IOWA DEPARTMENT
OF EDUCATION
(Cite as 22 D.o.E. App. Dec. 271)

In re John Myers

Lana Myers, Appellant,	:	
	:	DECISION
vs.	:	[Admin. Doc. 4573]
Newell-Fonda Community School District, Appellee.	:	

The above-captioned matter was heard telephonically on April 21, 2004, before designated administrative law judge Carol J. Greta, J.D. The Appellant, Lana Myers, was present on behalf of her minor son, John. Newell-Fonda Community School District Superintendent Steve Mitchell represented his District. Also appearing on behalf of the District were Middle School Principal Randy Nielsen and Board President Jim Wernimont. Neither party was represented by legal counsel.

An evidentiary hearing was held pursuant to agency rules found at 281 Iowa Administrative Code 6. Authority and jurisdiction for the appeal are found in Iowa Code §§ 282.18(5) and 290.1 (2003). The administrative law judge finds that she and the State Board of Education have jurisdiction over the parties and subject matter of the appeal before them.

Ms. Myers seeks reversal of the April 5, 2004 decision of the local board of directors of the Newell-Fonda District to deny the open enrollment request filed on behalf of John.

I.
FINDINGS OF FACT

John Myers is a 7th grader. On or about April 12, 2004, he transferred from the Newell-Fonda District to the Sac Community School District. John lives with his parents, Matt and Lana Myers, in the Newell-Fonda District. Accordingly, the Myers pay tuition to the Sac Community District for the remainder of this year. Their open enrollment request for John is for the 2004-05 school year.

As a Newell-Fonda student, John was one of about 36 students in his class. Mrs. Myers testified here that harassment of John started in the 5th grade when a student new to the District and unknown to John pulled a chair out from under John at school. Later that same day, the same male student succeeded in getting other boys to taunt John with the chant, "John is gay." She complained to the District's administrators, and states that the student was dealt with. However, for the past year or so, a group of about eight male

classmates of John picked up on the homosexual theme and perpetuated the bullying of John. These boys continued to call John "gay" and made vulgar remarks of a suggestive sexual nature about John and his best male friend.

Mrs. Myers was not specific about what incidents of bullying and harassment occurred before January 1, 2004. However, she and her husband told John during November or December of 2003 that they had missed the open enrollment deadline[1], so he would have to "tough it out" until the 2005-06 school year.

In January of this year, Mrs. Myers testified, the bullying became bad enough that she started to fear that John would "lash out" and retaliate. When Mrs. Myers expressed her concerns to one of John's teachers, she felt that the teacher showed no interest. Mrs. Myers met with Principal Randy Nielsen on February 3 to update him as it had been about a year since she had last told Mr. Nielsen of any specific problems John experienced. She and Mr. Nielsen discussed alternatives; Mr. Nielsen's action steps are detailed herein.

After January 1 of this year, John's school days consisted fairly regularly of a backdrop of teasing, taunting, laughter at his expense, having his books and school materials hidden. In addition, there were specific incidents related by Mrs. Myers. John's "assignment notebook," which is as important to a middle school student as a Palm Pilot© is to an adult, was stolen. He was punched on the shoulder at school on February 10. The next day he was punched in the groin when he exited the school bus. On February 12, he refused to attend school, tearfully telling his mother "they were going to kill him." Mrs. Myers stated that, while she had no way to prove so, she believed that John was close to a nervous breakdown during this time frame. He told his mother that he intended to drop out of school as soon as he could do so. John wrote on the cover of one of his notebooks words to the effect, "school is meant for learning, not for being picked on."

Mr. Nielsen provided a very thorough account as to his involvement in this matter. He does not disagree with the facts as presented by Mrs. Myers, and he acknowledges that Mrs. Myers was understandably frustrated by what her son was experiencing. After the February 3rd meeting with Mrs. Myers, he met with John's teachers to make them aware of the concerns and to ask them to make an effort to be watchful on behalf of John. Mr. Nielsen also addressed the issue one-on-one with each aggressor. He specifically sought the cooperation of one of the aggressors, believing that this student ["Student A"] commands the respect of and would be listened to by his peers.

[1] Mrs. Myers testified that she believed that October 31 was the open enrollment deadline. This is discussed further under "Conclusions of Law" as we analyze why the family missed the filing deadline.

On February 9, a day on which John was absent from school due to illness, Mr. Nielsen talked to Student A, who told him that he and the other boys were leaving John alone. (Also on or about this date the mother of one of the boys complained to Mr. Nielsen that John had initiated the name-calling on one occasion, and the other boys had responded in kind. Mr. Nielsen dutifully reported this to Mrs. Myers, who may have perceived this as an attempt to deflect responsibility onto John. We find that Mr. Nielsen was performing his job, and was merely giving the facts – as reported to him – to Mrs. Myers. In any event, even if John instigated some confrontations, it does not diminish the culpability of the other boys.) The next day, February 10, Mr. Nielsen continued to talk to the other boys, warning them of adverse consequences if they persisted in harassment of John.

After his own brief absence from school, Mr. Nielsen returned on February 13 to learn that John had been punched in the groin on the 11th. He called Mrs. Myers to suggest "peer-to-peer mediation," in which each student could "hear the other out." Thinking that John was too depressed to do this, Mrs. Myers declined, but she did file a formal complaint.[2] Later that same day, Mr. Nielsen talked to John and was told by John that no one had called him any derogatory names lately. Mr. Nielsen also talked to John's best friend, who also reported that things were going OK for John. Three days later, Mr. Nielsen again discreetly checked with John, and received the same "it's going OK" type of response. This question and response were repeated on February 19, February 27, March 23, and April 1.

A letter was sent on February 17 from the District to the parents of all of the students implicated in the harassment of John. A copy of the letter was not made available at this hearing. However, Mr. Nielsen testified that the letter emphasized the seriousness of the situation, asking parents to address the allegations with their children. The letter closed by stating that the local county sheriff's office would be asked by the District to intervene if the students did not voluntarily cease the harassment.

On February 20, Mr. Nielsen called Mrs. Myers. He left a message on her voice mail as to the name of the District's school psychologist, but received no call back from Mrs. Myers. He called her again March 5, and was told by Mrs. Myers that John was seeing a private therapist, so the family did not plan to have John visit with the school's psychologist. Also during the March 5 telephone conversation, Mrs. Myers reported to Mr. Nielsen that while John was not being "picked on," he was not comfortable being at school.

On March 31 at a faculty meeting, Mr. Nielsen reminded the staff to "keep an eye" on the situation. Staff told Mr. Nielsen at that meeting that John had become "super argumentative," and was refusing help in math and science. The next day, April

[2] The District has initiated its own local complaint procedure for investigation of peer harassment complaints. Secondary Principal Phil Casey is the designated investigator. Neither party makes an issue of the complaint process; we merely note that this additional step was available to and utilized by the parties.

1, Mr. Nielsen talked to John about this. John acknowledged that he had recently performed poorly on a science test, but stated that "it was going better now."

Also on April 1, Mr. Nielsen called Mrs. Myers to inform her that the open enrollment request on behalf of John would be voted on by the local Board on April 5. While he never told Mrs. Myers that she could not be present for that meeting, he believes that he may have stated to her that her presence was not necessary. Mr. Nielsen remembers telling her that he expected the Board to do "what's best for John." Mrs. Myers testified that she did not attend the April 5 local Board meeting, relying on a belief that the Board would approve open enrollment for John.

The minutes of the April 5 local Board meeting reflect that the open enrollment request was denied on a vote of 5-0. Board President Wernimont testified that the Board was made aware by Mr. Nielsen of the extent of the harassment of John by his peers. In his opinion, the Board's denial of the open enrollment request was for two reasons: (1) the Board believed that the District and AEA were appropriately dealing with the harassment[3] and (2) the Board was reluctant to depart from its usual and customary practice of denying all late-filed open enrollment applications.

II.
CONCLUSIONS OF LAW

The controlling statute for this appeal is the open enrollment law, Iowa Code section 282.18. In general, open enrollment requests must be filed on or before January 1 of the school year preceding the school year for which open enrollment is requested. Subsection (5) of the law involves applications filed after January 1, seeking open enrollment due to "repeated acts of harassment of the student or serious health condition of the student that the resident district cannot adequately address." The last sentence of 282.18(5) is as follows:

> The state board shall exercise broad discretion to achieve just and equitable results that are in the best interest of the affected child or children.

Only three prior cases serve as precedent for this type of appeal. In the first such case, *In re Melissa J. Van Bemmel*, 14 D.o.E. App. Dec. 281 (1997), the student had experienced harassment by a group of about 20 students that had caused her to seek medical and mental health treatment for a variety of physical ailments, as well as for anorexia, depression, and insomnia. The harassment ranged from late night phone calls to life-threatening behavior where she was in a vehicle that was chased by other vehicles

[3]The Prairie Lakes Area Education Agency ["AEA 8"] intervened on John's behalf, at the request of District personnel. An AEA 8 consultant contacted Mrs. Myers for the purpose of coordinating counseling services. No specific testimony was offered regarding the AEA's involvement.

and twice pushed off the road. The threats and harassment started in the fall, but stopped at that time with appropriate intervention by the District. However, the incidents resumed in January, and despite the family repeatedly working with school officials and law enforcement to solve the problem, the State Board noted that the "District is unable to effectively address the situation at school and the police are unable to effectively address the situation outside of school." 14 D.o.E. App. Dec. at 285.

In ordering that Melissa be allowed to open enroll out of the district, the State Board provided six guiding principles for districts to use to analyze open enrollment requests based upon allegations of harassment.[4] Those guidelines were affirmed in *In re Jeremy Brickhouse*, 21 D.o.E. App. Dec. 35 (2002), where this Board reversed the local Board's decision not to allow Jeremy to open enroll out. The indignities and degradation to which Jeremy was subjected are explained in great detail in that decision; suffice it to say, they were found by this Board to go well beyond "typical adolescent cruelty." It is also noteworthy that Jeremy developed a severe case of hives which took six weeks to heal.

The next and most recent appeal of an open enrollment request due to alleged harassment is *In re Mary Oehler*, 22 D.o.E. App. Dec. 46 (2004). Concluding that the original six guidelines are now too restrictive for victims of harassment, this Board promulgated a new set of guidelines, as follows:

1) The harassment must have happened after January 1, or the extent of the problem must not have been known until after January 1, so the parents could not have filed their applications in a timely manner.

2) The evidence must show that the harassment is likely to continue.

3) The harassment must be beyond typical adolescent cruelty. We caution schools not to be bound by a strict formula of what constitutes typical adolescent cruelty, as this can depend heavily on the circumstances, the age and maturity level of the students involved, etc. *Usually* such immature behavior as name-calling, taunting, and teasing – when done with no intent to physically harm or scar the other child's psyche – can be viewed as typical adolescent cruelty. This is not by

[4] Those guidelines were as follows: (1) The harassment must have happened after January 1, or the extent of the problem must not have been known until after January 1. (2) The harassment is likely to continue. (3) The harassment must be widespread in terms of numbers of students and the length of time harassment has occurred; relatively severe with serious consequences, such as necessary counseling, for the student who has been subject to the harassment; and must be beyond typical adolescent cruelty. (4) The parents must have tried to work with school officials to solve the problem without success. (5) The evidence of harassment must be specific. (6) There must be reason to think that granting the student's open enrollment request will alleviate the situation.

any means to say that schools should take lightly such cruelty. Schools must address typical adolescent cruelty quickly and seriously. However, for purposes of open enrollment requests based on harassment, the acts must be more than typical adolescent cruelty. Once a school has determined that the harassment goes beyond typical adolescent cruelty, we no longer require evidence that more than one student was the perpetrator of the harassment or that the harassment continued over any particular length of time. Nor does there need to be proof of serious consequences, such as necessary counseling, for the student who has been subject to the harassment.

4) School officials, upon notification of the harassment, must have worked without success to resolve the situation.

5) The evidence of harassment must be specific.

6) Finally, there must be reason to think that changing the student's school district will alleviate the situation.

Our analysis of the facts of this case under the new principles is as follows.

1) *Timing.* Clearly, the extent of the harassment against John occurred after January 1. The testimony of both parties focuses on events and interventions that followed January 1, leading us to conclude that this criterion is satisfied. (It is troubling that some of the District's student handbooks still contained the former open enrollment deadline of October 31. The Iowa General Assembly changed this deadline in *1996* legislation. However, the District attempted to cure the error in a newsletter that was sent to all patrons of the District.)

2) *Likelihood that harassment will continue.* The evidence in this regard is not conclusive. Accordingly, we give the benefit of any doubt to the child.

3) *Severity.* John was physically assaulted by being punched in the shoulder and the groin area. There is no evidence that these assaults were anything but minor. However, what was not minor was the constant taunting that John was subjected to, making him dread going to school and actually refusing to attend on one occasion.

In a class of just 36 students, one-half of whom presumably are male, eight students acted to take away from John any perception of school as a safe haven where learning could take place. John's experience was that nearly half of his male classmates were actively engaged in attempts to physically and/or emotionally harm him. We conclude that this criterion is satisfied.

4) *Resolution attempts by school officials*. We find no fault whatsoever with the efforts made by John's principal, Mr. Nielsen, to end the harassment. Mrs. Myers perceives that other District personnel did not take her allegations as seriously as she desired, but we have no evidence that the school did not act responsibly and appropriately. Making Mrs. Myers aware that at least one parent stated that John had also engaged in name-calling does not mean that the school was negligent in proactively protecting John. This criterion has not been met.
5) *Specificity*. The purpose of this guideline is to ensure that this Board is not left to guess at what happened in a given case. The allegations of harassment in this case are specific enough for us to know what occurred.

6) *Effect of change.* Mrs. Myers testified that she had no reason to believe that John would not have a positive experience in senior high school at the Newell-Fonda District. However, she expressed that she was not willing to wait another full school year. Given John's threat to quit school and given his written statement about school on his book cover, this is not an unreasonable position for a parent to take. John needs a change, and there is no other middle school attendance center in this District for him to attend. Although John may have engaged in some reciprocal name-calling with one or more of his harassers at Newell-Fonda, he did not create the initial hostile climate against himself. Therefore, we have no reason to believe that John will instigate any confrontations at his new district of attendance.

Although this is an extraordinarily close case, if we err it is on the side of John's safety.

It is critical to our decision that Iowa Code section 282.18(5) demands that we "exercise broad discretion to achieve just and equitable results that are in the best interest of the affected child… ." [Emphasis added.] This is a different standard of review from our chapter 290[5] general standard of review. In a section 290.1 appeal we review the local board's decision to determine whether it is "unreasonable and contrary to the best interest of education." [Emphasis added.] *In re Jesse Bachman*, 13 D.o.E. App. Dec. 363, 369 (1996). We view the language of section 282.18(5) as a mandate to give the benefit of any doubt to the child.

[5]Iowa Code Chapter 290 provides generally from appeals to the State Board from other decisions or orders of local boards.

III.
DECISION

For the foregoing reasons, it is recommended that the decision of the Board of Directors of the Newell-Fonda Community School District made on April 5, 2004, denying the open enrollment request filed on behalf of John Myers be REVERSED. There are no costs of this appeal to be assigned.

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Date Carol J. Greta, J.D.
Administrative Law Judge

It is so ordered.

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Date Gene E. Vincent, President
State Board of Education