

DALE AND DONNA DANNER,

Appellant

v.

CARROLL COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 02-45

OPINION

This is an appeal of the denial of Appellants' request to allow their daughter to continue at Westminster High School as an out-of-district student rather than attend the newly constructed Winters Mill High School. The local board has submitted a motion for summary affirmance maintaining that its decision is not arbitrary, unreasonable or illegal. Appellants have submitted a reply opposing the local board's motion.

FACTUAL BACKGROUND

Appellants' daughter Shelby is scheduled to attend tenth grade at the newly constructed Winters Mill High School which opens for the first time for the 2002–03 school year.¹ Although Shelby attended Westminster High School for the 2001-02 school year, Appellants reside in an area that was redistricted for Winters Mill.

As part of Carroll County Public Schools' Pathways to Careers Program, Shelby has selected a career pathway in instrumental music. Her specific interest is in the percussion area. In pursuit of that goal, Shelby has participated and excelled in the instrumental music program at Westminster.² Mr. Lortz, the band director at Westminster, is a percussionist and has given Shelby detailed instruction in the percussion area with the opportunity to learn on multiple instruments. To assist in Shelby's career pathway, Mr. Lortz set up a four year plan for Shelby which encompasses the courses she will need to be competitive for entrance to music colleges and conservatories. Those courses are as follows: Music Theory/Ear Training; Music History and Literature; Electronic and Computer Music; Piano; Guitar; Concert Band; Orchestra; Marching Band, and Percussion Ensemble (extracurricular Chamber Ensemble). Most of these courses are offered only at Westminster.

Appellants requested that Shelby be permitted to remain at Westminster High School so that she could continue in the instrumental music program there. Appellants indicated in their request that the instrumental music course selection at Winters Mill is extremely limited with the

¹Shelby's class will be the first graduating class at Winters Mill in June 2005.

²Westminster High School offers the largest amount and variety of percussion equipment in the State. See 4/9/02 letter from Lortz.

only course option available to Shelby being below her current level. Additionally, the marching band at Winters Mill will not have a percussion pit. Appellants also indicated that if Shelby were to remain at Westminster, she would continue to participate in Marching Band, and would take Wind Ensemble and Jazz Ensemble to which she has already been accepted through audition. Appellants further noted Shelby's desire to take Music Theory and Electronic Music, neither of which is offered at Winters Mill. Finally, Appellants asserted that Shelby would likely become a music major in college and they were concerned about the detriment to her education and future scholarship opportunities if she were not permitted to continue with her studies in instrumental music in high school.

The local board has identified Westminster High School as a closed school due to overcrowding. A closed school is one that has student enrollment at or above 90% of the school's functional capacity. Even with the opening of Winters Mill, Westminster High School will have an expected student enrollment of 2,159 for the 2002-03 school year, approximately 112% of its functional capacity of 1,921 students. Once a school is declared closed as a result of population growth, local board policy places strict limitations on the admission to the closed school of students who do not reside within the school's attendance area. *See* policy JEA.III. Shelby's circumstances were not found to be within any of the exceptions.

Appellants' request for Shelby to remain at Westminster was denied by the pupil personnel worker because it did not meet the guidelines for an out-of-district transfer to a closed school. Appellants further appealed to the Director of Pupil Services, acting as the superintendent's designee, who denied their request, stating:

Although your desire for Shelby to attend Westminster High School is certainly understandable, such a request does not meet the criteria for an out-of-district placement in a "closed" school. Once a school population has grown to the point that it becomes closed, it becomes necessary to place limits on students who do not reside in the attendance district. Your request does not fall within the stated reasons for approval of a student to attend a closed school. Therefore, I am affirming the decision made by Mrs. Pyles denying your request for Shelby's placement at Westminster High School.

See 3/14/02 letter from Cynthia Little. Ms. Little advised Appellants to contact the principal at Winters Mill to discuss the music program there in order to determine how best to meet Shelby's needs.

Appellants further appealed the denial of their transfer request to the local board. The superintendent's designee responded by letter to the local board, stating in part:

Policy JEA and the accompanying administrative regulations do not provide for an out-of-district placement at a "closed school" due to the availability of a course or program of studies. Further,

the Danners' request does not meet the guideline for an exception to the regulation in that the availability of a specific course or program of study is not a "rare or unusual circumstance" nor is it a "documented hardship." The decision is consistent with decisions made regarding similar petitions for consideration of out-of-district placements.

In a decision issued June 12, 2002, the local board upheld the denial of the transfer request.³ The local board explained that the transfer policy previously allowed a student transfer to an open out of district school offering a particular course of study, however the option was not available if the intended receiving school was closed. For the 2002-03 school year, the policy was changed and the ability to transfer to attend a school offering a particular course or program of study was dropped altogether. The local board further explained that if it found Shelby's situation to constitute an exception for a "rare and unusual circumstance" then it would be opening a door that was closed when the "course or program of studies" exception was eliminated from the policy.

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 the 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). The State Board has noted that student transfer decisions require balancing county-wide considerations with those of the student and family. *See, e.g., Marbach v. Board of Education of Montgomery County*, 6 MSBE 351, 356 (1992). Socio-economic level, building utilization, enrollment levels, and the educational program needs of the individual student are all legally permissible and proper subjects of consideration in weighing the impact of a request for a student to transfer from his or her home school to some other school of choice. *Slater v. Board of Education of Montgomery County*, 6 Op. MSBE 365, 371-72 (1992).

Substantive Arguments

Carroll County Board Policy JEA permits students to attend schools outside of their respective attendance area under certain circumstances upon the approval of the superintendent or his designee. The local board regulations implementing Policy JEA set forth guidelines for out-of-district student transfers to closed schools. The guidelines specify that such transfer applications will be denied unless one of the following conditions is met:

³The local board president was absent and did not participate in the decision. One board member filed a concurring opinion finding that the superintendent's decision was consistent with board policy and regulations. The board member, however, encouraged the superintendent to revisit the regulations on closed schools and consider whether an exemption should be granted when a program of study exists at the closed school but is not available at other schools.

- A. An in-coming Kindergarten student may pre-enroll in the requested out-of-district school. Once the out-of-district application has been approved, the enrollment process can be completed at the out-of-district school. (This is for the Kindergarten year only. As a First Grader, the student will be considered a new out-of-district applicant.)
- B. Student is a member of an in-county family with specific proof of plans to move into the requested school district within 90 days (must provide contract at time of application).
- C. Student is a senior who wishes to complete the high school program where the student attended and successfully completed the eleventh grade
- D. Student's parent/guardian is a contracted staff member at the requested school.

The regulations also contain an exception for "rare and unusual circumstances when a documented hardship is deemed to exist by Pupil Services Staff." The regulations state at IV.H:

Problems that are common to large numbers of families do not constitute a hardship, absent additional compelling factors. Exceptions will not be made for redistricting, family convenience, participation in extra curricular activities, provisions of daycare/supervision not otherwise covered by this regulation, separation/divorce, or the student's desire to remain with the same peer group at the same school.

Based on Policy JEA and its regulations and our review of the record we find that the only exception applicable in this case is the one for "rare and unusual circumstances when a documented hardship is deemed to exist."

The local board maintains that Shelby's desire to partake in specific music courses at Westminster does not constitute "rare and unusual circumstances" under the policy. The board argues that if such a desire were recognized as such, it would essentially nullify the result of eliminating the exception that once existed for participating in a "course or program of studies" from the policy.

As the local board notes, the Court of Appeals has ruled that there is no right to attend a particular school. *See Bernstein v. Board of Education of Prince Georges County*, 245 Md. 464, 472 (1967). Moreover, the State Board has upheld local board decisions where a desire to attend a course or program of study was not deemed a hardship sufficient to justify the transfer. *See*

Dennis v. Board of Education of Montgomery County, 7 Op. MSBE 953 (1998) (desire to participate in particular courses does not constitute unique hardship sufficient to override utilization concerns); *Marshall v. Board of Education of Howard County*, 7 Op. MSBE 596 (1997) (no entitlement to attend four-year communications program offered at Mount Hebron); *Williams v. Board of Education of Montgomery County*, 5 Op. MSBE 507 (1990) (denial of transfer to program offering advanced German); *Sklar v. Board of Education of Montgomery County*, 5 Op. MSBE 443 (1989) (denial of request to attend school offering four years of Latin, note taking/study skills course, and piano).

Here, although Shelby's request for transfer is based on a desire to participate in a particular program of study, we find based upon our review of the record that Shelby's unique circumstances differ from the situations described in the cases cited above. These circumstances include the fact that the Carroll County Public School System has a Pathways to Careers Program; Shelby chose as her career pathway instrumental music specializing in percussion; and Westminster High School offers advanced music course offerings and a highly developed music program, particularly in the percussion area, compared to the neophyte program at Winters Mill where courses are below Shelby's ability level. In addition, Shelby has already spent her freshman year at Westminster where Mr. Lortz, a percussionist, worked with Shelby to provide her with individualized training and tutoring in the percussion area. Furthermore, the four year plan devised by Mr. Lortz provides a solid foundation to enable Shelby to be competitive for entry into music colleges and conservatories.

Moreover, we note that although the exception allowing transfers to open schools based on a desire to take a particular course or follow a program of study was eliminated from the regulations for policy JEA, section IV.H of the regulations does not list this basis as one of the reasons which may not constitute a hardship. For all of these reasons the State Board finds that Shelby's unique situation as described above falls within the hardship exception that would allow her to remain at Westminster High School. The local board's decision is therefore unreasonable under all of the specific circumstances of this case.

Procedural Arguments

Appellants allege that the local board failed to provide a written decision to the Appellants in this case in a timely manner. Appellants are under the mistaken impression that the local board's written opinion must be issued within thirty days of the decision if the decision and written opinion are not issued at the same time. State law provides no time limitation on the period in which a local board gives a written opinion in a student appeal. In fact the provision cited by Appellants which provides for appeals to the State Board specifically states that an appeal may be taken within thirty days of the local board decision, with the thirty days running "from the later of the date of the order or the opinion issued reflecting the decision." COMAR 13A.01.01.03B(3)(a). In any event, it appears that the local board issued an order on May 8, 2002, the day it reviewed the appeal, and issued a written decision approximately one month later on June 12, 2002. We do not find this to be unreasonable.

Appellants also allege that the local board violated the Maryland Public Information Act (PIA), Md. Code Ann., State Gov't 10-611 *et seq.* The PIA sets forth the procedures to be followed by those aggrieved by a public body's failure to comply with the provisions of the Act. Section 10-623 provides that an individual who is adversely affected by a public body's failure to comply with the PIA may file a petition in the circuit court. Thus, the State Board of Education is not the appropriate forum for redress of Appellants' PIA claims or claims of false testimony in court.

With regard to Appellants' claim that the local board met illegally in executive session to deliberate on this appeal, such a claim is governed by the Maryland Open Meetings Act found in the State Government Article, Annotated Code of Maryland. The law specifies the circumstances in which a public body may conduct open or closed sessions. *See* Md. Code Ann., State Gov't §§10-505, 10-508. Again, the State Board is not the appropriate forum to address issues arising under the Open Meetings Act. Such matters should be raised with the State Open Meetings Compliance Board.

Appellants have also raised other arguments regarding violations of laws concerning special education, career and technology education, gifted and talented programs, and false advertising. These various arguments were either not raised before the local board or are inapplicable in this case. *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).

CONCLUSION

For these reasons and under the unique circumstances as they pertain to Shelby, we reverse the decision of the Board of Education of Carroll County based on a finding of unreasonableness. We therefore direct the Board to allow Shelby to continue her high school career at Westminster High School, provided that she pursues the instrumental music pathway that she had begun.

Marilyn D. Maultsby
President

Reginald L. Dunn
Vice President

JoAnn T. Bell

Philip S. Benzil

Clarence A. Hawkins

Walter S. Levin, Esquire

Karabelle Pizzigati

Edward L. Root

Walter Sondheim, Jr.

John L. Wisthoff

DISSENT

Finding that the local board did not act arbitrarily, unreasonably, or illegally in this matter, I would affirm the decision.

Dunbar Brooks

September 5, 2002