

THE STATE OF NEW HAMPSHIRE
BOARD OF EDUCATION

Student/Madison School Board
SB-FY-09-03-014

RECOMMENDED DECISION

INTRODUCTION

This is an appeal of the March 3, 2009 decision of the Madison School Board (hereinafter "Madison") denying Parent's request for a change of school assignment on behalf of her daughter (hereinafter "Student").

FACTS

Student is currently a sophomore at Hanover High School. Her family has resided in Hanover since 2006; prior to that, the family resided in Madison for many years and have continued to own a home there. In June of 2009, the family plans to move back to Madison. While attending Hanover High School, Student took two years of Latin; Kennett High School, to which Madison sends its students, does not offer Latin. According to Parent, Student is interested in a career in veterinary medicine and needs to continue on to advanced Latin courses.

On January 14, 2009, Parent wrote to Superintendent Poirier and Madison School Board Chair Sara Parsons, requesting a change of school assignment to Fryeburg Academy in Maine. The basis for the request was a) best interest of the child and b) manifest educational hardship. Parent asserted that, because Kennett High School does not offer Latin, Student should be transferred to Fryeburg Academy in Maine, which does offer Latin.¹ Parent maintained that Student must continue with Latin "in order to be acceptable to many colleges and to best prepare for a potential medical education", and that not being able to transfer constituted manifest educational hardship. Although there are other public New Hampshire high schools offering Latin, Fryeburg Academy is the closest geographically. Parent is unwilling to consider the other in-state high schools, believing it impractical to send Student further away when there is a much closer option.

On February 26, 2009, the Madison School Board held a hearing on the Parent's request. Parent attended that hearing. By letter dated March 3, 2009, the Superintendent notified the Parent that her request had been denied. This appeal followed.

¹ Parent asserted that she had been advised that Fryeburg offers advanced Latin courses; however, Fryeburg's website indicates that it only offers Latin I and II, which Student has already taken. Madison Exh. K.

A prehearing conference was held on March 31, 2009, following which a Prehearing Order was issued. The parties agreed that this matter could be determined by record review, without the necessity of calling witnesses.

The parties were given the opportunity to present oral and/or written argument. They appeared for oral argument on April 29, 2009. Parent presented on behalf of the Student; Gwen Poirier, Superintendent, and Sara Parsons, Madison School Board member, appeared with Attorney Barbara Loughman. Both parties articulated their respective positions clearly and submitted exhibits.

As the appealing party, the Parent had the burden of proof as to whether the unavailability of Latin at Kennett High School, and denial of tuition to Fryeburg Academy constituted manifest educational hardship for the Student

On April 10, 2009, Madison filed a Motion to Dismiss, a ruling on which was held in abeyance pending oral argument

DISCUSSION

First, Parent contends that Student should be reassigned to Fryeburg Academy based upon the "best interest" standard. A superintendent may reassign a student to another public school based upon the best interests of the student. RSA 193:3(III)(a). However, a superintendent's decision as to reassignment based upon best interests is final. RSA 193:3(III) (h). Accordingly, the "best interest" standard cannot form the basis of an appeal

The only issue is whether there is manifest educational hardship within the meaning of the governing regulations. To establish a manifest educational hardship, the Parent must prove, by clear and convincing evidence, that:

- 1) A substantial portion of a pupil's academic, physical, personal *and* social needs cannot be met by the assigned school or are not found within the student Body of the assigned school;
- 2) The assigned school's failure to meet the pupil's needs will impair the educational progress of the pupil, *and*
- 3) Another *public* school, either within the district or in another district, reasonably meet the pupil's educational needs.

Ed 320.01(e)(1) – (3) (emphasis added).

No evidence was presented as to Student's current educational experience, or that it was being negatively affected in any way. There was no showing that Student's academic, physical, personal *and* social needs could not be met at Kennett High School. Likewise, there was no showing that the unavailability of Latin would impair Student's

educational progress. Student has not yet even decided upon prospective colleges; whether she would in fact be denied admission is purely speculative. Additionally, as was noted at the hearing before the Madison School Board, there are other possible alternatives such as online courses and in-state public high schools that offer Latin.

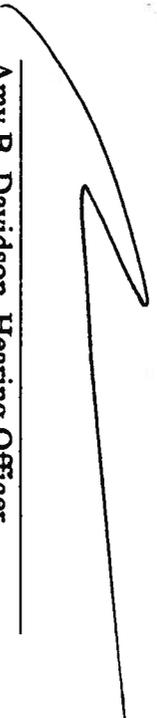
The Parent must also demonstrate that a circumstance exists which applies to the particular needs of the Student rather than generally to all students. The lack of availability of a Latin course, which applies to all students rather than the educational needs of any one student, does not constitute a manifest educational hardship. *See, e.g., Fremont School Board, SB 01-08 (July 31, 2001); Franklin School District v. Hill School District, SB-044-97 (November 28, 1997); aff'd by State Board (January 26, 1998).* In short, there was essentially no evidence presented as to the first two regulatory provisions.

As to the third element of proof, there was a good deal of debate as to whether Fryeburg Academy is a public school within the meaning of the applicable law. Parent argues that Fryeburg should be considered a public school because it contracts with several towns to serve as those towns' high school. However, Fryeburg is listed by the Maine Department of Education as an approved private school. *Madison Exh. D.* Acceptance of public funds by a private school does not make it a public school for purposes of this analysis.

CONCLUSION AND RECOMMENDATION

The Parent has presented her position in a thoughtful, well-researched manner. Nonetheless, it is a position that, given these facts, is not supported by the applicable law. Accordingly, it is recommended that the State Board uphold the decision of the Madison School Board.

Date: May 4, 2009



Amy B. Davidson, Hearing Officer

THE STATE OF NEW HAMPSHIRE
BOARD OF EDUCATION

Student/Madison School Board

SB-FY-09-03-014

ORDER RELATIVE TO MOTION TO DISMISS

The Motion to Dismiss filed by the Madison School Board will be held in abeyance pending the oral argument scheduled for April 29, 2009. The motion will be addressed in the Hearing Officer's proposed decision to the State Board.

So ordered.

Signed,
Amy B. Davidson

Date: April 27, 2009

Amy B. Davidson, Hearing Officer

Cc: Parent, Attorney Loughman

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Student

v.

Madison School District

IDPH FY 09-03-014

MOTION TO DISMISS

NOW COMES the Madison School District, by its attorneys, Soule, Leslie, Kidder, Sayward and Loughman and moves for dismissal of the parent request that her daughter be assigned to Fryeburg Academy under RSA 193:3 for the reasons set forth in the attached Memorandum of Law.

Respectfully submitted,

MADISON SCHOOL DISTRICT

By Their Attorneys

SOULE, LESLIE, KIDDER,

SAYWARD & LOUGHMAN, PLLC

Dated: April 10, 2009

By:



Barbara F. Loughman, Esq.

16 Depot Street, PO Box 908

Wolfeboro, NH 03894

(603) 569-8044

RULE 3 CERTIFICATION

I hereby certify on the _____ day of April 2009, a copy of the foregoing Motion was mailed via First Class, postage prepaid to the following party, Donna Lane, Pro Se.



Barbara F. Loughman

Student

v.

Madison School District

IDPH FY 09-03-014

MEMORANDUM OF LAW

Madison School District, by and through its attorneys, Soule, Leslie, Kidder, Sayward and Loughman respectfully submits this Memorandum of Law with its Motion to Dismiss and in response to the April 3, 2009 Prehearing Conference Order, in the above captioned case.

The case should be dismissed, because RSA 193:3 and the implementing state and local regulations do not authorize placement in a private school. Fryeburg Academy is a private school. Furthermore, the unavailability of Latin at Kennett High School is not a Manifest Educational Hardship.

PROCEDURAL BACKGROUND

On January 14, 2009, the parent wrote to Superintendent Gwen Poirier and Sara Parsons, Chairman of the Madison School Board, to request a change of school assignment based on the Best Interest Of The Child standard and Manifest Educational Hardship. Parent explained that her daughter had two years of high school Latin and must continue with Latin to be acceptable to many colleges and to best prepare for a potential medical field education. Kennett High School does not offer Latin. Fryeburg Academy, which she described as a public school that accepts a minority of private students, offers Latin.

Parent also explained in her letter that they had lived in Madison for 13 years, moved to Hanover where they resided from 2006, through the present, and now plan

to move back to Madison in June.

On February 26, 2009 the School Board held a hearing on the parent request and voted unanimously to deny the request. On March 3, 2009, the Superintendent notified the parent, by letter, of the School Board decision to deny the request.

On March 13, 2009, the State Board received the parent appeal, which is dated March 11, 2009.

DISCUSSION.

1. There is no appeal from a superintendent's decision not to reassign a pupil under the Best Interest of the Child standard.

RSA 193:3, III empowers school boards to authorize their superintendents "to reassign a pupil from the public school to which he or she is currently assigned to another public school, or to approve a request from another superintendent to accept a transfer of a pupil from a school district." RSA 193:3, III (h) provides that "notwithstanding RSA 21-N:11, III (3), for the purposes of this paragraph, the decision of the superintendent shall be final." Therefore, the issue in this appeal is whether or not the request meets the standard for Manifest Educational Hardship as set forth in RSA 193:3, not the Best Interest of the Child standard.

2. New Hampshire law does not allow a school district to assign a child to attend a private school under RSA 193:3, the Manifest Educational Hardship statute.

Under RSA 193:3, I a parent may apply to the school board for reassignment of a child to different school than that which she would otherwise attend, on the basis of Manifest Educational Hardship, to the child. If the local board denies the request, the parent may appeal to the State Board which has the authority to "order such child to attend another school in the same district, if such a school is available, or to attend school in another district." Although an argument can be made that the reference to school, in RSA 193:3 does not necessarily exclude private school, the reference to "district" in the statute and New Hampshire State Board of Education decisions and

regulations make it clear that school means public school, and the only possibility is assignment to a public school.

In 1996, the State Board of Education held that “New Hampshire state law does not provide for direct payments to private schools except in very limited situations, or payments to parents to offset such tuition costs.” Tamworth School District (In Re: John D.), SB 024-96; (In Re: Michael B.), SB 022-96 page 1. Attached as Exhibit A. That decision stated clearly that Manifest Educational Hardship is not one of the limited situations in which school boards may pay for private school tuition.

In 1998, the State Board of Education adopted Ed 320, Manifest Educational Hardship. That rule, as originally adopted provided that

A parent...[who] thinks that the attendance of the child at the school to which such child has been assigned will result in a manifest educational hardship to the child... may apply to the school board for a change of school assignment to: (1) attend another school in the same district; (2) attend a public school in another district. Ed 320.01 (a).

When that rule was reenacted, effective May 16, 2008, the State Board clarified the rule by providing that the choices are for the student to “(1) attend another public school in the same district; or (2) attend a public school in another district. Ed 320.01 (a) (1) and (2). (emphasis added).

Both the 1996 rule and the current rule, also provide that

“(c) if a school board determines that manifest educational hardship has been found, the school board shall issue a waiver of the school assignment and the student shall be reassigned to a reasonably available public school, in the district or in another district.” Ed 320.01 (c).

The Madison School Board has also adopted a Manifest Educational Hardship Policy. That policy, like the state regulations, permits reassignment only to another public school. See Madison School Board Policy JEC attached as Exhibit B.

Finally, the legislative history also indicates that placement in private school

under the Manifest Educational Hardship statute is not permitted. In April 1999, the House Committee on Education voted House Bill 701 “inexpedient to legislate.” That bill would have granted parents education vouchers to help pay tuition at any school, including private schools. What the parent is requesting here is a voucher to apply against private school tuition.

3. Fryeburg Academy is not a public school.

In her application to the School Board, the parent asserts that Fryeburg Academy is a public school. Although Fryeburg Academy provides education to some students placed there by Maine public school districts, Fryeburg Academy is not a public school. Attached, as Exhibit C, is the list from the Maine Department of Education of approved public schools. Fryeburg Academy is not on the list. Attached, as Exhibit D, is the list from the Maine Department of Education of approved private schools. Fryeburg Academy is on this private school list. Attached as Exhibit E is the list of public secondary schools, in the state of Maine, put out by the New England Association of Schools and Colleges. Again, Fryeburg Academy is not on the list of public schools. Attached as Exhibit F is the New England Association of Schools and Colleges list of independent (private) schools in Maine. Fryeburg Academy is on the private school list.

Furthermore, Fryeburg Academy describes itself as “an independent secondary school that serves a widely diverse population of local day students and boarding students from across the nation and around the world.” Exhibit G. Indeed, as explained by the Headmaster in his “Headmaster’s Welcome”, “our diverse student body enjoys all the advantages of a private education at a school that also serves youngsters from many villages of western Maine and eastern New Hampshire.” See Headmaster’s Welcome attached as Exhibit H. Fryeburg Academy’s tuition and financial aid policy and schedule of fees also make it clear that Fryeburg Academy is a private school. See Exhibit I. The fact that Fryeburg Academy accepts students

placed at Fryeburg Academy by nearby Maine school districts does not make it a public school.

Fryeburg Academy is also not a public academy under New Hampshire law.

RSA 194:23 II defines public academy to mean

“an independent school which contracts with one or more school districts to provide education services to such districts in compliance with RSA 194:23. All contracts between a public academy and a school district must be approved by the state board of education. In this section, ‘independent school’ means a school which is governed by a board of trustees or other officials who are not publicly elected. An independent school shall not include a charter school established under RSA 194-B.”

RSA 194:23, I requires public high schools and public academies* to comply with the New Hampshire state standards prescribed by the State Board of Education and to teach certain mandated subjects, including “instruction in history, government, and constitutions of the United States and New Hampshire and of the organization and operation of New Hampshire municipal, county, and state government.”

Furthermore, the State Board of Education has already ruled that placement at a public academy is not permitted, under the Manifest Educational Hardship statute. Tamworth School District (In Re. John D.) SB 024-96; (In Re Michael B.) SB 022-96, page 1. Attached as Exhibit A. Specifically, the State Board pointed out that

“the law calls for tuition in such [manifest educational hardship] cases to be paid to the “district in which such child attends.” Also citing RSA 193:4 such payments are based “upon the tuition costs of the receiving district.” Districts are public entities.

Districts not operating public schools. RSA 194:27 is clear in that it expressly states such tuition payments to enrollment in “an approved public high school... or in approved public high school... or an approved public academy.” Nor does RSA 194:22 apply since it contemplates a single school serving as the district’s high school.”

* Pinkerton Academy in Derry and Coe Brown in Northwood are “public academies” under New Hampshire law and, as such, are subject to the NH State Standards.

In other words, although a district may contract with an approved public academy, as a result of which the approved public academy serves as the district's high school, placement of an individual student in an approved public academy, under the Manifest Educational Hardship statute, is not permitted.

4. The unavailability of Latin at Kennett High School is not a Manifest Educational Hardship.

The parent claims that her daughter will suffer a manifest educational hardship, because she has taken two years of Latin in her current school in Hanover, whereas Kennett, the high school to which students from Madison are assigned, under the District's Tuition Agreement, does not offer Latin. It is clear from the Minutes of the February 26, 2009 School Board meeting and from the parent's comments at the prehearing, that the only placement she would consider is Fryeburg Academy. See Minutes, attached as Exhibit J. There is a statement in the Minutes that there may be other opportunities to take third and fourth year Latin, including online courses, community college courses, or by augmenting classes between the schools. Again, however, the parent was not interested in any other possibilities. The parent also was not willing to consider any other public schools, because Fryeburg Academy is the closest school.

RSA 193:3 does not define "manifest educational hardship." From 1921 until 1969, the statute that is now RSA 193:3, provided that the State Board of Education could reassign a child to a school, other than the school to which she was assigned, by the school district of residence, if it was in the best interest of the child. From 1969 until 1973, RSA 193:3, I, allowed the State Board to reassign a child based upon manifest hardship.

In 1974, the New Hampshire Supreme Court defined the “manifest hardship” standard for reassignment that was set forth in RSA 193:3, I, for the 1969-1972 school years. Lisbon Regional School District v. Landaff School District, 114 N.H. at 674, 676 (1974). The Court held that the kind of “hardship” contemplated by the statute was a difficulty or deprivation arising from: (1) problems accessing the assigned school; (2) the physical or mental condition of the pupil; or (3) the availability of the school to which a reassignment is sought of courses better suited to the educational needs of that particular child. Id. at 677. The Court also held that a hardship is “manifest” if it is obvious and apparent. Id.

The Legislature amended RSA 193:3, I, in 1973 to permit reassignment under that statute only for a “manifest educational hardship.” The parent’s reliance on Lisbon v. Landaff to support her claim that the unavailability of Latin at Kennett High School constitutes a Manifest Educational Hardship is misplaced. First, Lisbon v. Landaff was decided under a previous version of the statute.

To establish a manifest educational hardship, the parent must prove that the hardship “is likely to affect the educational needs of a particular child, not general conditions or circumstances which affect or could affect numerous children attending a given school.” Franklin School District v. Hill School District, State Board Case No. SB-014-97, at 12 (Nov. 28, 1997), aff’d by State Board (Jan. 26, 1998) (emphasis added). The absence of Latin at Kennett High School affects all Kennett students, not

just Jenelle and she is unlikely to be the only student interested in pursuing a medical career. Furthermore, the parent has presented no evidence that high school latin is required for a medical career.

In addition, after RSA 193:3 was amended, the State Board of Education adopted regulations to clarify the criteria needed to establish a manifest educational hardship. Those regulations place the burden of proof on the parents to prove to the local school board by “clear and convincing evidence” that:

- (1) A substantial portion of a pupil’s academic, physical, personal and social needs cannot be met by the assigned school or are not found within the student body of the assigned school;
- (2) The assigned school’s failure to meet the pupil’s needs will impair the educational progress of the pupil; and
- (3) Another public school, either within the district or in another district, may reasonably meet the pupil’s educational needs.

Id. at 320.01(e)(1)-(3). (emphasis added)

Thus, Ed 320.01 (e) requires that the parent prove by clear and convincing evidence that: (1) Jenelle’s academic, physical, personal and social needs will not be met by, or are not found within, Kennett High School; (2) Kennett High School’s failure to meet these needs will impair Jenelle’s educational progress; and (3) another public school will meet Jenelle’s educational needs. Establishing the first and second elements of this test requires a two-step process. Unless the parent satisfies the first element, that Jenelle’s academic, physical, personal and social needs will not be met,

the parent cannot go on to establish the second element, that the school's failure to meet each of these needs will result in an impairment to Jenelle's educational progress. By failing to establish the first element by clear and convincing evidence, the parent's claim fails, as a matter of law, and should be dismissed.

The parent cannot establish by clear and convincing evidence, that all four of Jenelle's educational needs will not be met simply because Kennett High School does not offer Latin. The parent provided no evidence as to Jenelle's physical, personal and social needs. Furthermore, given the number of courses high school students are required to take, two years of high school Latin does not rise to the level of "a substantial portion" of a student's academic needs.

The parent has submitted information from About.com regarding foreign language requirements for admission to the most competitive colleges. For the most part, the schools on the list expect two or more years of a foreign language, which Jenelle already has, in Latin. In addition, Kennett High School offers other foreign language courses in French, Spanish and German. Furthermore, if the parent believes that it is that important for Jenelle to take third and fourth year Latin, there are other options available, which were discussed at the School Board meeting, including online courses, community college courses and other public high schools, which may offer Latin, and none of which the parent was willing to consider. If Jenelle intends to pursue a medical career, and more than two years of high school Latin is really

necessary, she can take Latin in college.

Finally, many changes have been made in the New Hampshire Department of Education regulations since the 1973 amendment to RSA 193:3 requiring proof of a Manifest Educational Hardship. The state has adopted regulations for high school curriculum, see Ed 306.27 through Ed 306.48. The curriculum regulations and curriculum frameworks were adopted under the requirements of RSA 193-E, Adequate Public Education. Parent has presented no evidence that Kennett High School does not provide the curriculum required under both RSA 193-E and the New Hampshire Department of Education regulations for high school curriculum. There is nothing in the statute or regulations requiring that a high school offer any Latin instruction, let alone third and fourth year Latin courses. In the absence of evidence, from the parent, that Kennett High School does not offer the curriculum required by RSA 193-E and/or the curriculum required under the state Department of Education regulations, the parent cannot prove that Jenelle's educational needs are not being met. The education she will receive at Kennett is all that state law requires the school district to provide.

Respectfully submitted,

MADISON SCHOOL DISTRICT
By Their Attorneys
SOULE, LESLIE, KIDDER,
SAYWARD & LOUGHMAN, PLLC

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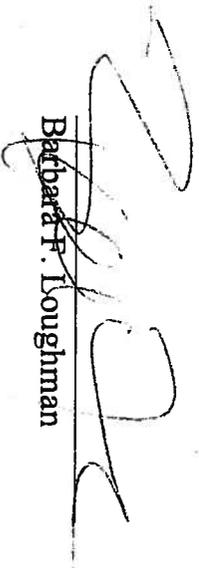
Dated: April 16, 2009

By:


Barbara F. Loughman, Esq.
16 Depot Street, PO Box 908
Wolfeboro, NH 03894
(603) 569-8044

RULE 3 CERTIFICATION

I hereby certify on the 16 day of April 2009, a copy of the foregoing Motion was mailed via First Class, postage prepaid to the following party, Donna Lane, Pro Se.


Barbara F. Loughman

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ULF. LESLIE. KIDDER,
YWARD & LOUGHMAN
P.L.L.C.

ATTORNEYS AT LAW
ALEM & WOLFEBORO
NEW HAMPSHIRE