



## MEMORANDUM

**TO:** Indiana State Board of Education

**FROM:** Michael Moore, Hearing Examiner

**DATE:** June 20, 2013

**SUBJECT:** In the Matter of O.L., Petitioner, and Fort Wayne Community School Corporation; Respondent Medical Transfer pursuant to I.C. 20-26-11-15; I.C. 20-26-11-2 and 511 IAC 1-6

SBOE Cause No. 1304004

The issue to be determined was whether Petitioner, due to her medical condition, would be better accommodated at the transferee school corporation. The hearing was held on May 29, 2013. Based on evidence and testimony presented, the Hearing Examiner's recommended order sent on May 31<sup>st</sup> found that Petitioner would be better suited at the transferee school pursuant to 511 IAC 6-1-3(3). The Hearing Officer recommended order provided that if the transferee school corporation accepted Petitioner, the Respondent shall pay the transfer tuition owed.

No objections to the hearing examiner's recommended decision have been filed.



school, does not accept transfer students. Petitioner filed her response to the motion to dismiss on May 27, 2013 and the hearing examiner issued an Order denying the motion on May 28, 2013.

The hearing occurred on May 29, 2013 at approximately 10:00 a.m. O.L. and her parents attended the hearing on behalf of Petitioner. Attorney, William Sweet, represented Fort Wayne Community Schools and Mary Hess was present as a witness on behalf of FWCS. During the hearing, Petitioner's exhibits were marked P-1 through P-6 & P-8. There was no Exhibit P-7 tendered. Exhibit P-6 was offered by the Petitioner over objection by FWCS and the hearing examiner sustained the objection and ruled that exhibit inadmissible. Exhibit P-6 was retained by the hearing officer for the record. Exhibits P-1 through P-5 & P-8 were admitted into the record with no objections by FWCS, as follows:

- P-1: Indoor Environmental Quality Assessment Report dated August 7, 8 & 9, 2012;
- P-2: Northwest Allen Bylaws & Policies;
- P-3: EPA Student Health and Academic Performance Quick Reference Guide dated November 2012;
- P-4: Letter from Naresh J. Patel, D.O., Fort Wayne Allergy and Asthma Consultants Inc.;
- P-5: Letter from Justina M. Girod, M.D., Lutheran Health Physicians, Lutheran Medical Group;
- P-6: Offered, but ruled inadmissible;
- P-7: Not offered;
- P-8: USPS tracking confirmation and copies of three certified mail receipts;

Respondent tendered one exhibit which was admitted without objection. The exhibit was a summary of the testimony of Mary Hess, RN, BSN and it was marked as Exhibit R-1.

After consideration of the testimony and exhibits, the hearing examiner makes the following findings of fact, conclusions of law, and recommended order.

#### Findings of Fact

1. O.L. had previously been attending St. Joseph-St. Elizabeth Ann Seton School in Fort

Wayne;

2. She is an incoming freshman whose legal settlement is within FWCS' district;
3. O.L. has severe allergies, particularly to mold, and has frequent sinus infections as a result; She often misses school due to illness caused by her allergic reactions to dust and mold;
4. She is under the care of both a family practitioner, Dr. Justina M. Girod, and an allergy specialist, Dr. Naresh J. Patel. Both doctors recommended that O.L. attend a school that is free of mold and allergens; See Petitioner's Exhibits Nos. 4 & 5
5. Dr. Justina M. Girod specifically recommended that O.L. attend Carroll High School in Fort Wayne because; "Carroll is the newest school in Ft. Wayne, this would be the obvious best choice with regards to air purifiers and mold control." See Petitioner's Exhibits No. 5
6. O.L. last attended St. Joseph-St. Elizabeth Ann Seton Schools in Fort Wayne schools. St. Elizabeth is in a newer building than the building that houses St. Joseph. O.L. had frequent problems due to her allergies while at St. Joseph, the older school. She had fewer problems at St. Elizabeth;
7. She will be attending public school this upcoming freshman year.
8. FWCS operates five high schools within its school district: (1) North Side; (2) Northrop; (3) Snider; (4) South Side; and, (5) Wayne;
9. North Side and South Side High Schools have air conditioning HVAC systems. Currently, both schools share nursing staff with an elementary school; however, will be fully staffed with a nurse in the coming school-year. FWCS believes that it can accommodate O.L.'s needs with respect to her severe allergies by placing her in one of the air-conditioned high schools within FWCS;
10. The parents wish to transfer O.L. from the FWCS to Carroll High School/Carroll Freshman Center, which is located in the Northwest Allen County Schools (NACS) District, an adjoining school district;

11. Carroll High School and its Freshman Center are two buildings that are physically connected;
12. O.L. and her parents visited each of the five high schools in FWCS and also Carroll High School/Freshman Center in NACS. O.L. saw mold on some of the walls at Wayne High School. She also reported having an allergic reaction or difficulty breathing when she was in the five FWCS high schools;
13. She reported having no allergic reactions when she visited Carroll High School and the Freshman Center in NACS;
14. NACS employs an outside company to conduct an Indoor Environmental Quality Assessment Report annually. A report was conducted for both Carroll High School and the Freshman Center; See Petitioner's Exhibit 1
15. NACS' bylaws and procedures establish procedures to address health and safety issues including the phasing out of certain chemicals, insecticides and other materials that the Federal government is phasing out;
16. FWCS does not conduct an indoor environmental quality assessment or any other air quality assessments unless an issue arises and there is a request to conduct one. FWCS has not conducted an indoor environmental quality assessment or any other air quality assessments in recent memory;
17. Both FWCS and NACS see roughly the same percentage of students in their nursing clinics who either have a diagnosis for allergies or have complaints related to allergies; see Respondent's Exhibit 1
18. The five high schools in FWCS and Carroll have, at different times, undergone varying levels of renovations that include as little as adding an addition or as much as a complete gutting of an existing building and rebuilding on the existing foundations.

#### Conclusions of Law

1. Any Finding of Fact deemed to be a Conclusion of Law is hereby denominated as such, and any Conclusion of Law deemed to be a Finding of Fact is hereby denominated as such;
2. The State Board has jurisdiction to decide this matter. Indiana Code Section 20-26-11-15(a)(3) confers jurisdiction upon the Indiana State Board of Education to hear

- all disputes involving legal settlement and transfer tuition;
3. Indiana Code Section 20-26-11-5 allows the parents of any student to request a transfer from a school corporation of legal settlement to another school corporation in Indiana or another state if the student “*may be better accommodated in the public schools of the transferee school corporation;*”
  4. 511 IAC 1-6-3 states<sup>1</sup>:
    - “[A] student will be determined to be better accommodated in the transferee [school] than in the transferor [school], as provided in IC 20-26-11-5, on a showing [that]... :
    - (A) attendance by the student at the transferor entails the risk of physical illness; and
    - (B) in the opinion, as supported by written documentation, of two (2) persons holding unlimited licenses to practice medicine in Indiana who have examined the student, attendance at the transferee would substantially reduce this risk.

511 IAC 1-6-3.
  5. A request for medical transfer must be made in writing before the first day of April that proceeds the first day of school. 511 IAC 1-6-2. After a parent files a request for transfer, the transferor school corporation “shall immediately mail a copy to the transferee corporation.” I.C. 20-26-11-5(b). The transfer is denied when either school mails a written denial; Id.
  6. The Board requires written documentation to authenticate the risk of physical harm. The documentation must include opinions from two persons holding unlimited licenses to practice medicine. 511 IAC 1-6-3(3)(B). These persons are in the best position to authenticate the risk because physical harm has its genesis in a physical ailment, such as severe allergic reactions;
  7. Both her family doctor and her allergist stated that she has severe allergies, particularly to mold, and should be in a school building that is free from allergens and mold. Both established that contact with allergens, particularly mold, causes her physical illness such as sinus infections;

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<sup>1</sup> The authority to create these requirements is established in Indiana Code Section 20-26-11-16, which requires the State Board of Education to adopt rules for the enforcement of payment of transfer tuition, calculation of transfer tuition, credits for state distribution, and the time in the year when requests for transfer must be filed.

8. The family reported that O.L. often misses school when she is sick from her allergies or frequent sinus infections. She and her family reported that she regularly takes antibiotics due to her allergy related illnesses;
9. Although the term “physical illness” is not defined in either the Indiana Code or the Indiana Administrative Code, the Board finds that O.L.’s frequent illnesses and her regular use of antibiotics caused by contact with allergens meets the generally understood definition for that term;
10. The Petitioner must, however, prove that she would be better accommodated by attending Carroll High School rather than one of the five high schools located in FWCS’ district;
11. Dr. Justina M. Girod specifically recommended that O.L. attend Carroll High School in Fort Wayne because it is the “newest school in Ft. Wayne, this would be the obvious best choice with regards to air purifiers and mold control;”
12. It is unclear how Dr. Girod came to this conclusion. Mary Hess, Health Services Specialist at FWCS, contacted her counterpart at NACS to learn about their air purifiers mentioned in Dr. Girod’s letter. Hess learned that NACS does not have an air purifier system;
13. For the Board to find that O.L. would be better accommodated at Carroll High School than at one of the FWCS high schools for purposes of 511 IAC 1-6-3(3), the medical opinion would need to provide some medical substantiation for the opinion other than a general support for a transfer; See e.g. In Re: E.S. and P.S., (SBOE, 2007) Cause No. 9708018.
14. The Board finds that Dr. Girod’s statement, alone, fails to meet that burden. Although Dr. Girod’s letter substantiates that O.L. has a medical condition and that contact with allergens, particularly mold, would cause her physical harm, Dr. Girod’s letter fails to establish a sufficient nexus showing that attending Carroll would reduce that the risk of physical harm to O.L.;
15. But, the Board’s analysis does not end here;
16. O.L. and her parents reported seeing mold in at least one of the high schools located in FWCS. O.L. also testified that she experienced an allergic reaction at each of the FWCS schools, but not at Carroll when she toured;

17. It is uncontroverted that NACS engages in yearly indoor environmental quality assessments in its high school and freshman center, the two buildings that O.L. would be in if she attends school in NACS. It is also uncontroverted that FWCS does not engage in this same testing unless there is an issue and a request made. FWCS does not know when the last time testing like this occurred or if it has ever occurred in any of its schools;
18. The Board FINDS that because NACS (Carroll) engages in yearly indoor environmental quality assessments and FWCS does not, O.L. would be better accommodated at Carroll than at any of the high schools within FWCS;
19. 511 IAC 6-1-3(3) requires petitioner to show that “attendance at the transferee would substantially reduce [the] risk” of physical injury. Having actual knowledge of the indoor environmental quality of the building that petitioner will be in would substantially reduce her risk of physical injury;

Northwest Allen County Schools

20. Indiana Code § 20-26-11-5 provides that a “request for transfer must be made in writing to the transferor corporation which shall immediately mail a copy to the transferee corporation;”
21. The ostensible purpose for this rule is so that the parties will know whether the transferee school corporation, in this case NACS, would even accept the petitioner. If the transferee school corporation would not accept the petitioner, then the need for appeal would be moot;
22. There was no evidence introduced at the hearing showing whether FWCS complied with this requirement;
23. FWCS made a prehearing motion to dismiss and inserted a summary of NACS’ bylaw number 5111(H), which states that the NACS does not accept and/or enroll cash transfer tuition students. FWCS copied that portion into the body of its motion;
24. At the hearing, and in response to FWCS’ motion to dismiss, petitioner’s parents testified that one or both of them communicated with NACS and that the school does accept transfer students;
25. The petitioner also introduced certified mail receipts showing that she mailed a copy of her request to appeal FWCS’ denial of her transfer request, as required under I.C. §

- 20-26-11-5(c), along with a copy of her transfer application to NACS on April 23, 2013. The USPS track and confirm sheet provided in Petitioner's Exhibit Number 8 shows that those documents were delivered to NACS on April 23, 2013;
26. Additionally, the hearing examiner, upon request by the Petitioner, issued a subpoena *duces tecum* to NACS to obtain the previously mentioned yearly indoor environmental quality assessment report and NACS complied and provided the petitioner with a copy of the report;
  27. Lastly, the petitioner testified that she went to Carroll High School/Freshman Center for a tour of the building in anticipation of attending the school;
  28. At best, it is unclear whether NACS will accept the Petitioner and it is unclear whether FWCS complied with I.C. § 20-26-11-5 (b) and sent a copy of transfer request application to NACS;
  29. Knowing this, definitively, would have aided the hearing examiner in determining whether the issue was ripe or moot for appeal.

Recommended Order

Fort Wayne Community Schools shall immediately forward the transfer request application to the Northwest Allen County Schools and make inquiry as to whether NACS will accept Petitioner under the provisions of 511 IAC 1-6-3. Should NACS accept the Petitioner, FAWC shall pay the transfer tuition to NACS when Petitioner enrolls.

Dated: May 31, 2013



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#### APPEAL RIGHT

Any party wishing to file objections to this recommended decision may do so in writing within fifteen (15) calendar days from the receipt of this order. The basis of any objections must be stated with particularity. A party must cite to any Finding of Fact, Conclusion of Law, or Order with which the party takes exception. Objections must be mailed to Laura Naughton, State Board Administrator, Indiana Department of Education, Room 229, State House Indianapolis, Indiana 46204-2798. If objections are filed or the Board, by majority vote, decides to set this cause for oral argument, you will be advised of the date the Board will consider the case. The Board will adopt this recommended decision as its final order if no objections are filed and the Board does not decide to hear oral arguments.

Any party filing objections or responding to same must provide a copy of such written objections or written responses to the representative of the other party. Failure to do so may result in dismissal of your appeal.

Distribution via certified mail and electronic mail to:

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