BEFORE THE
INDIANA EDUCATION EMPLOYMENT
RELATIONS BOARD

RICHMOND EDUCATION ASSOCIATION,
KELLY MCDERMOTT,
Complainants,

v.

RICHMOND COMMUNITY SCHOOLS,
TODD TERRILL,
Respondents.

IEERB Case No. U-16-06-8385
U-16-08-8385

FINAL ORDER

The above-entitled case came before the Indiana Education Employment Relations Board ("the Board" or "IEERB") at the Board's meeting on September 28, 2017, for oral argument on Respondent's timely exceptions to the July 11, 2017, Hearing Examiner's Report on Respondents' Motion for Summary Judgment and Attorney's Fees ("Report"). The Board held discussion and voted on the following issues: 1) summary judgment regarding the Respondents' alleged failure to discuss curriculum changes to the general music class; and 2) summary judgment regarding the alleged frivolousness of the Complainants' claims. On October 24, 2017, the Board reconvened at a public meeting and voted on the remaining claim, summary judgment on the issue of discussion of curriculum changes to READ 180.

Having considered the arguments of counsel, the briefs, the record, and being otherwise duly advised, the Board AFFIRMS and ADOPTS the Hearing Examiner's Report with MODIFICATIONS. The Report in its entirety, except for the changes listed below, is adopted and incorporated by reference herein.

DELETES: Discussion, Section II.

ADDS:

- Discussion section (below)
- Order section (below)
- Finding of Fact No. 9b: The only READ 180 teacher at Test stated that she is "not doing anything different" this year "[b]ecause I was told to continue to follow my READ 180 curriculum." (Respondents' Appendix of Exhibits to Respondents' Motion for Summary Judgment, Ex. 1, McDermott Dep., p. 34, and Ex. 8, Dep. of Rita Slifer, pp. 13-14).
- Finding of Fact No. 13: Past practice at Test "has been that the grade level in which Test students receive General Music fluctuate from year to year" but that counselors try to ensure that students receive music at least once during their tenure at Test. (Respondents' Appendix of Exhibits to Respondents' Motion for Summary Judgment, Ex. 11, Norris Aff. and Ex. A).
- Conclusion of Law No. 3b: The Board defers to the State Board of Education's definition

of curriculum, "the planned interaction of pupils with instructional content, materials, resources, and processes for evaluating the attainment of educational objectives." 511 IAC 6.1-1-2. In other words, as Complainant Kelley McDermott explained: "[c]urriculum is the materials, the resources, the plans, the pedagogy, and it's essentially ... the blueprint for teachers, it's what they operate off of when they teach the subject they teach." (Respondents' Appendix of Exhibits to Respondents' Motion for Summary Judgment, Ex. 1, McDermott Dep., p. 8).

MODIFIES:

- Finding of Fact No. 7: During the 2015-2016 school year, students with below grade level reading skills took READ 180 for **two periods**~~one period~~ a day and had a general, grade level English class consisting of writing and reading for one period per day. (Engle Dep. at p. 15, l. 11 - p. 16, l. 5; Gaddis Dep. at p. 18, l. 3-18; Ex. B).
- Finding of Fact No. 8: During the 2016-2017 school year, students with below grade level reading skills took **two**~~one and one-half~~ periods of READ 180 and one~~-half~~ period of general English writing. (Engle Dep. at p. 16, l. 6-16).
- Finding of Fact No. 9: There are no facts in the Record indicating that either the READ 180 or general English reading courses' instructional content, materials, resources, or processes for evaluating the attainment of educational objectives have changed. **(*See* Respondents' Appendix of Exhibits to Respondents' Motion for Summary Judgment, Ex. 8, Slifer Dep., pp. 13-14; *see generally* Respondents' Appendix of Exhibits to Respondents' Motion for Summary Judgment; Complainants' Designation of Evidence in Opposition to Respondents' Motion for Summary Judgment).**
- Finding of Fact No. 12: There are no facts in the Record indicating that the general music course's instructional content, materials, resources, or processes for evaluating the attainment of educational objectives have changed. **(*See* Respondents' Appendix of Exhibits to Respondents' Motion for Summary Judgment, Ex. 1, McDermott Dep., pp. 12-27; *see generally* Respondents' Appendix of Exhibits to Respondents' Motion for Summary Judgment; Complainants' Designation of Evidence in Opposition to Respondents' Motion for Summary Judgment).**

DISCUSSION

I. Curriculum

School employers are required to discuss changes to all "curriculum development and revisions" prior to implementation. Ind. Code § 20-29-6-7. Complainants assert that a change in curriculum occurred because in school year 2016-17 READ 180 students did not take general English reading and 6th, 7th, or 8th grade students did not take general music. However, not every change in a class constitutes a curriculum change. The record shows only that a change in eligibility and scheduling occurred; there is no evidence that the curriculum changed with respect to music, READ 180, or general reading.

The crux of this case centers on the definition of curriculum. Curriculum is a ubiquitous word in education that is used in a variety of contexts. For example, curriculum can be used to refer to subjects (e.g., science or mathematics) or to individual courses of study. Moreover, curriculum is

not defined in IEERB's statute or administrative rules. The State Board of Education defines curriculum as "the planned interaction of pupils with instructional content, materials, resources, and processes for evaluating the attainment of educational objectives." 511 IAC 6.1-1-2.[1] We adopt this definition but also adopt Complainant Kelley McDermott's explanation: "[c]urriculum is the materials, the resources, the plans, the pedagogy, and it's essentially ... the blueprint for teachers, it's what they operate off of when they teach the subject they teach." (Respondents' Appendix of Exhibits to Respondents' Motion for Summary Judgment, Ex. 1, McDermott Dep., p. 8).

The Complainants' main argument is that the "planned interaction of pupils" requires the school employer to discuss changes at a detailed level, including any changes in student eligibility. Not so. The pupil interaction is better phrased through Ms. McDermott as pedagogy. And while it is possible that changes in pupil eligibility could lead to changes in curriculum, the eligibility itself is not a change in curriculum. To do so could require discussion of almost every student's individual class schedule, something not intended or contemplated by the statute.

There are several changes to a course that constitute a curriculum change and therefore require discussion. As an initial matter, the addition or elimination of a course from course offerings may constitute a curriculum change. *See Knox Federation of Teachers v. Knox Community School Corporation*, U-03-20-7525, 2004 WL 5675763 (IEERB Hearing Examiner 2004). A change in overall instruction time also may constitute a change in curriculum. In *Hippensteel v. Manchester Community School Corporation*, the school employer unilaterally reduced physical education time from one hour to thirty minutes for all students. U-81-42-8045, 1982 WL 917178 (IEERB Hearing Examiner 1982). The hearing examiner concluded, without supporting rationale, that the reduction in overall instruction time was a change to the elementary curriculum. *Id.* Complainants use this case to assert that a change in instructional time, standing alone, is a change in curriculum. However, the Board does not agree that a failure to discuss a change in class time is always, without more, an unfair practice.[2] The failure to discuss a change in course time is but one factor for the hearing examiner to weigh in determining if an unfair practice claim occurred. Discussion of curriculum revision also may include items within the course such as course content and description. *Board of Sch. Trustees of the Sch. Town of Highland*, IEERB Case No. U-83-8-4720, 1983 WL 824920 (IEERB H.E. Rep. 1983).

The Respondents claim there was a failure to discuss curriculum changes with regard to general music. Specifically, only certain students take general music. The instruction time in general music remains unchanged. And the record does not reflect any change to the instructional content, materials, resources, or processes for evaluating the attainment of educational objectives for general music. Therefore, summary judgment was appropriate.[3]

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[1] The SBOE regulations also state that each school corporation must develop and implement a curriculum "that provides a planned sequence of learning experiences of adequate breadth and depth" to accomplish certain enumerated objectives. 511 IAC 6.1-5-0.6. Similarly, there is an entire article devoted to curriculum, Indiana Code 20-30. That article is about course offerings, not the scheduling of classes or the eligibility of certain students subsets.

[2] Therefore, the Board chooses not to adopt the 1982 Hearing Examiner's unsupported conclusions (made prior to statutory changes in discussion) to the contrary.

[3] Even if the Board were to conclude that the change in eligibility constituted a curriculum change, it is unclear how the Complainants would prove that an unfair practice occurred given the past practice of rotating student eligibility for music.

The Complainants also claim there was a failure to discuss curriculum changes with regard to READ 180 students. Specifically, READ 180 students no longer take a half-period of general reading. However, general reading is still provided by the school. And there is no claim of any undiscussed changes to the blueprint (instructional content, materials, resources, or processes for evaluating the attainment of educational objectives) for general English reading or READ 180 (indeed, the only READ 180 teacher at Test said she is "not doing anything different.").[4] Which students take general reading is an issue of student access to the curriculum, not of the blueprint of the course itself.[5]

The changes in student eligibility and scheduling for general English reading, and general music courses were not curriculum changes. This is not to say that the school employer cannot discuss these items – only that it is not required by the statute. Accordingly, summary judgment on both failure to discuss curriculum revisions claims at Test is appropriate as a matter of law. Complainants have failed to allege any facts that would permit a favorable inference that a change in curriculum occurred at Test.

II. Frivolousness

In 2011, IEERB's statute was amended to provide that if a failure to discuss claim is "found to be frivolous, the party that filed the complaint is liable for costs and attorney's fees." Ind. Code § 20-29-7-1(b). This is an issue of first impression for the Board. The term "frivolous" is not defined in IEERB's statute. However, the Hearing Examiner adopted the Indiana courts' standard (which also was adopted by an earlier Hearing Examiner). This standard defines a claim as frivolous

> if it is made primarily to harass or maliciously injure another; if counsel is unable to make a good faith and rational argument on the merits of the action; or if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law.

Gilday v. Motsay, 26 N.E.3d 123, 130 (Ind. Ct. App. 2015). The burden to prove this standard falls on the party claiming fees. *Id.* The Board adopts this standard for frivolous discussion claims.

Frivolousness is a difficult standard to prove. Indeed, "[a] claim or defense is not groundless or frivolous merely because the party loses on the merits." *Estate of Kappel v. Kappel*, 979 N.E.2d 642, 655 (Ind. Ct. App. 2012). There are several reasons for this. Not only does our legal system generally assume that litigants will pay their own fees, but a high standard prevents a chilling effect

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[4] It is true that there were some changes to English Language Arts, apparently as a result of a change to block scheduling. However, those changes are not the basis for the claim here. Instead, the Complainants only claim that READ 180 students no longer received general reading.

[5] Curriculum focuses on the standards, materials, and information presented – rather than whom it is presented to. The decision on student access to the curriculum is not a curriculum revision – it is a decision made at the administrative level given that particular student's abilities and scheduling concerns. Indeed, requiring discussion for changes to the access of subsets of student populations to the curriculum is an impermissible broadening of the scope of the school employer's duty to discuss.

on parties wishing to pursue legitimate claims. *See, e.g., Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003).

The Respondents ask the Board to find all of the Complainants' claims frivolous. There are several considerations. First, as this is a matter of first impression, we are reluctant to impose a finding of frivolousness without the parties having had the benefit of the appropriate standard. Moreover, given the adoption of a Board standard for curriculum (and the fact that the latest hearing examiner definition was thirty years ago) and the various ways curriculum is used, we do not believe the curriculum claims were frivolous.

The testing accommodations claim is closer, particularly given that testing accommodations are not a listed subject of mandatory discussion. However, not only are we reluctant to impose such a finding in a case of first impression, but we are also troubled by the Respondents' lack of timely pursuit in bringing a claim of frivolousness and its lack of specificity surrounding this claim. Therefore, we will not make a finding of frivolousness in this matter. The parties should be careful to adhere to this new standard in the future.

Finally, the Complainants ask the Board to strike guidance on this issue provided by the Hearing Examiner. However, given that this is an issue of first impression and to provide guidance to parties in the future, we adopt the Hearing Examiner's guidance.

ORDER

The Board hereby AFFIRMS and ADOPTS the Hearing Examiner's Report on Respondents' Motion for Summary Judgment and Attorney's Fees with the MODIFICATIONS listed above.

The Board is the ultimate authority, and this action is its Final Order and determination in this matter. **A party who wishes to seek judicial review must file a petition with the appropriate court within thirty (30) days of the issuance of this Order and must otherwise comply with I.C. 4-21.5-5.**

So Ordered this 21st day of November, 2017.

Tammy Meyer, Chair

Neil Pickett
Linda Troop
Dennis Brooks, voting only as to the READ 180 claim in U-16-08-8385.
Kim Jeselskis, dissenting only as to the READ 180 claim in U-16-08-8385.

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