noted that there is no constitutional right to participate in interscholastic athletics or other extracurricular activities; *Denis J. O'Connell High School v. Virginia High School*, 581 F. 2d 81, 84 (4th Cir. 1978) and that the State Board has held that participation in extracurricular activities, including athletics is a privilege not a right. *Bloch v. Board of Education of Howard County*, 7 Op. MSBE 388, 390 (1996); *Kevin Lawler v. Anne Arundel County Board of Education,* MSBE Op. No. 01-20 (2001). The local board noted that:

> [I]f Appellants believe that athletic participation should be considered as part of [K.M.'s] needs, they should present relevant information to the school 504 team for consideration.

(Local board decision, p. 6). The evidence shows that the Section 504 team met on August 30, 2005 and again on September 27, 2005 to discuss Appellants' request to include participation in

interscholastic athletics in K.M.'s 504 plan. The local board has objected to the inclusion of this material before the State Board as it was not initially presented to the local board. However, the material is instructive and, because it was an issue raised to the local board, we have decided that it would be appropriate for this Board to consider it.

At each meeting the 504 team declined to include participation in interscholastic athletics in K.M.'s Section 504 plan. The minutes of the latest meeting in September reflect the following:

> The 504 team staff members stated that at this point in time, they do not believe that [K.M.] needs the accommodation of team sports in order to meet his educational needs. [K.M.] is currently receiving above average grades in his classes and there have been no significant concerns that have come to the attention of the counselor or administration.

(Minutes, 9/27/05, p. 6).

Finally, Appellants argue for the first time in this case that another voluntary transfer student was currently playing JV volleyball and that the school system was arbitrary in its decision and discriminating against their son. (Letter of 9/13/05).[3] The local board has also objected to the inclusion of this material before the State Board as it was not initially presented to the local board. As to this issue, because it was not raised before the local board, we have concluded Appellants have waived their right to raise this matter for the first time on appeal to the State Board.

The State Board has consistently declined to address issues that have not been reviewed initially by the local board. *See Craven v. Board of Education of Montgomery County*, 7 Op. MSBE 870 (1997) (failure to challenge suspension before local board constituted waiver); *Hart v. Board of Education of St. Mary's County*, 7 Op. MSBE 740 (1997) (failure to raise issue of age discrimination below constituted waiver on appeal). *McDaniel v. Montgomery County Board of Education*, MSBE Op. No 03-22 (June 27, 2003)(complaints from public not raised before local board deemed waived).

However, we note that in response to the Appellants' argument, the local board has presented evidence that the other student was erroneously permitted to play volleyball and a letter was sent to her parents that she would be ineligible for any interscholastic sports participation for the remainder of the year.

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[3] Appellants also submitted a letter dated October 11, 2005 with a picture of the JV volleyball player.

CONCLUSION

For all of these reasons, the State Board affirms the denial of Appellants' request for a waiver of the one year prohibition against participation in interscholastic athletics.

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January 25, 2006