

CHARLES AND MICHELLE SULLIVAN,

Appellants

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 01-10

OPINION

In this appeal, Appellants contest the denial of their request to transfer their son Frank to Cabin John Middle School in Montgomery County. They maintain that (1) Montgomery County Board of Education (“local board”) failed to apply Regulation JEE-RA (Revised, December 2, 1999) to the transfer request; and (2) the County Board failed to establish an effective date for Regulation JEE-RA. The local board has filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable or illegal. Appellants have filed an opposition to the local board’s motion.

BACKGROUND

This is the second consecutive year that Appellants have requested a transfer for Frank. Previously, on March 3, 1999, Appellants requested Frank to be transferred from Cold Spring Elementary School to Cabin John Middle School for the 1999-2000 school year instead of his attending Kingsview, his home school for the sixth grade. That appeal was based on Frank’s desire to be with friends and to simplify after school child care arrangements for Frank and his younger brother. The local board denied the transfer request concluding that there was no unique hardship. Appellants appealed to the State Board of Education. In Opinion No. 00-22 (April 19, 2000), the State Board upheld the County Board decision denying the transfer.

On March 28, 2000, when Frank was a sixth grade student enrolled at Kingsview Middle School, Appellants requested a transfer for Frank to Cabin John Middle School for the 2000-2001 school year when he would be in the seventh grade. The stated reason for the transfer was “continue in a feeder pattern, except for boundary change.” On April 22, 2000, Dr. Richard Pottinger, Field Office Supervisor, denied Appellants’ request. Appellants appealed the denial of the transfer request to the Deputy Superintendent for Education, on May 19, 2000.¹

The superintendent’s designee assigned a hearing officer, Laurence E. Jeweler, to further investigate the transfer request. As part of his investigation, Mr. Jeweler spoke with Mrs.

¹Although that appeal was filed beyond the 15 day time limit allowed by MCPS Regulation JEE-RA, it was permitted by hearing officer Arch Webster.

Sullivan who informed Mr. Jeweler that she was unhappy with the middle school Frank was attending. Mr. Jeweler suggested that Appellant contact the counselor at Kingsview to discuss her son's situation and to work with the school to facilitate an appropriate program for him. Mr. Jeweler concluded that because Frank was currently attending Kingsview, he was no longer within the feeder pattern from Cold Spring Elementary to Cabin John Middle School. Moreover, finding no hardship in this case, Mr. Jeweler recommended that the transfer request be denied. The superintendent's designee, Larry Bowers, Chief Operating Officer, adopted the hearing officer's report and advised Appellants by letter dated June 8, 2000 that the transfer denial was affirmed.

On July 6, 2000, Appellants appealed to the local board claiming that "its decision is **not** supported by Montgomery County Board of Education Regulation JEE-RA, revised December 2, 1999." (Emphasis in original.) They further argued that the December 2, 1999, revision to JEE-RA should have applied to their March 1999, transfer request because the regulation was revised during the process of that appeal. The local board affirmed the Superintendent's denial of the transfer request and concluded:

Contrary to the argument made by Mr. and Mrs. Sullivan, the Board's resolution and the regulation have been applied properly, inasmuch as this appeal seeks a transfer to a new middle school (albeit the one into which his elementary school feeds) for next year after a year when Frank was attending his home middle school. Seventh Grade is not a transition point and he is not moving to another educational level.

Appellants would argue that the new regulation should have been applied automatically to last year's application for a transfer, inasmuch as it went into effect immediately and subsequent to the request being made to continue the feeder pattern. However, this argument ignores the fact that last year's transfer season had ended, transfers were denied, appeals were lodged, and the school year had begun long before the revised regulation was issued. . . .

Rather, the regulation was applied with a prospective application to newly filed transfer requests once the new transfer season began on February 1, 2000. Appellants filed their request for this coming year on March 28, 2000, and the new regulation was applicable. Accordingly, this appeal is hereby denied. (Local board opinion).

ANALYSIS

The standard of review that the State Board applies in reviewing a student transfer decision is that the State Board will not substitute its judgment for that of the local board unless

that decision is shown to be arbitrary, unreasonable or illegal. *See, e.g., Breads v. Board of Education of Montgomery County*, 7 Op. MSBE 507 (1997).

Montgomery County Public Schools (“MCPS”) Regulation JEE-RA - Transfer of Students was revised on December 2, 1999, in response to a judicial decision, *Eisenberg v. Board of Education of Montgomery County*, 197 F.3rd 123 (4th Cir. 1999). As revised, the policy lists three possible criteria for consideration of a student transfer: (1) an older sibling attending the requested school at the same time; (2) continuation of a feeder pattern when the student is ready to move to the next education level, *e.g.*, elementary to middle school or middle school to high school; and (3) a documented hardship. Because the first and third criteria do not apply in this case, the only issue here is whether Appellants’ request is a continuation of a feeder pattern when the student is ready to move to the next educational level, such as elementary to middle school or middle to high school.

(1) Interpretation of Regulation JEE-RA

Appellants argue that the local board failed to apply Regulation JEE-RA III.A.2 to their transfer request and that Frank remains in the feeder pattern for Cabin John Middle School.² The local board argues that Frank is no longer in the feeder pattern for Cabin John Middle School because he attended Kingsview Middle School for the sixth grade. Thus, the question becomes when does a student’s feeder pattern end for purposes of a transfer pursuant to JEE-RA III.A.2? In analyzing the meaning and intent of a regulation, the local board’s interpretation of its own regulation is entitled to deference. *Changing Point, Inc. v. Maryland Health Resources Planning Com’n*, 87 Md. App. 150, 589 A.2d 502 (1991).

The local board’s interpretation that the feeder pattern ends after the student transitions to the next educational level is explained by Superintendent Jerry Weast in his July 19, 2000 memo to the local board. “Although the current transfer policy allows students to continue in a feeder pattern, Frank spent the 1999-2000 school year at Kingsview Middle School. As a result, Frank is no longer in the feeder pattern of Cold Spring Elementary School to Cabin John Middle School.” The local board acknowledged and relied on the Superintendent’s interpretation of the regulation in its August 29, 2000 decision. “The revised Regulation JEE-RA makes clear that this criterion for consideration of a transfer applies when a student ‘is ready to move to the next educational level.’” The local board continued, “Seventh grade is not a transition point and he is not moving to another educational level.”

The local board’s interpretation that the regulation was not intended to apply to students who were not at transition points in their education, *e.g.*, elementary school to middle school or middle school to high school is supported by the plain language of the regulation. Although it is possible that the regulation is susceptible to other interpretations, the local board’s interpretation

²Appellants do not maintain that his transfer is necessary because of a hardship.

is reasonable and entitled to the State Board's deference. Accordingly, since appellants have not presented evidence that the regulation was applied in a way that was arbitrary, unreasonable or illegal, the State Board will not substitute its judgement for that of the local board and the local board's decision is affirmed on this issue.

(2) Effective Date of Regulation JEE-RA

Appellants next argue that the local board failed to establish an effective date for Regulation JEE-RA with no mention of any particular academic year, and no exclusion of applicability of "current, in-process requests." Without a fixed effective date, Appellants contend, the regulation should have been effective immediately upon publication on December 2, 1999, and applied retroactively to their 1999 appeal which was pending before the State Board at the time.

It is undisputed that the regulation was revised while the 1999 transfer denial appeal was pending before the State Board. However, Appellants failed to raise the issue to the State Board while the issue was pending, and cannot do so in the context of the present appeal. Pursuant to Ed. Art. § 2-205(d)(3) and COMAR 13A.01.01.03R, the State Board's decision regarding the 1999 appeal is final. Consequently, the State Board cannot consider Appellants' arguments with respect to the earlier case.

Without considering the merits of any retroactive application of regulation JEE-RA to the 1999 appeal, we will briefly address whether there was an effective date of the regulation and what was the effective date. As a general rule, regulations are presumed to operate prospectively and are to be construed accordingly. The presumption against retrospectivity is rebutted only where there are clear expressions in the measure to the contrary. Even where permissible, retroactive application is not found except upon the plainest mandate in the enactment. The rationale underlying this general rule provides that retroactive application, which attempts to determine the legal significance of acts that occurred prior to the statute's effective date, increases the potential for interference with individuals' substantive rights. *Washington Suburban Sanitary Com'n v. Riverdale Heights Volunteer Fire Co. Inc.*, 308 Md. 556, 520 A.2d 1319 (1987).

Regulation JEE-RA does not include language to indicate that it was intended to apply retroactively. The language of the regulation demonstrates that local board intended for it to apply to transfer requests made between February 1 and April 1, 2000, for the 2000-2001 school year. JEE-RA III.B.1. states, "Transfer requests for the next school year will only be accepted between February 1 and April 1 for the following school year." The phrase "for the following school year" clearly demonstrates the local board's intention that the regulation applies prospectively to transfer requests made from February 1, 2000 until April 1, 2000, and then each year afterward. Also, when the regulation was revised in December 1999, the time period for transfer requests for the 1999-2000 school year had ended several months earlier in April 1999. Although Appellants contend that the transfer period did not end for Frank when the regulation was revised (because the 1999 appeal was still unresolved), it would make little sense for the local board to revise a regulation midway through the 1999-2000 school year, and apply the regulation in a way that would cause it to reexamine previously decided transfer requests. Such an interpretation would

likely disrupt the educational placements for numerous students half-way through the school year. The local board could not have intended a result that would cause substantial disorder and agitation.

Furthermore, Appellants by their conduct, appear to have understood that the regulation would be effective prospectively. The record shows that they followed the requirement of the regulation and requested a transfer for their son for the 2000-2001 school year on March 28, 2000. This was at the end of the transfer period, but before the April 1, 2000, deadline. It is reasonable to assume that if the Appellants believed that the regulation applied retroactively, they would have sought to revise their transfer request at the time the regulation was revised. Yet, they did not do so and waited several months until the transfer period had nearly ended for transfers for the 2000-2001 school year.

Finally, since an agency is best able to discern its intent in promulgating a regulation, *Changing Point, Inc. v. Maryland Health Resources Planning Com'n, supra*, the local board's interpretation that the regulation was effective prospectively is given deference. The local board stated in its August 29, 2000 decision that "the regulation was applied with a prospective application to newly filed transfer requests once the new transfer season began on February 1, 2000." The plain language of the regulation, the local board's own interpretation, and the absence of any language indicating retroactive applicability, clearly demonstrate that the regulation had prospective application for transfer requests for the 2000-2001 school year. There is no evidence in the record to support Appellants' argument that regulation JEE-RA did not have an effective date. Although the enactment date was December 2, 1999, the effective date of implementation of the regulation was no earlier than February 1, 2000, the beginning of the transfer period of 2000-2001 school year. As such, the local board's decision to apply the regulation prospectively was not arbitrary, unreasonable or illegal.

CONCLUSION

For these reasons, we affirm the transfer decision of the Board of Education of Montgomery County.

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February 27, 2001