

SONIA P. STEWART,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 00-13

OPINION

This is an appeal of the denial of a request for placement of William Stewart in a magnet program at Piney Branch Elementary School in Montgomery County. Appellant argues that the local board decision is illegal because the transfer denial was race based. The local board has filed a Motion to Dismiss the appeal based on untimeliness. Appellant has submitted a reply in opposition to the motion.

BACKGROUND

William is currently a fourth grade student at Summit Hall Elementary School in Montgomery County. In early 1999, Appellant requested that William be transferred to Piney Branch Elementary School so that he could attend the school's Magnet Program for the 1999-2000 school year. Appellant contends that the instructional program, equipment and facilities available at Piney Branch, but not at Summit Hall Elementary where William attends school, "would provide [her] son an educational opportunity that would allow him to reach his full potential." She also stated that William "is a child with tremendous curiosity and an eagerness for learning, given the right stimulation." On June 17, 1999, the Field Office Supervisor for Montgomery County Public Schools ("MCPS") advised Appellant that the transfer request was denied based on the impact on diversity. *See* MCPS Student Transfer Form dated 6/17/99.

Appellant appealed the denial to the local superintendent who assigned a hearing officer to further investigate the transfer request. The hearing officer acknowledged in his report that the field office denied William's transfer based on the impact on diversity at Summit Hall. In addition, the hearing officer indicated that Piney Branch Elementary School is overcrowded; that there were already a number of 4th Grade students waiting for a spot in the Piney Branch Elementary School Magnet Program; that other similar transfer requests had been denied; and that William's case presented no unique hardship. He recommended that the transfer be denied.¹ *See* Hearing Officer Report dated 8/9/99. The Superintendent's Designee concurred

¹The hearing officer advised Appellant to contact the principal of Summit Hall to discuss the school's programming for gifted and talented students.

with the findings of the hearing officer and adopted his recommendation denying the transfer. See Letter from Seleznow dated 8/12/99.

Appellant appealed the denial by the superintendent's office to the local board. The local board unanimously upheld the denial of the transfer. This appeal followed.

ANALYSIS

As a threshold matter, the local board argues that this appeal should be dismissed because it was untimely filed with the State Board. We find that the timeliness issue is affected by the practice of the Montgomery County Board often issuing an order followed several days or weeks later by an opinion explaining the order, and the State Board's recent promulgation of a regulation clarifying that the 30 day appeal deadline runs from the date of the order or opinion, whichever is later.

The order of the local board was issued on September 14, 1999. At that time, State Board regulation stated that "[a]n appeal shall be taken within 30 calendar days of the decision of the county board or other individual or entity which issued the decision on appeal." COMAR 13A.01.01.03B (3); *see also* Md. Code Ann., Educ. § 4-205 (c). The regulation further provided that an appeal is deemed transmitted within the limitations period if it has been delivered to the State Board or deposited in the United States mail, as registered or certified, before the expiration of the time period. COMAR 13A.01.01.03B (3). According to this regulation, the instant appeal to the State Board was due on October 14, 1999. The local board's written decision explaining its order was issued on the same day, October 14, 1999. The letter of appeal was filed on October 18, 1999.

However, earlier on August 13, 1999, the Maryland Register published the State Board's proposed amendment to its regulation that added the following: "The 30 days shall run from the later of the date of the order or the opinion issued reflecting the decision." *See Maryland Register*, Vol. 26, Issue 17 (8/13/99). On September 28, 1999, the State Board adopted the proposed amendment, effective November 1, 1999. (Notice of Final Action was published on October 22, 1999 in the *Maryland Register*. *See* Vol. 26, Issue 22.) This change clarifies the limitation deadline for submitting an appeal to the State Board where the local board issues its opinion and written decision on separate dates. If the amended regulation applied to this case, the appeal to the State Board would have been due on November 13, 1999. Since the appeal was filed on October 18, 1999, it would have been timely filed.

Time limitations are generally mandatory and will not be overlooked except in extraordinary circumstances such as fraud or lack of notice. *See Scott v. Board of Education of Prince George's County*, 3 Op. MSBE 139 (1983); *See also* COMAR 13A.01.01.03G (2). The State Board has strictly applied this rule of law, and has dismissed appeals that have been filed a mere one day late based on untimeliness. *See Christine Schwalm v. Board of Education of Montgomery County*, MSBE Opinion No. 98-50 (September 24, 1998); *Marie Friedman v. Board of Education of Montgomery County*, MSBE Opinion No. 98-41 (July 29, 1998);

Eleanor Duckett v. Board of Education of Montgomery County, MSBE Opinion No. 97-14 (March 26, 1997). However, this case is in an unusual posture. The local board's order was issued after the amendment to the regulation was published, but before the amendment was adopted by the State Board. Additionally, the letter of appeal to the State Board, which was delivered by certified mail postmarked October 18, 1999, was submitted after the amendment was adopted by the State Board but before its effective date. Given these unique circumstances, we decline to dismiss the appeal on the basis of untimeliness.

With respect to the merits, the standard of review in a student transfer appeal is that the State Board will not substitute its judgment for that of the local board unless the local board decision is shown to be arbitrary, unreasonable or illegal. *Michael & Barbara Breads v. Montgomery County Board of Education*, MSBE Opinion No. 97-1 (January 29, 1997). On October 6, 1999, the United States Court of Appeals for the Fourth Circuit issued its opinion in *Eisenberg v. Montgomery County Public Schools*, 1999 WL 795652 (4th Cir. 1999), which challenged the use of diversity as one factor, among others, in deciding whether to grant or deny a requested student transfer. In pertinent part, the Court held the following: "We have not enjoined any aspect of the transfer policy of Montgomery County *except that it may not consider the race of the applicant in granting or denying the transfer.*" (Emphasis supplied)

In this case the field office supervisor indicated that the sole basis for the decision to deny William's transfer request was the impact of voluntary transfers on the diversity of the existing population at Summit Hill Elementary School. Although additional factors were cited by the hearing officer upon subsequent review, we find that the case must be revisited in light of the Fourth Circuit's ruling in *Eisenberg*.

CONCLUSION

For these reasons, we are remanding this appeal to the Board of Education of Montgomery County for further action consistent with the opinion of the U.S. Court of Appeals for the Fourth Circuit in *Eisenberg v. Montgomery County Public Schools*, 1999 WL 795652 (4th Cir. 1999).

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February 23, 2000