



No. 15987

# The University of the State of New York

## The State Education Department

Before the Commissioner

Appeal of J.A., on behalf of his children, from action of the Board of Education of the Levittown Union Free School District regarding educational placement.

Appeal of J.A., on behalf of his children, from action of the Board of Education of the Levittown Union Free School District, Principal Joanne Wallace and Lynn Dionisio, regarding educational placement.

Ingerman Smith, LLP, attorneys for respondents, Jonathan Heidelbergger, Esq., of counsel

In two separate appeals, petitioner challenges the determination of the Board of Education of the Levittown Union Free School District ("board" or "respondent board"), elementary school principal Joanne Wallace ("Wallace") and kindergarten teacher Lynn Dionisio ("Dionisio"), (collectively "respondents") that his twins be placed in separate classes for the 2008-2009 school year. Because the appeals present similar issues of fact and law, they are consolidated for decision. The appeals must be dismissed.

Petitioner's twins attend Abbey Lane Elementary School ("Abbey Lane") in the Levittown Union Free School District ("district"). At petitioner's request they were placed in the same kindergarten class for the 2007-2008 school year. On June 3, 2008, petitioner requested that they be placed in the same first grade class. On June 5, 2008, petitioner met with Dionisio, Wallace and the school psychologist and was informed that the twins would be placed in separate

classes for first grade. By letter dated June 11, 2008, the superintendent affirmed this decision. Petitioner's first appeal ensued and his requests for interim relief were denied.

On September 19, 2008 petitioner commenced a second appeal ("second appeal"), which named Wallace and Dionisio as additional respondents, and he requested that it be consolidated with his first appeal.

In the first appeal, petitioner contends that the board's determination was arbitrary and capricious and seeks an order permitting the twins to remain in the same first grade class. Petitioner also claims that the district disregarded the guidelines of the New York Association of School Psychologists ("NYSAP"), the Educational Resources Information Center ("ERIC") and the National Association of Elementary School Principals ("NAESP") pertaining to the class placement of twins. In his second appeal, petitioner also claims that Wallace and Dionisio conducted themselves improperly; that the board failed to investigate petitioner's allegations of improper conduct; and that respondents' attorney, who is also a special education impartial hearing officer, should not be allowed to practice before the State Education Department.

Respondents maintain that there was a rational basis for their decision. Respondents also claim that petitioner fails to state a cause of action and that the appeals are moot. Respondents further argue that any claims relating to the 2009-2010 school year are not yet ripe. Respondents also assert that the petition in the second appeal should be dismissed because it does not contain a clear and concise statement of petitioner's claims showing that he is entitled to the relief sought. Finally, respondents claim that petitioner failed to obtain personal jurisdiction over Wallace and Dionisio.

I must first address several procedural matters. A petition must contain "a clear and concise statement of the petitioner's claim showing that the petitioner is entitled to relief, and shall further contain a demand for the relief to which the petitioner deems himself entitled" (§ NYCRR §275.10). Such statement must be sufficiently clear to advise a respondent of the nature of petitioner's claim and of the specific act or acts complained of (*id.*). Where a petition fails to state a comprehensible claim and fails

to identify the specific remedy sought, it will be dismissed (see Appeal of Farrell, 45 Ed Dept Rep 224, Decision No. 15,308; Appeal of Darrow, 43 *id.* 394, Decision No. 15,029). While I agree that the second petition could be more clear and concise, I find that petitioner's claims and demand for relief with respect to the twins' placement are adequately set forth. Respondents have not alleged or demonstrated that any prejudice resulted from the lack of clarity in the petition. Accordingly, I decline to dismiss the petition on this basis.

Additional affidavits, exhibits and other supporting papers may only be submitted with the prior permission of the Commissioner (8 NYCRR §276.5). While this provision permits the submission of additional evidence, it cannot be used to add new claims against a respondent for which notice has not been provided (Appeals of Cass, et al., 46 Ed Dept Rep 321, Decision No. 15,521; Appeal of Johnson, 46 *id.* 67, Decision No. 15,443). In both appeals, petitioner has continuously sought permission to submit additional exhibits and supporting papers for consideration. Respondents objected to certain additional submissions. Accordingly, while I have reviewed petitioner's additional submissions, I have not considered additional exhibits and supporting papers that constitute new allegations or are not responsive to the pleadings.

With respect to personal service, the record indicates that Wallace was personally served with a copy of the petition within 30 days of the board's determination. It also appears that Dionisio was personally served after several unsuccessful attempts and a request for alternate service. Any delay in service on Dionisio was minimal and excusable under the circumstances. Accordingly, I will not dismiss the appeal against Wallace and Dionisio for lack of personal service.

However, both appeals must be dismissed as moot. The Commissioner will only decide matters in actual controversy and will not render a decision on a state of facts which no longer exist or which subsequent events have laid to rest (Appeal of Tine, 46 Ed Dept Rep 579, Decision No. 15,600; Appeal of N.C., 46 *id.* 358, Decision No. 15,532; Appeal of Lombardo, 46 *id.* 282, Decision No. 15,508). Since the 2008-2009 school year has ended, petitioner's appeals concerning his children's placement for that school year are moot and must be dismissed. The record does not

address placement for any subsequent school years. Thus, to the extent petitioner seeks to address his children's placement for the 2009-2010 school year, the appeals must be dismissed as premature. The Commissioner will not render an advisory opinion on an issue before it becomes justiciable (Appeal of Lachler, 47 Ed Dept Rep 455, Decision No. 15,752; Appeal of Fioretti, 45 id. 188, Decision No. 15,297; Appeal of Lombardo, 44 id. 167, Decision No. 15,135).

Even if the appeals were not dismissed on procedural grounds, they would be dismissed on the merits. A board of education has broad authority, under Education Law §1709 (3), to prescribe the course of study and to regulate the admission of pupils and their transfer from one class to another. Consistent with that authority, a board has the power to place students in particular classes (Appeal of Gergely, 47 Ed Dept Rep 423, Decision No. 15,742; Appeal of J.K. and M.B., 40 id. 368, Decision No. 14,500; Appeal of Dawn H., 39 id. 635, Decision No. 14,336). The Commissioner will not substitute his judgment for that of a board of education with respect to student placement, absent evidence that the board has acted in an illegal, arbitrary or capricious manner (Appeal of Gergely, 47 Ed Dept Rep 423, Decision No. 15,742; Appeal of J.K. and M.B., 40 id. 368, Decision No. 14,500; Appeal of Dawn H., 39 id. 635, Decision No. 14,336). In an appeal to the Commissioner, a petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which petitioner seeks relief (8 NYCRR §275.10; Appeal of Brown, 46 Ed Dept Rep 584, Decision No. 15,602; Appeals of Hubbard, 46 id. 533, Decision No. 15,585; Appeal of Darrow, 46 id. 182, Decision No. 15,477).

Respondents submit an affidavit from Wallace, explaining Abbey Lane's policy regarding class placement. Although the school does not have a specific policy on the placement of twins, the school tries to achieve a "balance" for each class. This "balance" refers to the number of boys versus girls, and the various academic levels and special needs of the students. Teacher and confidential parent input may also be considered. This policy was followed with respect to the twins' first grade class placement, which included consideration of petitioner's request that the twins stay together, as well as input from Dionisio as the children's kindergarten teacher. Dionisio

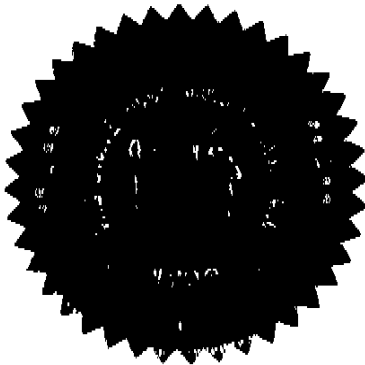
recommended that the twins be separated in first grade in order to avoid comparisons that "can grow into competition" and to help foster their individuality.

Petitioner argues that respondents failed to consider the guidelines issued by NYSAP, ERIC and NAESP pertaining to the separation of twins in class placement. However, petitioner cites no specific legal authority for the proposition that school districts are bound by these guidelines in making class placement decisions, and indeed there is no such authority. Petitioner also references a 2007 bill that passed the New York State Senate but was never enacted into law. As such, this legislative proposal has no bearing on the outcome in this matter.

In sum, petitioner has failed to demonstrate that respondents' determination was arbitrary, capricious or illegal. Respondents' decision was rationally based on professional judgments as to the appropriate placement of petitioner's children. In addition, I note that reports prepared by the school's psychologist and social worker, which were submitted as evidence by petitioner, indicate that both children adapted well to first grade.

I have considered petitioner's remaining arguments, including those concerning representation by the district's attorney in these proceedings, and find them to be without merit.

THE APPEALS ARE DISMISSED.



IN WITNESS WHEREOF, I, Carole F. Huxley, Interim Commissioner of Education of the State of New York for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this *21<sup>st</sup>* day of *September*, 2009.

*Carole Huxley*  
Interim Commissioner of Education