SEMERE D. &
YEHDEGO K.,

Appellant

v.

MONTOMGERY COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 17-09

OPINION

INTRODUCTION

Semere D. and Yehdego K. (Appellants) appeal the decision of the Montgomery County Board of Education (local board) rescinding their sons' transfers to Rock Creek Valley Elementary School (Rock Creek). The local board filed a Motion for Summary Affirmance, maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant responded and the local board replied.

FACTUAL BACKGROUND

Appellants have two children who attend Montgomery County Public Schools (MCPS). T.D. is in the fifth grade and N.D. is in the second grade. Both students were assigned to attend Sargent Shriver Elementary School (Sargent Shriver), but were granted a transfer to attend Rock Creek. The record does not indicate why the school system granted the transfers.

Prior to the 2015-16 school year, school officials recorded inappropriate behavior from both students. These behaviors continued into the 2015-16 school year. According to Principal Kevin Burns, both children "exhibited aggressive behavior toward other students, disruptive classroom and recess behaviors, such as tripping another student, fighting, disrespect to adults, and inappropriate use of technology." (Motion, Ex. 4).

As a result of these various incidents, Principal Burns met with the children in his office and visited their classrooms in an effort to improve their behavior. He also tried to speak with the parents during afternoon pick-up at the school and scheduled meetings with the parents to address the behavior problems.[1] At some point during the school year, the school convened

[1] Although Appellants speak limited English, there is no indication from the record that the language barrier prevented them from effectively communicating with school officials. They are represented by counsel in this appeal.

educational management team meetings to discuss the children.[2] In addition, on March 17, 2016, school officials held a screening meeting to discuss whether T.D. should have an Individualized Education Program (IEP). At the screening meeting, Appellants stated that they did not want the school to evaluate T.D. and would instead seek outside evaluations. In particular, Appellants disputed a recommendation that T.D. receive speech language therapy. (Motion, Ex. 4).

Meanwhile, the school continued to record behavioral incidents involving the students. On March 22, 2016, T.D. fought with another student at the school playground. School officials called Appellants to discuss the incident, but were unable to reach them. They also sent the discipline referral form home for the Appellants' signature, but neither one signed the form. (Motion, Ex. 5A). T.D. had a second discipline referral on May 25, 2016, after he threw a rock at a first-grader during recess. He claimed that his brother N.D. told him to do it. School officials discussed the incident with Appellants in person and again sent home a discipline referral form. Neither Appellant signed the form. (Motion, Ex. 5B).

After this last incident, on May 25, 2016, Principal Kevin Burns wrote to Appellants. He reminded Appellants that the transfers for T.D. and N.D. were contingent on good behavior and explained that their transfers could be rescinded for the 2016-17 school year. Principal Burns wrote that "[o]ver the course of the school year, we have discussed these behaviors on multiple occasions with you, however, the behaviors are still impacting your children and the other students in the building on a daily basis." (Motion, Ex. 1).

On June 23, 2016, MCPS informed Appellants that their change of school assignment had been rescinded "due to failure to comply with behavior requirements." The rescission was done at the request of Principal Burns. Appellants were instructed to enroll their children in their home school, Sargent Shriver. (Motion, Ex. 2).

On July 6, 2016, Appellants appealed the decision. In their appeal letter, they wrote that all had been going well and that the decision appeared sudden. The letter states, in part:

> I feel that [T.D.] has not received the help he needs. Instead of speech therapy on his IEP, I feel he needs help with reading comprehension. I believe that [the] school administrator has focused on behavior issues instead because I do not agree with the IEP. I believe that I have not had sufficient opportunity to discuss my concerns with the principal. I have conferred with two employees at the central office who informed me that the principal would contact me. I was never contacted by the principal.

(Motion, Ex. 3).

MCPS assigned a hearing officer to review the complaint. She spoke to Appellant Semere D. and to Principal Burns. Appellant reiterated his concerns that the school did not communicate effectively and argued that the school focused on behavior issues because of Appellants' disagreement with the school during the IEP screening meeting. Principal Burns

[2] The management team is made up of educators who act as a resource to all school staff regarding students who are not meeting academic or behavior expectations. Among the actions the team may take is recommending a screening for special education services. *See* http://www.montgomeryschoolsmd.org/departments/special-education/common-questions/overview.aspx (last visited February 9, 2017).

recounted the numerous disciplinary issues involving the children and the school's efforts to address them. He also described his attempts to reach out to the parents to discuss their children's behavior. The hearing officer concluded that T.D. and N.D. had a history of disruptive behaviors and that the school had made attempts to address the behaviors without success. She recommended that the rescission of the transfers be upheld. (Motion, Ex. 4).

On July 25, 2016, the superintendent's designee adopted the hearing officer's report. Appellants appealed the decision to the local board. In their initial appeal letter, they described rescinding the transfer as a hardship and suggested that the decision was based on race. They also reiterated their claim that the decision was in retaliation for their disagreement with the recommendations at the IEP screening meeting. (Motion, Ex. 7). Appellant Yehdego K. sent a supplemental letter to the local board in which she claimed that the school system discriminated against black and immigrant children, failed to meet with her to discuss her sons' behavior, and used behavior as a pretext to rescind the transfer. (Motion, Ex. 10).

While the appeal was pending, Appellants submitted new change of school assignment forms to MCPS requesting that their children attend Wheaton Woods Elementary School (Wheaton Woods) for the 2016-17 school year. They requested it based both on hardship and due to a family move. Appellants' child care provider is located near Wheaton Woods and Appellants expressed concerns about finding a child care provider closer to home. (Motion, Ex. 8A, 8B, 12).

Superintendent Jack Smith did not object to considering the new transfer request as part of the overall appeal to the local board. He urged the board, however, to reject the new transfer request because Appellants had not offered any documentation or evidence of a unique hardship warranting a transfer. As of September 8, 2016, Superintendent Smith stated that the children had been attending, and adjusting well to, their home school Sargent Shriver. He explained that school staff reached out to the family to offer resources to access child care. (Motion, Ex. 11).

On September 26, 2016, the local board issued its decision upholding the rescission of the transfer for the two children. The board adopted the findings of the superintendent's designee, as well as the arguments raised by Superintendent Smith before the board. The board observed that MCPS regulations permit the school "with proper cause, such as poor attendance or behavior" to rescind permission for a school transfer. The board found that the children had "a pattern of disruptive, aggressive, and unacceptable behavior" and that the school system had tried various interventions without success. The board determined that there was no evidence to support Appellants' claims of racial animus or retaliation. (Motion, Ex. 12).

As to the new transfer request, the board observed that concerns about child care providers are common to many families. In the absence of any other extenuating circumstances, the board concluded that Appellants had not met their burden to demonstrate a unique hardship. (Motion, Ex. 12).

This appeal followed.

STANDARD OF REVIEW

Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall be considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A.

LEGAL ANALYSIS

Thousands of students every year seek transfers between MCPS schools. The school system has developed particular criteria to guide its process for determining which students are eligible to change schools. Transfers may be granted for students who meet certain criteria, such as those with an older sibling at the same school, or who can demonstrate a "documented unique hardship." MCPS Regulation JEE-RA. These transfers come with certain conditions. "Students who have been given permission to attend schools other than assigned may, with proper cause, such as poor attendance or behavior, have that permission rescinded." *Id.*

Appellants raise several arguments against the rescission of their sons' transfers, which we shall consider in turn.[3]

Special education issues

Appellants' chief argument is that MCPS violated the Individuals with Disabilities Education Act (IDEA) in rescinding the transfer for student T.D. based on his behavior.

Background on IDEA

In order to be covered by IDEA, a student must meet the definition of one or more categories of disabilities and be in need of special education and related services as a result of his or her disability or disabilities. 20 U.S.C. §1401(3); COMAR 13A.05.01.03B(78). The "Child Find" obligation of IDEA requires a school system to identify, locate, and evaluate all children with disabilities within their jurisdiction. 20 U.S.C. §1412(a)(3).

Once a child is suspected to be a student with a disability, the next step is for a child to be evaluated. This evaluation may be requested by the parent of a child, the State, or the school system. 20 USC §1414(a)(1). Evaluations may include information provided by parents, current classroom-based assessments, local or state assessments, classroom observations, and observations by teachers and related service providers. *Id.* The ultimate decision on whether a student will be identified and receive special education and related services rests with a student's parent. *See Fitzgerald v. Camdenton R-Ill Sch. Dist.*, 439 F.3d 773, 775 (8th Cir. 2006) (observing that "the IDEA allows parents to decline services and waive all benefits under the IDEA").

[3] Appellants do not appeal the local board's denial of their request for a transfer to Wheaton Woods. Accordingly, we need not address that portion of the local board's decision.

There are consequences to refusing consent to an evaluation or to receiving services. A student who might otherwise qualify for special education services is not covered under IDEA if a parent refuses consent for an initial evaluation or withdraws consent for special education services. *See* 20 U.S.C. §1414(a)(1)(D)(ii)(III) (school system is not considered to be in violation of the requirement to make available FAPE and not required to convene an IEP meeting or develop an IEP in the absence of parental consent). Under the law, a student whose parents have refused consent for an evaluation or services may be disciplined in the same manner as any other regular education student. 20 U.S.C. §1415(k)(5)(D)(i).

Parents, however, may assert the protections of IDEA, even if a child has not yet been determined to be eligible for special education and related services if the local school system had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. 20 U.S.C. §1415(k)(5)(A). Among the protections under IDEA is the requirement for a "manifestation determination" if a disciplinary action will result in a change in placement for more than 10 school days. Essentially, if the behavior leading to the disciplinary action was a manifestation of a child's disability, or due to a failure to implement an IEP, a school system is required to hold an IEP team meeting, evaluate the circumstances, and return the child to his original placement, absent the commission of serious drug, weapons, or other offenses. 20 U.S.C. §1415(k)(1)(E)(ii); 20 U.S.C. §1415(k)(1)(F-G); COMAR 13A.08.03.08.

The State Board's jurisdiction

We have long declined to extend our jurisdiction to resolve special education disputes. *See Parents R. & Z. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 14-67 (2014); *Frye v. Montgomery County Bd. of Educ.*, MSBE Op. No. 01-30 (2001). This is because specialized forums exist through IDEA to resolve these complex and fact-intensive matters in a timely fashion. In *Parents R. & Z.*, we explained the various options that parents have to challenge special education decisions:

> The IDEA has created specialized forums for challenging school system decisions concerning a student's rights under IDEA. There are three specific processes in place for resolving special education disputes. There is a due process hearing conducted at the Office of Administrative Hearings, the results of which are appealable directly to court. 20 U.S.C. §1415(f); COMAR 13A.05.01.15C. In connection with or in lieu of the due process hearing, there is a mediation process. 20 U.S.C. §1415(e); COMAR 13A.05.01.15(B). There is also a complaint investigation process in place at the Maryland State Department of Education (MSDE). COMAR 13A.05.01.15A.[4]

The local board and Appellants disagree on whether or not Appellants may invoke the protections of IDEA, specifically the requirement for a manifestation determination, and whether such a proceeding should have occurred in this case. This is precisely the type of mixed question of fact and law that the specialized forums created by IDEA are designed to address. There is no indication that Appellants were unable to pursue relief in those forums, or that they are precluded from doing so now. Accordingly, we decline to address the special education issues raised by

[4] A full explanation of these rights, and other resources, are available in multiple languages on MSDE's website. *See* http://marylandpublicschools.org/programs/Pages/Special-Education/mpsn.aspx (last visited Feb. 10, 2017).

this case. In declining to address Appellants' IDEA claims, we render no opinion on whether IDEA applied to the situation or whether Appellants have a meritorious claim under IDEA.

Retaliation

Separate from the question of special education is whether the school system retaliated against Appellants by rescinding the transfer. Appellants claim that, because they disputed the recommendations of the school system during an IEP screening meeting, school officials decided to rescind their children's transfer. Because this allegation concerns retaliation, rather than special education itself, we shall address Appellants' argument.

In order to establish a *prima facie* case of retaliation, Appellant must show that (1) they engaged in a protected activity; (2) that the school system took a materially adverse action against them; and (3) that a causal connection existed between the protected activity and the materially adverse action. *See Jones v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 15-33 (2015) (citing *Burling N. & Santa Fe. Ry. Co. v. White*, 584 U.S. 53, 68 (2006)). The school system may then rebut the prima facie case by showing that there was a legitimate non-discriminatory reason for the adverse action. *Id.* The burden then shifts back to the Appellant to show that the reasons given by the school system are pretextual. *Id.*

The local board concedes, for the sake of argument, that disagreeing with the school system during an IEP screening meeting could be a protected activity and that the rescission of the transfer is an adverse action. The local board also acknowledges that these two incidents took place close in time, with the dispute occurring on March 17, 2016, followed by a warning about possible rescission of the transfer on May 25, 2016, and a final decision revoking the transfer on June 23, 2016. The local board maintains, however, that Appellants have failed to demonstrate a causal connection beyond this mere temporal proximity.

Even presuming that the proximity in time was enough to create a causal connection, the record demonstrates a legitimate non-discriminatory reason for the action. Both students had a history of behavioral problems, including fighting with other students, being disruptive in class, and disrespecting adults. One incident — throwing a rock at a first-grader during recess — occurred on the same day as the principal's warning about a possible rescission of the transfer. In our view, Appellant has failed to offer any evidence that these behavioral issues were a mere pretext.

Racial and national origin discrimination

In addition to claiming illegal retaliation, Appellants also have raised claims of racial and national origin discrimination. Appellants have not, however, offered specific allegations or any evidence in support of their claim. "Allegations of discrimination must be supported by evidence. Allegations alone are insufficient to support a claim of discrimination." *Weeks v. Carroll County Bd. of Educ.*, MSBE Op. No. 13-44 (2013). Because Appellants have offered no evidence to support their discrimination claims, this argument lacks merit.

CONCLUSION

We decline to address Appellants' claims regarding violations of IDEA. We otherwise affirm the decision of the local board because it was not arbitrary, unreasonable, or illegal.

Signatures on File:

_____
Michele Jenkins Guyton

_____
Laurie Halverson

_____
Stephanie R. Iszard

_____
Rose Maria Li

_____
Barbara J. Shreeve

_____
Madhu Sidhu

_____
Guffrie M. Smith, Jr.

_____
Laura Weeldreyer

Abstain:

_____
Andrew R. Smarick
President

Dissent:

Maryland wrongly makes it exceptionally difficult for parents to select their child's school. It should be the policy of the state to encourage, rather than discourage, a parent's ability to place their child in the school that will best serve him or her.

_____
Chester E. Finn, Jr.
Vice-President

February 28, 2017