148-20

New Jersey Commissioner of Education

Final Decision

G.S. and C.S., on behalf of minor child, D.S.,

Petitioners,

v.

Board of Education of the Township of Holland, Hunterdon County,

Respondent.

Synopsis

Petitioners challenged the location of the school bus stop that the respondent Board established for D.S., located one-half mile from their home, and sought an order directing the Board to provide D.S. with a bus stop at their driveway. Petitioners asserted that the Board is bound by the doctrine of *res judicata* to provide a bus stop at their driveway as a result of a prior controversy between the parties. Further, the petitioners argued that the Board acted in an arbitrary, capricious and unreasonable manner when it assigned D.S. to a bus stop that requires her to walk one-half mile along a winding rural road with no sidewalks or shoulders. The Board contended that it did not act improperly in assigning D.S. to her current bus stop because the Board is only required to provide D.S. with a safe bus stop, and that the Board is not responsible for providing D.S. with a safe walking route to and from the bus stop. The Board also denied that *res judicata* applies in this case, as material circumstances have changed since the prior controversy was decided.

The ALJ found, *inter alia*, that: the route that D.S. must walk to reach her bus stop remains hazardous; prior case law has determined that the safety of a child's route to the bus stop is a factor the Board must consider when establishing bus routes and stops, though other factors such as the safety of the children on the bus must be taken into consideration; the propriety of a school bus stop decision depends on the totality of circumstances in a given case; the Board in this case abused its discretion by providing non-remote, courtesy busing students with bus pick up at the closest point to their home where a hazard no longer exists, while refusing to extend the same consideration to remote students, who have to walk along a hazardous route to and from their bus stops; and the Board's failure to consider the safety of D.S.'s route to her bus stop was not consistent with precedent. Accordingly, the ALJ ordered the Board to provide a bus stop in front of petitioners' home.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this case. The Commissioner left the precise mechanism for complying with this decision to the Board's discretion, provided that D.S.'s bus stop is located at petitioners' driveway.

July 16, 2020

OAL Dkt. No. EDU 10265-15
Agency Dkt. No. 144-6/15

New Jersey Commissioner of Education

Decision

G.S. and C.S., on behalf of minor child, D.S.

Petitioner,

v.

Board of Education of the Township of Holland, Hunterdon County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by both parties pursuant to *N.J.A.C.* 1:1-18.4 and both parties' replies thereto.

In this matter, petitioners challenge the Board's refusal to provide their minor child with a bus stop at their driveway. Petitioners' challenge is made on two grounds: 1) that the Board is bound by the doctrine of *res judicata* to provide a bus stop at their driveway as a result of a prior controversy between the parties; and 2) that the Board acted in an arbitrary, capricious, or unreasonable manner by assigning D.S. to a bus stop that requires her to walk one-half mile along an allegedly hazardous route.

In the prior matter, petitioners sought to require the Board to provide a bus stop at their driveway for their minor children.[1] *G.S. and C.S., J.G., and C.J. v. Board of Education of*

[1] The prior matter involved petitioners' two sons, who are now adults. In 2013, petitioners adopted their granddaughter, D.S., who was not born at the time of the decision in the prior matter.

the Township of Holland, Hunterdon County, State Board of Education Decision No. 49-96 (April 2, 1997). The State Board of Education issued an order requiring the Board to provide a bus stop at petitioners' driveway.[2] After adopting D.S. in 2013, petitioners again sought a bus stop at the end of their driveway, and the Board refused. The parties agreed that there have been no material changes to the roads or their conditions in the twenty years since the prior decision, which the prior ALJ and the State Board of Education found to present significant safety issues.

In the current matter, the ALJ found that the doctrine of *res judicata* did not apply because there were material factual differences in the cases, namely that the current case did not involve evidence of another minibus stop close to petitioners' house, and that the Board's transportation policy has changed since the prior case.

The ALJ thoroughly reviewed the testimony and determined that the route D.S. must walk to reach her bus stop remains hazardous. The ALJ also detailed a long line of cases involving the location of school bus stops and determined: that the safety of the child's route to the bus stop is a factor that the Board must consider when establishing bus routes and stops, although other factors – including the safety of the children already on the bus – must also be taken into consideration in establishing bus stops; that a school board may not treat similarly situated children differently when establishing bus stops; and that the propriety of a school bus stop decision depends on the totality of the circumstances in a given case.

The ALJ found that the Board abused its discretion by providing hazardous busing to nonremote students at the closest point where the hazard no longer exists, without extending the same consideration to remote students who have to walk along a hazardous route to and from their bus stops. The ALJ also concluded that the Board's failure to consider the

---

[2] At the time of the prior matter, the State Board of Education had the authority to hear appeals from decisions of the Commissioner of Education. In 2008, the Legislature removed that authority and conferred final decision making authority on the Commissioner. *N.J.S.A.* 18A:6-9.1.

safety of D.S.'s route to the bus stop was not consistent with precedent. Accordingly, the ALJ ordered the Board to provide a bus stop in front of petitioners' home.

Petitioners filed exceptions regarding the ALJ's decision on the issue of *res judicata*. Petitioners argue that the circumstances in the current case are virtually identical to those in the prior case. According to petitioners, they are seeking the same relief – relocation of the bus stop – for the same reasons that led to the prior decision in their favor, and the mere fact that the Board updated its transportation policies in the intervening years is insufficient to support the ALJ's conclusion that *res judicata* does not apply.

In reply, the Board argues that there are factual differences between the two cases that support the ALJ's conclusion that *res judicata* does not apply. In the prior case, a minibus stopped near petitioners' home, and the State Board of Education found that it was arbitrary, capricious, or unreasonable for the Board to refuse to extend the minibus service to petitioners' home even though petitioners offered to construct a turnaround in their driveway. In the current case, a full-size bus is used to transport the students at D.S.'s bus stop, and – according to the Board – a full-size bus cannot safely traverse the roadway where petitioners' home is located. The Board also notes that it would be unreasonable to apply a twenty-year-old decision, which required the Board to provide a bus stop in the driveway for petitioners' children, to a child who was not adopted by petitioners until sixteen years later.

The Board also filed exceptions, arguing that the ALJ erroneously found that it failed to consider D.S.'s safety and pointing to the testimony of its witnesses demonstrating that they did consider student safety in selecting the route and the bus stop. The Board contends that it also considered all of the surrounding circumstances, including: 1) the full-size buses it currently uses to pick up D.S. at her assigned bus stop, which could not safely travel to petitioners' driveway; 2) the fact that the Board does not currently use minibuses to extend

stops closer to students' homes; 3) the additional cost to the Board of approximately $17,000 to have a minibus pick up D.S. at her driveway; and 4) the fact that other pupils living in the area have used D.S.'s assigned bus stop without incident. According to the Board, granting petitioners' request would not mean simply extending a bus stop, but rather would require the creation of an entirely new bus route. The Board argues that its decision was not arbitrary, capricious, or unreasonable, and that the ALJ improperly substituted her opinion for that of the Board, contrary to case law establishing the standard of review for board of education decisions. Finally, the Board contends that the Initial Decision sets a "dangerous precedent" for a "never-ending series of requests for customized transportation routes. . ." .Respondent's Exceptions at 32.

The Board also argues that remote and nonremote students cannot be similarly situated and, even if they were, the Board treats all students in a fair and equitable manner. The Board contends that the only students who could be similarly situated to D.S. are the other students who are assigned to her bus stop. The Board notes that it is statutorily required to provide transportation to remote students, while it is authorized – but not required – to provide transportation to nonremote students. According to the Board, even putting aside the legal distinction between the two groups of students, there are sufficient factual differences between D.S.'s route and the courtesy busing routes along the town's main highway to overcome a conclusion that the groups could be similarly situated. Moreover, the Board contends that it considers the safety of all students, and thus has not treated D.S. differently. Finally, the Board takes exception to the ALJ's decision to allow petitioners to testify as expert witnesses in the area of school bus transportation because they are biased in favor of their own case and do not have sufficient expertise; further, the Board also takes exception to certain items admitted into evidence.

In reply, petitioners argue that the record contradicts the Board's assertion that it considers the safety of all students equally, pointing to testimony that the Board considered the safety of walking routes for courtesy busing students but that the only considerations for mandatory busing routes were whether the stops themselves were safe. Petitioners contend that the $17,000 cost cited by the Board is misleading, because it assumes D.S. will be the only student on the new route, when that route – and the cost – would cover multiple students at a per pupil rate lower than the district's current transportation cost. Moreover, petitioners argue that the district can extend an existing minibus route, which already operates on the road on which petitioners' home is located, rather than creating a new one. Finally, petitioners contend that the ALJ properly exercised her discretion to admit their expert testimony and evidence and to accord them whatever weight she deemed appropriate.

Upon review, the Commissioner concurs with the ALJ that *res judicata* does not apply here. The prior decision was based on the existence of an active minibus stop three-tenths of one mile from petitioners' home – a material fact – and the resulting conclusion that the Board had acted in an arbitrary, capricious, or unreasonable manner by refusing to extend the minibus service to a stop at petitioner's driveway. Critically, that bus stop no longer exists, nor does a minibus currently serve D.S.'s route. Moreover, petitioners allege an additional wrong by the Board, claiming that the courtesy busing policy developed by the district since the conclusion of the prior matter results in discrimination against remote students who receive mandatory busing services. With these significant differences in both a material fact and the theory of recovery, the Commissioner cannot conclude that *res judicata* applies. *See Culver v. Ins. Co. of N. America*, 115 *N.J.* 451, 461-62 (1989) (citations omitted).

Turning to the location of the bus stop, the Commissioner concurs with the ALJ's detailed analysis, as well as the analysis of the ALJ and the State Board in the prior matter, that

D.S.'s walking route is hazardous.[3] Furthermore, the Commissioner agrees with the ALJ that the Board abused its discretion by treating courtesy and mandatory busing students differently. A student who lives within two miles of school receives courtesy busing under the Board's hazardous busing policy if the route they would have to walk to get to school is unsafe, and their bus stop is located at the point closest to their home at which the hazard no longer exists.[4] "Although boards of education have wide discretion to promulgate pupil transportation policies, including school bus routes and stops, they may not discriminate or act in a manner that is arbitrary, capricious, or unreasonable." *R.D. and V.D., on behalf of C.D., a minor, and M.H and M.H., on behalf of M.H. and S.H., minors v. Board of Education of the Twp. of Bernards*, 97 N.J.A.R.2d (EDU) 414 (citations omitted). While the Board is not required to provide courtesy busing for hazardous routes, when it chooses to do so, its policies must be applied equitably. It is discriminatory for the Board to require that a remote student must walk along a hazardous route, while a student who receives courtesy busing does not.[5]

The legal distinction between mandatory busing and courtesy busing does not preclude a conclusion that the two groups of students are similarly situated for purposes of this decision. D.S. is a Holland Township student who must walk along a hazardous road in order to get to school. This makes her similarly situated to all courtesy busing students who receive busing under the Board's hazardous busing policy. Moreover, while the facts underlying those hazards may be different, the fact that both the highway and petitioner's road are hazardous

[3] The Commissioner is not persuaded by the Board's arguments that other students have used D.S.'s bus stop without incident. The fact that students have successfully avoided the hazards of the route in the past does not mean that the route is not hazardous. The Commissioner further notes that the parties agreed that the conditions of the road have not materially changed since they were found to be hazardous in the prior matter.

[4] Despite the fact that the hazardous busing policy requires stops to be at the closest point where the hazard no longer exists – which would be at intersections of the highway that constitutes the hazardous route – the testimony demonstrated that several bus stops are situated within neighborhoods, closer to the homes of the students.

[5] The Board is not absolved of responsibility because D.S.'s parents could drive her from their home to the bus stop. Students who receive courtesy busing could also be driven to school; yet, by implementing a hazardous busing policy, the Board has chosen to assist those students in avoiding a hazardous walking route.

walking routes is the same. And although the Board contends that it considers all students' safety, it also argues that it is not responsible for the safety of D.S.'s route from her home to her bus stop, demonstrating that it applies disparate standards when considering student safety for each group. Therefore, the Commissioner concludes that the Board treats mandatory busing students differently than courtesy busing students because it does not locate the stops for mandatory busing students at the closest location to their home at which a walking hazard no longer exists.

The Commissioner does not find the Board's exceptions, which substantially reiterate arguments made before the ALJ, to be persuasive. Initially, the Commissioner finds that the ALJ, who was in the best position to evaluate the testimony and exhibits, appropriately exercised her discretion in allowing petitioners to testify as expert witnesses and admit their evidence. The Commissioner disagrees with the Board's contention that the ALJ improperly substituted her judgment for that of the Board. The cases cited by the Board for this proposition pertain to the Board's weighing of safety concerns between the assigned bus stop and the requested bus stop, and do not address questions of discriminatory treatment between two groups of students. Nor is the Commissioner persuaded by the Board's "slippery slope" argument and agrees with the State Board of Education's express rejection of that argument in the prior matter. In both matters, the decision is limited to these particular facts for these particular petitioners, and the situations of any other students are immaterial to the decision. Furthermore, the Board's justifications related to cost are insufficient to overcome its discriminatory treatment of mandatory busing students. Finally, although the Commissioner recognizes that the Board considered the safety of the other students on the full-size bus that serves D.S.'s route, which cannot safely traverse the portion of the road leading to petitioners' home, extending the full-size bus service to petitioners' home is not the Board's only option for safely transporting D.S. to

school. The Commissioner leaves the precise mechanism for complying with this decision to the Board's discretion, provided that D.S.'s bus stop is located at petitioners' driveway.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter.

IT IS SO ORDERED. [6]

COMMISSIONER OF EDUCATION

Date of Decision: 7/16/20
Date of Mailing: 7/16/20

[6] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c*. 36 (*N.J.S.A.* 18A:6-9.1).