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D.B. BY HER PARENTS E.B. AND D.B.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,
Respondent.

OAL Docket No. EDU 5669-92

Agency Docket No. 302-7/92

Education

93 N.J.A.R.2d(EDU) 10; 1992 N.J. AGEN LEXIS 5119

August 27, 1992, Initial Decision
October 7, 1992, Final Agency Decision

COUNSEL: [*1] Jamie Epstein, Esq., for the petitioner
Howard Mendelson, Esq., for the respondent (Davis, Reberkenny & Abramowitz, attorneys)

FINAL DECISION BY: ELLIS, Commissioner of Education

FINAL AGENCY DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to the prescriptions of N.J.A.C. 1:1-18.4, and thus are not considered in the Commissioner's disposition of this matter.

Upon careful and independent review of the record of this matter, the Commissioner adopts as his own those findings and conclusions of the Office of Administrative Law that for the equitable reasons as expressed in the initial decision, and because D.B. has satisfied the requirements to be promoted to eighth grade, petitioner's prayer for relief seeking D.B.'s promotion to grade 8 in September 1992 be granted. In so determining, the Commissioner stresses, as did the ALJ below, that this matter is strictly limited to the facts pertaining solely to D.B., and does not extend to any other pupil.

Accordingly, the initial decision is affirmed for the reasons expressed therein.

INITIAL DECISION BY: THOMAS, ALJ, t/a

INITIAL DECISION: Petitioner is a seventh grade pupil who appeals the [*2] determination of the Board of Education of Oaklyn (Board) which denied her an opportunity to be promoted to eighth grade despite repeating in summer school the courses she failed in the regular school year.

The matter was filed in the office of the Commissioner of Education on July 8, 1992 and transferred to the Office of Administrative Law as a contested case on July 28, 1992 pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was conducted in the Office of Administrative Law, Trenton, on August 25, 1992. Sixteen documents were submitted in evidence and testimony was educed from the pupil's mother and the school superintendent. The record was closed after oral summation by counsel.

FACTS

The salient facts are not in dispute and are listed as follows:

1. D.B. is a seventh grade girl who failed three subjects in the 1991-92 school year (Language Arts, Home Economics and Industrial Arts).

2. Between September 27, 1991 and May 7, 1992, D.B.'s parents were notified by fifteen interim reports from her teachers concerning D.B.'s poor performance in her classes (J-4).

3. The parents do not contest any of the grades received by their daughter.

4. The Board has a policy which provides that "Failure [*3] in three or more subjects means the grade must be repeated." (J-12)

5. Failure in one or two subjects can lead to promotion if those subjects are passed in summer school.

6. D.B.'s mother attended a Board meeting on June 15, 1992 in an attempt to have the policy changed where non-academic subjects are involved (home economics and industrial arts) so that D.B. could be promoted. (J-5, J-7).

7. After some debate in executive session, and irrespective of the objections voiced by the superintendent, the board voted 5 to 4 to waive its retention policy "with the stipulation that D.B. passes English in summer school." (J-5)

8. The day after its June 15, 1992 meeting, another mother (P) called the superintendent about concerning son. She had been in attendance at the meeting the prior evening where the waiver was voted upon.

9. Thereafter, a special meeting of the Board was called on June 22, 1992. The Board went into executive session to entertain the concerns of (P) about her son who failed three subjects one year earlier and at that time the Board denied her request to promote him. One subject he failed was home economics and P believed this subject should not be counted. P. allegedly [*4] spoke to a "legal examiner" at the state department who advised her to confront the Board about her situation. (J-11)

10. After discussion with its attorney and debate among its members, the Board voted 6 to 1 to rescind its action respecting D.B. on June 15, 1992 "on the grounds that such action is a violation of administrative policy and to require student D.B. in accordance with the policy to repeat 7th grade." (J-11)

11. The superintendent testified that the promotion policy had never been waived except for D.B.; that there is no distinction in the policy between academic and non-academic subjects; that there was no discussion of D.B. in the executive session attended by P; and that the promotion and retention policy submitted by petitioners (P-1) applied only to elementary school pupils in grades K-6. D.B. is a pupil in the 7 through 9 junior high school.

I accept the superintendent's testimony as fact.

DISCUSSION

This is a classic case of a board of education creating a problem for itself by its failure to abide by its own policy and its failure to adhere to the advice of its superintendent. The superintendent understands that policy is designed to

keep the institution on [*5] the straight and narrow path and that deviations from policy are fraught with danger.

D.B.'s mother testified that she and her daughter were called to the superintendent's office on June 23, 1992, the day after the meeting in which the promotion policy waiver was rescinded. They were very upset and cried when they heard the news. Nevertheless, D.B. began her non-academic subjects on June 16, 1992 and had paid the tuition at Collingswood for her summer English class which would begin on July 1. This suit followed.

Now that she has passed English with a grade of "B" and made up home economics and industrial arts requirements with passing grades to the satisfaction of the school district, D.B. seeks promotion as a regular eighth grade pupil beginning in September 1992.

The Board argues that D.B. has acquired no vested right since she was notified before she began her English course in Collingswood and that she would be reimbursed for any tuition paid for that subject. (The other two courses were offered in the local district at no charge to the pupils). Therefore, D.B. should be required to repeat seventh grade pursuant to its retention policy.

In McDowell v. Board of Education of [*6] Island Heights, 1974 S.L.D. 1316, that board of education rescinded its resolution permitting entrance to school for an under age kindergarten pupil. The Island Heights board cited its statutory and discretionary authority to make, amend and repeal rules pursuant to N.J.S.A. 18A:11-1. Relevant portions of that decision are quoted below:

The Board asserts ... that when a board of education acts within its discretionary authority, the Commissioner should not interfere or substitute his judgment for that of the local board. Kopera v. Board of Education of West Orange, 60 N.J. Super. 288 (1960) ...

The Board argues, finally, that the infant acquired no vested right since he had not been enrolled, nor did he attend any classes; therefore, his right to a free public school education has only been postponed for a year.

In previous decisions by the Commissioner, it has been held that ***an acquired right through the adoption of a resolution by a board of education cannot be invalidated by a rescinding of the resolution at a subsequent meeting." Marion S. Harris v. Board of Education of Pemberton Township, Burlington County, 1939-49 S.L.D. 164 (1938) (at pp. 165-166) See also Samuel Hirsch [*7] v. Board of Education of the City of Trenton, Mercer County, 1961 S.L.D. 189; Anthony Amorosa v. Board of Education of the City of Jersey City, Hudson County, 1964 S.L.D. 105; Leon Gager v. Board of Education of the Lower Camden County Regional High School District No. 1, Camden County, 1964 S.L.D. 81; James Docherty v. Board of Education of West Paterson, Passaic County, 1967 S.L.D. 297; Leonard V. Moore v. Board of Education of the Borough of Roselle, Union County, 1973 S.L.D. 526.

The Board avers that this matter is distinguishable from the cases cited, ante, in that the persons represented therein had signed contracts with their boards giving them vested rights.

In the hearing examiner's judgment, pupils also have rights. They have a right to be treated equitably and a right to expect that those persons charged with the responsibility of charting the educational future of children will do so in their best interest. The hearing examiner finds in the instant matter that the infant acquired a right to attend kindergarten in the Borough of Island Heights because of the several actions of the Board ... (at pp. 1319-1320).

The Commissioner adopted the report of the hearing examiner [*8] as his own and directed the Board to admit the kindergarten pupil holding also that no new underage applicants need be considered for entrance.

I FIND and CONCLUDE:

The matter herein is similar. D.B. had a right to rely on the determination of the Board to waive its promotion policy thus making it possible for her to be promoted on the successful completion of summer school. The fact that D.B.

acquired no vested right is not germane to the fact pattern here. D.B. must be promoted according to equitable principles. Black's Law Dictionary defines equitable as --

Just; conformable to the principles of justice and right.

Just, fair, and right in consideration of the facts and circumstances of the individual case.

Now that D.B. has satisfied the requirements to be promoted to eighth grade no educational or rational purpose can be served by forcing her to repeat seventh grade.

This determination for D.B. does not extend to any other pupil. If a pupil was aggrieved in a prior year, action should have been taken at that time.

The Board's promotion policy is not questioned. It appears fair and designed by its professional staff in the best interest of the school pupils. This problem arose only [*9] because the Board did not follow its own policy.

In his closing argument counsel for petitioner sought to amend his complaint on the ground that there was a discussion of D.B. with another parent at the executive session of the Board on June 22, 1992, in violation of the rules concerning confidentiality of pupil records. It appears that D. B. was mentioned at this meeting (J-11); however, the superintendent testified that there was no such discussion while P was in attendance.

I am convinced from the record as a whole that any mention of D.B., if it occurred at all, was only in the context that a waiver had been authorized for her and not for P's son who had a similar problem in an earlier year. Accordingly, the motion to amend the complaint is DENIED.

The Commissioner has no authority to award counsel fees. As stated in Balsley v. North Hunterdon Board of Education, 117 N.J. 434 (1990) " ... the absence of express statutory authority is fatal to the claim for counsel fees." (at 443) Accordingly, petitioner's request for counsel fees is DENIED.

Based on all of the above, petitioner's prayer for relief is GRANTED She will begin in grade 8 in September 1992.

I hereby FILE this initial [*10] decision with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION for consideration.

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
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