

O.S., on behalf of minor child, K.S., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH : DECISION
OF FORT LEE, BERGEN COUNTY AND
ANTHONY P. CAVANNA, SUPERINTENDENT, :
RESPONDENTS. :

SYNOPSIS

Petitioning parent challenged the Board's placement of her daughter, K.S., in the 6th grade, rather than the 7th grade. The Board contended it took into consideration her age and English proficiency. The Board urged that the petition be dismissed for mootness because K.S. was withdrawn from the District.

The ALJ concluded that, even though the matter would appear moot, because this issue is one that is capable of frequent repetition, it is not rendered moot. In light of the record and testimony of witnesses, the ALJ concluded that the Board did not act in an arbitrary or discriminating manner in applying its entrance age policy (#5112) to determine that petitioner's daughter was not eligible for admission to its 7th grade for the 2003-2004 school year. The petition was dismissed.

The Commissioner concurred with the ALJ that the matter should not be dismissed as moot. The Commissioner, however, concluded that the Initial Decision misperceived the question at issue herein necessitating remand to the OAL to address and resolve the propriety of the District's actions. Petitioner contended that the District acted in violation of its established regulation for new students, R 5120 (Assignment of Pupils), by its failure to objectively evaluate K.S. through testing in its determination of an appropriate grade placement for her as required by that document. The remand is for expansion of the record as to Board policy #5120 and regulation R 5120 and the interrelationship between the two, along with the reasonableness of the District's deviation from established policies/procedures in making the grade placement determination for K.S.

<p>This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

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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 were filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner’s exceptions charge that “[i]n his findings of fact, legal discussion and conclusion, [the Administrative Law Judge (ALJ)] completely ignored the whole premise and basis for my petition of appeal.” (Petitioner’s Exceptions at 1) She claims that throughout this matter, in both her written submissions and at the hearing, she continually stressed that resolution of this matter revolved around one single piece of evidence, a District regulation (P-7) which “requires that all new pupils must be administered the District Approved Standardized Test to ensure proper grade placement.” (*Ibid.*) Notwithstanding this clear regulation, which on its face makes no exception for students with limited English proficiency, the District repeatedly denied K.S. an opportunity to take these tests. As such, petitioner contends, the District was in clear violation of its own policies and/or procedures in the placement of her child. Rather than recognizing and addressing this violation, the ALJ erroneously concluded that chronological age,

in and of itself, is a sufficient basis to determine grade placement. In so concluding, she argues, the ALJ's case citations and legal discussion centered around acceptance into kindergarten and first grade, along with the bold assertion that the District has extended the kindergarten/first grade age entrance policy to all grades through high school, an assertion that is without foundation as there is no written policy in the Fort Lee School District so stating. (Petitioner's Exceptions at 2)

Upon his full and independent review and after due consideration of petitioner's exception arguments, the Commissioner finds and concludes that the Initial Decision misperceives the question at issue herein necessitating remand to the OAL to address and resolve the propriety of the District's actions, under the particular circumstances existing in this matter, as explicated below.

Initially, however, the Commissioner concurs with the ALJ that, notwithstanding K.S.'s withdrawal from the District and her subsequent enrollment in a private school, this matter should not be dismissed as moot. Rather, as recognized by the ALJ, "[t]he Fort Lee School District is a multi-cultural, transient community with an increasing immigrant population" (Initial Decision at 13), and, therefore, the issue involved here is of substantial importance and one capable of frequent repetition, qualifying it as an exception to the mootness doctrine. *See Advance, Inc. v. Montgomery Tp.*, 351 N.J. Super. 160 (App. Div. 2002).

This said, the Commissioner next observes that, in his Initial Decision, the ALJ categorizes the issues to be resolved in this matter as:

whether the Board has the authority and/or discretion to apply an educational policy utilizing chronological age in determining the grade placement of the minor child, K.S. upon entering and enrolling in its schools and whether the Board has improperly utilized English language proficiency in making such determination. (Initial Decision at 2)

Based on his review here, the Commissioner finds that the ALJ's categorization does not adequately identify the issue in controversy. It is by now well-established that a board of education possesses the statutory right to promote or place pupils enrolled in its schools according to the prescription of its own rules. *Shenkler v. Bd. of Ed. of the Borough of Ho-Ho-Kus*, 1974 S.L.D. 772, *aff'd* State Board 1975 S.L.D. 1157; *Boulogne v. Bd. of Ed. of the City of Jamesburg*, 1964 S.L.D. 107; *Wilcox v. Bd. of Ed. of the Borough of Oceanport*, 1954-55 S.L.D. 75. It is, likewise, well-established that when a local school board acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. *Thomas v. Bd. of Ed. of Morris Tp.*, 89 N.J. Super. 327, 332 (App. Div. 1965), *aff'd* 46 N.J. 581 (1966). The record in this matter indicates that this District has established both a Policy, #5120, and a Regulation, R 5120, with respect to ascertaining the appropriate grade level placement for new or returning students from a private or public school outside of the District (*see* R-2 and P-7), although the interrelationship between these two documents is unclear. The gravamen of the instant petitioner's contention here is that the District acted in violation of its established regulation by its failure to objectively evaluate K.S. through testing in its determination of an appropriate grade placement for her as required by that document. Although recognizing that testing for English language proficiency for students such as K.S. is mandated by *N.J.A.C. 6A:15-1.1 et seq.*, the Commissioner finds the examination herein should focus on whether the District's reliance on the results of this test and its "Entrance Age" policy (P-6), dealing with the admission of children to kindergarten and first grade, to determine whether K.S. would more appropriately be placed in 6th or 7th grade, when it appears to have in place a generally applicable

policy or practice for determining grade placement which it ostensibly uses for all other new students, was arbitrary, capricious or unreasonable.

Accordingly, this matter is hereby remanded to the OAL for expansion of the record as to Board policy #5120 and regulation R 5120 and the interrelationship between the two, along with the reasonableness of the District's deviation from established policies/procedures in making the grade placement determination for K.S.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: September 2, 2003

Date of Mailing: September 3, 2003

* This decision 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.* 6A:4-1.1 *et seq.*