

ROBERT & ANN BRADO,

Appellants

v.

MONTGOMERY COUNTY  
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 06-23

### OPINION

In this appeal, the Brados contest a decision by the Montgomery County Board of Education that there was an appropriate educational plan in place for their daughter. The local board has submitted a Motion for Summary Affirmance and the Brados have submitted a Reply.

### FACTUAL BACKGROUND

In the 2005-2006 school year, M.B., the Brados' daughter, was a ninth grade student at Thomas A. Wootton High School. Because of M.B.'s medical condition, she often could not attend school. Therefore, she received services from the Home and Hospital Teaching Office.

On October 31, 2005, the Brados filed a complaint with the school system that neither the high school nor the Home and Hospital Teaching Office had been providing appropriate services for M.B. Thereafter, the principal of the high school met with Mr. Brado. Subsequently, Elaine Lessenes, Hearing Officer, conducted multiple fact-finding interviews to identify the issues involved in the complaint. Within this time period, a second complaint was filed.

Although the Brados had many specific complaints, the Hearing Officer classified the issues this way:

On Monday, December 5, 2005, I met with Mrs. Brado, who clarified that her concerns are primarily with the Home and Hospital Teaching Office, not with Thomas S. Wootton High School. She reported that she had not received any communication from the Home and Hospital Teaching Office since August 2005, except for the message from Ms. Levine stating that their program is short-term. It is Mrs. Brado's belief that the family should have been notified that the English teacher had been replaced and a new English teacher had been assigned. Mrs. Brado would also like to be informed about the plans for American Sign Language, such as the number of sessions to be held, and expectations for future instruction. Mrs. Brado still has concerns about whether the Home and Hospital Teaching Office is following the curriculum at a pace to ensure that [M.B.] can graduate with her class.

(Ex.1, at 3, Motion for Summary Affirmance.)

To address those issues, the Hearing Officer met with Mr. Mark Kelsch, Community Superintendent, Dr. Michael Doran, Principal, and Ms. Shelia Levine, Coordinator of the Home and Hospital Teaching Office. They established a means for two-way communication; assigned a guidance counselor to coordinate curriculum materials and lesson plans; assigned a resource counselor to keep the Brados informed of M.B.'s progress toward graduation; explored the possibility of on-line instruction; and assigned a teacher of American Sign Language to provide home instruction. (Ex. 1, at 4). The Hearing Officer concluded that an appropriate plan had been developed to provide M.B. with home based instruction to enable her to complete high school. (Ex. 1 at 4).

By letter dated December 13, 2005, the Chief Operating Officer concurred with the Hearing Officer's findings. (Ex. 2). The Brados appealed that decision to the local board which affirmed the Chief Operating Officer's decision citing the number of persons involved in reviewing M.B.'s situation and the number of programs put in place to enable M.B. to complete high school. The local board noted, however, that the case before them appeared to be one that should have been presented in a Special Education Due Process forum. (Ex. 4 at 2).

Thereafter, the Brados timely appealed to this Board.

### STANDARD OF REVIEW

In cases involving a local policy or a controversy or dispute about the rules and regulations of the local board, the decision of the local board is considered prima facie correct. The State Board will not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A.

### ANALYSIS

Prior to a review of the merits of the local board's decision, it is essential to determine whether the State Board is the appropriate forum to hear this case.

Under State and federal law, a student with disabilities is entitled to a free appropriate public education. Md. Educ. Code Ann. §8-403; 20 U.S.C. §1400 *et seq.* In the Brados' appeal to this Board they state, "Our goals and objectives in bringing this matter to your attention are to obtain a Free Appropriate Public Education (FAPE) for our daughter." (Appeal letter, March 12, 2006.)

There are three specific processes in place for resolving special education disputes regarding the provision of FAPE. There is a due process hearing conducted at the Office of Administrative Hearings, the results of which are appealable directly to court. 20 U.S.C. §

1415(f); COMAR 13A.05.01.15C. In conjunction with or in lieu of the due process hearing, there is a mediation process. 20 U.S.C. § 1415(e); COMAR 13A.05.01.15(B). There is also a complaint investigation process in place at the Maryland State Department of Education (MSDE). COMAR 13A.05.01.15A. The Appellants have initiated that complaint process, but MSDE has stayed investigation of the complaint pending a decision of this Board. (Exs. 6-7, Motion for Summary Affirmance).

Whichever process is engaged in these types of cases, it is, by necessity, a fact intensive one. Determining whether a child is receiving a free appropriate public education requires a full and fair exposition of the facts in the context of the law governing special education. In *Frye v. Montgomery Co. Bd. of Educ.*, MSBE Opinion No. 01-30, this Board opined that “[t]o the extent that the Appellant is contesting the school system’s decisions regarding the provision of special education and related services . . . , the State Board is not the appropriate forum for redress. The Appellants’ remedy is through the due process procedures set forth in IDEA.”

The law has created specialized forums for challenging school system decisions regarding FAPE. The Appellants have utilized one of them by initiating a complaint at MSDE. We, therefore, dismiss the appeal for lack of jurisdiction, allowing MSDE to proceed with its complaint investigation process.

We note that deciding whether or not M.B. is receiving a free appropriate public education involves assessment of the Home and Hospital Teaching services that she is receiving. We have serious concerns about the Home and Hospital Teaching Program that Montgomery County Public School System (MCPS) is providing to M.B. The Home and Hospital Teaching regulations establish the *minimum requirements* of six hours of instruction per week. COMAR 13A.03.05.03(D)(2). We note that M.B. receives 7 ½ hours per week, but it is clear from the record that M.B. intends to graduate from high school with her class. This 7 ½ hours per week of instruction is not going to be sufficient to cover all the credit requirements for graduation within a reasonable time period, which the Coordinator of the Home and Hospital Teaching Office has acknowledged:

Sorry, but as I said in my other e-mail to you, HHT covers the four core subjects - English, Math, Social Studies, and Science. We are a temporary program, meant to be a band-aid while a student is out of school for a short period of time. We cannot be equal to a full day program at a school. Perhaps it is time to look into some other means of schooling [M.B.]. She has been with us a long time and HHT is not meant to be a long term. Six hours a week is just not enough time to fully cover the curriculum.

(Internal E-mail from Shelia Levine, 10/24/05, attached to Appellants’ Response).

We further note that nothing in the regulations identifies the Home and Hospital Teaching Program as only a short-term option. Indeed, the regulation specifically recognizes the needs of students with severe, chronic, long-term physical conditions:

Concurrent delivery of instructional services and enrollment in a public school shall be provided for a student whose physical condition requires the student to be absent from school on an intermittent basis. These conditions include, but are not limited to, *kidney failure, cancer, asthma, cystic fibrosis, and sickle cell anemia.*

COMAR 13A.03.05.01(C) (emphasis added).

Based on these facts and the law, it appears that M.B. is not receiving an adequate educational plan from the Home and Hospital Teaching Program. We recognize, however, that the ultimate decision on that issue is part of the overarching issue in this case – whether M.B. is receiving a free appropriate public education. That is the issue which must be addressed by MSDE in the complaint investigation process, or through the other administrative procedures established in federal and state law.

#### CONCLUSION

For all the reasons stated, we dismiss the appeal and direct MSDE to commence the complaint investigation process.



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Edward L. Root  
President



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Dunbar Brooks  
Vice President




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Lelia T. Allen

  
JoAnn T. Bell


*absent*  
J. Henry Butta

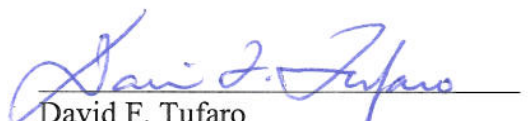
  
Beverly A. Cooper

  
Calvin D. Disney

  
Richard L. Goodall

  
Karabelle Pizzigati

  
Maria C. Torres-Queral

  
David F. Tufaro

July 19, 2006