IOWA DEPARTMENT OF EDUCATION
(Cite as 22 D.o.E. App. Dec. 46)

In re Mary Oehler

Kenneth and Marilyn Oehler, Appellants,	:	
	:	DECISION
vs.	:	[Admin. Doc. 4538]
Davenport Community School District, Appellee.	:	

The above-captioned matter was heard in person on May 22, 2003, before designated administrative law judge Carol J. Greta, J.D. The Appellants, Kenneth and Marilyn Oehler, were present on behalf of their daughter, Mary, who was also present. The Oehlers were represented by legal counsel, Curt Sytsma, of The Legal Center in Des Moines. Appellee, the Davenport Community School District , was represented by legal counsel, William Davidson of the Davenport law office of Lane & Waterman. Also appearing on behalf of the Appellee were Superintendent Jim Blanche, Sudlow Intermediate School Principal Bruce Potts, and Board President Susan Low.

An evidentiary hearing was held pursuant to agency rules found at 281 Iowa Administrative Code chapter 6. Authority and jurisdiction for the appeal are found in Iowa Code §§ 282.18(5) and 290.1 (2003). The administrative law judge finds that she and the State Board of Education have jurisdiction over the parties and subject matter of the appeal before them.

The Oehlers seek reversal of the decision of the local board of directors of the Davenport District to deny two open enrollment requests they filed on February 4, 2003 on behalf of Mary. They filed a timely appeal to this agency on behalf of their minor daughter.

I.
FINDINGS OF FACT

Prior to February 3, 2002, 12 year old Mary Oehler was a 6th grade student at Sudlow Intermediate School in the Davenport Community School District. Sudlow is one of six intermediate schools in the District, all of which house a 6-8 grade span. Mary, who described herself as one of the tallest girls in 6th grade, had an uneventful first half of the year at Sudlow. In fact, Mrs. Oehler testified that on January 1, 2003, the deadline for filing an open enrollment request for the 2003-04 school year, the family had no intention of moving Mary from Sudlow.

Problems not of her making began for Mary in mid-January of this year. A fellow student, who had transferred into Sudlow on December 17, 2002, started harassing Mary.

The other student [hereinafter "Student A"], described by Mary as the largest girl in the 6th grade, was in the same section (and, therefore, most of the same classes) as Mary.[1] Specifically, the incidents started on January 13 when Student A demanded that Mary give her a sweatshirt that Mary had worn to class. When Mary refused to do so, Student A told Mary that she would be sorry that she refused to comply. That same day Student A intentionally twisted Mary's arm behind her back and, in Mary's words, "smashed" Mary's hand against her desk while passing out papers in a class.

That evening, Mary spoke to her mother about these incidents, but asked her mother not to talk to school officials about it. Mary stated that she was afraid of retaliation from Student A and friends of Student A. It was Mary's belief that Student A "makes good on her threats." The next day, January 14, Mrs. Oehler did what most reasonable parents would do; she went to Sudlow and spoke with Principal Bruce Potts about the matter. Mr. Potts stated that, consistent with Mrs. Oehler's request that attention not be drawn to Mary, he would talk to the team of teachers in charge of that section of 6th graders about discreetly monitoring the situation.

Mrs. Oehler returned home believing that the issue was closed. She did check periodically with Mary over the next two weeks, but was given no reason to believe anything but that life at Sudlow was progressing well for her daughter. Likewise, Mr. Potts testified that nothing more was said to him, so he believed that things were going better for Mary. Mr. Oehler testified that there were incidents on January 28 and 29, but no details were provided at this hearing.

On January 30, however, Mary unquestionably was assaulted by Student A. This occurred during the lunch period at school when Student A and four of her friends sat by Mary at a lunch table. When Mary moved elsewhere at the table, Student A and her friends followed Mary. Eventually, Student A asked her friends how many of them thought that she should hit Mary. Five hands were raised, and Student A slapped Mary in the face. When Mrs. Oehler picked up Mary after school that day, Mary reported this assault to her mother.

Friday, January 31, both of Mary's parents arrived at Sudlow where they first visited with the Associate Principal before Mr. Potts also joined in that meeting. The two District administrators told the Oehlers that the following steps would be implemented immediately by the District:

1. Student A received in-school suspension.

[1] At Sudlow there are two sections of approximately 105 6th graders in each section.

2. Student A was removed from Mary's section of 6th grade and was placed in the other section. She and Mary would no longer have any classes together, but would share the same lunch period, although the two sections of 6th graders do not sit at the same lunch tables.

3. Student A's parents were notified of the incident and the consequences to their daughter.

4. Because of Mary's fears of retaliation, security at the attendance center was told to watch Mary, particularly when Student A was near her.

To the Oehlers' distress, when Mary arrived home the afternoon of January 31, she related another assault that had occurred that very day. Student B, one of the four students who had been with Student A the prior day when Student A slapped Mary, approached Mary during the lunch period on the 31st. Student B, described by Mary as the largest boy in the 6th grade, pulled a punch just inches from Mary's face and threatened her with words to the effect that "[Student A] may be in in-school suspension now, but she doesn't let people get away with this."

The next Monday, February 3, the Oehlers withdrew Mary from Sudlow and from the District. They filed two open enrollment requests on February 4, one for the remainder of the present school year and one for the 2003-04 school year, both seeking to transfer Mary to the Bettendorf Community School District.

Mr. Potts testified that moving Student A to the other section of 6th graders was "the strongest intervention" available to the District, and that students and teachers alike view the change as "a huge step" for the school to take. He reported that Student A herself told Mr. Potts that the change and the in-school suspension would encourage her to "mind her own business." Therefore, he was quite concerned that the District's interventions were not being given a chance by the Oehlers. Speaking for the family, Mr. Oehler testified that they thought that the District had its chance to correct the situation. The family was particularly unhappy that just three hours after their meeting with building administrators, Mary was assaulted by Student B.

The Sudlow principal also testified regarding the district's attempts to fight harassment in general. By local board policy, all Davenport students are educated in an anti-harassment program entitled "Victims, Bullies, and Bystanders." Mr. Potts stated that students – in all intermediate buildings, not just Sudlow – are given a "booster shot" of this program in the 6th grade designed to emphasize the role of bystanders and how they should respond to bullying and harassment.

Superintendent Blanche met with the Oehlers on February 7. He testified that Principal Potts' response was appropriate and "sent a strong message" to Student A that her harassment of Mary would not be tolerated by the District. He offered at that meeting

to allow Mary to transfer to any of the other five intermediate schools in the District. As had Mr. Potts, he expressed disappointment that the District had not been given a chance to resolve the matter. The Oehlers acknowledge that they had determined prior to the meeting with Dr. Blanche to withdraw Mary from the District, explaining that the exposure to further harm to their daughter outweighed giving the District any further opportunity to reach a resolution.

Finally, Board President Low stated that the Board heard 90 minutes of testimony regarding the Oehlers' open enrollment requests, and then analyzed the evidence point-by-point against the six *Brickhouse*[2] principles. She testified that during the Board's "vigorous and spirited" debate, it was clear that of primary influence on the Board was its conclusion that the District had not been given a fair opportunity to assist Mary. The local Board then voted 5-1 (with one abstention) to deny both open enrollment requests.

II.
CONCLUSIONS OF LAW

The controlling statute for this appeal is Iowa's open enrollment law, Iowa Code § 282.18. In general, open enrollment requests must be filed on or before January 1 of the school year preceding the school year for which open enrollment is requested. This statute was significantly amended in 2002. New subsection (5) of the law states as follows:

> Open enrollment applications filed after January 1 of the preceding school year that do not qualify for good cause as provided in subsection 4[3] shall be subject to the approval of the board of the resident district and the board of the receiving district. … A decision of either board to deny an application filed under this subsection involving 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 under section 290.1. The state board shall exercise broad discretion to achieve just and equitable results that are in the best interest of the affected child or children.

Thus, the only open enrollment appeals over which this Board now has jurisdiction are those involving "repeated acts of harassment of the student or serious health condition of the student that the resident district cannot adequately address." The Oehlers alleged that

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[2] *In re Jeremy Brickhouse*, 21 D.o.E. App. Dec. 35 (2002), discussed *infra.*

[3] "Good cause" as used in the open enrollment law relates to two types of situations: those involving a change in the student's residence, and those involving a change in the status of the student's school district. Good cause to have missed the January 1 filing deadline is not at issue here.

Mary should be allowed to open enroll out of the District due to repeated acts of harassment. A serious health condition is not alleged.

The parties both acknowledge that the seminal cases are *In re Melissa J. Van Bemmel*, 14 D.o.E. App. Dec. 281 (1997) and *In re Jeremy Brickhouse*, 21 D.o.E. App. Dec. 35 (2002). Both of these cases involved secondary students attending small school districts in which there was but one high school.

In *Van Bemmel*, the student had experienced harassment by a group of about 20 students that had caused her to seek medical and mental health treatment for a variety of physical ailments, as well as for anorexia, depression, and insomnia. The harassment ranged from late night phone calls to life-threatening behavior where she was in a vehicle that was chased by other vehicles and twice pushed off the road. The threats and harassment started in the fall, but stopped at that time with appropriate intervention by the District. However, the incidents resumed in January, and despite the family repeatedly working with school officials and law enforcement to solve the problem, the State Board noted that the "District is unable to effectively address the situation at school and the police are unable to effectively address the situation outside of school." 14 D.o.E. App. Dec. at 285. The State Board stated, "This is not the same as a situation where a student is being harassed by one or two other students one or even several times. The second period of harassment at school occurred on a daily basis for the entire semester. There is no reason to believe the students involved in the harassment will stop." *Id.* [Emphasis added.]

In ordering that Melissa Van Bemmel be allowed to open enroll out of the district, the State Board provided six guiding principles for districts to use to analyze open enrollment requests based upon allegations of harassment. Those principles are as follows:

1) The harassment must have happened after January 1, or the extent of the problem must not have been known until after January 1, so the parents could not have filed their applications in a timely manner.

2) The evidence must show that the harassment is likely to continue.

3) The harassment must be widespread in terms of numbers of students and the length of time harassment has occurred. The harassment must be relatively severe with serious consequences, such as necessary counseling, for the student who has been subject to the harassment. Evidence that the harassment has been physically or emotionally harmful is important. Although we do not condone harassment of

students, in order to use section 282.18(20)[4] authority, the harassment must be beyond typical adolescent cruelty.

4) The parents must have tried to work with school officials to solve the problem without success.

5) The evidence of harassment must be specific.

6) Finally, there must be reason to think that granting the student's open enrollment request will alleviate the situation.

Just over one year ago the *Brickhouse* case was heard and decided by the State Board. In affirming the above principles, this Board reversed the local Board's decision not to allow Jeremy Brickhouse to open enroll out. The indignities and degradation to which Jeremy was subjected are explained in great detail in that decision; suffice it to say, they were found by this Board to go well beyond "typical adolescent cruelty." It is also noteworthy that Jeremy developed a severe case of hives that took six weeks to heal.

This Board concluded in *Brickhouse* that the harassment against Jeremy, which took place over several months, "might also be likely to continue because it had apparently been an established tradition of behavior known to adults and there was not evidence of prior aggressive steps to end the behavior." 21 D.o.E. App. Dec. at 45. In fact, while the District in *Brickhouse* did take some post-appeal steps to correct student behavior in school, it acknowledged that long-standing student behavior traditions would preclude "overnight progress." *Id.* at 41. Inadvertently demonstrating that these student traditions had a history of tolerance by school officials, the District introduced written student comments into evidence to the effect that Jeremy was targeted because he "didn't know his place," and that bullying of other students was actually much worse than what Jeremy experienced. The written comments only served to show the State Board that intolerable student misbehavior was so institutionalized at the District that students accepted it as the norm.

Before we align the facts of this case point-by-point with the above six principles, it is clear to this Board that those principles are now in need of further examination and of some amendment. Accordingly, we first undertake a thorough analysis of the *Brickhouse* principles.

We conclude that the first, second, fifth, and sixth principles need no change. When open enrollment requests are filed after the January 1 deadline, there still must be evidence that the application could not have been filed prior to January 1, that the harassment was

[4] Former section 282.18(20) stated in part that "the state board shall exercise broad discretion to achieve just and equitable results which are in the best interest of the affected child or children."

likely to continue, that the harassment was real, and that granting the open enrollment will halt the harassment. However, the remaining principles – the third and fourth – need substantial change.

Traditionally, the third principle (severity of harassment) has required that the harassment be widespread in terms of number of perpetrators and length of time involved; it has also included a requirement that the harassment have serious consequences for the victim such as physical or emotional harm. We believe that this is unnecessarily harsh and punitive to the victim of the harassment. The harassment must be beyond typical adolescent cruelty. However, if the harassment is severe enough, we shall not require proof that more than one student was the perpetrator nor that the harassment occurred over a certain time period. In addition, while we shall continue to look for some adverse consequence to the victim, we shall not require that the victim prove medical treatment, counseling, or similar professional assistance.

Heretofore, the fourth principle (parents have tried to work with school officials to solve the problem without success) has put too much emphasis on the duty of the victim's parents to work with school officials to effect a positive change. We believe that parents must inform school officials of all pertinent information regarding their child's harassment and must give the officials a reasonable chance to intervene. In turn, it must be clear that the district has promptly responded in a meaningful way to the harassment. We appreciate that no district can guarantee the safety of all of its students. Certainly, no court holds schools to such a standard. However, we expect the response of the district to demonstrate two components – (1) that the victim's well-being is highly valued by the district and (2) that the conduct of the perpetrator(s) will neither be minimized nor tolerated by school officials.

Accordingly, the modified guidelines adopted herein and to be used by school districts to determine whether to approve a late-filed open enrollment request alleging harassment of the student are as follows:

1) The harassment must have happened after January 1, or the extent of the problem must not have been known until after January 1, so the parents could not have filed their applications in a timely manner.

2) The evidence must show that the harassment is likely to continue.

3) The harassment must be beyond typical adolescent cruelty. We caution schools not to be bound by a strict formula of what constitutes typical adolescent cruelty, as this can depend heavily on the circumstances, the age and maturity level of the students involved, etc. *Usually* such immature behavior as name-calling, taunting, and teasing – when done with no intent to physically harm or scar the other child's psyche – can be viewed as typical adolescent cruelty. This is not by

any means to say that schools should take lightly such cruelty. Schools must address typical adolescent cruelty quickly and seriously. However, for purposes of open enrollment requests based on harassment, the acts must be more than typical adolescent cruelty. Once a school has determined that the harassment goes beyond typical adolescent cruelty, we no longer require evidence that more than one student was the perpetrator of the harassment or that the harassment continued over any particular length of time. Nor does there need to be proof of serious consequences, such as necessary counseling, for the student who has been subjected to the harassment.

4) School officials, upon notification of the harassment, must have worked without success to resolve the situation.

5) The evidence of harassment must be specific.

6) Finally, there must be reason to think that changing the student's school district will alleviate the situation.

Now that the principles have been modified, we analyze the facts of this case under the new principles.

1) *Timing.* The harassment against Mary happened after January 1, so her parents could not have filed their applications in a timely manner.

2) *Likelihood that harassment will continue.* The evidence is simply inconclusive as to whether the harassment was likely to continue if Mary had stayed at Sudlow. True, Student B threatened Mary just hours after administrators stated that security would keep a sharp eye out for Mary if Student A approached her. But the school officials were not aware of Student B specifically as a threat against Mary at that time. Furthermore, there is no evidence whether Student B acted on his own or at the behest of Student A. There is no evidence regarding whether Student A communicated at all with Student B after Mr. Potts had talked to her and her mother on January 31. We know that Mr. Potts was convinced that Student A's harassment of Mary would cease, and there was no evidence presented to contradict his conviction. The isolated incident regarding Student B is insufficient to convince us that the harassment of Mary would have continued at Sudlow. However, the totality of the evidence in this regard being inconclusive, we give the benefit of the doubt regarding this factor to Mary.

3) *Severity.* The point of this principle is to give districts and this Board a means of separating facetious complaints from those in which a student was truly harassed. This Board has no doubt that Mary was harassed. While we view

the events prior to January 30 and 31 as typifying nothing more than adolescent cruelty, the slap in the lunchroom and the pulled punch and threat of further violence the next day go beyond typical adolescent cruelty.

4) *Resolution attempts by school officials*. We do not fault the reaction by the school officials in this case and their attempts to protect Mary. In contrast to *Van Bemmel* and *Brickhouse*, the Davenport administrators took prompt and appropriate action when notified of the assault against Mary. They unambiguously did not condone the treatment Mary received at the hands of a few of her peers. The District did not attempt to cast blame on Mary; the Davenport administrators and Board believed Mary from the outset. The District already had in place an anti-bullying program which was implemented pursuant to local board policy. It is important to this Board that the program was approved by the local board and implemented district-wide, thus sending a clear signal to the students, parents, and all patrons of the District that harassment is taken seriously by the District and will not be tolerated.

5) *Specificity*. The evidence of harassment on January 14, 30, and 31 was specific.

6) *Effect of change.* The gist of this principle is whether putting the student who was the object of harassment in a different environment will make a difference. When read in concert with the other principles, this one begs the question whether the student herself is inviting the harassment in some way. We have no doubt in this case that Mary did nothing to provoke the harassment she experienced. Therefore, there is reason to think that changing Mary's district will alleviate the situation.

   However, as this is the first case of its type where the Appellee is a district with multiple attendance centers, we look also at whether an intradistrict transfer would alleviate the harassment. Mary has not experienced any harassment at her new middle school in Bettendorf. However, there was no evidence that Mary would have been harassed if she had transferred to another intermediate school within the Davenport District. Mr. Oehler testified to his belief that the security at all Davenport intermediate schools is similar to that existing at Sudlow; therefore, the family did not feel that Mary would be safer at any other intermediate school within the District. The Oehlers presented no evidence in support of their feeling about Mary's safety at another intermediate school. Later in the hearing, the Oehler's attorney clarified that the family was not alleging that all intermediate schools in Davenport are unsafe. Indeed, the Oehlers testified that they chose Bettendorf, not for safety reasons, but because it made for an easier transition for Mary, who knew the soccer coach and attended church with many students in her new middle school. Mr. Oehler added that the Bettendorf middle school is closer to their residence

> than any other Davenport intermediate school. Mary herself testified that she never visited any of the other Davenport intermediate schools. Therefore, we conclude that changing her attendance center *within* the Davenport District would have alleviated the situation.

To summarize, we acknowledge that the Oehlers have an absolute right to withdraw Mary from the Davenport District, assuming they comply with our compulsory education law, Iowa Code chapter 299. However, that does not mean that the District has a corresponding obligation to allow the withdrawal to occur via open enrollment. This Board concludes that the harassment of Mary, albeit severe, could have been adequately addressed by the District's offer to transfer Mary to any of its other intermediate attendance centers.

[Although not effective until May 7, 2003, and, therefore, not raised by either party herein, we believe it will be instructive to discuss how the new "unsafe school choice option" rules will impact cases such as this where the Appellee District has more than one attendance center per affected grade level. These rules were recently enacted at 281—Iowa Administrative Code chapter 11. Specifically, the individual student option rule, 281—IAC 11.4, provides as follows:

> Any student who becomes a victim of a violent criminal offense shall, to the extent feasible, be permitted to transfer to another school within the district. For purposes of this rule, a victim of a violent criminal offense is a student who is physically injured or threatened with physical injury as a result of the commission of one or more of the following crimes against the student while the student is in the school building or on the grounds of the attendance center:
>
> 1. A forcible felony …;
>
> 2. Offenses, excluding simple misdemeanors, involving physical assault …;
>
> 3. Offenses…involving sexual assault …;
>
> 4. Extortion ….
>
> Within ten calendar days following the date of the request, a local school district shall offer an opportunity to transfer to the parent/guardian of a student who meets the definition of a victim of a violent crime.

[Emphasis added.]

The record before us shows only that the slap in the school cafeteria did not rise above the commission of a simple misdemeanor assault. However, assuming *arguendo* that Mary would have been eligible to exercise the individual student option, the District's sole obligation would be to permit Mary to transfer to another intermediate school within the District.]

III.
DECISION

For the foregoing reasons, it is recommended that the decision of the Board of Directors of the Davenport Community School District made on May 6, 2003, denying the open enrollment requests filed on behalf of Mary Oehler be AFFIRMED. There are no costs of this appeal to be assigned.

_____ _____

Date Carol J. Greta, J.D.
Administrative Law Judge

It is so ordered.

_____ _____

Date Sally Frudden, President Protem
State Board of Education