

OAL DKT. NOS. EDU 1840-03 AND EDU 9894-03 (ON REMAND)

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AGENCY DKT. NO. 395-12/02

O.S., on behalf of minor child, K.S., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH : DECISION ON REMAND
OF FORT LEE, BERGEN COUNTY AND
ANTHONY P. CAVANNA, SUPERINTENDENT, :
RESPONDENTS. :

The record of this matter and the Initial Decision on Remand of the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

In her exceptions, petitioner points out that, on remand, this case was reassigned to the original judge who previously rendered an Initial Decision in this matter and that she believes “that Judge Giordano could not be totally impartial since ruling in my favor on the remand would indicate that his own prior decision was wrong.”¹ (Petitioner’s Exceptions at 1) With respect to her specific exceptions to the Administrative Law Judge’s (ALJ) decision on remand, petitioner argues, *inter alia*, that, even accepting the ALJ’s interpretation of Regulation 5120, the District is still not excused from administering the standardized math test. (*Ibid.*) Petitioner posits that, if her daughter had been given the standardized test in math, it would have proved that she should have been learning math at a higher level. (*Id.* at 1-2) Based

¹ The Commissioner lacks jurisdiction over this issue. Issues concerning a judge’s ability to provide a fair and impartial hearing must be addressed in the first instance with the judge, pursuant to *N.J.A.C.* 1:1-14.12(c), with appeals of the judge’s ruling on the issue thereafter being addressed to the Director of the OAL, pursuant to *N.J.A.C.* 1:1-14.12(d).

on the (presumed) test results, petitioner claims that her daughter should have been afforded the curriculum consistent with her skills and knowledge and could have been placed in the gifted and talented program. (*Id.* at 2)

Petitioner further asserts that her daughter was not given any standardized tests during the three months she was in attendance. (*Ibid.* at 2) Petitioner points out that the Assistant Superintendent testified that Regulation 5120 provides that standardized tests are to be administered to new students, but that the earliest standardized tests were given in April, eight months after the start of the school year. (*Ibid.*) Petitioner contends that this means that a new student has to wait eight months to be evaluated for proper grade placement or to be placed in a gifted and talented program. (*Ibid.*)

Moreover, petitioner takes issue with the ALJ's conclusion that the regulation at issue is ambiguous, asserting that there is nothing ambiguous about Regulation 5120 in that it clearly states that the standardized test must be administered to all new pupils. (*Ibid.*) Petitioner also disagrees with the Board's use of age and English language ability in determining her daughter's grade placement, pointing out that the Board, over her objections, placed her daughter in the sixth grade, a grade she had completed in Russia. (*Id.* at 3) Additionally, petitioner asserts that the Board's use of English language ability for grade placement is discriminatory and that the Board failed to produce any evidence proving that it has extended the kindergarten and first grade entrance policy to all grades including high school transfers. (*Ibid.*)

Upon careful and independent review of the record in this matter, the Commissioner initially notes that, pursuant to Board Policy 5120, "[t]he building principal may assign pupils in his or her school to grades, classes and groups on the basis of the needs of the pupil****" with the final decision on such matters to be made by the superintendent of schools. (Exhibit R-2, in evidence) Moreover, the Board has established that its intent in promulgating Regulation 5120, the implementing regulation for Board Policy 5120, was to specify the use of

the District Approved Standardized Test for the assessment for in-grade placement of students in gifted and talented or remedial programs, as appropriate. In support thereof, the Board's three witnesses at hearing provided uncontested testimony² that Regulation 5120 was constructed as a device for in-grade placement and that the regulation had been consistently applied to in-grade placement. (Initial Decision at 3-5) Additionally, the Commissioner's independent review of Regulation 5120 finds that the language in the regulation supports the Board's contention that this regulation applies to in-grade placement of new students in that A.3. and A.4. and B.3 of the regulation (see below) specifically state that, based on the results of the District Approved Standardized Test referenced therein, pupils may be placed in gifted and talented programs or remedial programs. (Exhibit P-7, in evidence)

The Board requires that the following screening procedures be performed for all new pupils to insure the best possible grade placement in this school district for each.

A. Grades 1-6

1. The nurse will administer hearing, vision, and scoliosis screening to all new pupils.
2. The guidance counselors will administer the District Approved Standardized Test to grades 1 – 6.
3. *Based on results of the above*, pupils who score extremely high will be referred to the gifted and talented teacher for further evaluation. The gifted and talented teacher may call upon the resources of the Child Study Team to assist in the evaluation.
4. Pupils who score extremely low will be referred to either the BSI math or reading improvement teacher for further evaluation. Either teacher may call upon members of the Child Team for assistance.

² The Commissioner relies herein on the ALJ's summary of Mr. Emr's testimony in that transcripts of the hearing before the ALJ were not provided by the parties.

5. The classroom teacher will refer all observed speech problems to the school's speech teacher for evaluation.

B. Grades 7 – 12

1. The nurse will administer hearing, vision and scoliosis screening to all new pupils.
2. The guidance counselors will administer the District Approved Standardized Test to all new pupils.
3. Pupils who score extremely low will be referred to either the BSI math or reading improvement teacher for further evaluation. Either teacher may call upon members of the Child Study Team for assistance.
4. The classroom teacher will refer all observed speech problems to the school's speech teacher for evaluation.
(emphasis supplied) (*Ibid.*)

The Commissioner also emphasizes that “an agency’s interpretation of its own rule is owed considerable deference since the agency that drafted and promulgated the rule should know the meaning of that rule.” (Initial Decision at 8) *See, also, In re Revision in Rates Filed by Plainfield-Union Water Co., supra*, at 177.

Accordingly, for the reasons set forth above, the Commissioner finds that Regulation 5120 does not require the administration of the District Approved Standardized Test to determine the grade placement of transfer students. However, Regulation 5120, by the Board’s own admission, requires the administration of the District Approved Standardized Test to determine the in-grade placement of new students for the purpose of placing students in a gifted and talented program and/or to provide necessary remedial programs. Notwithstanding the District’s contention that the LAS test, a test utilized to determine the English language proficiency of foreign born and other students, administered to K.S., was a standardized test that

satisfied compliance with the requirement that “guidance counselors will administer *the* District Approved Standardized Test” set forth in Regulation 5120 (Initial Decision at 3, Testimony of Dr. Taffaro; Board’s Letter Brief, dated February 19, 2004; and Exhibit P-7, in evidence), the LAS test is obviously not *the* test to which Regulation 5120 refers in that the regulation specifies that the results of *the* District Approved Standardized Test is utilized to determine whether pupils may be placed in gifted and talented programs or remedial programs. Moreover, the Board has not claimed, nor is there anything in the record to suggest, that K.S. does not possess the English language skills necessary to take the District Approved Standardized Test or that the administration of the test was delayed so that an accommodation could be made for any language difficulties.

Principal Peter Emr testified that the LAS test is utilized to test new pupils with limited English proficiency and that there is no other test used for the placement of new pupils in the District. (Initial Decision at 5) Mr. Emr further testified that standardized testing is used with large populations of students in the spring, primarily to develop standard norms, and that the Terra Nova II standardized test is used by the District for grades 2, 5 and 6 and the State-authorized standardized test is given to grades 3 and 4. (*Ibid.*) Presumably the District Approved Standardized Test in Regulation 5120 refers to the standardized test administered at each grade level in the spring, as Superintendent Taffaro appears to be referring to these same tests in testifying that the District contemplated testing K.S. in April, eight months after K.S.’s enrollment in the district schools.

The witness acknowledged that the Regulation 5120 provides that the standardized tests are to be administered by the guidance counselor. K.S. was not given a standardized test in math. That test would be given in April. If K.S. were to score well on that test, she might be placed in a Gifted and Talented Program. (*Id.* at 3)

Although Regulation 5120 does not specify a timeline for the administration of the District Approved Standardized Test, the stated purpose of the regulation is to insure the best possible grade placement for new students. Thus, it can be reasonably inferred that new students are to be immediately administered the District Approved Standardized Test upon entering the District's schools. Principal Jack Foster testified that the regulation is poorly written. (*Id.* at 4) That may be the case, but what is clear is that the *practice* of the District with respect to administering the District Approved Standardized Test to new students is not in concert with Regulation 5120. The Commissioner, therefore, directs that either the regulation be re-written to reflect District practices or that the District conform its practices to the regulation as written.

Turning to the District's administrative decision placing K.S. in the sixth grade, rather than in seventh grade as her mother requested, the Commissioner notes that, by letter of November 13, 2002, the superintendent of schools (at the time Anthony P. Cavanna) informed petitioner that the administrative determination to place K.S. in the sixth grade was made based on K.S.'s chronological age, English language ability, educational opportunities in middle and secondary schools, equivalent grade level in her previous school and country, social adjustment, peer acceptance and preparation for secondary level honors courses. (Exhibit R-3, in evidence) K.S. was born on February 28, 1991 and was eleven-and-a-half years old when she enrolled in the District. Thus, if she had started attending school in the Fort Lee School District in kindergarten, she would be in the sixth grade pursuant to the District's policy regarding entrance age for attending school. (Policy 5112, Exhibit P-6, in evidence). Moreover, a review of her Russian transcript indicates that K.S. was enrolled in "1B" class on September 1, 1998 and 1st class in 1999,³ 2nd class in 2000, 3rd class in 2001 and 6th class until June 2002. (Transcript, R-1, in evidence) Additionally, K.S. scored in the 42.5 percentile in language proficiency.

³ There is no record of the courses she took or her grades in any classes for these first two years.

(Exhibit R-4, in evidence) Given these facts, the Commissioner finds that the District's carefully weighed decision to place K.S. in the sixth grade is not unreasonable, but makes sound educational sense. Moreover, petitioner has presented no evidence that her daughter was treated any differently from any other similarly situated pupil or that the Board acted with any improper motive. The Commissioner, therefore, concludes that the District did not act in an arbitrary, capricious or unreasonable manner in placing K.S. in the sixth grade.

It is well established that when a board acts within its discretionary authority, "its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." *Thomas v. Bd. of Ed. of Morris Tp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966). *See, also, J.M. v. Hunterdon Central Regional High School District*, 96 *N.J.A.R.2d* (EDU) 415, 419, (1996), *citing Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288 (App. Div. 1960).

Accordingly, the Initial Decision on Remand is adopted as modified above for the reasons expressed herein.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: July 7, 2004

Date of Mailing: July 8, 2004

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.*