

MARIAN M.,

Appellant

v.

BOARD OF EDUCATION
OF BALTIMORE COUNTY,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 14-34

OPINION

INTRODUCTION

This is an appeal of the denial of Appellant's request to continue her son's attendance at West Towson Elementary School under a special permission transfer. The Baltimore County Board of Education (local board) filed a Motion for Summary Affirmance arguing that its decision was not arbitrary, unreasonable or illegal. Appellant submitted a Response to the local board's Motion, to which the local board has submitted a Reply.

FACTUAL BACKGROUND

Appellant was employed with Baltimore County Public Schools (BCPS) for seven years as a business teacher at George Washington Carver Center for Arts and Technology (Carver). (App. Response to Mtn., Ex. 2). Appellant's son, N.M., attended West Towson Elementary School (West Towson) for kindergarten and first grade on a special permission transfer related to Appellant's employment. BCPS granted N.M. a special permission transfer under the employee exception, which allows a child attending a BCPS school to transfer to a school closer to the workplace of a parent employed by the school system. (App. Ltr., Ex. 3). The corresponding policy states:

When the parent is a BCPS employee and is requesting a special permission transfer to the school where the parent is employed or to the school nearest the employee's primary work site:

- (1) The employee's primary work site must be located within the attendance area of the receiving school.
- (2) If the receiving school is overcrowded, the student will be given the option of applying for a special permission transfer to another school that is not overcrowded and whose boundary is adjacent to the employee's work site...

Board of Education Policy, Rule 5140(III)(D)(7), *STUDENTS: Enrollment and Attendance*.

On or about May 1, 2013, Appellant resigned from her teaching position after allegedly experiencing workplace discrimination. (Appellant's Response to Respondent's Mtn., Ex. 2). Upon learning of Appellant's resignation, Ms. Sue Hershfeld, Principal of West Towson, sent a letter to Appellant dated July 11, 2013 notifying her that N.M. would no longer be able to attend West Towson under the special permission transfer. (Appeal Ltr., Ex. 3). The letter advised Appellant that she had fifteen (15) business days from the date of the letter to appeal her decision to the Executive Director of Student Support Services. *Id.*

On August 26, 2013, thirty-two (32) business days from the date of the letter, Appellant submitted her appeal. (Appeal Ltr., Ex. 4). Although late, Mr. Dean Colletta, Residency Liaison for BCPS, reviewed Appellant's appeal. Mr. Colletta denied the appeal because the BCPS policies clearly state that the student can be withdrawn at the end of the school year if the reason for granting the transfer changes. (*Id.*; Rule 5140 (IV)(E)(1)(7)). At the start of the 2013-2014 school year, N.M. began attending Oakleigh Elementary School (Oakleigh), the school serving the attendance area where Appellant resides.

Meanwhile, Appellant appealed the transfer decision to Mr. Edward J. Novak, BCPS Hearing Officer for the Office of the Superintendent. On September 17, 2013, Mr. Novak met with Appellant. Appellant argued: 1) That N.M. would be academically set back because of the teaching disparities in Oakleigh compared to West Towson and 2) BCPS withdrew N.M. from West Towson in retaliation for her workplace discrimination claim. (Appeal Ltr., Ex. 5). On October 8, 2013, Mr. Novak rendered his decision. His decision stated in part:

“[T]here is no information in the record nor any information provided by you that contradicts the fact that you are no longer a BCPS employee and that your son qualified under Rule 5140...[Y]ou did not raise any other factors or claims that would establish a basis under Board Policy or Superintendent's Rule for your son to continue to attend West Towson.”

Id.

On October 10, 2013, Appellant appealed Mr. Novak's decision to the local board. In her letter, Appellant argued that: 1) N.M. deserved to be treated equally; 2) Ms. Hershfeld stated an incorrect basis for withdrawal, indicating that the first grade was too overcrowded to allow N.M. to continue at West Towson, where N.M. was to attend the second grade; 3) Local policy for special permission transfer should allow for a child of an employee to stay at their receiving school during the number of years that the employee has worked for BCPS; 4) N.M.'s emotional and mental behavior had been impacted by the change in school; and 5) Local policies, in general, unfairly impact minorities, including black males. (Record Extract, Ex. 2).

On January 15, 2014, Mr. John A. Austin, Esq., Hearing Officer for the local board conducted a hearing. (Respondent's Record Extract, Ex. 4). At the hearing, Appellant further argued that N.M.'s withdrawal at West Towson violated equal protection principles under the Fourteenth Amendment. *Id.* Mr. Austin affirmed the previous decisions, pointing out that there were no valid reasons that would permit N.M. to continue under his special permission transfer.

(Respondent's Record Extract, Ex. 5). Additionally, Appellant failed to carry her burden of proof that the prior decisions were made in an arbitrary, unreasonable or illegal manner. *Id.* Instead, Appellant argued that the policies "should be bent" for N.M. *Id.*

On January 30, 2014, upon Appellant's request, the local board reviewed the hearing officer's decision and adopted his recommendations, upholding N.M.'s withdrawal from West Towson. (Respondent's Record Extract, Ex. 9).

STANDARD OF REVIEW

The standard of review in a student transfer decision is that the State Board will not substitute its judgment for that of the local board unless the Appellant demonstrates that the local board's decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.05. 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 of the local board. COMAR 13A.01.05.05(B). A decision may be illegal if it is unconstitutional, exceeds statutory authority or jurisdiction of the local board, misconstrues the law, results from an unlawful procedure, is an abuse of discretionary power, or is affected by any other error of law. COMAR 13A.01.05.05(C)

ANALYSIS

This appeal is about which school N.M. may attend. It also raises the issue of retaliation and discrimination in the denial of the Appellant's request that her son remain in West Towson. We address Appellant's arguments herein.

(1) Initial special transfer application

Appellant's initial special permission transfer application was approved by BCPS under an employee exception under Rule 5140 (III)(D)(7), but at the end of the 2012-2013 school year, he was withdrawn because Appellant was no longer an employee of BCPS. A special transfer request is not permanent and certain conditions must be followed by the applicant, such as the following:

The child's enrollment shall be conditional upon completing and signing the *Student Contract: Nonresident Employee/Special Permission Transfer* (Rule 5140, Form B).

Students who have failed to meet the conditions of the *contract* may be withdrawn at the end of the school year for any of the following reasons:

...

(7) There is a change in reason for which the transfer was granted.

Rule 5140 (IV)(E)(1)(7).

To satisfy N.M.'s approved transfer condition, Appellant needed to continue her employment. Once she resigned from her position at Carver, the condition was no longer satisfied. Appellant does not dispute that N.M. no longer qualified for transfer under this exception. In accordance with the transfer policy, N.M. was withdrawn.

(2) Failure to consider Appellant's program of study and medical exception arguments

Appellant, however, argues that N.M.'s special transfer at West Towson should continue because he meets the Program of Study and Medical/Adjustment exceptions, therefore, the local board acted arbitrarily when it disregarded her arguments that show he meets these exceptions. The requirements to meet these exceptions are outlined under Rule 5140 (III)(D)(2) & (3). Although the local board asserts that Appellant failed to raise these issues, Appellant initially presented these arguments before Hearing Officer Austin, and again, in her written appeal to the local board and at oral argument before the local board.¹ Appellant, however, has failed to meet the requirements for a transfer under these two exceptions.

A. Program of study

Appellant proposes that N.M. should continue his transfer under the Program of Study exception. Eligibility under this exception requires a student's desire to "pursue a curricular, academic or sequential program of study not offered in the student's regularly assigned school." (Rule 5140 (III)(D)(2)(a)). Appellant proposes that N.M. would meet the requirements under this provision because West Towson is academically better than Oakleigh. She suggests that West Towson has higher state test scores and more teachers with advanced certification. As a result, N.M. would academically benefit from attending West Towson. However, those facts do not establish that N.M. seeks to pursue a specific course of study. Instead, it appears that Appellant is using the provision to seek a transfer to an academically better school, a worthy effort, to be sure. There is, however, no right to attend your school of choice.

B. Medical/Adjustment

Additionally, she argues that N.M. should be granted a continuance of the transfer under the Medical/Adjustment exception because he has suffered emotionally, behaviorally, and physically from his withdrawal at West Towson. The Medical/Adjustment exception policy requires the following:

[T]he student demonstrates exceptional hardship for reasons of medical, emotional, or social adjustment.

- (1) Independent, detailed documentation substantiating the circumstances (e.g. from physicians, psychologists, social workers, or counselors) is required and must be attached to the *Application for Special Permission Transfer*.

Rule 5140 (III)(D)(3)(a).

¹ The hearing officer did not touch upon these issues in his decision.

Appellant provided N.M.'s progress reports from Oakleigh, an X-ray of N.M.'s injury as a result of an altercation with another student, and an audio recording of "the emotional distress that [N.M.] is going through right now" as a result of the withdrawal. (App. Argument, Hearing Examiner Transcript). However, this is not the specific documentation needed to meet this provision. There is no evidence from doctors or counselors that shows N.M.'s attendance at Oakleigh has caused an exceptional hardship. Instead, Appellant argues that she does "not need any written documentation from a therapist to prove that my child is hurting." *Id.* Based on the policy, she does not provide enough to satisfy continuance under this exception. We note, however, that Appellant provides evidence of an injury sustained by N.M. involving an incident with another student at Oakleigh. While Appellant refers to the matter as "bullying" in her appeal filing, the extent of the interaction between the students is unclear. We urge the school system to look into any alleged "bullying" claims by the Appellant.

(2) *Equal Protection*

Appellant alleges an equal protection violation, claiming that N.M. is being denied the same opportunity as non-minorities to attend an academically better school. This board has consistently ruled that there is no right to attend a particular school. *Adele and Nicholas B. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 13-46 (2013) (citing *Bernstein v. Bd. of Educ. of Prince George's County*, 245 Md. 464 (1967)). Instead, a student must attend a school based on their geographic attendance area. Rule 5140 (I)(B). A student may also attend a certain school under a transfer based on its listed exceptions. Rule 5140 (III)(A). Appellant states that, "these policies and rules that...employees are executing were created by traditional educational governing powers, which originally segregated schools in Baltimore City. The same social group or governing powers of Baltimore City who decided to migrate to Baltimore County in order to liberally continue to support mostly white affluent people and build schools with government funds while black low-income neighborhoods were negatively impacted." (App. Resp. to Mtn.). She continues to argue that those living in white affluent neighborhoods in Baltimore County "openly say that we have just enough poor or people of color at our school to keep our test scores competitive." (Appeal Ltr. 3/31/2014). However, Rule 5140 is a race neutral policy. As explained above, N. M. does not satisfy one of the transfer exceptions listed in Rule 5140 (III) (D). As a result, N. M.'s home school is Oakleigh.

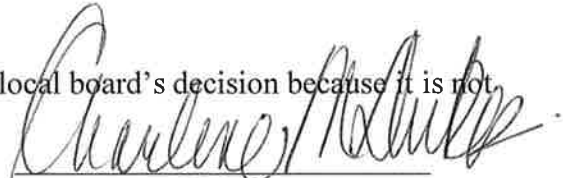
(3) *Unfair Retaliation*

Appellant contends that the decision to withdraw N.M. from West Towson was based on retaliation for her workplace discrimination claim. In order to establish a *prima facie* claim of retaliation, the Appellant must show that she engaged in a protected activity, that the school system took a materially adverse action against her, and that there was a connection between the protected activity and the materially adverse action. *Burlington N. & Santa Fe Ry. Co.*, 584 U.S. 53, 68 (2006). Assuming that the Appellant has established a *prima facie* case of retaliation, the school system may rebut the *prima facie* case by showing that there was a legitimate non-discriminatory reason for its action. *Id.* In this case, the transfer policy itself required that N.M. return to his home school after his mother resigned her teaching position. In addition, none of the additional evidence Appellant offered to support a transfer was sufficient to meet the

requirements of the transfer policy. It is our view that the local board had a non-discriminatory reason for its action.

CONCLUSION

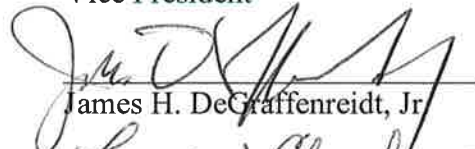
For the reasons stated above, we affirm the local board's decision because it is not arbitrary, unreasonable or illegal.



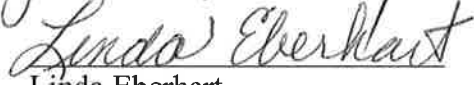
Charlene M. Dukes
President



Mary Kay Finan
Vice President



James H. DeGraffenreidt, Jr



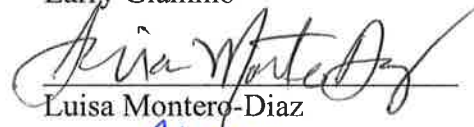
Linda Eberhart

Absent

S. James Gates, Jr.

Absent

Larry Giammo



Luisa Montero-Diaz

Absent

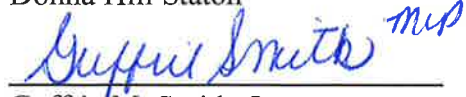
Sayed M. Naved



Madhu Sidhu



Donna Hill Staton



Guffie M. Smith, Jr.

June 27, 2014