

ERIK & SUSAN E.,
Appellants

BEFORE THE

v.

MARYLAND

MONTGOMERY COUNTY
BOARD OF EDUCATION,
Appellee

STATE BOARD

JAMES & MAUREEN W.
Appellants

OF EDUCATION

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,
Appellee

LIZA G. & PHILIP B.
Appellants

Opinion No. 09-23

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,
Appellee

OPINION

These three appeals¹ involve the Appellants' challenge to the decision of the Montgomery County Board of Education ("local board") denying their request to transfer their child from kindergarten at Rosemary Hills Primary School to Bethesda Elementary School. The local board has filed a Motion for Summary Affirmance in each case arguing that its decision was not arbitrary, unreasonable or illegal. The Appellants have filed Responses to the local board's motions and the local board filed a Reply in the W. appeal.

¹ We are consolidating these appeals because they involve substantially similar facts and challenge the same local board policy on similar grounds. Where necessary, we highlight unique facts or arguments raised separately in the parties' record.

FACTUAL BACKGROUND

History of the School Pairings and "Agreement" for Student Transfers

During the 1981-82 school year, residents of the former Lynnbrook area (now East Bethesda) successfully appealed the local board's plan to close Rosemary Hills Primary School. Following the State Board's reversal of the closing decision² and in response to resident concerns, the local board eventually developed a plan establishing attendance boundaries and patterns that now includes the "pairing" of Rosemary Hills with Bethesda Elementary School for some East Bethesda residents.

Pairing the two schools means that students from this area are assigned to attend Rosemary Hills from kindergarten to second grade, and then attend Bethesda ES from third to fifth grade. The Rosemary Hills/Bethesda ES pairing is the only one in the county of a K-5 school (Bethesda ES) with a K-2 school (Rosemary Hills).

Because primary grade classes are available at both schools, Montgomery County Public School ("MCPS") officials have historically provided flexible transfer options for East Bethesda residents under an unofficial "agreement".³ Under that agreement, transfer requests for East Bethesda residents who want their children to attend K-2 classes at Bethesda ES instead of Rosemary Hills are approved as long as there is space available. In addition, a lottery is held if there are more requests than available seats. (Local Bd. Motion at 1-6; Exh. 5, "School Articulation Options for East Bethesda Community".)

Appellants' Transfer Request

All of the Appellants are East Bethesda residents with a younger child who was assigned to begin kindergarten at Rosemary Hills for the 2008-09 school year. The Appellants also have an older child or children who were assigned to, or already attending, Bethesda ES. As a result, the Appellants timely requested a change of school assignment so that their younger children could attend kindergarten at Bethesda ES with their older sibling(s).

As explained previously, MCPS agreed to grant transfer requests between paired schools Rosemary Hills and Bethesda ES if space was available in the requested school. However, the Appellants did not apply for their transfers under that agreement, but under the local board's student transfer policy. Under the policy, student transfers from the home school are only permitted in cases of documented hardship unless they qualify for one of the policy exemptions. One of those exemptions applies if "an older sibling

² See 3 Op. MSBE 143 (Apr. 27, 1983).

³ This "agreement" is a flowchart that describes three possible articulation patterns for East Bethesda students, which includes the pairing of Rosemary Hills and Bethesda ES.

attends the requested school in the regular program.” (Policy JEE; Regulation JEE-RA.) Thus, the Appellants indicated on their Change of School Assignment forms that the reason for their request fell under the older sibling exemption.

In May 2008, the MCPS Field Office denied the Appellants’ requests because they did not meet MCPS guidelines and there was no space available. The Appellants appealed the transfer denial to the local superintendent’s designee, Larry Bowers, Chief Operating Officer. The Appellants contended that their transfer request should be granted because it falls squarely within the older sibling exemption of the local board policy. The Appellants argued that space is only a consideration under that exemption if the older sibling is enrolled in a magnet or special program, which does not apply in their cases. The Appellants noted the strain on their families, including transportation and child care concerns, which would result by having their children attend different schools, and that the intent of the older sibling exemption was to prevent such strain on families.

Elaine B. Lessenco, Hearing Officer, reviewed the appeal and provided a written report and recommendations to the Chief Operating Officer. In her report, Ms. Lessenco explained the history that eventually led to the Rosemary Hills/Bethesda ES pairing and the “agreement” between MCPS staff and East Bethesda residents allowing greater flexibility for transfers into Bethesda ES if space was available. Ms. Lessenco noted that this agreement has always been understood to be an exception to the student transfer policy.

Ms. Lessenco concluded that the older sibling exemption did not apply to the Appellants’ transfer requests for three reasons. First, Bethesda ES was overenrolled for the 2008-09 school year and creating an additional kindergarten section was not an option due to budget and building space. While Bethesda ES capacity is 384, its enrollment for the 2007-2008 school year was 447 and projected to be 455 for the 2008-09 school year. (Local Bd. Motions, Exh. 5.) In addition, Ms. Lessenco concluded that none of the Appellants demonstrated any unique hardship as a result of their children’s assignment to Rosemary Hills.

Last, Ms. Lessenco reasoned that the local board’s policy considers paired schools, like Rosemary Hills and Bethesda ES, as “essentially one school where children go to school in two different campuses”. Consequently, the older sibling exemption cannot be applied “because both schools are considered to be the assigned school, depending on the child’s grade level, and to apply the sibling preference would have the effect of undoing the pairing.” Therefore, Ms. Lessenco’s recommendation was to uphold the denial of the Appellants’ transfer requests, which the Chief Operating Officer adopted. (*Id.*)

The Appellants appealed the transfer denials to the local board of education. On July 28, 2008, the local board considered the matter in closed session and was not able to obtain a majority vote to reverse the decision of the superintendent’s designee.⁴ In its

⁴ The local board’s vote was officially four to three in favor of reversing the Chief Operating Officer’s decision, but the vote of the student board member did not count.

decision issued on August 21, 2008, those board members who voted to reverse the decision believed the issue was a close one, but that the older sibling exemption under regulation JEE-RA should apply.

Conversely, those local board members who voted to affirm the decision acknowledged that school pairings are a unique situation not expressly addressed in the local board's regulations, but that the local superintendent's application and interpretation of the policy to the Rosemary Hills/Bethesda ES pairing was "reasonable and historically consistent." The board members further noted that "[t]he fact that some residents of the Rosemary Hills attendance area have been permitted more flexible transfer options does not and should not mean that the pairing articulation should not be preserved." (Local Bd. Motion, Exh. 8.)

One day after the local board's vote, local superintendent Dr. Jerry Weast issued a memorandum to the local board explaining a policy change, effective immediately, governing transfer requests for K-2 students from Rosemary Hills to Bethesda ES. Dr. Weast noted that the eight year transfer "agreement" with East Bethesda residents was "now a source of contention rather than accommodation" that is no longer understood the same way by all the parties. Consequently, Dr. Weast directed MCPS staff to grant future transfer requests based on hardship or an older sibling in Grade 1 or Grade 2, pursuant to the board's student transfer policy. (Local Bd. Motion in Lisa G./Philip B., Exh. 6.)

This appeal to the State Board followed, in which the Appellants argue that the older sibling exemption applies and neither space, hardship nor school pairings are factors under the exemption. Appellants Lisa G./Philip B. also challenge MCPS's decision denying their transfer request after MCPS granted transfer requests for three other families who were similarly situated to them. The Appellants argue that the local board's refusal to apply the transfer policy as written and consistently is arbitrary, unreasonable and illegal.

Some of the Appellants further challenge the validity of the local board's vote. Specifically, James & Maureen W. state they were not given adequate representation on the board because member Stephen Abrams, who helped draft the policy language at issue, abstained from voting. In addition, Lisa G./Philip B. contend that the local board unreasonably failed to consider their request for reconsideration following the local superintendent's policy change one day after the local board voted on these appeals. They argue that the superintendent's decision unilaterally rescinded the agreement with East Bethesda residents and unlawfully changed the interpretation of the student transfer policy.

The local board filed a motion for summary affirmance arguing that the older sibling exemption does not apply here because paired elementary schools are considered to be one school for change of school assignment purposes. (*Id.* at 10; Reg. JEE-RA sec. IV.) The local board argues that a student assigned to attend Rosemary Hills for grades K-2 can only access Bethesda ES under the student transfer policy if there is a

documented hardship, or “an older sibling is attending a school other than his assigned school”. Because the Appellants’ older children are attending Bethesda ES as their assigned school, the local board argues that the older sibling exemption does not apply.

In addition, the local board contends that the Appellants have not met their burden of demonstrating a unique hardship by the school assignments. Finally, the local board concedes that while the legality of the unofficial “agreement” with East Bethesda residents is debatable, the board’s interpretation of the student transfer policy in a way that preserves the school pairings is not arbitrary, unreasonable or illegal.

The Appellants filed a Response to the local board’s motion reiterating most of their previous arguments. Appellants James & Maureen W. and Lisa G./Philip B. also contended that several factors unique to the Rosemary Hills/Bethesda ES pairings demonstrate that the two schools are not lawfully paired at all. Lisa G./Philip B. further argued that nothing in the community’s “agreement” with MCPS waived their right to sibling transfers under the local board’s policy.

STANDARD OF REVIEW

These appeals involve a decision of the local board involving a local policy, and therefore, the local board’s decision is considered prima facie correct. The State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable or illegal. A decision may be arbitrary or unreasonable if it is contrary to sound educational policy, or a reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached. COMAR 13A.01.05.05; *Pamela M. v. Montgomery County Bd. of Ed.*, MSBE Op. No. 08-04 (Jan. 30, 2008).

LEGAL ANALYSIS

The three cases involving transfer between paired schools, Rosemary Hills and Bethesda ES, involve mutually exclusive and seemingly contradictory methods of analyses - the paired school analysis and the non-paired school analysis.

Paired School Analysis

Rosemary Hills and Bethesda ES are the only paired schools in the school system with overlapping grades K-2. The local board has adopted a policy that states that “paired elementary schools are considered one school for change of school assignment purposes.” (Reg. JEE-RA.) Under this policy, no transfer would be possible because assignment to Rosemary Hills or to Bethesda ES is considered an assignment to the same school. Apparently, in recognition of the preclusive effect of this policy on transfer requests, the school system adopted a flexible approach for East Bethesda residents that grants transfer requests between the paired schools if space is available. (Local Bd. Motion, Exh. 5.) Neither hardship nor older siblings at the requested school are factors under this approach.

Applying this paired school analysis, the local board's denial of the transfer request was not arbitrary or illegal because there is no space available in Bethesda ES. The local board reported that while capacity at Bethesda ES is 384, its updated projected enrollment for the 2008-09 school year was 464 students. (Local Bd. Motion at 6.)

Non-Paired School Analysis

The Appellants, on the other hand, challenge the local board's decision using a non-paired school analysis. Specifically, they argue that Rosemary Hills and Bethesda ES are separate schools and, therefore, the local board's transfer policy applies. That policy allows a student to transfer to a school other than his/her home school in cases involving a documented hardship or if an "older sibling attends the requested school in the regular program." (JEE; JEE-RA, sec. IV.) Space is not a consideration unless the transfer request is because the older sibling attends a magnet or special program in a school other than the home school. (*Id.*)

The local board argues that the non-paired school approach does not apply because its policy considers paired schools as one school for change of assignment purposes. However, this argument contradicts the record, which shows that the local board partly employed the non-paired school analysis in denying these transfer requests.

At each stage of the transfer request process, MCPS and local board officials considered hardship to the Appellants, which is only a criterion under the non-paired school analysis. For example, the hearing officer bases her recommendation in part on the absence of hardship for the Appellants. (*See, e.g.,* Local Bd. Motion in Wilson and Evenson appeals, Exh. 5A at 4.) Also, in his memoranda to the local board, the local superintendent noted that "[i]n processing the Change of School Assignments, the field office reviews all requests for hardship factors. If a hardship is verified, then the request is granted." (*Id.*, Exh. 6.)

Indeed, the local board noted that some transfer requests from Rosemary Hills to Bethesda ES were granted this year where a "*documented, unique hardship was shown, as is required under the Student Transfer Policy.*" (Local Bd. Motion at 5, emphasis added.) Consequently, it is our view that the local board cannot argue that this analysis does not apply to paired schools when it previously applied part of the analysis in other cases.

Applying the non-paired school analysis, the Appellants cite transportation, scheduling and child care difficulties by having children at separate schools. While these are real challenges, the State Board has held that such problems common to large families do not constitute a documented hardship under the local board's policy. *See Pamela M. v. Montgomery County Bd. of Ed.*, MSBE Op. No. 08-04 (Jan. 30, 2008) (upholding local board decision that having multiple children in different schools is a common problem that does not constitute a unique hardship); *Mehdi K. v. Montgomery County Bd. of Ed.*, MSBE Op. No. 08-03 (Jan. 30, 2008) (finding child care concerns presented did not

constitute a unique hardship). Thus, the local board's finding that the Appellants did not show a documented hardship was not arbitrary or unreasonable.

The non-paired school analysis also permits transfer if the request is based on an older sibling's attendance at the requested school in the regular program. It remains undisputed that each of the Appellants' requests is based on this requirement, as documented on their Change of School Assignment Forms. Thus, because the sibling exemption would apply here, the Appellants' transfer requests should have been granted.

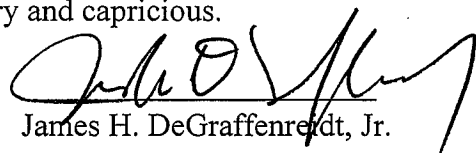
Instead, the record indicates that the local board denied the Appellants' transfer requests only after considering space and hardship under the student transfer policy. The local board did not give any consideration to the older sibling exemption, which the Appellants cited as the basis for their transfer requests. The board argues that the pairings of Rosemary Hills/Bethesda ES justifies such a distinction, but we disagree.

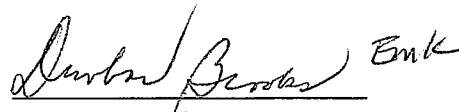
To explain why they did not consider the older sibling exemption, the local board returns to its original argument that when schools are paired, the siblings are considered to be going to the same school. Therefore, the local board asserts, no transfer is possible unless the older sibling attended a school outside the paired school attendance area. This argument incorrectly imports the paired school analysis into the non-paired school analysis. The two analyses, however, are mutually exclusive.

Either the schools are paired, and the applicable transfer policy is the flexible "agreement", or they are not, and the written transfer policy applies. The written policy considers hardship or the older sibling exemption. If the written transfer policy does not apply to paired schools, as the local board contends, the local board should not have considered hardship in these appeals or reversed transfer denials between Rosemary Hills/Bethesda ES on that basis. If the written transfer policy does apply, the local board should have applied all of it, not part of it. Therefore, our view is that the local board's inconsistent application of the student transfer policy was arbitrary and capricious.

CONCLUSION

For all these reasons, we reverse the decisions of the Montgomery County Board of Education on the grounds that they were arbitrary and capricious.


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