

G.L.L. AND N.M.L., on behalf of minor child, C.C.L., :
 :
 PETITIONERS, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF UPPER : DECISION
 TOWNSHIP, CAPE MAY COUNTY, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioning parents sought admission of their child, C.C.L., into the French Immersion Program offered for the kindergarten by the District. The District contended C.C.L. was not admitted because he scored below 30 on the Kindergarten Readiness Test (KRT), the test used to screen for eligibility for the program. Parents sought a retest.

The ALJ found that the criterion for the French program was developed in a fair and reasonable manner and that the District's action was well within management's prerogative. In addition to a lottery, the ALJ found that the District used the KRT to establish the child's level of maturity and skills and to reduce the pool of students who applied for the French program. The ALJ determined that petitioners did not meet their burden of establishing that the District's use, administration or grading of the KRT was unfair or arbitrary. Moreover, petitioners had signed a letter of commitment for the French program that contained clear and unambiguous language regarding the necessity of a satisfactory KRT score before a student would be admitted into the program. The ALJ denied petitioners' request to admit C.L.L. into the French Immersion Program or to retake the KRT.

Upon review of the record, including testimony, exhibits and petitioners' exceptions, the Commissioner adopted the findings and determination in the Initial Decision as his own.

<p>This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

March 14, 2003

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The record of this matter, including nine hearing tapes, and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions¹ were submitted in accordance with *N.J.A.C.* 1:1-18.4² and were duly considered by the Commissioner in reaching his determination herein.³

In their exceptions, petitioners take issue with 15 of the "Factual Findings," in the Initial Decision, as follows:

- 1) Page 17 and 21 of the Initial Decision wherein the French Immersion Program was referred to as "extra-curricular." Petitioners submit that the French Immersion Kindergarten Class is a regular kindergarten class in which the New Jersey Core Curriculum courses are taught and that the only difference in this program as opposed to the standard kindergarten program is that most subjects are taught in French. (Petitioners' Exceptions at 2)

¹ Petitioners enclosed an unofficial transcript of the hearing conducted on October 3, 2002 and Petitioners' Closing Argument Brief, which was filed in proceedings before the Administrative Law Judge (ALJ) with their exceptions.

² Notwithstanding the filing of exceptions by counsel on their behalf, petitioners submitted a letter, dated February 19, 2003 and received on February 24, 2003, pertaining to the instant matter. In that petitioners' submission was not timely filed pursuant to *N.J.A.C.* 1:1-18.4, this letter was not considered.

³ Respondent did not file exceptions to the Initial Decision, nor reply to petitioners' exceptions.

2) Page 8 of the ALJ's summary of facts, wherein it is stated that "[o]nce a standardized test is administered, it is preferable not to have the student re-take the test." Petitioners point out that the Kindergarten Readiness Test (KRT) booklet states that "the test may be re-administered within a month's time, if the examiner feels it is warranted." (Petitioners' Exceptions at 2)

3) "There was not sufficient time to permit a reexamination of the test. Page 8 of the Decision." Petitioners claim that there was more than enough time to re-administer the KRT to their child, given that the test was administered at the end of May and the Commitment Letter for the Cohort II class provides for the administration of the test in June. (*Ibid.*)

4) "The French Immersion Program is more intense and more difficult than the regular Kindergarten class." Petitioners assert that the program is for all levels of students and that the immersion program covers the same curriculum as the regular kindergarten class. The extended day, petitioners posit, is for additional curricular areas including cultural factors and writing in script. (*Id.* at 3)

5) "The KRT is objective and an indicator of readiness for kindergarten as well as French." Petitioners argue that "the primary purpose of the KRT is to assess the child's readiness for school" and that, according to petitioners' expert witness, Janice Dennis, the KRT is "not an appropriate instrument to be used as a determining factor in admission into a foreign language immersion program" and that the KRT is meant to be used in combination with other factors. (*Id.* at 3-4) Moreover, petitioners assert that the previous superintendent, Dr. Monillas, a witness for petitioner, testified that, if he were still the superintendent, he would consider the KRT as one indicator of readiness for kindergarten. Petitioners also aver that Dr. Monillas stated that, in considering the child for admittance into the immersion program, he would consider the fact that the child's mother spoke French in the home and then determine what was in the best interest of the child. (*Id.* at 4)

6) "On Page 71 of the opinion, the Court finds that the KRT was used as a screening device." Petitioners take issue with this language and aver that the KRT was used as an exclusionary device. (*Ibid.*)

7) "Page 19 of the opinion. The evidence and testimony support respondent that the primary purpose of the KRT was to make sure that a child who was not ready for kindergarten did not get into a

more intense program.” Petitioners submit that the French Immersion Program was not a more difficult program and that that was not the purpose of the KRT. Petitioners also point to Janice Dennis’s testimony that none of the other French Immersion Programs she studied administered an entrance or admission exam. (*Id.* at 5)

8) “Page 21 of the Decision. C.C.L.’s father testified that the KRT test was a reasonable tool to screen students for the French program. He did agree that the District’s use of the KRT exam was reasonable. Petitioners claim that these answers were elicited by the ALJ from the father, a layman, who did not understand the implications of his answers and that in direct examination afterwards, the father clarified that it was reasonable to administer the KRT as an assessment, but not reasonable to exclude a child from a program by that assessment alone. (*Ibid.*)

9) “Page 16 of the opinion. In referring to Janice Dennis’s opinion concerning other districts ‘the data supports that some districts use a post-admission exam while Respondent uses a pre-admission exam.’” Petitioners argue that there is a big difference between a post-admission and pre-admission exam because the pre-admission exam excludes students from participating. (*Id.* at 6)

10) “Page 16 of the Decision. Petitioner cannot complain about or fault the decision by the District if Petitioner withheld pertinent information prior to the KRT exam.” Petitioners advance the argument that they did contact the child study team concerning their son’s background and difficulties in January 2002, prior to the KRT test, and also requested a retest on the KRT within 30 days of the child’s testing, which is provided for in the KRT manual. (*Ibid.*)

11) “Page 3 of the Decision. Upon revising the program for the second year, the district concluded the academic intensity of the French Immersion Program together with the increased applications for the program, necessitated that a lottery method of selection and a minimum threshold-readiness be part of the admission process.” Petitioners rely on Dr. Monillas’ testimony, who, according to petitioners, testified that he established the lottery to exclude students from the program and that the KRT was established not to limit the number of students in the class, but to give an opportunity to go into a remedial reading program. (*Ibid.*) Petitioners also claim that Dr. Monillas testified that it was not his intent that if a child was educationally handicapped and would

have difficulty in taking the test, that he would be excluded from the immersion program. (*Id.* at 7)

12) “The parents’ [chief concerns] at the time of the Dial 3 evaluation were related to C.C.L.’s behavior rather than the skills.” Petitioners dispute this, stating that the child study team, in particular Janet Norbury, was advised as to the problems relating to their son’s academics, as well as behavior. (*Ibid.*)

13) “The KRT test was properly administered and graded by Debbie Miller, an experienced teacher.” Petitioners aver that Ms. Miller admitted that she had trouble scoring the test and that she was not aware that the KRT could be re-administered within 30 days. (*Id.* at 8)

14) “Debbie Miller stated that she would not have aided CCL even if she was aware of his personal medical history.” Petitioners deny that Ms. Miller gave such testimony, preferring that she did not know the child’s history to even speculate on what she might have done. (*Id.* at 9)

15) “[Dr. Monillas] also stated that if a student scored below 31 and thus evidenced a lack of readiness, they would be permanently excluded from the program. He did not intend for the KRT test or a different test to be retaken.” (Initial Decision at 9) Petitioners contend that Dr. Monillas did not have much knowledge about the KRT test, did not read the manual or the part of the test that said it may be re-administered and never said that he did not intend for the KRT test to be retaken. (Petitioner’s Exceptions at 10)

As part of their exceptions, petitioners also submit what are characterized as “Additional Factual Findings,” which aver that: 1) the letter of commitment for the French Immersion Program did not specify that a child scoring below 30 on the KRT would be offered the Title I full-day kindergarten program (*Id.* at 7); 2) although the KRT booklet specifies that the examiner has the option to re-administer the test, the decision as to whether to retest was made by the principal and supported by the acting superintendent (*Id.* at 8); 3) Ms. Miller and the principal were advised of the child’s background by his father (*Ibid.*); 4) the reasons provided to petitioners for not allowing the retest were that Dr. Monillas had established the rules and the principal and acting superintendent could not change them, the visibility of the immersion

program, the lack of time to retest and the effect on others who wanted to be in the program (*Ibid.*); 5) it is not educationally unreasonable to have 23 students in the class (*Id.* at 9); 6) the child's Dial 3 assessment indicated that he was progressing and developing adequately for his age (*Ibid.*); 7) the father testified that the test was given in 15-minute periods (*Ibid.*); 8) the child did better at the beginning of the test and faltered as the test went beyond 15 minutes, toward 30 minutes (*Ibid.*); 9) "the child's attention span was not adequate for the complete evaluation session as he would not focus and the child needed repeated instructions to stay on track" (*Ibid.*); 10) the KRT manual states that the KRT is intended to be used in combination with other factors in helping a parent to determine whether the child is developmentally ready to begin kindergarten (*Id.* at 10); 11) the KRT manual states that the KRT is sensitive to identifying those children with handicapping conditions and those children scoring below the average range should not be discouraged from beginning school until formal evaluations are made to determine whether a child has such handicapping condition (*Ibid.*); and 12) the KRT manual states that handicapped and non-English speaking children should be assessed using a variety of measures and that social, familial and cultural environments should be considered when a significantly low score is obtained. (*Ibid.*)

Additionally, petitioners submit "Legal Exceptions," essentially restating arguments presented in the "Factual Findings" and "Additional Factual Findings." Petitioners do state their agreement that the appropriate standard to be applied to the district's administrators' decision in this matter is that of whether such decision was arbitrary, capricious and unreasonable. (*Id.* at 11) Petitioners also agree that holding a lottery for admittance into the French Immersion Program in order to limit the size of the class was an objective method of limiting the class size. (*Ibid.*) However, petitioners take issue with the requirement that a child score above a 30 on the KRT as a condition of admittance into the French Immersion Program.

(*Ibid.*) Petitioners point out that the French Immersion Program is not a gifted and talented program and that practically everyone can be successful. (*Ibid.*)

Petitioners also argue, *inter alia*, that the Board did not take into consideration the fact that the child's mother is a French national, that French is spoken in the home, that the child is an adopted child of African-American descent, who has a history of being born drug-addicted, with a hearing problem and raised in foster homes, and that the child study team evaluated the child with a Dial 3 screening and found the child to be "okay," with no further assessment for handicapping conditions warranted. (*Id.* at 12) Petitioners reiterate their argument that the KRT gives the discretion of whether to retest a child to the person administering the test, not to the principal and acting superintendent. (*Ibid.*) Petitioners further claim that to use the KRT as an exclusionary device for admission into the French Immersion Program is an unreasonable and arbitrary use of this instrument because the KRT is not designed for this purpose. (*Ibid.*) Moreover, petitioners submit that the principal's decision denying re-administration of the test after petitioners provided information on the child's history was an arbitrary and capricious act. (*Id.* at 13) Petitioners further argue that the use of the KRT score to exclude a child from the immersion program is making use of a test which is not rationally related to the learning of the French language and, therefore, the question is posed, "How could one use a test for kindergarten readiness that is not even used to exclude a child from entering the kindergarten class, to now preclude a child from entering into a French program?" (*Id.* at 14)

Finally, petitioners take exception to the ALJ's conclusion that *Borough of Lawnside* is distinguishable from this matter. (*Id.* at 14) Petitioners aver that *Lawnside* is on point because the KRT is an assessment test and is meant to be utilized with other factors in making decisions concerning the child being tested. (*Ibid.*) Moreover, petitioners assert, that, as

in *Lawnside*, the decision makers in the instant matter lacked familiarity with the provisions for the re-administration of the KRT. (*Ibid.*)

Upon his full and independent review, the Commissioner concurs with the ALJ that petitioners have failed to establish that the managerial decisions of the District denying petitioners' son admission into the French Immersion Program for the kindergarten class of 2002-2003 were arbitrary, capricious or unreasonable.

In so determining, the Commissioner notes that the fact that petitioners disagree with the Board's selection criteria for the French Immersion Program and its decision not to waive its policy as to their son does not make the Board's decision improper; nor does petitioners' suggestion that other school professionals or Boards might establish different criteria for admission to a French Immersion Program or decide differently with respect to the appropriateness of re-administering the KRT when a low score is achieved, render the Board's decision arbitrary. As set forth by the ALJ, the standard of review for arbitrary, capricious or unreasonable action is narrow in its scope and consequently imposes a heavy burden on those who challenge actions of boards of education. The standard defined by the New Jersey courts states:

In the law, "arbitrary" and "capricious" means having no rational basis. (citation omitted) *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two options, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. (citations omitted) Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. (citation omitted) *Bayshore Sew. Co. v. Dep't. of Env.* 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), *aff'd* 131 N.J. Super. 37 (App. Div. 1974)

In the instant matter, the Board established clear selection criteria, including selection via a lottery and a score of 31 or above on the KRT, for admission into the French Immersion Program and applied such criteria in a consistent manner. Moreover, the commitment letter, signed by the child's mother and faxed to the Board on February 3, 2002, prior to the administration of the KRT test, contains clear and unambiguous language, advising that:

As the parent or guardian of an enrolling student, you are hereby stating your interest and commitment to enrolling your child in this program *with the following conditions:*

* * * * *

Full understanding that if your child scores 30 or below on the KRT (Kindergarten Readiness Test) that your child will not be admitted to the program. (emphasis in text) (Exhibit P-4, in evidence)

In assessing the reasonableness of the Board's cutoff score of 31 as the minimum score for entry into the program, the Commissioner observes that the Scoring Interpretation appearing in the KRT booklet provides school districts with the following evaluative information:

45-49	above average
42	the median score
38-44	average
31 to 37	lower average
24-30	below average, questionable readiness
below 23	a parent should check with local school personnel

(Exhibit P-18 at 33)

Given these evaluative interpretations, the Commissioner finds that the Board's decision to establish a cutoff score of 31 on the KRT as a minimum score for participation in the French Immersion Program to avoid placing an immature child in a difficult program was rational and within the realm of the Board's decision-making authority. In that C.C.L.'s score of

28 falls in the 57th percentile and in the below average, questionable readiness range, it is undisputed that his score did not meet the minimum score required. (Exhibit P-18) Although the Board was not precluded from re-administering the test to C.C.L. as requested by his parents, there was no provision, nor requirement to do so in the Board's established selection process for the immersion program.

With respect to petitioners' claim that the French Immersion Program is a regular kindergarten class except that most classes are taught in French, and, thus, not "extra-curricular" as the ALJ states, the Commissioner points out that the ALJ most likely characterized this program as "extra-curricular" because school districts are not required by law to offer kindergarten programs, but may do so pursuant to *N.J.S.A.* 18A:44-2. It makes no difference for purposes of entitlement, however, whether the French Immersion Program is deemed curricular or extra-curricular because it is well-established that the protected interest is "the right to participate in the entire educational process and not the right to participate in each individual component of the process." *Glidden, supra* at 73. Thus, petitioners cannot establish a protected property interest in participating in an individual component of the school's curriculum, such as the French Immersion Program, at issue herein. *See E.A., Sr. supra; Glidden, supra; and Gross, supra.*

Additionally, the Commissioner agrees with the ALJ that this matter is distinguishable from the *Borough of Lawnside, supra*, in that, unlike *Lawnside*, the selection criteria established in this instance was clearly set forth and administered in such a way as to be fair to all students who desired to participate. Also, in *Lawnside*, a gifted student was denied access to the National Honor Society due to a flawed methodology and the decision makers' unfamiliarity with the selection criteria; whereas the child in this matter was administered the

KRT by a qualified staff member and simply did not meet the selection criteria due to a low score on the KRT indicating questionable readiness to enter kindergarten.

The Commissioner, therefore, concludes that petitioners have failed to meet their burden in establishing that the Board's use, administration or grading of the KRT as a selection criterion for the French Immersion Program was arbitrary, capricious or unreasonable. Accordingly, the Initial Decision of the OAL is affirmed for the reasons detailed therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: March 14, 2003

Date of Mailing: March 14, 2003

⁴ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*