



Karen B. Salmon, Ph.D.
State Superintendent of Schools

TO: Members of the State Board of Education

FROM: Karen B. Salmon, Ph.D.

DATE: May 21, 2019

SUBJECT: State Board Analysis and Review of School Transfer Appeals and Other Similar Cases

PURPOSE:

To provide the State Board with information to use in deciding whether to change the way the State Board analyzes and reviews school transfer appeals and other similar cases.

BACKGROUND:

Over the last two years or so, when a case involving a student's preference to be in a different school or to take particular classes came before the State Board, some members expressed discontent about how limited they were in crafting a decision that could take into account the best interests of the student. For reasons explained herein, the State Board's analysis of the case was limited essentially to whether the local board followed its own policies and applied them fairly.

In each of the 24 school systems in Maryland, the most common reasons for the granting of transfers are:

- Employee parent works in school;
- Siblings attend school;
- Proven hardship/extraordinary circumstances;
- Documented safety issues; and
- Health/medical reasons.

It is interesting to note that only five school systems list access to a course of study not offered in the student's zoned school as a reason for transfer. They are: Cecil, Frederick, Harford, Washington, and Worcester School Systems.

The reasons for denial of transfers include:

- Failure to fit into a transfer category;
- Failure to prove hardship or other reason for transfer;
- School or class is at capacity;
- Transportation; and
- Student does not have the grades, attendance and/or good discipline record.

The limitation on how the State Board could decide student transfer appeals arises mainly from the standard of review and burden of proof that apply in student transfer appeals.

Currently, the standard of review is that the decision of the local board involving a local policy or a controversy or dispute regarding the rules and regulations of the local board shall be considered *prima facie* correct, and 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 one or more of the following:

- (1) It is contrary to sound educational policy; or
- (2) A reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached.

A decision may be illegal if it is one or more of the following:

- (1) Unconstitutional;
- (2) Exceeds the statutory authority or jurisdiction of the local board;
- (3) Misconstrues the law;
- (4) Results from an unlawful procedure;
- (5) Is an abuse of discretionary powers; or
- (6) Is affected by any other error of law.

COMAR 13A.01.05.05(A); (B); (C).

Currently, the burden of proof is on the Appellant to prove by preponderance of evidence that the local board's decision was arbitrary, unreasonable, or illegal. COMAR13A.01.05.05(D).

EXECUTIVE SUMMARY:

Staff and counsel will present three possible changes to the way the State Board reviews appeals in cases in which a student requests a transfer to another school and other similar cases. The first possible change is a "best interest of the student" analysis. The second is a change to the standard of review applicable in such cases. Third, is a change in the burden of proof.

ACTION:

For information only.

Attachments:

Best Interest Analysis Examples

Memorandum on Requests for School Transfers

Examples of State Board Decisions in School Transfer Appeals

School Transfers



STATE BOARD MEETING

May 21, 2019

Considerations for the State Board on School Transfers

- Definition of “Best Interest of the Student”
- Standard of Review
- Burden of Proof

Is the Local Board's Decision in the Best Interest of the Student?

- Best interest could be based on:
 - Academic needs/interests (courses, special programs, etc.)
 - Physical and/or emotional wellbeing (emotional trauma, anxiety, bullying, etc.)
 - Other Factors

- Are there factors that make the student's preference impractical even if it is in the student's best interest?
 - Capacity of the school or class
 - Transportation
 - School does not offer described course
 - Other factors

Types of Cases for Application of “Best Interest”

- School Transfer
- Request for a particular course in another school
- Placement in an alternative school
- Other

Standard of Review

Reflects Amount of Deference:

- No Deference – Use Independent Judgement...
- Some Deference – Decision Presumed Correct Unless...
- Lots of Deference – Decision Reversed Only If Clearly Erroneous Facts or Plain Errors of Law

Burden of Proof

Party Responsible for Presenting Evidence:

- Appellant or
- Local Board

Level of Evidence the Party Must Produce:

- Preponderance of Evidence – 51% Likelihood to be True
- Clear and Convincing Evidence – Substantial Likelihood to be True
- Beyond a Reasonable Doubt – Beyond Doubt Likely to be True

Choosing a Standard of Review

Independent Judgement

De Novo Review

Is the decision in best interest of the student?

(No deference to Local Board Decision)

OR

Decision is presumed to be in the best interest of the student unless...

(Some deference to local board decision)

Choosing a Burden of Proof

If you choose the **independent judgment** standard:

- Shift burden of proof to the local board to prove that its decision is in the best interest of the student by:
 - Preponderance
 - Clear and Convincing

or

- Leave burden on appellant to prove that the local board's decision is not in best interest of student:
 - Preponderance
 - Clear and Convincing

If you choose the **presumed correct** standard:

- Leave burden on the appellant to prove that the local board's decision is not in the best interest of the student by:
 - Preponderance
 - Clear and Convincing

Best Interest Analysis Examples

When students in foster care, out-of-home placement, or homeless students move to a new county, the State agency and/or the local school systems involved conduct a best-interest analysis to determine whether it is in the best interest of the student to remain in the student's school of origin or to transfer to a new school in the county in which the student now resides.

Attached are three "best interest" determination forms that are used. They may be helpful to you in discussing the factors that the Board might use to determine the best interest of a student in a school transfer case. The first is from Maryland; the second from San Diego; the third from Indiana.

MARYLAND

M.D.

BEST INTEREST DETERMINATION FORM SCHOOL ENROLLMENT OF STUDENT IN OUT-OF-HOME PLACEMENT

*This form shall be completed by the DJS Point of Contact
Copies shall be kept in the student's education record and Juvenile Services case record*

Student's Name: _____
State Assigned Student Identifier (SASID): _____ DOB: _____
Current School: _____ Grade: _____
Previous School(s): _____
Date of Best Interest Determination Meeting: _____

Best Interest Determination: A Checklist for Decision Making

Remaining in the School of Origin Considerations

- Safety of the student and community**- *the school of origin is a safe environment for the student and community.*
- Social/emotional considerations** - *the student's social and emotional wellbeing will be negatively affected if transferred to a new school (considerations include age of the student, location of siblings, etc.)*
- Length of anticipated stay in an out-of-home placement location** - *in light of the anticipated short duration of the stay, the student would benefit from the continuity offered by remaining at the school of origin where meaningful relationships exist.*
- Continuity of instruction** - *the student has experienced frequent school changes or has attended the school of origin for an extended period of time, and would be best served by remaining at the school of origin (considerations include credits necessary for graduation and preparation for future instruction).*
- Academic performance** - *the transfer will significantly and adversely affect the student's academic performance.*
- Unique educational needs or academic and extracurricular interests** - *the student's special educational needs (IEP or 504 Plan) or unique academic and extracurricular interests cannot be met at the potential receiving school.*
- Transportation considerations** - *the advantages of remaining in the school of origin outweigh any potential disadvantages presented by the length of the commute.*

Transferring to a New School Considerations

- Safety of the student and community** - *the new school will be a safer environment for the student and community.*
- Social/emotional considerations** - *the student's social and emotional wellbeing will be positively affected or will not be substantially affected if transferred to the potential receiving school (considerations include age of the student, location of siblings, etc.)*
- Length of anticipated stay in an out-of-home placement location** - *the student's current living situation appears to be stable and unlikely to change suddenly, so the student will benefit from establishing new relationships with school peers in the potential receiving school.*
- Continuity of instruction** - *the student has not attended the school of origin for very long and will be best served at the potential receiving school (considerations include credits necessary for graduation and preparation for future instruction).*
- Academic performance** - *the transfer will not significantly and adversely affect the student's academic performance.*
- Unique educational needs or academic and extracurricular interests** - *the student's special educational needs (IEP or 504 Plan) or unique academic and extracurricular interests can be met at the potential receiving school.*
- Transportation considerations** - *the length of the commute to the school of origin is excessive and may adversely affect the student's concentration, attitude, or readiness for school.*

Attach all documents relevant to the student's best interest determination. Check any that apply.

- Report Cards/Progress Reports
- Achievement Data (test scores)
- Attendance Data
- IEP Plan or 504 Plan
- Communications from individuals consulted (include electronic communications).
- Other: _____

SAN Diego

Best Interest In School of Origin Decisions: A Checklist for Decision Making

(Adapted from the San Diego County Interagency Agreement for Providing Educational Support to Students in Foster Care And the Texas Homeless Education Office)

Student Name: _____

Date: _____

Remaining in the Same School (School of Origin) Considerations	Transferring to a New School Considerations
<input type="checkbox"/> Continuity of Instruction <i>Student is best served at the same school due to prior history.</i>	<input type="checkbox"/> Continuity of Instruction <i>Student is best served at a different school due to his or her history/future.</i>
<input type="checkbox"/> Age and grade placement of the student <i>Maintaining friends and contacts with peers is critical to the student's meaningful school experience and participation. The student has been in this environment for an extended period of time.</i>	<input type="checkbox"/> Age and grade placement of the student <i>Maintaining friends and contacts with peers is <u>not</u> critical to the student's meaningful school experience and participation. The student has attended the school of origin for only a brief time. The student has destructive or dangerous relationships at their school of origin.</i>
<input type="checkbox"/> Academic Strength <i>The child's academic performance is weak, and the child would fall further behind if he/she transferred to another school.</i>	<input type="checkbox"/> Academic Strength <i>The child's academic performance is strong and at grade level and the child would likely recover academically from a school transfer.</i>
<input type="checkbox"/> Social and emotional state <i>The child is suffering from the effects of mobility, has developed strong ties to the current school, does not want to leave, or involved in school related or extra-curricular activities.</i>	<input type="checkbox"/> Social and emotional state <i>The child seems to be coping adequately with mobility, does not feel strong ties to the current school, does not mind transferring to another school, or is not involved in school related or extra-curricular activities.</i>
<input type="checkbox"/> Distance of the commute and its impact on the student's education and/or special needs <i>The advantage of remaining in the school of origin outweighs any potential disadvantages presented by the length of the commute.</i>	<input type="checkbox"/> Distance of the commute and its impact on the student's education and/or special needs <i>Shorter commute may help the student's concentration, attitude, or readiness for school. The new school can meet all of the necessary educational and special needs of the student.</i>
<input type="checkbox"/> Personal safety of the student <i>The school of origin has advantages for the safety of the student.</i>	<input type="checkbox"/> Personal safety of the student <i>The new school has advantages for the safety of the student.</i>
<input type="checkbox"/> Student's need for special instruction <i>The student's need for special instruction, such as Section 504 or special education and related services, can be met better at the school of origin.</i>	<input type="checkbox"/> Student's need for special instruction <i>The student's need for special instruction, such as Section 504 or special education and related services, can be met better at the new school.</i>
<input type="checkbox"/> Length of anticipated stay in a temporary or permanent location <i>The student's current living situation is outside the school of origin attendance area, but his/her living situation or location continues to be uncertain. The student will benefit from the continuity offered by remaining in the school of origin.</i>	<input type="checkbox"/> Length of anticipated stay in a temporary or permanent location <i>The student's current living situation appears to be stable and unlikely to change suddenly. The student will benefit from developing relationships with school peers who live in his or her community.</i>
<input type="checkbox"/> Academic Performance Ranking <i>The school is in program improvement, but the student is connected (academically or socially) to the school which outweighs transferring to a new school or higher performing school.</i>	<input type="checkbox"/> Academic Performance Ranking <i>The school of origin is in Program Improvement and the new potential school will meet the educational needs of the student. The new school can provide more academic support services and greater opportunities than the school of origin.</i>

Indiana

Remaining in School (School of Origin) Considerations	Transferring to School (New School) Considerations
<p>Continuity of Instruction <i>Student is best served at the same school due to prior history.</i></p>	<p>Continuity of Instruction <i>Student is best served at a different school due to his or her history/future.</i></p>
<p>Age and grade placement of the student <i>Maintaining friends and contacts with peers is critical to the student's meaningful school experience and participation. The student has been in this environment for an extended period of time.</i></p>	<p>Age and grade placement of the student <i>Maintaining friends and contacts with peers is not critical to the student's meaningful school experience and participation. The student has attended the school of origin for only a brief time. The student has destructive or dangerous relationships at their school of origin.</i></p>
<p>Academic Performance <i>The child's academic performance is weak, and the child would fall further behind if he/she transferred to another school.</i></p>	<p>Academic Performance <i>The child's academic performance is strong and at grade level and the child would likely recover academically from a school transfer.</i></p>
<p>Social and emotional state <i>The child does not adjust well to change, has developed strong ties to the current school, does not want to leave, or involved in school related or extra-curricular activities.</i></p>	<p>Social and emotional state <i>The child seems to have the coping skills to adequately adjust to change, does not feel strong ties to the current school, does not mind transferring to another school, or is not involved in school related or extra-curricular activities.</i></p>
<p>Distance of the commute and its impact on the student's education and/or special needs <i>The advantage of remaining in the school of origin outweighs any potential disadvantages presented by the length of the commute.</i></p>	<p>Distance of the commute and its impact on the student's education and/or special needs <i>Shorter commute may help the student's concentration, attitude, or readiness for school. The new school can meet all of the necessary educational and special needs of the student.</i></p>
<p>Personal safety of the student <i>The school of origin has advantages for the safety of the student.</i></p>	<p>Personal safety of the student <i>The new school has advantages for the safety of the student.</i></p>
<p>Student's need for special instruction <i>The student's need for special instruction, such as Section 504 or special education and related services, can be met better at the school of origin.</i></p>	<p>Student's need for special instruction <i>The student's need for special instruction, such as Section 504 or special education and related services, can be met better at the new school.</i></p>
<p>Length of anticipated stay in a temporary or permanent location <i>The student's current living situation is outside the school of origin attendance area, but his/her living situation or location continues to be uncertain. The student will benefit from the continuity offered by remaining in the school of origin.</i></p>	<p>Length of anticipated stay in a temporary or permanent location <i>The student's current living situation appears to be stable and unlikely to change suddenly. The student will benefit from developing relationships with school peers who live in his or her community.</i></p>
<p>Academic Performance Ranking <i>The school of origin has a higher academic performance ranking than the transferring school; or, the school of origin is in Program Improvement, but the student is connected (academically or socially) to the school, which outweighs transferring to a new school or higher performing school.</i></p>	<p>Academic Performance Ranking <i>The transferring school has a higher academic performance ranking; or, the school of origin is in Program Improvement and the new school can provide more academic support services and greater opportunities than the school of origin.</i></p>

Office of the Attorney General
Maryland State Department of Education
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6465

April 23, 2019

TO: State Board Members

FROM: Elizabeth M. Kameen

RE: Requests for School Transfers in Maryland Schools

This memo addresses several topics related to the transfer of students between school systems and within school systems. It addresses the reasons transfers are granted in the 24 school systems. Next, it provides some data on transfer request approvals and denials by school systems. And finally, it presents some advice for decision-making going forward.

I. Reasons for Transfers in Maryland

We reviewed the transfer policies of each of the 24 school systems in Maryland. The most common reasons school systems list for granting transfers are:

- Employee parent works in school;
- Siblings attend school;
- Proven hardship/extraordinary circumstances;
- Documented safety issues;
- Health/medical reasons.

It is interesting to note that five school systems list access to a course of study not offered in the student's zoned school as a reason for transfer. They are: Cecil, Frederick, Harford, Washington, and Worcester. And, in Harford County, if circumstances exist, open enrollment in certain secondary schools is announced and a lottery is conducted, if necessary. Baltimore City has its own open enrollment rules. Other school systems may have open enrollment opportunities in a variety of contexts.

The reasons for denial of transfers include:

- School or class is at capacity;
- Failure to prove that the student meets the criteria for transfers established by the school system.

Other barriers to transfers are:

- Transportation is parents' responsibility;
- Student must maintain grades, attendance and good discipline record.

II. Transfer Case Appeals

Of all the school systems in Maryland, Montgomery County by far has the most appeals of transfer decisions generally. We looked at the State Board docket for years January 2010 to December 2016. Of the 160 or so transfer cases appealed in those six years, 60 plus were appeals from Montgomery County. The remaining 100 or so cases came from the other 23 school systems, mostly Charles, Prince George's, Baltimore County, and Howard County.

In November 2014, the State Board became concerned about the number of transfer appeals from Montgomery County. The Board asked that school system to provide a report on its transfer decisions. The State Board learned that of the thousands of transfers requested each year over 80% were initially approved and, of those initially denied, almost 40% of those were ultimately approved by the Superintendent.

Montgomery County Public Schools Student Transfer Summary*

	2011- 2012	2012- 2013	2013- 2014	2014- 2015
Countywide Requests	4,477	4,192	4,098	4,200
Approved	85%	88%	88%	86%
Superintendent-Level Appeals	373	408	513	514
Approved	38%	38%	42%	39%
Board of Education-Level Appeals	63	71	96	87
Affirmed**	56	69	90	86

Data as of September 30 of each school year. These data reflect only fully processed requests.

* Data includes approved requests for changes of school assignment in Consortia and application programs.

** This is the pool of cases that can be appealed to the State Board.

Thus, you can see that the appeals that came to the State Board from Montgomery County represented very few of the requests that the school system received for transfers. Most of them had already been granted at the local level.

In February 2018, the State Superintendent gathered similar information from all school systems about transfer requests, approvals, and denials. They reflect a pattern very similar to Montgomery County. For example, for the 2017-2018 school year, eleven school systems reported approving between 90% and 100% of transfer requests. They are Allegany, Baltimore City, Calvert, Carroll, Cecil, Garrett, Queen Anne's, St. Mary's, Somerset, Talbot, and Worcester. Seven school systems report approving 80% to 89% of requested transfers, The remaining six school system's approval rates range from 78% (Wicomico) to 64% (Charles).

It is the transfers that were not approved that were the focus of appeals to the State Board and of concern for some Board members.

III. Decisions Going Forward

The State Board has issued hundreds of opinions in school transfer cases over many decades. In almost every one of them, it has upheld denials of transfers because the school of choice was overcrowded, or because the reason given for wanting to transfer did not meet the criteria for hardship, or because the evidence did not support a medical or safety reason for the transfer. It has found that those reasons for the denials were not arbitrary, unreasonable, or illegal.¹ Those cases represent years of precedent on which local boards have relied to govern their student transfer decision-making.

When years of precedent are in place, the Court of Appeals decision in *CBS v. Comptroller*, 319 Md. 687 (1990) governs how the precedent can be changed. In that case, the Comptroller's Office changed years of precedent in the way it applied certain tax laws to specific types of revenue. *Id.* at 697. It did so in an administrative decision adjudicated against a tax payer. Ultimately, the Court of Appeals ruled that when an agency tries to materially change how it has applied its policies or laws, particularly when the change is to be applied as a general standard and deals with broad policy issues transcending those of the individual litigants, the agency must make that change through the regulatory process, not through an *ad hoc* adjudicatory process. *Id.* at 695.

Thus, the regulatory process is the legally appropriate way to make changes to intradistrict school transfer policies statewide. The State Board's authority to affect interdistrict transfers, however, is confined by State law which requires a child to attend the public school in the county where the child is domiciled with parents or guardians. Md. Ed. Art. §7-101(b). A change in State law would be necessary to mandate interdistrict transfers.

¹ The standard of review in a student transfer decision is that the decision of the local board shall be considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A. A decision is arbitrary or unreasonable if "it is contrary to sound educational policy" or if "a reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached. COMAR 13A.01.05.05 (B)(1) & (2).

ALLEN S.,

Appellant

v.

ANNE ARUNDEL COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 18-01

OPINION

INTRODUCTION

Allen S. (Appellant) appeals the decision of the Anne Arundel County Board of Education (local board) denying an out-of-area school transfer for his son. The local board filed a Motion for Summary Affirmance, maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant responded and the local board replied.

FACTUAL BACKGROUND

Appellant's son, B.S., was assigned to attend Old Mill High School (Old Mill) for ninth grade during the 2017-18 school year. On April 1, 2017, Appellant filed a Request for an Out of Area Transfer with Anne Arundel County Public Schools (AACPS) so that his son could attend Severna Park High School (Severna Park) rather than Old Mill. Appellant did not provide a reason for the transfer request. (Motion, Ex. 1).

On April 10, 2017, AACPS denied the transfer request because the reasons offered for the transfer were "inconsistent with regulation." (Motion, Ex. 1). The AACPS coordinator for pupil personnel workers called Appellant the same day to discuss the school system's transfer policies. Appellant explained that his son is on a STEM¹ waiting list and that he is not interested in having his son pursue the International Baccalaureate (IB) program offered at Old Mill. Appellant stated that he believed his son's best opportunity for getting into medical school would be by attending Severna Park. (Motion, Ex. 5).

Appellant appealed the transfer denial decision. He argued that his son was an excellent student, but that he had not been selected for any STEM programs in middle or high school. Appellant stated that he wanted his son to have better educational opportunities and more academic challenges, which he believed could only occur at Severna Park. He enclosed a character reference letter from one of B.S.'s teachers. (Motion, Ex. 4).

¹ STEM stands for science, technology, engineering, and math. AACPS offers STEM Magnet Programs at some of its schools, though Severna Park is not one of them. See <https://www.aacps.org/stem> (last accessed November 9, 2017).

On May 11, 2017, the superintendent's designee denied the transfer. She informed Appellant that transfers are permitted "when space and facilities are available to accommodate the transferring student and the reason for the transfer falls under our guidelines." Because the request did not fit within AACPS regulations, she denied it. Around this same time, a pupil personnel worker also reached out to the family by phone to discuss the appeals process and Appellant's concerns. (Motion, Ex. 5, 6).

Appellant appealed to the local board. On August 29, 2017, the local board affirmed the denial of the transfer. (Motion, Opinion and Order).

This timely appeal followed.

STANDARD OF REVIEW

The standard of review in a student transfer decision is that the local board is considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A; *see Ralph and Tremaine N. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 17-30 (2017).

LEGAL ANALYSIS

AACPS has developed geographic zones for school attendance and created policies aimed at governing transfers within the school system. Students must attend school in the attendance area where their bona fide residence is located. (AACPS Regulation JAB; Motion, Ex. 2). Students may, however, request transfers to other schools based on a professional recommendation (from a medical or mental health care provider); because a student is continuing in a special program at the school; if the student is moving into or out of an attendance area; if the student is the child of a full-time employee at the school; or, for students in K-8, there is a daycare-related documented hardship. (AACPS Policy JAB; AACPS Regulation JAB; Motion, Ex. 1 and 2).

The transfer request and special programs

Appellant argues that his son will not have the same educational opportunities at Old Mill that he would have had at Severna Park. Appellant explains that he wanted his son to be accepted into one of the county's STEM Magnet Programs and disagrees with AACPS's current lottery system. Appellant included with his appeal his son's Math and English Language Arts scores, as well as other school awards and a letter of recommendation from a teacher.

AACPS's transfer policy provides for transfers in only a limited number of circumstances, and Appellant has not argued that his son falls into any of the allowable categories. We have previously affirmed denials of school transfers under AACPS's transfer policy, concluding that it does not lead to arbitrary, unreasonable, or illegal results. *See, e.g., Carolyn B. v. Anne Arundel County Bd. of Educ.*, MSBE Op. No. 15-20 (2015); *Deborah M. v. Anne Arundel County Bd. of Educ.*, MSBE Op. No. 14-58 (2014). Although Appellant is disappointed that his son did not get into his preferred school, he has failed to meet his burden to show that AACPS acted in an arbitrary, unreasonable, or illegal fashion by denying the transfer request. There is no right to attend a particular school, including "attendance at schools that

parents believe are better academically or otherwise than the child's assigned school." *Ralph and Tremaine N. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 17-30 (2017).

In addition to challenging the transfer decision, Appellant also complains about his son's placement on a STEM Magnet Program waiting list. We observe that Appellant's requested transfer school – Severna Park – is not one of the schools that offers a STEM Magnet Program. Moreover, Appellant did not appeal the school system's Magnet Program admissions decision. Even were Appellant to have timely appealed that decision, we have concluded that there is nothing arbitrary, unreasonable, or illegal about a local board following its established criteria – in this case, a lottery system – for determining which students will attend particular magnet programs. *See Amanda B. v. Bd. of Educ. of Baltimore County*, MSBE Op. No. 14-24 (2014).

Changes in AACPS policy

Appellant argues that AACPS should change its transfer policies because they are obsolete and not appropriate for the 21st century. He advocates instead for a statewide policy that would require all high schools in the State to accept 15 to 20 percent of their students from outside of their designated attendance areas if those students have a grade point average of 3.8 or better. Appellant criticizes the current attendance policy, which he believes requires parents to buy expensive homes in certain parts of the county in order to attend better schools. Appellant urges the State Board to "overwrite" AACPS's policy and allow his son to attend Severna Park. On a related note, Appellant argues that AACPS's current lottery system for STEM Magnet Programs is based too much on luck and that more rigorous academic credentials should be required of students who apply. We have long held that the appeals process is not the appropriate mechanism for seeking such policy changes, and that such decisions belong instead with the local board. *See Jared H. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 16-37 (2016).

Voucher for nonpublic school

Finally, Appellant requests a voucher so that his son can attend a nonpublic school if his transfer request is denied. The Broadening Options and Opportunities for Students Today (BOOST)² program provides scholarships to some Maryland students who are eligible for free or reduced-price meals to attend eligible nonpublic schools. Awards are granted based on household income, with the lowest income students served first. The BOOST Advisory Board, not the State Board, awards the scholarships to eligible students. The program is closed for the 2017-18 school year, but, if eligible, Appellant's son may apply for a scholarship beginning in March 2018 for the following school year. There is no guarantee, however, that he would receive a BOOST scholarship.

CONCLUSION

We affirm the decision of the local board because it is not arbitrary, unreasonable, or illegal.

² Details on the program are available at <http://www.marylandpublicschools.org/Pages/boost/index.aspx> (last accessed November 9, 2017).

Signatures on File:

Andrew R. Smarick
President

Chester E. Finn, Jr.
Vice-President

Michele Jenkins Guyton

Justin Hartings

Stephanie R. Iszard

Rose Maria Li

Michael Phillips

Abstention:

I have carefully read the opinion in *Allen S. v. Anne Arundel County Board of Education*.

Because I believe that the Anne Arundel County Board of Education behaved consistently with its legally established school transfer guidelines, I did not vote against the decision by my colleagues to affirm the actions of that local board. However, because I believe that public school districts should have, to the greatest extent possible, a rational ranking/preference system available to all parents for high school admissions into high schools across that district, and because in this case, the local district's guidelines do not simply focus on space and facilities availability but rather mix them with other selected special treatment categories such as teachers with children, I abstained from the vote. Most basically, I fail to see a compelling rationale for restricting parental choice when "space and facilities" may be available in the school preferred by the parent even after the local district has afforded that choice to its preferred categories of parents. In such instances, a system should be in place to enable parents an equal opportunity to have their children considered for transfer.

Signature on File:

David Steiner

January 30, 2018

KEITH AND VENERA J.,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee:

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 18-37

OPINION

INTRODUCTION

This is an appeal of the Montgomery County Board of Education's ("local board") decision denying the Appellants' Request for Change of School Assignment ("COSA") for their son. The local board filed a Motion for Summary Affirmance maintaining that its decision to deny the request was not arbitrary, unreasonable, or illegal. The Appellant responded to the local board's Motion. The local board replied.

FACTUAL BACKGROUND

At the start of this school year (2018-2019), Appellants' son, K.J., began the 9th grade at his assigned school, Wootton High School ("Wootton"). K.J. had previously attended Cabin John Middle School ("Cabin John"), which has a split articulation to high school. Depending on where they live, some Cabin John students attend Wootton and some attend Churchill High School ("Churchill").

On February 27, 2018, while K.J. was still in middle school, Appellants submitted a COSA application asking that K.J. be allowed to attend Churchill instead of Wootton. (Motion, Ex. 2). Appellants cited "unique hardship" as the basis for the request but failed to provide any information or documentation to support their request at that time. *Id.* On March 13, 2018, the Division of Pupil Personnel and Attendance Services ("DPPAS") denied the request for lack of documentation regarding a unique hardship. (*Id.*).

On April 5, 2018, Appellants appealed the denial of their request and submitted supporting documents. (Motion, Ex. 3). In their letter of appeal, Appellants explained that they want K.J. to take Russian as a foreign language at school, and Russian is offered at Churchill through the AP level, but it is not offered at Wootton. Appellants argued that the denial of the COSA prevents K.J. from learning his mother's native language, prevents him from improving his ability to communicate with his Russian speaking relatives, prohibits him from gaining a deeper understanding of his culture and heritage, and will negatively impact his career opportunities and college admissions prospects. *Id.* In support of the appeal, Appellants attached the following items to the letter:

- Letter dated February 9, 2018, from Nathalie McGregor, Founder, CEO and Chairman of the American-Russian Educational Center, Inc., where K.J. had been attending private Russian School for the past seven years, recommending that he continue his Russian studies in high school.
- Email dated January 11, 2018 from Kimberly Bolden, Principal of Wootton, confirming that she would “sign off on the COSA and forward it to central office,” but cautioning that she has no say in such decisions and that they are made at the central office.¹
- Email dated January 10, 2018 from Joan Benz, Principal of Churchill, expressing support for the COSA request.
- Email from Anthony DeRosa, resource teacher in the World Languages Department at Wootton, confirming that Wootton does not offer Russian.

MCPS Chief Operating Officer, Andrew M. Zuckerman, Ed.D., acting as the Superintendent’s Designee, referred the matter to Hearing Officer Sandra S. Walker for review. In a Memorandum dated April 23, 2018, Ms. Walker summarized Appellants’ concerns as set forth in the April 5 letter of appeal and in discussions with Appellant, Mr. J. (Memorandum). Mr. J. explained that K.J.’s older brother attended Churchill and took Russian courses there, which resulted in his qualifying for scholarships and awards that he might not have otherwise received. The family has since moved into the Wootton attendance zone where no high school Russian class is offered. He further explained that K.J. had been taking Russian classes for several years on Saturday mornings, and how important it is to them that K.J. continue to advance in Russian language studies at Wootton. *Id.*

Ms. Walker explained that changes in school assignment are not made for requests to take a specific class. She recommended denial of the COSA request based on the “absence of a unique hardship.” However, given that the Russian language class is offered first period at Churchill, Ms. Walker offered K.J. the option of attending the first period class at Churchill and return to Wootton for the remainder of the school day so long as the family could provide the transportation. *Id.* By letter dated April 24, 2018, Mr. Zuckerman advised the Appellants that he agreed with Ms. Walker’s findings and recommendations regarding lack of a unique hardship, and adopted the recommendation that K.J. not be allowed to transfer from Wootton to Churchill for the 2018-2019 school year. (Zuckerman Letter).

By letter dated May 23, 2018, Appellants, through newly retained legal counsel, appealed Dr. Zuckerman’s decision to the local board. The appeal letter reiterated Appellants’ desire for K.J. to continue to learn Russian at Churchill given that his mother and relatives are native Russian speakers and K.J. has taken private Russian lessons for several years. Appellants noted that K.J. and his brother were raised bi-lingual, speaking both Russian and English, and that K.J. was placed into the English as a Second Language (“ESOL”) program for third through fifth grades. Appellants claimed that because they are now paying a college expense for their older son, K.J.’s “continued enrollment in the Russian Saturday program would constitute a significant financial burden” for them and they “likely will not be able to continue paying tuition for the

¹ Principals are required to sign COSA requests so that they have notice of the request only. The signature is not indicative of approval or disapproval.

Saturday Russian class.” They also claimed that it would be difficult for K.J. to keep up with the demands of high school and extracurricular sports (swim and tennis teams) while also taking the Saturday class.

In addition, the Appellants indicated that they had moved around a lot when K.J. was younger, five years in Tokyo and one year in Vienna, before returning to the United States and moving from the Beverly Farms Elementary School (“Beverly Farms”) district to the Cold Spring Elementary School (“Cold Spring”) district. Because of the move during elementary school, Appellants explained that K.J. had some anxiety separating from his good friend at Beverly Farms. Appellants further explained that K.J.’s friend from Beverly Farms and his friends from Cold Spring will all be attending Churchill and Appellants would like him to go there to attend school with them, presumably to avoid the anxiety he experienced when he changed elementary schools. *Id.*

Appellants also pointed out that having K.J. take Russian as his first period class at Churchill and then having him finish the rest of the day at Wootton would not be a workable situation. First, they explained that they both work and cannot wait around for the first period class to end at 8:40 to take K.J. back to Wootton before heading off to work. Second, they explained that even if they could arrange for a ride, the schools are on the same time and bell schedule and K.J. would have to miss part of the first period class or part of the second period class in order to get from one school to the next. *Id.*

Appellants argued that their situation was a unique hardship sufficient to support the COSA. They summarized it as follows:

[K.J.’s] desire to take high level Russian language courses is not a mere preference, it is a way for him to continue studying Russian as he had been doing over seven years, as well as a connection to his heritage. While he may not be the only MCPS student interested in Russian language courses, it is highly unlikely that there are large numbers of students living near Churchill for whom it represents such a personal and familial connection or who were placed in ESOL because they communicated at home in Russian. Furthermore, [K.J.] has experienced several different transitions in his education: he lived abroad for six years, then he attended two different MCPS elementary schools. He also has and will experience separation from friends due to MCPS school assignments. For [K.J.] to lose the opportunity to study Russian – or have to choose between participating on athletic teams or Russian – will create significant anxiety when he is about to start high school and constitutes a unique hardship under MCPS Regulation JEE-RA, Section V.A.I.

Id.

By memorandum dated June 4, 2018, Superintendent of Schools, Dr. Jack R. Smith, responded to the appeal and recommended that the local board uphold Dr. Zuckerman’s decision.

(Smith Memorandum). Dr. Smith addressed the issues raised by Appellants and noted that none of the information provided rose to the level of a unique hardship. *Id.* He specifically noted that the desire to take particular courses is not a hardship, that the Appellants did not submit supporting documentation of financial hardship, and that K.J. would know many students attending Wootton because his middle school is a feeder school for Wootton.

In a Decision and Order issued June 25, 2018, the local board agreed with Dr. Zuckerman's decision that the Appellants failed to present a unique hardship and affirmed the denial of the COSA request. The local board noted that it "has consistently held that the desire to access a particular program, such as the Russian language cited by [the Appellants], does not constitute a unique hardship for COSA Purposes." The local board also noted that the "COSA Booklet explains and as the Board has said in many COSA decisions, the desire to attend school with existing friends does not constitute a unique hardship."

This appeal followed.

STANDARD OF REVIEW

The standard of review in a student transfer decision is that the decision of the local board shall be considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A. A decision is arbitrary or unreasonable if "it is contrary to sound educational policy" or if "a reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached. COMAR 13A.01.05.05 (B)(1) & (2). The Appellants have the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.05(D).

LEGAL ANALYSIS

Thousands of students every year seek to transfer between schools in Montgomery County. For this reason, the Montgomery County Public Schools ("MCPS") has developed particular criteria to guide its process for determining which students are eligible to change schools. It is well established that there is no right or privilege to attend a particular school. *See Bernstein v. Bd. of Educ. of Prince George's County*, 245 Md. 464, 472 (1967); *Carolyn B. v. Anne Arundel County Bd. of Educ.*, MSBE Op. No. 15-20 (2015).

Unique Hardship Standard

MCPS permits student transfers in certain situations, one of which is when the family can demonstrate unique hardships "that could be mitigated by a change of school assignment." (MCPS Regulation JEE-RA, Section V.A.1). However, "problems that are common to large numbers of families, such as day care issues ... do not constitute a unique hardship, absent other compelling factors." *Id.*

Appellants want K.J. to transfer to Churchill so that he can take Russian classes there. A COSA based on the desire to participate in particular courses or a program of study runs counter to MCPS policy because it is an issue common to large numbers of families who may prefer the course offerings of one school over another. *See id.* The State Board has repeatedly upheld cases denying COSA requests based on a desire to participate in particular classes/programs. *See*

Christine C. v. Montgomery County Bd. of Educ., MSBE Op. No. 14-59 (2014)(denial of transfer request based on desire to participate in business and finance course); *Richard and Nadia S. v. Harford County Bd. of Educ.*, MSBE Op. No. 07-41 (2007)(transfer to take advantage of science courses offered at one high school but not another found permissible); *William Wu & Linda Liu v. Montgomery County Bd. of Ed.*, MSBE Op. No. 04-40 (2004)(desire to participate in advanced studies in art and Chinese offered at Quince Orchard High School not a valid basis for transfer); *Warran v. Montgomery County Bd. of Educ.*, MSBE Op. No. 00-25 (2000)(denial of transfer based on desire to participate in high school's signature program in fine arts and humanities upheld); *Simms v. Prince George's County Bd. of Educ.*, MSBE Op. No. 00-12 (2000)(desire to participate in sign language program in high school is insufficient to justify transfer request).

The Appellants indicate that the family moved around a lot when K.J. was younger and that he attended two different elementary schools in the County. K.J. established specific friendships at those elementary schools, as well as at middle school, and Appellants would like him to attend Churchill where these specific friends will be attending school to provide A.J. with some stability and help ease his anxiety with attending a new school. Appellants have not provided any medical documentation to support claims of anxiety as required by MCPS Policy. See JEE-RA, Section V.A.2 ("Documentation that can be independently verified must accompany all hardship requests, or the request will be denied."). Nor does the desire to remain with a peer group satisfy the hardship standard. See *Mr. & Mrs. G. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 10-14 (2010). See also *Nicole B. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 13-57 (2013); *Brande v. Montgomery County Bd. of Educ.*, MSBE Op. No. 05-05 (2005); *Wuu & Liu v. Montgomery County Bd. of Educ.*, MSBE Op. No. 04-40; *Upchurch v. Montgomery County Bd. of Educ.*, MSBE Op. No. 99-7 (1999). Moreover, K.J. will know many of the students at Wootton because one of the elementary schools and the middle school attended by K.J. are feeders for Wootton.

As part of the basis for the COSA request, Appellants claim that they can no longer afford K.J.'s Saturday Russian lessons given the college expense of their older child. As the local board points out, the Appellants did not submit any documentation to support a financial hardship as required by MCPS policy. Even if they had done so, it is our view that such financial concerns could not serve as a basis for a unique hardship here. The financial issues associated with out-of-school activities are matters faced by numerous families of school-aged children and do not amount to a unique hardship absent additional compelling factors. See *Greg & Sivan K. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 15-38 (2015).

The Appellants maintain that the local board's decision to deny the COSA is illegal because it misconstrues the COSA policy which requires the local board to look at the totality of all of the factors presented in determining if the unique hardship standard was satisfied. Appellants cite to Regulation JEE-RA, Section V.A.1 which states:

Transfers, or COSAs, may be requested when a family's individual and personal situation creates a unique hardship that could be mitigated by a change of school assignment. However, problems that are common to large numbers of families, such as day care issues or program/course preferences do not constitute a unique hardship, **absent other compelling factors**. [Emphasis added].

Appellants argue that K.J.'s family background and desire to speak Russian with his relatives; his former experience as an ESOL student; his bi-lingual upbringing; the logistical impossibility of taking Russian first period at Churchill and then traveling to Wootton; his need for stability in high school; his inability to take the Saturday Russian class due to its impact on his education, participation in extra-curricular sports and finances; and all of the factors specifically addressed above collectively serve as the compelling factors that raises this case to the level of a unique hardship sufficient to justify the COSA.

The local board took all of the information provided by the Appellants into consideration and determined that the COSA request did not rise to the level of a unique hardship. Although the Appellants believe that there are compelling factors that make the confluence of all of their reasons sufficient to justify the COSA, the local board did not find that to be the case. Many students seek transfers to other schools for a variety of reasons. Some of those reasons may be personal and some may be related to academics, college and career, or other things. Having reasons for requesting a COSA does not mean that those reasons are compelling enough to satisfy the unique hardship standard. We do not find that the local board misconstrued or misapplied the unique hardship requirement.

Offer to Take Russian Course at Churchill

As this Board understands it, MCPS does offer some students who have been denied transfers to the school offering the class the student wants to take the option to take the class at that school within the confines of the student's schedule. As far as we can tell, there is no written policy on when and how that option is offered or implemented. It appears to be on an *ad hoc* basis.

It is commendable that MCPS offers such opportunity to students. This case demonstrates, however, that the opportunity may seem to be an elusive one. Such an opportunity was offered here but not pursued by the family because they believed that scheduling and transportation were insurmountable barriers to taking the Russian class at Churchill. The record reflects that the family did not attempt to resolve those problems with the school system. It is possible, however, that other options could have been available, such as schedule changes or an on-line course.

We emphasize that there is no legal requirement that MCPS offer other feasible educational options for students who are legally denied transfers. MCPS exercises good educational policy when it does so. As we stated previously, however, there appears to be an *ad hoc* nature to when other educational options are offered to some students denied transfers. When transfers are denied, there is no notice that discussions about options will be entertained. To the extent that all students who are denied transfers are not aware that the school system is willing to discuss other options, we have concerns about fairness. We understand that there may not be feasible options available for every student, but all students denied transfers should be made aware that discussions about other options are possible. We note that determination of what is a feasible option remains within the sole discretion of the school system. If the parents and student do not accept the option offered, no appeal right arises.

While we agree with the local board that there was no basis to grant the transfer on account of hardship, we request that MCPS re-examine the options available for this student and discuss feasible options, if any, with the family. If the family wishes to discuss such options, it should contact the school system forthwith.

MCPS Educational Policy

Appellants argue that the local board's decision to deny K.J. entry to Churchill to participate in the Russian language program is contrary to MCPS' educational policy. To support their argument, Appellants cite to the following portion of the MCPS world languages curriculum framework that sets forth the program goals:

[P]repare students to be linguistically and culturally competent in languages other than English. The ability to communicate in a culturally appropriate manner with speakers of other languages is the key to success in the increasingly diverse global community of the 21st century. As students develop proficiency in world languages and an understanding of the underlying values and beliefs of other cultures, they gain the skills that are essential to meaningful communication.

(Appellants' Opposition at 5).

The COSA policy and the statement of goals for the world languages curriculum are completely separate matters. The curriculum goals statement sets forth MCPS' general desire to educate students to become "linguistically and culturally competent" in a foreign language. K.J. will have the opportunity to take a foreign language at Wootton, but it may not be the foreign language he prefers. We do not find the local board's denial of the COSA request to be contrary to MCPS educational policy.

Although we affirm the local board's decision in this case, we will be examining transfer policies across the State at a future State Board meeting to determine whether we should adopt regulations concerning student transfers.

CONCLUSION

For the reasons stated above, we find that the local board's decision is not arbitrary, unreasonable or illegal. We affirm the decision of the Montgomery County Board of Education to deny the Appellants' request to transfer their son from Wootton High School to Churchill High School.

Signatures on File:

Justin M. Hartings
President

Stephanie R. Iszard
Vice-President

Vermelle D. Greene

Michele Jenkins Guyton

Jean C. Halle

Rose Maria Li

Joan Mele-McCarthy

Michael Phillips

Warner I. Sumpter

Dissent:
Chester E. Finn, Jr.

Abstain:
David Steiner

October 23, 2018