

IN THE COURT OF APPEALS
FOR THE STATE OF MISSISSIPPI

CAUSE NO. 2010-CA-0042

MARK E. FAILS AND LAURA FAILS,
PARENTS AND NEXT FRIENDS OF COURTNEY FAILS

APPELLANTS

v.

JEFFERSON DAVIS COUNTY PUBLIC SCHOOL BOARD

APPELLEE

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Circuit Court of Appeals may evaluate possible disqualifications or recusal.

Mark E. and Laura Fails Appellants

Alexander Ignatiev Counsel for Appellants

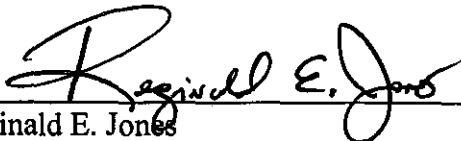
Jefferson Davis County Public School Board Appellee

James A. Keith
Reginald E. Jones
Nathaniel A. Armistad Counsel for Appellee

Glenn Swan Former Conservator

The Honorable Michael R. Eubanks Special Circuit Judge

SO CERTIFIED, this the 18th day of August, 2010.



Reginald E. Jones
One of the Attorneys for Appellee

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STATEMENT OF THE ISSUES

- I.** The Jefferson Davis County School Board has the authority to enact a no inter-district student transfer policy and to revoke existing transfers.
- II.** As District Conservator, Glenn Swan had the authority to prevent the Jefferson Davis County School Board from voting on the Fails' appeal of the student transfer policy.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Court Below

On November 12, 2008, Mark and Laura Fails filed a complaint in the Circuit Court of Jefferson Davis County against the Jefferson Davis County School Board ("JDCSB"), appealing the JDCSB's denial of their petition to transfer their daughter, Courtney, from the Jefferson Davis County School District ("JDCSD") to the Lamar County School District ("LCSD"). (R. 9-11) On December 8, 2008, the JDCSB filed its response and moved to dismiss Mark and Laura Fails' complaint. (R. 19-23)

On December 12, 2009, Circuit Court Judge Michael Eubanks entered his Order dismissing Mark and Laura Fails' appeal. (R. 101-106) The Fails filed timely notice of appeal to this Court. (R. 107-108)

II. Statement of Facts

On August 13, 2007, the JDCSB adopted a new policy which prohibited all inter-school district student transfers. (R. 12) The new policy required all students who live in the JDCSD to attend school in the JDCSD. (R.12) The policy prohibited any JDCSD student from attending school in another school district. (R.12)

The no-transfer policy was not implemented until the 2008-2009 school year, a year after the policy was adopted. During summer, 2008, the JDCSD published an announcement in the local newspaper about the no-transfer policy, notifying the public that all existing student transfers were revoked and that the JDCSB would not consent to any students transfers to another school district. (R. 73-74)

Courtney Fails, a ninth grader, lived in the JDCSD with her parents Mark and Laura Fails, but she had been attending school in the LCSD since 2003. The new policy required Courtney return to school in the JDCSD. (R.12)

In January, 2008, Glenn Swan was appointed Conservator of the District by the Governor of Mississippi. In August, 2008, Board Member Billie Boleware requested an Attorney General's opinion as to whether a student transfer is permanent and final. On September 10, 2008, the Attorney General issued his opinion that either a sending or receiving school board may revoke a student transfer and that a transfer is not final except in the sense that it is not subject to further administrative review. The Attorney General further opined that a school board cannot enter into a transfer contract that deprives a subsequent board of its rights and powers to revoke a transfer. MS AG Op., Boleware (September 10, 2008).

On September 23, 2008, the Fails asked the Conservator to allow them to appear before the JDCSB for clarification of the policy. (R. 14) Conservator Swan wrote the Fails, enclosing the Boleware Attorney General opinion, stating that the JDCSB's adoption of the August 13, 2007 policy constituted a revocation of Courtney's transfer. (R. 14) Swan told the Fails they could address the JDCSB at its next regularly scheduled meeting on October 13, 2008. (R.14)

On October 3, 2008, Conservator Swan requested a second Attorney General's opinion regarding whether the release of a student to attend school in another school district is permanent at the time of the release or if the student is required to request the release on an annual basis. The Attorney General responded that the release of a student to attend school in another school district is not permanent. The transfer is effective until

either the sending or receiving district revokes its consent. MS AG Op., Boleware (October 3, 2008).

On October 13, 2010, the Fails appeared before the JDCSB to seek clarification of the transfer policy and to vote again on the intention of the policy. (R.15) Conservator Swan exercised his authority and did not allow the JDCSB to vote on the Fails' request. (R. 85)

STANDARD OF REVIEW

When this Court reviews a decision by a Chancery or Circuit Court concerning an agency action, it applies the same standard of review that the lower Courts are bound to follow. The appellate court generally accords great deference to the Board's interpretation of its own rules and statutes which govern its operation. Mississippi State Tax Comm'n v. Mask, 667 So.2d 1313, 1314 (Miss.1995). An appeal from an administrative agency is a limited one. Mainstream Sav. & Loan Ass'n v. Washington Fed. Sav. & Loan Ass'n, 325 So.2d 902, 903 (Miss.1976). In reviewing decisions of administrative agencies, the appellate court will entertain the appeal only to determine: whether or not the order of the administrative agency (1) was unsupported by substantial evidence, (2) was arbitrary and capricious, (3) was beyond the power of administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party. Id. at 903; *See also*, Mississippi Comm'n on Env'tl. Quality v. Chickasaw County Bd. of Supervisors, 621 So.2d 1211, 1215 (Miss.1993)

SUMMARY OF THE ARGUMENT

The Circuit Court was correct in its ruling that the JDCSB's student transfer policy is a blanket ban, with substantial evidence to support that it was not enforced arbitrarily and capriciously, was not unreasonable, and was not an abuse of discretion. Miss. Code Ann. § 37-15-29 makes clear that the JDCSB had the authority to enact a no inter-district student transfer policy and to revoke existing transfers. Mississippi statute and case law support the legality of the district's transfer policy and reaffirms the notion that a school board has full authority to adopt and/or modify its own policies. The Fails are residents of the JDCSD. Therefore, under state law they are required to enroll their child in the JDCSD.

Additionally, the Circuit Court correctly held that Glen Swan, as the appointed Conservator of the JDCSD, had the authority to operate as the school board and uphold the no transfer policy established by the JDCSB in August 2007. A conservator is, in effect, the district. His decision, like a school board's, is final.

ARGUMENT

I. The Jefferson Davis County School Board has the authority to enact a no inter-district student transfer policy and to revoke existing transfers.

Miss. Code Ann. § 37-15-29 provides that no minor child may enroll in or attend any school except in the school district of his residence unless the child is lawfully transferred by both the sending and receiving school districts. By statute, a school board has authority to determine whether or not to grant a transfer request. Both the sending school district and the receiving school district must agree to the transfer. Miss. Code Ann. § 37-15-31 (Rev. 2007). *See also Tally v. Scott County*, 282 So.2d 217 (Miss. 1973) (holding that a pupil cannot transfer from one school district to another school district of another county without approval of board of trustees of school district of his residence or the approval of the county school board of his residence).

The facts in this instance are undisputed. The Fails are residents of the JDCSD. Therefore, under state law they are required to enroll their child in the JDCSD.

The Fails offer no statute or caselaw to support their conclusion that the JDCSB does not have legal authority to require students to attend school in the JDCSD. The Fails instead argue that the JDCSB must consider each student transfer on an individual or case-by-case basis. Fails Brief, p. 15. But their argument flies in the face of the statute. Under Miss. Code Ann. § 37-15-29, school districts may adopt a transfer policy of general applicability. In addition, the Fails' argument falls flat because Mr. Fails' was allowed to present his child's individual case to the JDCSB. (R. 15) After hearing the

Fails' concerns, Conservator Swan did not approve a transfer request per the JDCSD's general policy.

Further, two Attorney General opinions support this conclusion. MS AG Op., Boleware (September 10, 2008) and MS AG Op., Swan (October 3, 2008). In the Boleware opinion, the Attorney General stated that "final" simply means that the decision is not subject to further administrative review, but a school board may revoke any consent to transfer a student. (R.14) In the Swan opinion, the Attorney General reiterated his position. He again cited Miss. Code Ann. § 37-15-31(1) and stated, "there is no specific time limitation set forth in § 37-15-31 as to the duration of the student transfer, therefore the transfer of a student is effective until the school board of either school district, or the county Board of Education, if applicable, revokes its consent." Additionally, the opinion cited to *Humble Oil Refining Co., et al v. State, et al*, 41 So.2d 26 (1969) which states that a school board cannot enter into a transfer contract with another school board for a period of time that would deprive a subsequent board of its rights and powers. In keeping in line with the Supreme Court's holding in *Humble*, the JDCSB could not enter into a contract with the LCSD to allow Courtney Fails to attend school in the LCSD on a permanent basis.

The two Attorney General opinions and *Humble* support the legality of the district's transfer policy and reaffirms the notion that a school board has full authority to adopt and/or modify its own policies. There is no statutory language placing a time limitation on the duration of a student transfer. Other than the few statutorily created exceptions, either school district has the authority to deny a student transfer at any time.

As the Circuit Court articulated in its Order, the JDCSB's student transfer policy is a blanket ban, with substantial evidence to support that it was not enforced arbitrarily and capriciously, was not unreasonable, and was not an abuse of discretion. (R. 15)

II. As District Conservator, Glenn Swan had the authority to prevent the JDCSB from voting on the Fails' appeal of the student transfer policy.

The Circuit Court held that:

This Court is of the opinion that based upon Miss. Code Ann. § 37-17-6, a conservator acts with the same authority as a School Board. A Conservator has the broad statutory authority of conducting all of the administration, management and operation of the school district, which is not limited to the aforementioned list. Therefore, this Court is of the opinion that Glenn Swan as the appointed Conservator of the Jefferson Davis School District had the authority to operate as the School Board and in effect uphold the no transfer policy established by the School Board in August 2007. This authority extended to prohibiting a vote on the Fails' transfer. (R. 103-104)

The Fails offer no support for their argument that Conservator Swan does not have the broad authority that the Circuit Court found.

Furthermore, Miss. Code Ann. § 37-17-6 sets out the powers of a conservator. The conservator, in effect, is the district. His decision, like a school board's, is final. Miss. Code Ann. § 37-17-6. *See also* Op. Atty. Gen. No. 2000-0209, Thompson, April 12, 2000.

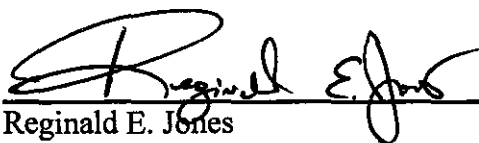
This Court should give the same deference for the Conservator as the Circuit Court. The Fails' daughter's transfer was properly revoked upon the adoption of the policy, therefore, Mr. Swan correctly exercised his authority as district Conservator by not allowing the JDCSB to consider the Fails' appeal and not approving the Fails' daughter's transfer request.

CONCLUSION

Substantial evidence exists to support the JDCSD's no inter-district student transfer policy. The JDCSB followed Mississippi law in implementing the transfer policy. The policy is legal and should stand as is. Furthermore, Mr. Swan had the authority, as Conservator, to prevent the JDCSB from voting on the Fails' appeal of the student transfer policy. The Court should affirm the Circuit Court's decision and dismiss the Fails' appeal.

Respectfully submitted, this the 18th day of August, 2010

**JEFFERSON DAVIS COUNTY PUBLIC
SCHOOL BOARD, APPELLEE**

A handwritten signature in dark ink, appearing to read "Reginald E. Jones", is written over a horizontal line.

Reginald E. Jones
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CERTIFICATE OF SERVICE

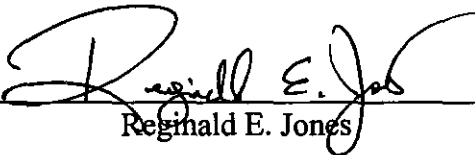
I, Reginald E. Jones, do hereby certify that I have this day mailed, by United States Mail, a copy of the foregoing to the following:

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