NIKOL E.,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
MONTGOMERY COUNTY BOARD OF EDUCATION	OF EDUCATION
Appellee.	Opinion No. 16-06

OPINION

INTRODUCTION

Appellant challenges the decision of the Montgomery County Board of Education ("local board") to dismiss her appeal for untimeliness. The local board filed a motion to dismiss the State Board appeal based on the untimeliness of the local board appeal. The Appellant responded to the motion and the local board replied.

FACTUAL BACKGROUND

During the 2014-2015 school year, Appellant's son, N.E., was in his third and final year at Briggs Chaney Middle School ("Briggs Chaney"). N.E. had been experiencing illnesses over the years that had interfered with his school attendance. According to the Appellant, N.E. suffered from stress which over time ultimately resulted in N.E. having stomach pains, lack of focus, and depression.

In April 2015, the Office of the Chief Operating Officer received a "Complaint from the Public" from the Appellant expressing her frustration in getting the principal and school staff at Briggs Chaney to establish and implement a Section 504 plan[1] for her son to address his academic issues. Appellant blamed N.E.'s poor academic performance on the school's failure to effectively communicate with her and establish accommodations. In particular, Appellant was dissatisfied with N.E.'s grade of incomplete in science and his grade of "E" in Spanish for the 3rd quarter of the 2014-2015 school year and sought resolution to change the grades. (Complaint from the Public).

Dr. Andrew Zuckerman, the Acting Chief Operating Officer ("COO"), assigned hearing officer Dennis L. Leighty to investigate the Complaint. Mr. Leighty spoke with the Appellant, and the Briggs Chaney principal, counselor, and pupil personnel worker. The Appellant expressed her belief that a lack of communication with the school had negatively impacted her son's academic performance and that there was insufficient communication about the

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[1] Section 504 of the Rehabilitation Act requires public schools to provide each qualified person with a disability a free appropriate public education through the provision of regular or special education and related aids and services. 29 U.S.C. §794(a); 34 C.F.R. §104.33. To this end, schools offer qualifying disabled students modifications or adjustments of educational programs, frequently referred to as accommodations in a Section 504 plan, in order to afford students with disabilities an equal opportunity to access education.

documentation she needed to provide to demonstrate that her son was eligible for a Section 504 plan. She requested that N.E.'s 3rd quarter Spanish and science grades be removed from his report card and that his 4th quarter grades be allowed to count for both quarters instead. She also requested that N.E. be given the accommodations of a reduced workload for classwork and homework, and 200 percent additional time to complete his work. (Motion, Ex. 3A).

In a Memorandum dated May 4, 2015, Mr. Leighty detailed N.E.'s extensive absences. During N.E.'s 6th and 7th grade years at Briggs Chaney, N.E. had at least 50 days of absence and 37 instances of tardiness. At the beginning of his 8th grade year (2014-2015), the school implemented a Truancy Prevention Plan that included counselor, pupil personnel and mentoring support and a reward system. Despite the interventions put in place and an initial improvement in attendance, N.E. had 50 absences during the 8th grade as of May 2015. Mr. Leighty noted in his report that consideration was given to presenting the case to the Truancy Review Board after the limited success of the truancy plan. (*Id.*).

With regard to the Section 504 plan, Mr. Leighty stated that N.E. first qualified for a Section 504 plan on February 11, 2015 due to information submitted by the Appellant regarding N.E.'s hearing loss.[2] Accommodations at that time were limited to the hearing loss issue alone and did not address student workload. After receipt of information from a psychiatrist identifying Attention Deficit Disorder ("ADD") and Post Traumatic Stress Disorder ("PTSD") as issues of concern, a Section 504 meeting convened on March 18, 2015, and a new Section 504 plan was developed.[3] New accommodations included a reduced workload for homework and preparation for classwork, breakdown of long-term assignments with built in due dates, and 50 percent more time to complete assignments.[4] (*Id.*). Appellant claims, however, that the accommodations were not followed by the teachers.

Based on his investigation, Mr. Leighty recommended that the Appellant's complaint be denied. He stated, in part:

> The erratic attendance has compromised the application of the Section 504 Plan accommodations, implementation of due dates/deadlines, and the issuance of grades. Throughout the 2014-2015 school year, teachers have attempted to provide supports but [N.E.] does not always follow through with his obligations.

He also noted that a meeting had been arranged for the Appellant to meet with the Spanish teacher to discuss concerns over that particular grade. (*Id.*).

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[2] It is unclear why there was no Section 504 plan put in place before February 2015. Appellant claims that there was a lack of communication concerning the documentation that she was required to submit to the school system. Other than the Complaint from the Public and the fact that two different Section 504 plans were implemented in February and March 2015, the record is devoid of any documentation between the parties on the accommodation issue, or any other issue.

[3] Appellant maintained that she did not know prior to February 2015 that she needed the note of a medical professional to substantiate her son's depression, which had been an ongoing issue since he began attending Briggs Chaney in the 6th grade.

[4] Although the psychiatrist recommended extended time of 200 percent to submit assignments, the 504 Team established a 50 percent accommodation. (Motion, Ex. 2A, p.2).

By letter dated May 8, 2015, Dr. Zuckerman issued his decision in which he concurred with Mr. Leighty's findings and adopted his recommendation that Appellant's request to change her son's grades in Spanish and science be denied. He advised the Appellant that she could contact the Educational Management Team if she wished to modify the extended time provisions in her son's Section 504 plan. (Motion, Ex. 3). He also advised that Appellant could appeal his decision in writing to the local board "as soon as possible, but not later than 30 calendar days from the date of this letter." (*Id.*). The office staff mailed the letter in accordance with the school system's usual procedures. (Motion, Ex. 9, Affidavit).

Approximately 3 months later, Appellant appealed Dr. Zuckerman's decision to the local board. Her letter of appeal was received by the local board office on August 5, 2015. The Appellant acknowledged an issue concerning the filing date. She stated as follows:

> This appeal letter has reached you after the deadline for the appeal according to the date on the letter. The date on the letter is May 8, 2015. It was mailed out to the correct address but I did not receive it. I contacted the office and spoke to Ariana who emailed me the letter July 9, 2015. I turned in the appeal on April 20, 2015 and was told that I would receive the response within ten days.

(Motion, Ex. 4). Apparently the Appellant contacted Dr. Zuckerman's office to inquire about the whereabouts of his decision because she did not receive it within the time frame set forth in MCPS Regulation KLA-RA. The Regulation states that "[w]ithin 15 work days of the receipt of the request [for review] . . . . the COO is expected to make a decision, unless further investigation requires additional time, in which case a 10-work day extension will be made with notification to the complainant."[5] (Motion, Ex.2, MCPS Regulation KLA-RA.B.2.a.6). In response to Appellant's inquiry, the office staff emailed her the decision on July 9, 2015.

Because the Appellant had submitted her appeal to the local board beyond the 30 day filing time frame, the local board's staff assistant offered the Appellant the opportunity to provide further explanation of the reasons for the late filing. (Motion, Ex. 5). The Appellant responded as follows:

> I am writing this email in response to the letter I received in the mail today at my address. I did not receive the notice regarding the decision of the initial complaint until around the 7 of July.[6] It was emailed to me around that day. I did not get a copy in the mail in May. When I asked about the response, I was told to wait for a

[5]Appellant sated that she expected the decision within 10 days. For Complaints from the Public submitted to the principal, the principal is expected to complete a written decision within 10 work days of receipt of the written complaint. (MCPS Regulation KLA-RA.B.1.f). The principal had previously denied the Appellant's request on March 26, 2015, but there is no written decision explaining that decision in the record. (*See* Complaint from the Public).

[6] Appellant has offered varying dates as the date she received Dr. Zuckerman's decision from the school system. In one filing she told the local board that she received it on July 9 and in another she stated July 7. In her State Board appeal she stated that she received it on July 13. For purposes of this appeal, we are using the July 9 date as the date of receipt because that is the date Appellant gave in her initial appeal to the local board. We do not find that Appellant's confusion regarding the precise date that she received the email of the letter suggests that she is not credible in her other statements as the local board claims.

> response in the mail even though it was passed (sic) the ten day deadline when I made the school aware of the fact that I had not heard anything. I cannot respond to something that I did not receive. I was not seeking a response as eagerly as normal because I was preoccupied with locating a new psychiatrist and therapist for my son because his father lost his job so he had no more health coverage. I was also dealing with a less than helpful administration at Briggs Chaney.

(Motion, Ex. 6).

By order dated September 8, 2015, the local board dismissed the Appellant's Complaint because it was untimely filed. (Motion, Ex. 7). The local board explained that appeals to the local board should be filed within 30 days of the date of the superintendent's or designee's decision or else they are subject to dismissal under Board Policy BLB. It further explained that although the Appellant maintained that she did not receive the May 8, 2015 letter by mail, by her own admission she received it on July 9th by email, yet waited almost a month to file her appeal to the local board. The local board concluded that "[e]ven if [Appellant] received the letter well after the date on the letter, there is not a sufficient reason for failing to appeal promptly after its receipt." *Id.*

Thereafter, on October 7, 2015, Appellant filed the instant appeal with the State Board.

STANDARD OF REVIEW

Local board decisions involving a local policy or a controversy and dispute regarding the rules and regulations of the local board are considered *prima facie* correct. The State Board will not substitute its judgement for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A.

LEGAL ANALYSIS

Untimeliness of Appeal to Local Board

Section 4-205(c)(3) of the Education Article provides that a "decision of a county superintendent may be appealed to the county board if taken in writing within 30 days after the decision of the county superintendent." Time limitations are generally mandatory and will not be overlooked except in extraordinary circumstances such as fraud or lack of notice of the decree. *See Scott v. Board of Educ. of Prince George's County*, 3 Op. MSBE 139 (1983).

In addition, local board policy BLB states that an appeal to the local board shall be initiated by filing the appeal "within 30 days of the date of the superintendent's or designee's final action or decision adversely affecting the appellant." It further states that if the appeal is not filed within the 30 day period, "such failure shall constitute sufficient grounds for the [local board] to dismiss an appeal."

Here, Dr. Zuckerman issued his decision by letter dated May 8, 2015. His letter stated that an appeal to the local board had to be filed within 30 days of the date of his letter. Thus, in a usual case, the appeal to the local board should have been filed on Monday, June 8, 2015. Appellant did not file her appeal to the local board until August 5, 2015.

Appellant explained to the local board that she filed her appeal late because she never received a copy of Dr. Zuckerman's letter in the mail. Rather, she had to contact his office to get a copy of the decision, which she later received via email on July 9. She also explained to the local board that she had been preoccupied with locating a new psychiatrist and therapist for her son because his father had lost his job and he had no more health insurance coverage. (Motion, Exs. 4 & 6).

In the State Board appeal, the local board maintains through affidavit that it properly mailed Dr. Zuckerman's May 8 decision to the Appellant in a timely fashion. (Motion, Ex.8, Affidavit). Under Maryland law, a "properly mailed" letter is presumed to have "reached its destination at the regular time and was received by the person to whom it was addressed." *See Border v. Grooms*, 267 Md. 100, 104 (1972). This is a rebuttable presumption, however. *(Id.)*.

In its decision, the local board did not invoke the mailbox rule. It stated:

> While the Board cannot confirm or refute [Appellant's] contention that she did not receive the May 8, 2015, letter in a timely fashion, despite the use of the correct address, there is no dispute that by July 9, at the latest, [Appellant] had notice of the decision, yet she waited nearly a month after that date to file her appeal. The letter from the acting chief operating officer clearly states that the appeal time period runs from the date of his letter. Even if [Appellant] received the letter well after the date on the letter, there is not a sufficient reason for failing to appeal promptly after its receipt.

(Motion, Ex. 7). Thus, in the same decision, the local board accepted the July 9 date as the date that the Appellant definitively had notice of Dr. Zuckerman's decision because it could not "confirm or refute" her contention regarding lack of notice. Yet, on the other hand, it found that because thirty days from the date of the letter had passed, Appellant should have submitted her appeal to the local board more "promptly" after receiving notice. It also rejected her reason for taking 27 days from the July 9 date of notice, finding it insufficient justification to excuse the late filing.

We disagree with the local board's conclusion. Given that the Acting COO did not inform the Appellant that the local board expected her appeal to be filed in less than 30 days from the July 9 date, there is no reasonable basis to deny the Appellant the full 30 days to appeal to the local board from that date. In addition, we find Appellant's explanation regarding the late filing to be sufficient justification to excuse it. In light of the entire record here, we find that the Appellant's appeal to the local board was timely filed.

Section 504 Due Process Procedures

We point out that Appellant's concerns relate to the implementation, or lack of implementation, of a Section 504 plan for N.E. Such concerns should have been resolved through the existing review process set forth in MCPS Regulation ACG-RB. The regulation states that a dissatisfied parent may contact the MCPS Section 504 coordinator to (1) seek review by the MCPS Department of Student Services, (2) access mediation through the Maryland Office of Administrative Hearings, or (3) have a Section 504 hearing through the Maryland Office of Administrative Hearings by contacting the MCPS Section 504 coordinator. In addition, a parent may file a complaint with the federal Office for Civil Rights if the parent believes that the child is being discriminated against based on his or her disability. (MCPS Regulation ACG-RB(V)(D)). The local board has not explained why this process was not utilized in this case. The Appellant suggests that it was the school's failure to communicate with her that led her to file the Complaint from the Public. It is our view that once the school system received the Complaint, it was up to the school system to follow the appropriate route for resolution.

CONCLUSION

For the reasons stated above, we reverse the decision of the Montgomery County Board of Education to dismiss the appeal based on untimeliness and remand this case to the local board for appropriate processing and a decision. We note that the statement of the hearing examiner, adopted by the Acting COO, that "erratic attendance" compromised the Section 504 plan raises concerns about the logic of the Acting COO's decision to dismiss the Complaint when one of the reasons for the Section 504 plan was to compensate for absences related to the student's disability.

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Absent

Laura Weeldreyer

February 23, 2016