IOWA DEPARTMENT OF EDUCATION
(Cite as 27 D.o.E. App. Dec. 538)

In Re: Open Enrollment of S.K.,	)	
	)	
Cassandra K.,	)	
	)	DECISION
Appellant,	)	
	)	
v.	)	
	)	
Waukee Community School District,	)	Admin. Doc. No. 4788
	)	
Appellee.	)	

STATEMENT OF THE CASE

The Appellant, Cassandra K. (hereinafter "Cassandra"), seeks reversal of a June 9, 2014, decision by Waukee Community School District Board (hereinafter "WCSD Board") denying a late filed open enrollment request on behalf of her minor daughter, S.K. The affidavit of appeal filed by Cassandra on July 7, 2014, attached supporting documents, and the school district's supporting documents are included in the record. Authority and jurisdiction for the appeal are found in Iowa Code §§ 282.18(5) and 290.1 (2013). The administrative law judge finds that she and the State Board of Education (hereinafter "State Board") have jurisdiction over the parties and subject matter of the appeal before them.

An in-person evidentiary hearing was held in this matter on August 15, 2014, before designated administrative law judge, Nicole M. Proesch, J.D., pursuant to agency rules found at 281 Iowa Administrative Code chapter 6. The Appellant was present on behalf of her minor daughter, S.K. Superintendent Dave Wilkerson (hereinafter "Superintendent Wilkerson") appeared on behalf of the Waukee Community School District (hereinafter "WCSD"). Also present was Lora Appenzellar-Miller, the Chief Financial Officer and Board Secretary for WCSD.

Cassandra testified in support of the appeal. Appellant's exhibits were admitted into evidence without objection. Superintendent Wilkerson testified for WCSD and the school district's exhibits were admitted into evidence without objection.

FINDINGS OF FACT

On May 19, 2014, Cassandra filed an application for open enrollment for S.K. from Dallas Center Grimes Community School District (hereinafter "DCG") to WCSD. The sole issue presented in this case is whether the WCSD Board erred by denying the late filed application for S.K. to open enroll out of DCG into WCSD. The record establishes the following facts and circumstances leading up to the application.

Cassandra[1] and her daughter S.K. have lived in DCG since 2006. S.K. has attended school at DCG since moving there. During the 2013-2014 school year S.K. attended DCG middle school until April of 2014 when S.K. began homeschooling. S.K. will be in the 9th grade during the 2014-2015 school year. At the time of this hearing schools were in summer break and Cassandra planned to homeschool S.K. for the 2014-2015 school year pending the outcome of this appeal.

Beginning in 2011 S.K. reported to Cassandra that she was being bullied and harassed by her classmates in school. When S.K. was in 5th grade there was a reported incident that occurred where S.K. became physically violent with another student who Cassandra believes was calling her names. Cassandra went to the principal, Mrs. Nerem, and spoke to her about the situation. Cassandra told her that the other student was calling S.K. ugly and stupid both before and after school and S.K. was reacting to this.

During the 6th and 7th grades there was one male student who was routinely calling S.K. ugly, fat, and stupid. This student and his group of friends began to bully S.K. and bother her in class. S.K. asked the students to leave her alone on multiple occasions to no avail. S.K. would get in trouble for speaking out in class when she was asking them to leave her alone. Cassandra spoke to the principal, Mrs. Phillips, the new principal, Mr. Hlas, and the school counselor, Mrs. Kopecky, about the situation. Cassandra complained to Mrs. Kopecky at least once a quarter for the two years she attended.

During S.K.'s 8th grade year the same group of students continued to call her names. S.K. could hear them whispering to each other "would you do that?" meaning would you have sex with her. The students also started flicking their pencils at her. S.K. would scream at the students to stop and then get in trouble for yelling in class. There were incidents in December, January, and February of the 2013-2014 school year reporting that S.K. was acting out in school. One report noted there was an incident with S.K. and another student. The school spoke to both students about the incident. S.K. got probation on the bus and had to sit at the front of the bus for a week. On another occasion S.K. had to switch buses.[2]

Cassandra reported incidents of harassment to Mrs. Judd, the school counselor, on at least four occasions in a couple of months. Mrs. Judd tried to work through things with S.K. and advised her to ignore the students, walk past them, and not to raise her voice at them. Cassandra thought that Mrs. Judd was documenting these instances but there was no evidence of this provided to WCSD Board. Cassandra did not fill out any reports but made verbal reports on a regular basis.

Before Christmas break of the 2013-2014 school year Cassandra began looking at open enrolling S.K. out of DCG.[3] S.K. told teachers and friends that she was planning to open enroll out of DCG. S.K.'s friends and teachers tried to talk her out of doing this. They encouraged her

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[1] Cassandra works as a teacher associate for the WCSD.

[2] Cassandra did not provide any further details about the incidents that occurred on the bus.

[3] Before Christmas break Cassandra talked to WCSD middle school vice principal, Mr. Shockey, about the open enrollment and he told her it would be for the betterment of the child and thus she would be allowed to open enroll. Superintendent Wilkerson testified that his principal should not have advised her of this.

to stay and told her they would pay more attention and be better advocates for her. After S.K. returned from break S.K.'s teachers and friends provided her support for about a month. Mrs. Judd told S.K. to email her every time something happened. S.K. reported that the name calling and pencil flicking stopped and there were no more incidents to report. Although the behavior stopped S.K. believed the students were still whispering about her in passing, but she could not hear what they were saying. S.K. reported feeling an aura of hatred toward her.

S.K. began getting ill in February of 2014. S.K. was physically ill once or twice a week with intestinal issues, vomiting, or a fever. S.K. had 107 total absences reported from February to April of 2014. S.K. was sick at least once a week from February until S.K. began to homeschool in April. Most of the days that S.K. missed were excused by Mrs. Phillips due to illness. Cassandra called the school almost every morning to tell them S.K. was physically ill, tired of school, the students, and the bullying.

In May Cassandra talked to Mrs. Judd about open enrolling. On May 19, 2014, Cassandra filed an application for open enrollment with WCSD and DCG. At the outset of the hearing Cassandra testified that she filed the application for two reasons. First, Cassandra asserts that DCG did not appropriately address bullying. In her opinion WCSD is good at reducing bullying and harassment. Cassandra knows all of the teachers personally and she knows they are good at dealing with these issues. Secondly, Cassandra seeks open enrollment for convenience. Since, Cassandra works for WCSD S.K. could ride with her to school each day. Given the limited legal standard in the matter before this Board, we will give little weight to matters of convenience.

WCSD received the application for open enrollment on May 20, 2014 which alleged pervasive harassment.[4] The staff employee who processes open enrollment requests contacted DCG regarding the application and DCG advised her that they had no record of bullying and harassment for S.K. Superintendent Wilkerson made a follow-up phone call to Superintendent Scott Grimes regarding the situation. Superintendent Grimes advised him that he was not a record of any bullying and harassment. He did not indicate whether DCG had approved the open enrollment application or not. Superintendent Wilkerson acknowledged that Superintendents are not always made aware of these issues. Superintendent Wilkerson did not conduct any follow up conversations with Cassandra regarding her claim of bullying and harassment.

The decision to deny the open enrollment request was placed on the consent agenda at the June 9, 2014, WCSD Board meeting. The board denied the request. On June 10, 2014, WCSD sent a letter to Cassandra notifying her that her request had been denied.

At the time of the hearing Cassandra presented a letter[5] dated July 8, 2014 from Barbara J. Graham, LISW on behalf of S.K. Mrs. Graham has been seeing S.K. since June 9, 2011 for stress, anxiety and depression related to being bullied at school. Mrs. Graham's letter recommends that S.K. be allowed to open enroll from DCG to WCSD.

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[4] There is no record indicating if or when DCG received a copy of the open enrollment request. There was also no record of whether or not DCG approved or denied the request.

[5] This letter was not presented to the WCSD at the time of the June 9, 2014, board meeting. Superintendent Wilkerson did not object to its admission in the present matter.

CONCLUSIONS OF LAW

Under Iowa Code section 282.18, the statutory filing deadline for an application for open enrollment for the upcoming school year is March 1st. The law provides that an open enrollment application filed after the statutory deadline, which is not based on statutorily defined "good cause," must be approved by the boards of directors of both the resident district and the receiving district. Iowa Code § 282.18(5). Open enrollment may be granted at any time with approval of both the resident and receiving school districts. *Id.* § 282.18(14).

A. Procedural Law

The appropriate process that both districts must follow when they receive an application for open enrollment in cases of pervasive harassment is outlined in 281 IAC 17.5(1).

Resident District Responsibilities:

1) The board of the resident district shall act on the request within 30 days of its receipt.
2) If the board denied the request they have three days in which to notify the parent.
3) If the board approves the request the superintendent has 3 days to notify the parent and 5 days to notify the receiving district of the approval.

Receiving District Responsibilities:

1) The board of the receiving district shall act to approve or deny the request within 30 days after receiving the approval from the resident district.
2) The superintendent shall notify the parent and resident district of either the approval or denial of the application within 15 days of board action.

281 IAC 15.5(1).

Here the resident district must act first. The law contemplates that the resident district is in the best position to make a decision about an open enrollment application filed on the basis of bullying and harassment since the student is attending their district. If the resident district denies the application then an appeal can be filed. If the resident district grants the application then it is sent to the receiving district to act. If the receiving district denies it then an appeal can be filed. But before they can act the board of the resident district has to act.

In this case there is no indication that the resident district ever acted on the open enrollment application at all. From a procedural standpoint the receiving district could not act to deny the application until the resident district acted. This Board has serious questions about the procedural posture of this matter; however, rather than send this appeal back to the districts to follow correct procedures the State Board will review the substantive law as it applies to this case and make a decision. **Moving forward, if these procedures are not followed this Board will not entertain these appeals.**

B. Substantive Law

A decision by *either* board denying a late-filed open enrollment application that is based on "repeated acts of harassment of the student or serious health condition of the student that the resident district cannot adequately address" is subject to appeal to the State Board of Education under Code section 290.1. Iowa Code § 282.18(5) (emphasis added).

The State Board applies established criteria when reviewing an open enrollment decision involving a claim of repeated acts of harassment.[6]

All of the following criteria must be met for this Board to reverse a local decision and grant such a request:

1. The harassment must have occurred after March 1 or the student or parent demonstrates that the extent of the harassment could not have been known until after March 1.

2. The harassment must be specific electronic, written, verbal, or physical acts or conduct toward the student which created an objectively hostile school environment that meets one or more of the following conditions:

> (a) Places the student in reasonable fear of harm to the student's person or property.
> (b) Has a substantially detrimental effect on the student's physical or mental health.
> (c) Has the effect of substantially interfering with a student's academic performance.
> (d) Has the effect of substantially interfering with the student's ability to participate in or benefit from the services, activities, or privileges provided by a school.

3. The evidence must show that the harassment is likely to continue despite the efforts of school officials to resolve the situation.

4. Changing the student's school district will alleviate the situation.

In re: Open Enrollment of Jill F., 26 D.o.E. App. Dec. 177, 180 (2012); *In re: Hannah T.*, 25 D.o.E. 26, 31 (2007) (emphasis added). This is a high standard.

Under the first criterion, the harassment must have happened or the extent of the harassment not known until after March 1st. The objective evidence in this case shows that

[6]The record indicates that S.K. was suffering from depression related to the bullying she has alleged. While depression has been found to be a serious medical condition by this Board which could also be appealed under § 282.18(5) this issue was not the basis of Cassandra's open enrollment application and was not presented to the local board for a decision. The appellant is bound by her application. Thus, this was not an issue preserved for appeal and our analysis will only focus on the claim of repeated acts of harassment of a student.

conduct alleged had been occurring as far back as the 2011-2012 school year. During the 2013-2014 school year each of the incidents S.K. complained about were discussed with Mrs. Judd prior to Christmas break. S.K. had considered open enrollment before returning from break and would have met the deadline had she filed her application then. However, S.K. chose to return. Upon S.K.'s return from Christmas break the name calling and pencil flicking stopped. Cassandra testified that when S.K. returned to school there were no more reportable instances of bullying and harassment. While, she did note that S.K. believed students were whispering about her there were no further verbal insults or incidents with a pencil directed at S.K.

The harassment started well before the March 1st deadline. Cassandra has not argued that she did not know the extent of the bullying until after March 1st and there is nothing in the record to suggest the alleged behavior continued after March 1st. Furthermore, for all practical purposes the behavior being complained about stopped after Christmas break. Therefore, the first criterion has not been met. Accordingly this Board need not continue its inquiry of the other criteria. However, since parents and school districts alike look to these decisions for guidance we will analyze the facts under the second criterion.

Under the second criterion, our focus is on the terms *objectively* hostile school environment and *reasonable* fear of the student. This means that the conduct complained of must have negatively affected a reasonable student in S.K.'s position. Thus, this Board must determine if the behavior of the students created an *objectively* hostile school environment that placed S.K. in *reasonable* fear of harm to her person or property, or had a substantially detrimental effect on her physical or mental health, or substantially interfered with her academic performance, or substantially interfered with her ability to participate in or benefit from services, activities, or privileges provided by the school.

This Board has granted relief under Iowa Code section 282.18(5) in only three other cases. In each case, the facts established that the experienced harassment involved serious physical assaults and destruction of property of those students.[7] In this case, the name calling,[8] derogatory comments, and pencil flicking is certainly hurtful, annoying, and inappropriate. No student

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[7] *See In re: Melissa J. Van Bemmel*, 14 D.o.E. App. Dec. 281(1997)(The board ordered a student to be allowed to open enroll out of the district for the harassment of the student by a group of 20 students that climaxed when the vehicle the student was riding in was forced off the road twice by vehicles driven by other students); *See also In re: Jeremy Brickhouse*, 21 D.o.E. App. Dec. 35 (2002) and *In re: John Meyers*, 22 D.o.E. App. Dec. 271 (2004). The students in both cases had been subjected to numerous physical assaults and destruction of property at school.

[8] The United States Supreme Court has held:

> Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. (Internal citations omitted). Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

Davis v. Monroe County Bd. Of Educ., 526 U.S. 629, 651-52 (1999).

should be subjected to mistreatment by his or her peers. However, there was no evidence at the hearing to support any direct threats to S.K.'s personal safety or her property. While this Board does not discount that S.K. felt "bullied" by this cruel adolescent behavior, the behavior does not rise to the level of pervasive harassment that the Legislature intended to remedy by allowing a late-filed open enrollment application.

This Board has considered S.K.'s subjective belief about the bullying she experienced at DCG, including her belief that an aura of hatred existed toward her. However, S.K.'s subjective belief must be weighed against the law's requirement that Cassandra prove an "*objectively* hostile school environment." *In re Jill F.*, 26 D.o.E. App. Dec. at 180 (emphasis added). If the environment is not objectively hostile, this standard is not met and her appeal fails.

Even if the behavior rose to the level of pervasive harassment required by Legislature, under the third criterion the appellant must also show that the behavior is likely to continue despite the efforts of school officials to resolve the situation. Here the evidence shows that S.K. reported the objectionable behavior to Mrs. Judd before Christmas break and when she returned to school after Christmas break the behavior stopped. There was no evidence offered to show that the behavior resurfaced or continued after this point. Under these facts one cannot conclude that the behavior was likely to continue despite the efforts of school officials. Thus, this appeal falls short of the third and fourth criterion.

The issue for review here, as in all other appeals brought to us under Iowa Code section 282.18(5), is limited to whether the local school board made error of law in denying the late-filed open enrollment request. We have concluded that the WCSD Board correctly applied Iowa Code section 282.18(5) when it denied the late open enrollment application filed on behalf of S.K. Therefore, we must uphold the local board decision.

DECISION

For the foregoing reasons, the decision of the Board of Directors of the Waukee Community School District made on June 9, 2014, denying the open enrollment request filed on behalf of S.K. is AFFIRMED. There are no costs of this appeal to be assigned.

10/30/14
Date

Nicole M. Proesch, J.D.
Administrative Law Judge

10/30/14
Date

Charles C. Edwards, Jr., Board President
State Board of Education