IOWA STATE BOARD
OF EDUCATION
(Cite as 16 D.o.E. App. Dec. 154)

In re Elijah Berry	:	
Twyla Berry Appellant,	:	
v.	:	DECISION
Colfax-Mingo Community School District, Appellee.	: :	
		[Admin. Doc. #4009]

The above-captioned matter was heard on August 12, 1998[1], before a hearing panel comprising Jeff Berger and Judge Brown, consultants, Bureau of School Administration and School Improvement Services; and Ann Marie Brick, J.D., legal consultant and designated administrative law judge, presiding. Appellant, Ms. Twyla Berry, was present and represented by Mr. August H. Luthens, Esq. of Colfax, Iowa. The Appellee, Colfax-Mingo Community School District [hereinafter, "the District"], was present in the persons of Mr. James Ferguson, superintendent; Ms. Patricia Ann Fox, elementary principal; and Edger J. Ackerman, junior high school principal. The District appeared *pro se*.

An evidentiary hearing was held pursuant to departmental rules found at 281 Iowa Administrative Code 6. Authority and jurisdiction for this appeal are found at Iowa Code sections 282.18 and 290.1(1997). 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 Appellant seeks reversal of a decision of the Board of Directors [hereinafter, "the Board"] of the District made on June 1, 1998, which denied her application for open enrollment for her son, Eli.

I.
FINDINGS OF FACT

Elijah Berry will begin middle school in the fall of the 1998-99 school year. He and his mother live in the Colfax-Mingo Community School District. They moved to the District just prior to the 1997-98 school year from Missouri. Ms. Berry wanted to live closer to her parents and raise her son in the country. She had attended the Colfax-Mingo Community School District as a child.

[1] **This matter was originally scheduled for hearing on July 15, 1998, but was continued upon application of Appellant's counsel until August 12, 1998.**

The elementary school is located in Colfax and is comprised of 400 students. Eli attended fifth grade there this past school year. The middle school is located in Mingo, which is approximately seven miles from Colfax. The middle school is comprised of grades six, seven and eight. Colfax students who attend middle school arrive at the elementary school for bus transportation each morning. The middle school buses leave Colfax around 8:05 a.m.

The elementary school offers a breakfast program and Eli participates in that program. The school opens its doors to students at 7:45 a.m. School begins at 8:15 a.m. Those students who wish to eat breakfast must arrive at school no later than 8:00 a.m.

Appellant does not work outside of the home. Because of the sale of her real estate in Missouri, she is presently able to be a full-time mom. She drives Eli to school each day. Some days they arrive as early as 7:30 a.m. and just sit in the car talking until it is time to go into school at 7:45 a.m. Appellant testified that she has to park on the West Side of the school, which is where the middle-school students gather to take the bus to Mingo.

Eli has been receiving services for Attention Deficient Hyperactivity Disorder (ADHD) since 1992. As a part of these services, Appellant testified that Eli has received counseling to help him cope with his disorder. These counseling services began in Missouri and Appellant was advised to continue receiving services when she moved to Iowa. Since her move here in 1997, she and Eli have both received help on how they can best deal with his short attention span and behavior control. At the present time, Eli attends biweekly counseling sessions at Four Rivers Mental Health Center in Newton, Iowa. There he receives services from a licensed social worker/therapist named Ruth Campbell. Ms. Campbell was present and testified at the appeal hearing.

Eli also receives some "accommodations" for his disability from the school district. However, it was unclear whether he has been identified as a special education student. No one present at the appeal hearing from the school district had reviewed his educational records prior to the appeal hearing. Ms. Berry testified that Eli receives social security disability (SSDI) benefits because of his ADHD. There is no dispute that because of Eli's "disability", he has a short attention span; is hyperactive; and often disturbs other students in class "with his noises and behavior".

Appellant believes the incidents giving rise to this appeal may have grown out of her actions at the end of October 1997. She had noticed that some times the doors to the elementary building were not unlocked at 7:45 a.m. Some times, they were not unlocked until 7:50 a.m. On a couple of occasions, she realized that some kids were holding the doors shut to prevent Eli, and other elementary students, from entering. Since she wanted Eli inside the building in time to eat breakfast, she reported these kids to the interim

elementary principal. As it turned out, the boys were middle school students. Appellant believes that is the reason she and her son became the target of a pattern of gradually escalating harassment from several middle school students.

At first, Appellant testified that she was called derogatory names as she waited in her car at school. Names such as "bitch" and "dike". During the winter months with the car windows up, she would be given "the finger". She complained about the behavior of the middle school students to Mr. Edwards, the interim elementary school principal.[2] Mr. Edwards told Ms. Berry that there was not enough elementary staff to supervise the middle school students. She then spoke with the high school principal, Mr. Morgan. He told her that he would speak to Mr. Ackerman about it because it appeared to be a problem with middle school students, not high school students. Principal Ackerman denied having any conversation with any one about the problem before May 19, 1998.

In late March and early April, the problems between Ms. Berry and the middle school students appeared to escalate. The vulgar name-calling and gestures increased. As the middle-school students passed Appellant and her son, they said things to her like, "Blow me, Bitch"; "Do you want to buy weed or blow?"; and they frequently gave her "the finger". Her son refused to eat breakfast at school because he did not want to get out of the car until the middle school buses had departed. After school, he was afraid to come outside until he saw his mother's car waiting for him. His counselor, Ruth Campbell, testified that Eli told her that the middle school students had threatened " to beat the shit out of him because his mother is such a bitch." Eli is scheduled to attend middle school this fall. He is very fearful for his safety and refuses to ride the bus.

An incident on May 19, 1998, brought matters to a head. Ms. Berry was sitting in her car with Eli when a student approached her car. She testified that he was very menacing. He was doing karate moves toward her and ended by pushing the car bumper with his foot. She became upset. She went over to the middle school bus and got on to talk to the bus driver. She testified that the bus driver was the only adult outside and she wanted to identify the students to report them. While she was on the bus talking to the driver, she was yelled at by at least three different students who called her a "bitch" and said "Bitch, get off the bus!"

Fearing for her safety and that of her son, Ms. Berry went to the chief of police to report what had been happening at the school. The chief of police had children at the elementary school who he drops off and picks up. He agreed to park next to Ms. Berry until the end of the school year. Ms. Berry also retained legal counsel at this time.

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[2] **The elementary school principal, Mrs. Wolf, died after the beginning of the school year. Mr. Edwards was hired as an interim principal until a permanent replacement could be found. Mrs. Patricia Ann Fox was hired as the elementary principal on February 2, 1998.**

On the same day as the bus incident, Ms. Berry went into the school to discuss the matter with the new elementary school principal, Patricia A. Fox. Ms. Fox recommended a meeting with middle school principal, Mr. Ackerman. The meeting was arranged for 9 a.m. on May 21 at the middle school. Ms. Fox agreed to accompany Ms. Berry to the meeting. Principal Ackerman testified that the first he had heard of any problems between the middle school pupils and Ms. Berry was from Ms. Fox and the bus driver. This occurred on or about May 19, 1998. Mr. Ackerman interviewed two middle school students who admitted calling Ms. Berry a "bitch" and so forth on the bus on May 19, 1998. He asked them to attend the May 21 meeting at 9:00 a.m. to apologize to Ms. Berry. However, when Ms. Fox and Ms. Berry had not appeared in Mr. Ackerman's office by 9:15 a.m. that day, he let the students return to their classes. Ms. Fox testified the delay was due to a problem at the elementary building and she and Ms. Berry did not arrive at the middle school until 9:30 a.m. As a result, the students were not questioned in Ms. Berry's presence, nor did they apologize. In fact, Mr. Ackerman testified, upon cross-examination, that the students were not punished in any way for their behavior. Ms. Berry testified that she was told that she brought these problems on herself.

In spite of Principal Ackerman's assurances that Eli would be just fine at the middle school, Ms. Berry was not satisfied. In addition, Eli's therapist, Dr. Jerry Lewis, as well as his counselor, Ruth Campbell, both recommended that it "would be in Elijah Berry's best interest to enroll him in another school system. Continued harassment and/or fear of harassment will potentially undermine the progress he has made." (Exh. B.)

Ms. Berry went to obtain open enrollment forms from then superintendent, Bonnie Baum. Ms. Baum is no longer superintendent at Colfax-Mingo and was not present to testify at the appeal hearing. Appellant testified that when she went to visit with Superintendent Baum, she was told that her application for open enrollment was late and that the Board would deny it. The Board met on June 1, 1998, and denied the open enrollment request on the grounds that it was late without good cause. There was no discussion about the reasons Ms. Berry had put on the open enrollment application for her request. Appellant filed her appeal to the State Board of Education on June 4, 1998.

In the interim, Ms. Berry talked with Mr. Hurbold, a District Board member, who advised her to request a closed hearing with the Board to discuss her situation. A closed session was held with the Board, Ms. Berry, and her legal counsel on June 29, 1998. The tape of the closed session was produced to the Administrative Law Judge in response to Appellant's Request for Production. Appellant and her attorney wanted the tape as evidence that at the closed session hearing, the Board members did not discuss the problems Ms. Berry raised about the middle school students' conduct or supervision. The only comments made during the closed session concerned the fact that since Ms. Berry had appealed their decision to the State Board of Education, they would just await the decision of the State Board.

Mr. Ackerman testified that as a result of his meeting with Ms. Berry he personally went down to the elementary school every morning at 7:30 a.m. to supervise the middle school students until the end of the school year. Ms. Berry did not report any incidents occurring on school grounds after the May 21 meeting. However, she attributes that to the fact that both the chief of police and Mr. Ackerman were supervising the students. She testified that just a week before this appeal hearing, one of the middle school students had approached her son at a public swimming pool and loudly accused him of having "sex with his sister". From Appellant's point of view, the problem has not been resolved.

II.
CONCLUSIONS OF LAW

At the time the Open Enrollment Law was written, the legislature recognized that certain events would prevent a parent from meeting the January 1 deadline. Therefore, there is an exception in the statute for parents or guardians of children who have "good cause" for missing the January 1 filing deadline. Iowa Code sections 282.18(2), (4), and (16)(1997).

The legislature has defined the term "good cause" rather than leaving it up to parents or school boards to determine. The statutory definition of "good cause" addresses two types of situations that must occur after the January 1 deadline and before June 30. The "good cause" exception relates to two types of situations: those involving a change in the student's residence and those involving a change in the student's school district. Iowa Code section 282.18(16)(1997); 281--IAC 17.4.

The pattern of harassment and threats experienced by Appellant and her son, and the inability of the District to solve the problem, are not "good cause" for a late-filed open enrollment application as defined by the legislature and the departmental rule. This is not to say that the problems experienced by Appellants are not a "good reason" to obtain open enrollment to a different district. It simply means that it is not a reason for which a school board is *required* to grant an open enrollment application.

However, the legislature has granted important authority to the State Board of Education to deal with extraordinary situations such as this one. Iowa Code section 282.18(18)(1997) provides as follows:

> Notwithstanding the general limitations contained in this section, in appeals to the state board from decisions of school boards relating to student transfers under open enrollment, 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.

The State Board has recognized that in certain situations, harassment of a student can create such a disturbing school climate that the student may not be able to profit from the educational program. In re Melissa J. Van Bemmel, 14 D.o.E. App. 281(1997). This appears to be such a case. The Van Bemmel case established principles to help guide the exercise of the State Board's discretion under Iowa Code section 282.18(18) in open enrollment cases involving harassment:

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.

Although the initial incidents occurred as early as the end of October 1997, the escalation of the harassment to the point of creating fear in both Appellant and her son did not occur until April and May 1998.

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

We were concerned by the fact that no one, except Appellant and her attorney, seemed to be upset by the behavior of the middle school students. It is bad enough when "student-to-student" harassment involves vulgar language and gestures, as well as offers to purchase drugs or perform sex acts. However, when these behaviors are directed toward a parent, it would appear to be equally important to address the issue through some type of disciplinary action to show the students that it is unacceptable behavior. There is no evidence that Superintendent Baum, Principal Edwards, Principal Morgan, Principal Ackerman, or the bus driver ever expressed any disgust or outrage at the students' admitted behavior. Therefore, there is very little evidence to show that the harassment is not likely to continue.

3. The harassment must be widespread in terms of numbers of students and the length of time harassment has occurred.

In the present situation, there appeared to be a number of middle school students who targeted Appellant and her son over a period of several months.

4. The harassment must be relatively severe with serious consequences, such as necessary counseling, for the student who has been subject to the harassment.

Although we cannot say that the harassment necessitated counseling, this is a fragile student who is already receiving counseling for problems in school. He has been receiving counseling since 1992 in an effort to stabilize his behavior and to help both he and his mother cope with his impulsiveness and distractibility. Given the type of

disability of this student, coupled with the recommendations of his therapist and counselor that he should attend a new school system, we think this criterion has been satisfied.

5. Evidence that the harassment has been physically or emotionally harmful is important. In order to use section 282.18(18) authority, the harassment must be beyond typical adolescent cruelty.

The evidence showed that the student was emotionally harmed to the extent that he could not eat breakfast at school and was afraid to leave the elementary school building prior to his mother's arrival. Since no one at the appeal hearing had reviewed Eli's educational records before the hearing, there was no testimony about any effect these experiences may have had on his academic or behavioral functions at school.

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

There is a substantial amount of evidence regarding Ms. Berry's attempts to contact school officials about the problem. There is not a lot of evidence that school officials were willing to work with her to solve the problem. She was told in various ways by more than one individual that there was not enough staff to supervise before-school, middle-school students' activities; it was not the job of the elementary principal; it was not the job of the high school; it was not the job of the bus driver; and finally when she met with Mr. Ackerman, Appellant testified that she was told that she had brought most of the problems on herself. The fact that Mr. Ackerman began to supervise the middle school students in the mornings at the end of May was too little, too late. The chief of police did as much. What was absent from the evidence was any attempt on the part of school officials to work with the students involved to educate them about the appropriate way to interact with parents and students when they are present together on school property.

7. The evidence of harassment must be specific.

We believe the specific testimony of Appellant as well as the lack of testimony which refuted her allegations satisfied this criterion.

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

We believe that granting Appellant's request for open enrollment to the PCM District will eliminate the problem for both Appellant and her son, as well as the Colfax-Mingo Community School District.

All motions or objections not previously ruled upon are hereby denied and overruled.

III.
DECISION

For the foregoing reasons, the decision of the Board of Directors of the Colfax-Mingo Community School District made on June 1, 1998, which denied Ms. Berry's late-filed request for open enrollment for her son, Elijah Berry, for the 1998-99 school year, is hereby recommended for reversal. There are no costs of this appeal to be assigned.

_____ _____

DATE

ANN MARIE BRICK, J.D.
ADMINISTRATIVE LAW JUDGE

It is so ordered.

_____ _____

DATE

CORINE HADLEY, PRESIDENT
STATE BOARD OF EDUCATION