

**BEFORE THE STATE BOARD OF THE
IOWA DEPARTMENT OF EDUCATION**

(Cite as 29 D.o.E. Dec. 325)

Sara Mallinger,
Appellant,

Case No. 21DOE0001
DE File No. 5118

vs.

DECISION

Des Moines Public School District,
Appellee.

The Appellant, Sara Mallinger (Mallinger), seeks reversal of a decision by the Des Moines Public School District Board (District) denying a late filed open enrollment request on behalf of her minor child, C.M. The affidavit of appeal filed on July 13, 2020, attached supporting documents, and the District's supporting documents are included in the record. The administrative law judge finds that she and the State Board of Education (State Board) have jurisdiction over the parties and subject matter of the appeal before them.

A telephone hearing was held in this matter on August 13, 2020, before the undersigned administrative law judge, Rachel D. Morgan, pursuant to agency rules found at Iowa Administrative Code section 281, chapter 6. The Appellant, Mallinger appeared along with Josh Mallinger, and were self-represented. Eleanor Shirley (Shirley), District Enrollment Specialist, appeared on behalf of the District, which was represented by attorney Carrie Weber.

Sara Mallinger testified in support of the appeal. The District submitted Exhibits 1-8 which were admitted without objection. Shirley testified for the District.

FINDINGS OF FACT

Mallinger, Josh Mallinger, and their daughter, C.M. are residents of the Des Moines Community School District. C.M. will be in the third grade for the 2020-2021 school year. (Mallinger Testimony; Ex. 2).

During the 2019-2020 school year, C.M. experienced at least two incidents of unprovoked physical attacks. On March 6, 2020, a student punched C.M. in the stomach and pushed her down. On March 11, 2020, the same student threw C.M. to the ground and grabbed her around the neck. (Ex. 5).

Both incidents resulted in disciplinary action and increased supervision for the student. The school put plans in place to keep the student apart from C.M.,

including, but not limited to, sitting near the teacher, having a break area, and not allowing to play or be near C.M. However, C.M.'s classroom teacher stated that even with the implementation of these plans, the student would still say things to C.M. and "give her dirt[y] looks and glances." The school was preparing to implement other measures to curb the harassment, but the school year ended early due to the pandemic. For the 2020-2021 school year, the school was not going to place the student in the same classroom as C.M. (Ex. 1; Shirley Testimony).

On May 27, 2020, Mallinger submitted a late filed open enrollment application for C.M. Mallinger stated that her good cause basis was "pervasive harassment." (Ex. 3). Mallinger indicated in her application that there have been "multiple bullying issues" at C.M.'s current school and even after the school took steps "it continued to occur." *Id.* Mallinger requested that C.M. attend the Carlisle School District because the family has transportation to the school, C.M. knows people who attend the Carlisle School District, and the family has before and after school care set up with a neighbor that works at the Carlisle School District. *Id.*

On July 7, 2020, the Des Moines School Board reviewed Mallinger's application for open enrollment. After consideration, the Board voted to deny the open enrollment application because it determined that C.M. can be accommodated at another school within the District to ease the family's concerns regarding the bullying. (*Id.*; Shirley Testimony).

Mallinger filed a timely notice of appeal to the State Board. At the hearing, the Mallingers argued that the District made its decision based on financial concerns and its decision is not in the best interest of their child. Mallinger argued that C.M. is familiar with Carlisle, knows students in the Carlisle School District, and would not be scared to attend school anymore. Further, Mallinger testified that transportation would be easier if C.M. were allowed to attend the Carlisle School District. (Mallinger Testimony). In response, the District does not dispute that C.M. experienced pervasive harassment. However, the District argues that it can alleviate the Mallingers' concerns by moving C.M. to another school within the District. (Shirley Testimony).

CONCLUSIONS OF LAW

The statutory filing deadline for an application for open enrollment for the upcoming school year is March 1. Iowa Code 282.18. After the March 1 deadline, a parent or guardian must send notification to the resident district that good cause exists for the failure to meet the deadline. *Id.* 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. *Id.* 282.18(5).

The State Board established criteria when reviewing an open enrollment decision involving a claim of repeated acts of harassment. *All* of the following criteria

must be met for the State 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).

The issue for review in this case is whether or not the Board made an error of law in not finding "good cause due to pervasive harassment" for the late filed open enrollment request.

1) March 1 Deadline

Under the first criterion, the harassment must have occurred after March 1, 2020 or that the extent of the harassment could not have been known until after the deadline. Here, the alleged harassment occurred on March 6, 2020 and March 11, 2020, after the March 1, 2020 deadline. Therefore, the first criterion is met. (Ex. 5; Mallinger Testimony).

2) Pervasive Harassment

Under the second criterion, the requirement of an objectively hostile school environment means that the conduct complained of would have negatively affected a reasonable student in C.M.'s position. This requirement means the State Board must determine if the behavior that occurred created an objectively hostile school environment that meets one or more of the above criteria listed above. The Board has granted relief in other cases where the harassment

involved serious physical assaults, degradation, and destruction of property directed toward the student that continued after school involvement. *See In re: Melissa J. Van Bommel*, 14 D.o.E. App. Dec. 281 (1997) (finding harassment when a 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) (finding harassment when the student was physically assaulted on numerous occasions, including a “hair bare” initiation ritual, and teachers at the school knew about the “hair bare” ritual and allowed it to continue); *In re: John Meyers*, 22 D.o.E. App. Dec. 271 (2004) (finding harassment when the student was subject to regular teasing, taunting, and laughter at his expense, having his books and school materials hidden, physical assault, ultimately leading to the student believing that fellow students would “kill him”).

Here, it is undisputed that C.M. experienced unprovoked physical attacks on at least two occasions. These attacks were serious – involving C.M. being pushed to the ground, grabbed around her neck, and punched in her stomach. Although the school attempted to prevent further bullying or attacks on C.M., C.M.’s classroom teacher indicated that such plans did not resolve all the issues as the student was still able to “say things to [C.M.] and give her dirt[y] looks and glances.” (Ex. 5). C.M. was fearful to go to school in the mornings. (Mallinger Testimony). Based on such evidence, the record supports a finding that C.M. feared harm to her person or property and the second criterion is met. (Ex. 5; Mallinger Testimony; Shirley Testimony).

3) *Efforts of the District.*

Under the third criterion, the evidence must show the harassment is likely to continue despite the efforts of school officials to resolve the situation. Here, the objective evidence shows that after the school was notified of the Mallingers’ concerns, the school took action to insure no further incidents occurred. However, additional incidents of bullying occurred.

On March 6, 2020, the student punched C.M. in the stomach. Despite efforts by the school to prevent another incident, such as separating the two students and providing support for the other student’s behavior issues, another physical attack occurred on March 11, 2020. On March 11, 2020, C.M. was thrown to the ground and grabbed by the neck. Accordingly, the efforts by the school to stop the conduct did not end the problematic, harassing behavior. Therefore, the third criterion is met.

4) *Change of District*

Finally, under the fourth criterion, the appellant must show that changing the school district C.M. attends would alleviate the situation, as opposed to merely changing schools within the same district. The crux of this criterion is determining whether putting the student in a different environment will make a difference. *See In re Mary Oehler*, 22 D.o.E. App. Dec. 46 (2004). This case

involves a resident district with multiple attendance centers. In cases involving multiple attendance centers, the State Board looks at whether an intradistrict transfer would alleviate the harassment. *See id.* On at least four other occasions, the State Board has upheld the denial of open enrollment in cases where the residence district had another attendance center in which the targeted student could enroll to escape their harassers. *See id;* see also *In re Lauren Hales*, 23 D.o.E. App. Dec. 39 (2004) and *In re Amanda Schamerhorm*, 24 D.o.E. App. Dec. 82 (2006).

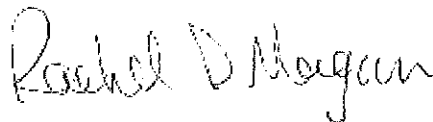
Here, there is no evidence that C.M. will continue to experience harassment at a different school within the District. Indeed, at the hearing, Mallinger admitted as much. (Mallinger Testimony). Rather, Mallinger wishes to move C.M. to the Carlisle School District because other children in her neighborhood attend Carlisle and there are more options for transporting C.M. to the Carlisle School District than another attendance center within the District. Under these circumstances, we conclude that the record establishes that preference and convenience are the primary concerns behind the open enrollment request. Thus, because the appellant has not shown that a change of school districts is necessary to alleviate the harassment, this appeal falls short on the fourth criteria.

This case is not about limiting parental choice. The State Board understands that the Mallingers want what is best for C.M. who was involved in an incident of pervasive harassment. The State Board does not fault the Mallingers for their decision to want to enroll their child in another school.

However, our review focus is not upon the family's choice, but upon the local board's decision under statutory requirements. 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 erred as a matter of law in denying the late-filed open enrollment request. We have concluded that the Board correctly applied Iowa Code sections 282.18(5) and 280.28(2)(b) when it denied the late open enrollment application filed on behalf of C.M. Therefore, we must uphold the local board decision.

DECISION

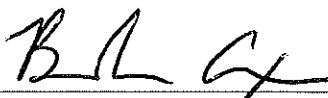
For the foregoing reasons, the decision of the Board made on July 7, 2020, finding denying Mallinger's open enrollment application for C.M. is **AFFIRMED**. There are no costs of this appeal to be assigned.



August 13, 2020
Date

Rachel D. Morgan
Administrative Law Judge

September 17
~~August~~, 2020
Date



Brooke Miller Axiotis, Board President
State Board of Education