59-21

New Jersey Commissioner of Education

Final Decision

A.P., on behalf of minor child, J.P.,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

Synopsis

Pro se petitioner challenged the respondent Board's decision to assign J.P., to the Jefferson Elementary School (Jefferson) for the 2020–21 school year, as part of a district-wide plan to reduce overcrowding in classrooms. J.P., a fourth grader, had previously attended Washington Elementary School (Washington) but was reassigned to Jefferson based on newly established attendance areas which coordinate with a student's home address. Jefferson is located one block from petitioner's home, while Washington is a mile away; A.P. maintained that the Board's decision was arbitrary, capricious, and unreasonable, and that J.P. should be allowed to remain at Washington until the end of fifth grade because his transfer has caused transportation and childcare issues, financial hardship, and has been detrimental to J.P.'s academic and emotional progress. The Board maintained that J.P. was among a group of 15 students whose parents had appealed the transfer based on similar reasons; none of these students were granted an exception to remain at Washington for the 2020-21 school year. The Board filed a motion for summary decision, which was opposed by petitioner without any supporting affidavits.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; a school board has discretionary power to determine which school students will attend within its district, so long as the decision is not contrary to law; the Board presented ample evidence supporting its reasons for the establishment of new attendance areas to reduce overcrowding and to populate a new elementary school; petitioner did not challenge the legitimacy of the Board's rationale for adopting new District policies, but rather asserted that an exception should be made for J.P., above all other transferred students, because of A.P.'s claimed inconveniences and her unsupported assertion that J.P. has regressed during his time at Jefferson, compared to the progress he had made at Washington. The ALJ concluded that the Board was not arbitrary, capricious, or unreasonable when it sought to reduce overcrowding by creating new attendance areas, which resulted in J.P.'s transfer to Jefferson Elementary School, located one block from his home. Accordingly, summary decision was granted in favor of the Board, and the petition was dismissed.

Upon review of the record, the Commissioner concurred with the ALJ's findings and conclusion. The Initial Decision was adopted as the final decision in this matter, for the reasons well expressed therein, and the petition was dismissed.

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.

March 15, 2021

OAL Dkt. No. EDU 08417-20
Agency Dkt. No. 174-8/20

New Jersey Commissioner of Education

Decision

A.P., on behalf of minor child, J.P.,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Petitioner challenges the Board's decision to reassign J.P. to Jefferson Elementary School when he had previously attended Washington Elementary School. The Administrative Law Judge (ALJ) found that the Board was not arbitrary, capricious, or unreasonable when it sought to reduce overcrowding by creating new attendance areas based on student addresses, which resulted in the transfer of J.P. to Jefferson Elementary School, located one block from his home.

Upon review, the Commissioner agrees with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in establishing new attendance areas and declining to make an exception for petitioner.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 15, 2021
Date of Mailing: March 16, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 08417-20

AGENCY DKT. NO. 174-8/20

A.P., ON BEHALF OF

MINOR CHILD, J.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH

OF NORTH ARLINGTON, BERGEN COUNTY,

Respondent.

A.P., petitioner, pro se

Robert D. Lorfink, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: January 5, 2021 Decided: January 29, 2021

BEFORE **SARAH H. SURGENT, ALJ**:

STATEMENT OF THE CASE

Petitioner A.P., on behalf of her minor child, J.P., challenges the Board of Education of the Borough of North Arlington, Bergen County (Board) decision to assign J.P. to the Jefferson Elementary School (Jefferson) for his fourth-grade 2020–2021 school year, due to the Board's establishment of new attendance areas created as part of the opening of a new elementary school in the District to reduce overcrowding. J.P. had previously attended the Washington Elementary School (Washington). A.P. maintains that J.P. should remain at Washington until the end of his fifth-grade academic year because his transfer has caused transportation and childcare issues, financial hardship, has been detrimental to J.P.'s academic and emotional progress, and because the Board's decision was arbitrary, capricious, and unreasonable.[2]

PROCEDURAL HISTORY

The pro se petition of appeal was filed with the Commissioner of Education (Commissioner) on August 18, 2020. It was transmitted to the Office of Administrative Law (OAL) on September 4, 2020, to be heard as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On December 7, 2020, the Board filed a motion for summary decision, pursuant to N.J.A.C. 1:1-12.5. On December 24, 2020, A.P. filed her opposition to the motion, with no responding

[2] A.P. also asserts that Free Appropriate Public Education (FAPE) and the "Stay Put" law should have permitted J.P. to remain at Washington until a final determination was made. Those principles are not applicable to this case, as this is not a special education appeal, which A.P. acknowledged, (P-1 at 1). It is an appeal to the Commissioner of Education, who does not have jurisdiction to adjudicate those claims. J.B. v. Bd. of Educ. of Westfield, 2003 N.J. AGEN LEXIS 1359 (Mar. 5, 2003).

affidavits, contrary to N.J.A.C. 1:1-12.5(b).[3] On January 5, 2021, the Board filed its reply brief, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

A.P. asserts, without any supporting affidavits or competent credible evidence, that "[t]here is currently availability for one student in Ms. Verrier's class at Washington," and that J.P. had excelled under her tutelage in the second grade. (P-1 at 2). However, the sworn affidavit of the Board's Superintendent of Schools (Superintendent) indicates that there is no more room at Washington for any fourth graders. (Yurchak Aff. at 13). A.P. also asserts that J.P. has "regressed since being at Jefferson . . . academically, emotionally, and mentally," again, without any proofs whatsoever. I therefore do not credit A.P.'s bald assertions.

These salient facts from a December 19, 2017 neurodevelopmental pediatric evaluation stating J.P.'s birthdate, (P-1 at 10), and the Superintendent's affidavit are undisputed. I therefore **FIND** the following as **FACT**:

J.P. is a fourth grader enrolled at Jefferson as of September 2020. He will celebrate his tenth birthday in February 2021. He previously attended Washington from kindergarten through the third grade. In December 2019, J.P.'s family moved to an

[3] A.P. asserts that she did not understand "a lot of what [she] read" in the Board's moving papers, stating "I do not have a lawyer to explain the legal lingo to me. I am in this alone, just me, as a mother." (P-1 at 1). However, because A.P. is pro se, she was specifically advised by this tribunal, both orally and in writing, about the mechanics of summary decision motions, oppositions, and cross motions, and was referred to N.J.A.C. 1:1-12.5 for further guidance. She cannot now be heard to complain that she was unaware of the procedural rule she was bound to follow. Tuckey v. Harleysville Ins. Co., 236 N.J. Super. 221, 224 (App. Div. 1989).

apartment which is approximately 0.2 miles, or one block, from Jefferson, and 1.0 miles from Washington.

Due to rising enrollments causing larger class sizes, the District needed additional classroom space, and purchased a vacant parochial high school during the 2018–2019 school year. After renovations of that building, the District's middle school students were transferred there, and the former middle school became a fourth elementary school for the District, the Susan B. Anthony grade school, beginning in September 2020.

To populate the new elementary school and reduce overcrowding, the Superintendent, District administration, and the Board created new attendance areas based on students' home addresses. The Board amended the District's policy regarding class sizes on May 21, 2020. District Policy 2312 provides that the maximum recommended class size for all elementary schools is twenty-five students. (R-A). The Board also amended District Policy 5120, which governs the school assignment of students accordingly, based upon their place of residence. (R-B). However, if enrollment exceeds twenty-nine students per classroom, students must be transferred to less crowded elementary schools, voluntarily and/or involuntarily. (R-B).

In the spring of 2020, the Superintendent emailed the parents of then third graders and advised them of the District's plans for the fourth grade 2020–2021 academic school year. As a result of the new policies, J.P. would be involuntarily transferred from Washington to Jefferson, the elementary school closest to his residence, for the fourth and fifth grades. The Superintendent received fifteen written requests from parents requesting that their children be permitted to remain at their old schools, rather than being transferred. A.P. was one of those parents. All the requests were denied.

A.P. emailed the Superintendent with her objections, stating that she and her husband had hectic work schedules, and that she relied on a family friend to take J.P. to and from school when needed. A.P. also noted that J.P. had an Individualized Educational Plan (IEP) under which J.P. had made much progress, that he was comfortable with his teachers, and that she did not want to "take him out of his comfort zone and have him regress." After deliberating back and forth with A.P. in numerous emails about possible resolutions for transportation and childcare, and possibly a transfer to the less-crowded Susan B. Anthony school, none of which A.P. found to be acceptable, the Superintendent notified A.P. on June 1, 2020 that J.P. would be assigned to Jefferson, and that his IEP would be reviewed to ensure his appropriate placement. (R-C).

A.P. appealed to the Board on June 23, 2020. After hearing A.P.'s arguments, the Board agreed with the Superintendent that there was no basis to permit J.P. to remain at or return to Washington. The Board fully heard and acknowledged all of A.P.'s concerns, but pointed out that there was nothing unique about A.P.'s appeal that would permit it to grant her appeal while denying the requests of other similarly situated parents whose children were involuntarily transferred. (R-D). This appeal from the Board's decision followed. (R-E).

On September 2, 2020, A.P. submitted to the Superintendent a doctor's note written by Sherif Hassan, M.D., stating:

[J.P.] has been under my care since early childhood. I have been involved in his care regarding his disabilities. The patient has a known hearing loss and dyslexia. Over the years he has grown to do well in the Washington school system. He has shown academic improvement and also shown self acceptance [sic] of his multiple learning disabilities. Due to the complexity of his learning disabilities I am concerned that changing his current school environment would be detrimental to his academic achievement. It is my clinical opinion that he should remain in his current school system.

[(R-F).]

The Superintendent then directed the District's Director of Special Education to review that note with the District's school physician. The school physician could not identify any health concerns that would prohibit J.P. from attending Jefferson. The Director of Special Education confirmed that Jefferson had the ability to fully implement all aspects of J.P.'s IEP. (R-G).

In the course of A.P.'s litigation, she identified two students who attended grade schools other than their neighborhood schools and claimed that J.P. should be similarly accommodated. The Superintendent reviewed those students' records and found their unique circumstances allowed for attendance at other grade schools, in keeping with Board Policy 5120. Neither of those students was transferred from or to Washington, which had already exceeded the recommended class size of twenty-five, and was dangerously close to having to transfer more fourth graders out as it approached the twenty-nine student per classroom cap. The District has not accommodated any request for a student to remain at or return to Washington.

Although A.P. claimed that she had no way to transport J.P. to and from Jefferson, J.P. attended Jefferson in-person until contracting an illness in the fall of 2020. The District switched from in-person instruction two days per week to fully remote instruction from November 30, 2020 through at least January 18, 2021.

LEGAL ANALYSIS AND CONCLUSIONS

Summary Decision Standard

A summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). That rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules. See R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

In Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'"

[Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).]

In evaluating the merits of the motion, "[a]ll inferences of doubt are drawn against the movant and in favor of the opponent of the motion." Judson, 17 N.J. at 75. "When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b) (emphasis added). "If the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, he[/she] will not be heard to complain if the court grants summary judgment." Judson, 17 N.J. at 75 (internal quotation marks and citations omitted). When the evidence "is so one-sided that one

party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252.

Having reviewed the parties' submissions, I **CONCLUDE** that no genuine issues of material fact exist which require an evidentiary hearing, and that this matter is therefore ripe for summary decision.

Summary Decision

It is long and well established that a school board has discretionary power to determine which schools students will attend within its district, so long as the decision is not contrary to law. State ex rel. Pierce v. Union Dist. School, 46 N.J.L. 76, 77-78 (1884). The law requires that school boards shall "[m]ake, amend and repeal rules, not inconsistent with . . . title [18:A] or with the rules of the state board, for . . . the government and management of the public schools and public school property of the district." N.J.S.A. 18A:11-1c. "Each school district shall provide, for all children who reside in the district . . . suitable educational facilities including proper school buildings and furniture and equipment, [and] convenience of access thereto." N.J.S.A. 18A:33-1.

"Convenience of access" has been construed to be a matter of distance between a student's residence and assigned school, rather than the parents' convenience for personal reasons. See, e.g., Van Note v. Branchburg Bd. of Educ., 2001 N.J. AGEN LEXIS 201 (April 16, 2001) (citing N.J.S.A. 18A:39-1 and concluding that board's decision to limit transportation of child of divorced parents with joint physical custody to the residence of one parent only was not arbitrary, capricious, or unreasonable). It is indisputable that 0.2 miles between J.P.'s residence and Jefferson is considerably less than 1.0 miles between J.P.'s residence and Washington, and A.P. has offered no explanation as to why J.P., who will turn ten in February 2021, could not simply walk to and from Jefferson, approximately one block away, either alone or with other students.

An "'action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives.'" Parsippany-Troy Hills Educ. Ass'n v. Bd. of Educ., 188 N.J. Super. 161, 167 (1983) (quoting Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div.1960)). The Board's discretionary decision to assign J.P. to Jefferson "'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.'" Ibid. (quoting Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div.1965)).

The arbitrary, capricious, or unreasonable standard of review "is narrow in its scope and consequently imposes a heavy burden on those who challenge actions of boards of education." Piccoli v. Bd. of Educ. of the Ramapo-Indian Hills Reg'l High Sch. Dist., 1999 N.J. AGEN LEXIS 1314 at 11-12 (Mar. 10, 1999).

In the law, "arbitrary" and "capricious" means having no rational basis. . . . 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 opinions, 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. 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.

[Id. at 12 (quoting Bayshore Sewerage Co. v. Dept. of Envtl. Prot., 122 N.J. Super. 184, 199-200 (Ch. Div. 1973) (internal citations omitted), aff'd o.b., 131 N.J. Super . 37 (App . Div. 1974)).]

In order to defeat the Board's summary decision motion, A.P. must therefore "demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. v. Bd. of Educ. of Franklin Lakes, 2014 N.J. AGEN LEXIS 19 (Feb. 24, 2014). There has been no such showing. Indeed, to the contrary,

there is no evidence of bad faith, the Superintendent addressed A.P.'s concerns in numerous emails, (R-C; R-G), and the Board's thorough written decision demonstrates that A.P.'s concerns were methodically considered by the Board, (R-D).

The Commissioner routinely adopts initial decisions dismissing petitions of appeal when parents object to their child's involuntary assignment to a different school to reduce or equalize class sizes and resources. See, e.g., C.F. v. Bd. of Educ. of Twp. of Pequannock, 2018 N.J. AGEN LEXIS 996 (Sept. 26, 2018), adopted Comm'r, 2018 N.J. AGEN LEXIS 996 (Nov. 2, 2018) (dismissing appeal of kindergartener's school assignment and concluding that school board's approval of students' school assignment plan to address decreasing enrollment and need to balance class sizes was not arbitrary, unreasonable, or made in bad faith); J.P. v. Bd. of Educ. of S. Brunswick, 2002 N.J. AGEN LEXIS 952 (Dec. 17, 2002), adopted Comm'r, 2003 N.J. AGEN LEXIS 1013 (Feb. 3, 2003) (dismissing appeal of grade schoolers' new school assignment and concluding that redistricting grade schools due to overcrowding, population growth, and acquisition of new elementary school was not arbitrary, capricious, or unreasonable, even if it was not the best of all proposed redistricting plans considered by the board); Piccoli, 1999 N.J. AGEN LEXIS 20 (Jan. 12, 1999), adopted Comm'r, 1999 N.J. AGEN LEXIS 1314 (Mar. 10, 1999) (dismissing appeal of amended high school assignment policy and concluding that school board's amendment of policy was not arbitrary, capricious, or unreasonable, and was a product of issues of overcrowding at one school, under-enrollment at another, and future use of the district's capital resources and further educational programs); G.M. v. Roselle Park Borough Bd. of Educ., 1994 N.J. AGEN LEXIS 1008 (Dec. 15, 1993), adopted Comm'r, (Jan. 26, 1994) (dismissing appeal of school board's change of geographic boundaries for kindergartners and concluding that board's goal of evenly distributing students within the district schools was reasonable exercise of authority, not arbitrary, capricious, or unreasonable, and did not result in child being treated differently than other similarly situated students. "[T]he school board may not look at each individual child and decide whose personal reasons are more compelling for attendance at one school than another. Absent some form of actual impediment to attendance or extraordinary circumstance boards must act in a

manner that treats all students equally."); Fullen v. Middletown Twp. Bd. of Educ., 1986 S.L.D. 582, 598, 601 (Jan. 27, 1986), adopted Comm'r, 1986 S.L.D. 603 (dismissing challenge to school redistricting plan to alleviate enrollment imbalances, underutilization of some facilities, and overutilization of other facilities, and concluding that "[a] policy or rule of a board of education is reasonable if it is designed to achieve a legitimate goal. . . . While pupils have a constitutional right to receive a thorough and efficient program of education, there is no corollary right to receive such education in a specific schoolhouse in the district."); Marcewicz v. Bd. of Educ. of Pascack Valley Reg'l High Sch. Dist., 1972 S.L.D 619, 625-26 (Nov. 28, 1972) (dismissing challenge to school redistricting plan to relieve overcrowding of high school and concluding "the Board acted in a reasonable, deliberate and thorough manner to examine the enrollment projections over a period of weeks prior to the time of its final action," as "[i]t is the Board alone which is empowered by N.J.S.A. 18A:11-1 to make rules for its own 'government' and the 'government' of the public schools entrusted to its supervision"); Rutherford v. Bd. of Educ. of Maywood, 1963 S.L.D. 129, 130 (May 24, 1963) ("Petitioner's claim of personal hardship, however sincere, does not raise a sufficient consideration to outweigh the educational values which respondent considers will emerge from classes limited in size and equalized with respect to the teachers' skills and experience.").

In this case, the Board indisputably has the management prerogative to adopt policies addressing the assignment of students within the District, "which cannot be usurped or assumed by the Commissioner . . . absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis." C.F., 2018 N.J. AGEN 996 at 15-16. The Board has presented ample evidence supporting its reasons for the establishment of new attendance areas to reduce overcrowding and to populate its new elementary school, and why it is entitled to summary decision as a matter of law.

A.P. does not challenge the legitimacy of the Board's rationale for adopting District policies 2312 and 5120, but rather asserts that an exception should be made for J.P., above all other transferred students, in essence, due to A.P.'s claimed

inconveniences and her unsupported assertion that J.P. has "regressed" at Jefferson, while he had made progress at Washington. During the current COVID-19 pandemic and this era of remote learning for many students, it may well be that students will "regress" in their learning, however, that does not make J.P. singularly situated, and therefore entitle him to an exception that is unavailable to any of the other fourteen families who also would have preferred that their children remain at their former elementary schools.

Under these circumstances, I **CONCLUDE** that the Board has met its burden to prove by a preponderance of the credible evidence that its decision to transfer J.P. was not arbitrary, capricious, or unreasonable, and that its motion for summary decision should therefore be **GRANTED** as a matter of law.

ORDER

It is therefore **ORDERED** that the Board's motion for summary decision is hereby **GRANTED**, and the petition of appeal is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 29, 2021 — Sarah H. Surgent

DATE — **SARAH H. SURGENT**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

APPENDIX

EXHIBITS

For Petitioner:

P-1 Petitioner's opposition letter brief with three attached un-marked exhibits dated December 24, 2020.

For Respondent:

R-1 Respondent's Notice of Motion for Summary Decision, Certification of Counsel, moving brief, Counsel's Statement of Undisputed Material Facts in Support of Respondent's Motion for Summary Decision, Affidavit of Stephen M. Yurchak, Superintendent, and Exhibits A through H (R-A through R-H) filed December 7, 2020.

R-2 Respondent's reply brief dated January 5, 2021.