

E.A., SR. AND D.A., on behalf of minor child, E.A., JR., :

PETITIONERS, :

V. :

COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON: COUNTY, MARIE MORRISSEY AND RICHARD DIPATRI, :

DECISION

RESPONDENTS. :

_____ :

SYNOPSIS

Petitioning parents challenged District’s disciplinary transfer of 7th grader, E.A., Jr., from the James F. Murray School to another school within the District. E.A. had been enrolled in P.S. 38 pursuant to an Open Enrollment program. Petitioners sought E.A.’s reinstatement in good standing as a student at P.S. 38 retroactive to December 3, 1997, reimbursement in the amount of \$5000 relevant to costs incurred for E.A.’s education and an award of counsel fees and costs.

The ALJ dismissed the petition. The ALJ concluded that the due process requirements of notice and hearing applicable to the exclusion of students from a public education system were not applicable in the current matter (E.A. was not excluded from participation in the District’s educational system); that petitioners did not prove by a preponderance of credible evidence that respondents acted in an arbitrary, capricious or unreasonable manner regarding the transfer of E.A., Jr.; and that petitioners did not prove discrimination.

The Commissioner adopted findings and determination in Initial Decision as his own.

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions and the District’s reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioners’ arguments on exception challenge, *inter alia*, the “unilateral action of Principal Marie Morrissey” transferring E.A., Jr., from the James F. Murray School (P.S. 38) “without seeking the advice of the student’s teachers, without providing assistance from a guidance counselor, [and] without notifying the Jersey City Board of Education ***.” Petitioners claim the principal’s action “constitutes a gross violation of reasonable, discretionary and proper school administration.” (Petitioner’s Exceptions at p. 5) With respect to the relief sought, although petitioners indicate that E.A., Jr., has “graduated from the Jersey City Elementary School System,” and, therefore, reinstatement to the James F. Murray School is not an appropriate relief, they ask the Commissioner to

enter a decision rescinding the unilateral action of the Principal *** and declaring that the transfer of the student, E.A., Jr. was unjustified. Such remedial action by the Commissioner will cure, to some degree,

the adverse impact of the Principal's decision upon the academic record of the student and its harmful and damaging effect upon his self-esteem. Further, the parents should be compensated by the School District for the expense which they would not have incurred but for the arbitrary action of the Principal *** in removing their child from his school of choice. This very modest expense of \$5,055.00 was not disputed at the hearing. *** Counsel fees incurred by the parents in seeking redress for the wrongful conduct of the Principal *** should also be awarded ***. (*Id.* at p. 7)

In reply, the District underscores that, as principal of P.S. 38, Ms. Morrissey reviewed the applications for admission to the Open Enrollment program, determining whether to admit or deny a student, and, therefore, it "was ***consistent with the operation of the program and the job description for the position of principal for [Ms. Morrissey] to rescind the open enrollment approval***." (District's Reply at p. 4) That this procedure was not reduced to a written policy does not necessarily, according to the District, render it arbitrary. (*Id.* at p. 5, citing *Gebhart v. Hopewell Twp. Bd. of Educ.*, 1938 S.L.D. 570 (1927); *aff'd* 1938 S.L.D. 576 (1928).) Moreover, the District argues that there is no requirement for a principal to consult with any teacher regarding the transfer of a student, and the evidence in this matter shows that the teachers at P.S. 38 had never been involved in making such an administrative decision. (*Id.* at p. 6) Finally, the District notes that the ALJ expressly found that petitioners *had not* proven that E.A., Jr., did not forge his father's signature, and that the boy's admission to same "was a serious infraction which, coupled with his previous behavioral problems, not only represented a violation of the requirement of the Open Enrollment program for good behavior, but also indicated to the Principal that E.A., Jr., lacked commitment to improve at P.S. 38." (*Id.* at p. 8) Consequently, the District urges the Commissioner to affirm the Initial Decision of the ALJ.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that petitioners have failed to demonstrate that the action taken herein to rescind E.A., Jr.'s open enrollment approval, under these circumstances, contravened school law, violated E.A. Jr.'s due process rights, was arbitrary, capricious, unreasonable or otherwise induced

by improper motive. To the extent petitioners challenge the facts determined by the ALJ based on the testimony of the witnesses and the credence ascribed to such testimony, the Commissioner notes that the record before him does not include transcripts of the hearing conducted at the OAL in this matter. Challenges to the factual findings predicated upon credibility determinations made by an administrative law judge require the party to supply the agency head with the relevant and necessary portion of the transcript. *See In re Morrison*, 216 N.J. Super. 143, 158 (App. Div. 1987). In the absence of transcripts from the hearing, due regard should be given to the person who heard the live testimony and assessed the witnesses' behavior at the hearing. *Close v. Kordulak Bros.*, 44 N.J. 589, 599 (1965).¹

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.² The Petition of Appeal is dismissed.

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

December 23, 1999

¹ While it is not necessary to specifically address petitioners' request for reimbursement for educational costs and counsel fees, the Commissioner notes that he is without the authority to award such fees and costs. *B.B., on behalf of her son, L.C. v. Board of Education of Union County Regional High School District No. 1 and Donald Merachnik, Superintendent of Schools, Union County*, 1987 S.L.D. 323 at 336; *Balsley v. North Hunterdon Bd. of Educ.* 117 N.J. 434, 442, 443 (1990).

² Contrary to the ALJ's statement on page 43 of the Initial Decision that "[p]ublic schools are required to provide a free education to individuals between the ages of 5 and 25 in certain circumstances ***," the Commissioner herein clarifies that, pursuant to N.J.S.A. 18A:38-1, any person over the age of five and under 20 who is domiciled in the district is entitled to a free public education. Additionally, pursuant to N.J.S.A. 18A:46-6, local boards must provide for the identification of "handicapped" persons between the ages of five and 21 residing in the district who require educational services.

³ This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to N.J.S.A. 18A:6-27 *et seq.* and N.J.A.C. 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.