

GEORGE AND SHARON K.

Appellant

v.

MONTGOMERY COUNTY BOARD
OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 12-09

OPINION

INTRODUCTION

The Appellants appealed the decision of the Montgomery County Board of Education (local board) denying their son's application to the Center Program for the Highly Gifted (Center Program) located at Cold Spring Elementary School. The local board has filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, capricious, or unreasonable. Appellants submitted an opposition to the local board's motion, and the local board responded.

FACTUAL BACKGROUND

Montgomery County Public Schools ("MCPS") operates seven centers for highly gifted students. The Centers provide instruction in grades 4 and 5, drawing students countywide to regional centers. Students are selected based upon multiple criteria including: above-grade level achievement, teacher and parent recommendations, student performance on the Center Program Assessment and report card grades. (Motion, Ex. 1, 4). For the 2011-2012 school year, 276 students applied and were screened for 58 fourth grade slots. (Motion, Ex. 2).

In November 2010, Appellants applied for N.K.'s admission into the Center Program. (Motion, Ex. 3). A selection committee reviewed all the candidates for the grade 4 Center Program. The committee considered the above-mentioned factors in making its decision (*Id.*). In March 2011, the Director of the Division of Consortia Choice and Application Program Services, Jeanie Franklin, sent notice to the Appellants that N.K. was not selected for the Center Program. One of the reasons for the denial was that N.K.'s scores were below the mean average for the students invited to the Center Program (*Id.*). His scores were as follows:

	Verbal	Quantitative	Nonverbal
<u>N.K.'s Standard Age Score (SAS):</u>	114	116	127
<u>Mean SAS of Selected Students:</u>	131	134	131

In April 2011, the Appellants appealed the denial to Ms. Franklin. (Motion, Ex. 12). On May 13, 2011, Ms. Franklin reviewed the matter and denied the appeal, concurring with the recommendations of the appeals committee. (Motion, Ex. 6).

By a letter dated May 31, 2011, Appellants filed a Level II appeal to the Deputy Superintendent of Schools, Dr. Frieda K. Lacey (Motion, Ex. 7). In this appeal Appellants revealed their concern that N.K. "may be a gifted child with ADHD". Appellants also mentioned that N.K.'s performance on the Center Program's assessment did not reflect his true ability because of the ADHD and the failure to provide proper testing accommodations. The Level II committee reviewed the information the Appellants provided, reviewed N.K.'s performance on the Center Program's assessment and the teacher information checklist. The Level II committee upheld the decision to not select N.K. for the Center Program. (Motion, Ex. 5). Erick J. Lang, the Associate Superintendent for Curriculum and Instructional Program, reviewed the Level II appeals committee decision and gave his support for the Level II appeal's committee decision and concurred. (Motion, Ex. 5). In a letter dated June 30, 2011, the Deputy Superintendent denied the Level II appeal after reviewing both the Level II committee's decision and Mr. Lang's report. (Motion, Ex. 9).

The Appellants appealed that decision to the local board by letter dated July 27, 2011. (Motion, Ex. 9). Appellants told the local board of their concern that N.K. "has an undiagnosed disability that impacts his ability to perform consistently to his full academic potential." (*Id.*). They accused schools staff of "withholding relevant data that would support an ADHD diagnosis". (*Id.*). They assert that because of the delay in identifying N.K.'s disabilities, N.K. did not have access to specific accommodations for the Center Program's assessment. (*Id.*). On September 13, 2011, the Board considered the matter and affirmed the Superintendent's decision not to admit N.K. to the Center Program. (Motion, Ex. 12).

STANDARD OF REVIEW

Because this appeal involves a decision of the local board involving a local policy, the local board's decision is 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

Appellants claim that N.K. was discriminated against because: 1) the application process relied on the teacher report and the assessment results, both of which would be negatively impacted by ADHD; and 2) N.K. did not have "the necessary accommodations" during the assessment that would have allowed him to "demonstrate his true abilities." (Motion, Ex. 9). Appellants argue that the accommodations N.K. would have under an IEP or 504 Plan may have

allowed him to score more competitively. This in turn would have resulted in his selection for the Center Program. (Motion, Ex. 12).

In the absence of direct evidence of the discriminatory intent of a school board, a parent or parents of a student who is denied admittance to an educational program must initially show that their child is an individual with a disability, who was able to perform competitively on exams with accommodation's that were reasonable and that the failure to provide the accommodation raises the inference of discriminatory intent. *Tangires v. John Hopkins*, 79 F. Supp.2d 587, 594 (D. Md. 2000); *Bryant v. Better Business Bureau of Greater Maryland*, 923 F. Supp. 720, 733-34 (D. Md. 1996).

a. Disability

In January of 2008, two years before applying for admission to the Center Program, Appellants attended an IEP meeting to determine N.K.'s possible eligibility for special education. The Appellants indicated on the Parent Report that N.K. "should have an IEP so he can receive speech-language intervention". (Motion, Ex. B). From this meeting, the IEP team members determined that N.K. had a speech/language impairment. (Motion, Ex. B). In March 2008, the IEP team met to conduct an evaluation of N.K. (Motion, Ex. C). Once again the IEP team members determined that N.K. had a speech/language impairment. (Motion, Ex. C). The IEP noted the services N.K. would receive would be an "hour weekly of direct speech/language therapy" during the school year. (Motion, Ex. C). The IEP also noted N.K.'s disability did "not require testing accommodations at this time". (Motion, Ex. C).

From May 2008 to April 2009, the IEP Team met to address N.K.'s need for additional services for his speech and language impairment. Each time the IEP reiterated that N.K. did not need testing accommodations. (Motion, Ex. E-F).

During the May 2010 IEP meeting, several months before Appellants applied for N.K.'s admission into the Center Program, Appellants raised their suspicions that their son might have undiagnosed ADHD. (Motion, Ex. H). The school psychologist stated that her observations did not show that N.K. had ADHD. The school psychologist also noted that the school would have to wait and see whether there was an educational impact in order to determine if N.K. did in fact need special education services. (Motion, Ex. H).

In June 2010, the IEP team re-evaluated N.K. in the area of speech/language and attention/focus. (Motion, Ex. I). The IEP team concluded that N.K. did not qualify as a student with impairment in the area of attention/focus and no longer qualified as a student with speech/language impairment. The IEP team noted that N.K. scored average to high average range on all speech/language assessments. (Motion, Ex. I).

In November 2010, N.K. was tested for admission to the Center Program. Based on the evidence presented in the record, we must conclude that at the time he was tested for entry into the Center Program N.K. had not been diagnosed with ADHD. Admittedly his parents had raised the ADHD possibility with N.K.'s IEP team about six months prior to applying for N.K.'s

admission to the Center Program, but it wasn't until July 2011 that N.K.'s pediatrician referred him to Kennedy Krieger Institute for further evaluation of ADHD symptoms. He was subsequently diagnosed with ADHD.

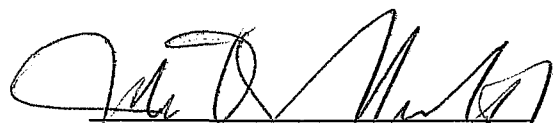
We recognize the possibility that if N.K. had been evaluated for ADHD prior to the Center Program testing, he might have been found to need accommodations. We recognize also that the Individuals with Disabilities Education Act (IDEA) creates a duty on the part of LEAs to identify, locate and evaluate "all children with disabilities . . . who are in need of special education and related services." 20 U.S.C. §1412(a)(3)(A). We express no opinion on whether the school system should have evaluated N.K. when the parents shared their concerns about ADHD with the IEP team. An appeal to this Board is not the appropriate forum to resolve those IDEA issues. Those issues should have been raised through the process and procedures set forth in IDEA. See, e.g. *Philip and Deborah W. v. Prince George's County Board of Education*, MSBE Op. No. 11-48 (October 25, 2011).


Moreover, we note that when the Appellants applied for N.K.'s admission to the Center Program, the Appellants did not provide the school system information about possible ADHD. Furthermore, on the application Appellants were asked "Does your child require accommodations for testing that are specified on the MCPS Individualized Education Program (IEP), English Language Learner (ELL) Plan or Section 504 Plan". (Motion, Ex. 3). They answered "no", which was, of course, an accurate answer to the specific question.

For the purpose of this appeal, based on the facts in the record, we conclude that the decision to deny N.K. admission to the Center Program was not arbitrary, unreasonable, or illegal.

CONCLUSION

For the reasons stated above, we affirm the local board's decision denying N.K. entrance into the Center for the Highly Gifted at Cold Spring Elementary School.


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March 27, 2012