IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STUART McCOLL, on behalf of his son, THEODORE "TED" McCOLL, Appellant, v. SEQUIM SCHOOL DISTRICT, a Washington municipal corporation, Respondent.	No. 38372-1-II UNPUBLISHED OPINION

BRIDGEWATER, P.J. — Stuart McColl appeals from a summary judgment in favor of the Sequim School District's decision to promote his son, Theodore McColl (Ted),[1] to the ninth grade after Ted successfully completed the District's eighth grade coursework. Despite McColl's desire that we direct the District to permit Ted to graduate in 2013, rather than in 2012, the issue is not ripe; nor is there any constitutional right impacted by the District's decision to promote Ted from his current grade to the next grade upon his completion of that grade's requirements. We affirm.

FACTS

During the 2004-05 academic year, Ted was a fourth grader in the District. He was a part of the District's highly capable program[2] at the time. At his parents' request, the District allowed

[1] We refer to Ted by his nickname for clarity; we mean no disrespect.

[2] *See* chapter 392-170 WAC (allowing schools districts to adopt a program for highly capable students).

Ted to skip the fifth grade.[3] Thus, Ted completed the sixth grade in the 2005-06 academic year. Thereafter, Ted successfully completed the seventh grade during the 2006-07 academic year and the eighth grade during the 2007-08 academic year. Accordingly, the District promoted Ted to the ninth grade for the 2008-09 school year. The VRP cites does nothing to substantiate the date.

McColl objected to this promotion. He requested that the District enroll Ted in the ninth grade for academic purposes but that it designate Ted an eighth grader for athletic and estimated graduation purposes. McColl suggested that Ted enroll in one eighth grade class in order to maintain his status as an eighth grader. After hearing and argument, the District denied McColl's request. Accordingly, McColl sought review in the Clallam County Superior Court under chapter 28A.645 RCW.[4] The superior court granted summary judgment to the District and dismissed McColl's claim with prejudice.

ANALYSIS

I. Standard of Review

McColl appeals the trial court's order granting summary judgment in the District's favor. We review a summary judgment standard order de novo. *York v.Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 302, 178 P.3d 995 (2008) (citing *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000)). In doing so, we consider all facts and all

[3] This acceleration request was outside of the highly capable program.

[4] "Any person, or persons, either severally or collectively, aggrieved by any decision or order of any school official or board . . . may appeal the same to the superior court of the county in which the school district or part thereof is situated." RCW 28A.645.010.

reasonable inferences from them in the light most favorable to the nonmoving party. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)). We may grant summary judgment only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

After the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts sufficient to rebut the moving party's contentions and demonstrate that material issues of fact remain. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Seven Gables*, 106 Wn.2d at 13. The trial court grants the motion only if reasonable persons could reach but one conclusion. *Wilson*, 98 Wn.2d at 437. We agree with the trial court that reasonable persons could conclude only that the District did not violate Ted's constitutional rights. Thus, the trial court properly granted summary judgment.

II. Ripeness

We note that at oral argument before this court, McColl clarified that he wanted Ted to graduate in 2013, not 2012, as the District has preliminarily assigned his estimated graduation date. The issue simply is not ripe; there is no claimed disability that he currently suffers by the designation of his projected graduation date. At one stage of the proceedings, there was an issue regarding Ted's athletic eligibility under the Washington Interscholastic Activities Association, but McColl assured us at oral argument that the athletic issue had been resolved and that his only

concern was with Ted's academics and Ted's desire to graduate in 2013.

Graduation depends on a student's completion of required credits and there simply are too many events that could affect the District's decision to graduate Ted—e.g., failure to complete required courses, illness, accident, or relocation. The issue is not ripe. *See Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 760, 63 P.3d 142 (2002) (equal protection challenge to city ordinance not ripe for review because petitioners had not yet suffered disparate treatment), *review denied*, 149 Wn.2d 1028 (2003). As well, we do not give advisory opinions. *Commonwealth Ins. Co. of Am. v. Grays Harbor County*, 120 Wn. App. 232, 245, 84 P.3d 304 (2004) (citing *Wash. Beauty Coll., Inc. v. Huse*, 195 Wash. 160, 164, 80 P.2d 403 (1938)). We could end our analysis at this stage, but we choose to address the merits of McColl's appeal, justifying the trial court's summary judgment order in light of McColl's constitutional claim. We note, however, that although we address the merits of McColl's appeal, we do not direct the District to accomplish any act with regard to Ted under this decision.

III. Constitutional Right to Education

The State has an affirmative duty to make ample provision for the education of all children residing within its borders. Wash. Const. art. IX, § 1; *Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 149 Wn. App. 241, 263, 202 P.3d 990 (2009). As a result, all children in Washington "have a 'right' to be amply provided with an education. That 'right' is constitutionally paramount and must be achieved through a 'general and uniform system of public schools.'" *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 513, 537, 585 P.2d 71 (1978); *Sch. Dists.' Alliance*, 149 Wn. App. at 263 (quoting Wash. Const. art IX, § 2).

While the Washington Constitution does not define the term "children," the Washington State Supreme Court has declared that under article IX, the term "children" includes individuals up to age 18. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 219, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2001). The legislature has further determined that "it is the general policy of the state that the common schools shall be open to the admission of all persons who are five years of age and less than twenty-one years residing in that school district." Former RCW 28A.225.160 (2006).[5] Accordingly, Washington public schools must remain open to qualified individuals between the ages of 5 and 21. *See* former RCW 28A.225.160.

The legislature has entrusted local school districts to administer an individual's right to public education within the laws and regulations the State adopts. RCW 28A.150.070 ("The administration of the public school system shall be entrusted to such state and local officials, boards, and committees as the state Constitution and the laws of the state shall provide.") Specifically, the Basic Education Act provides:

> In accordance with the provisions of Title 28A RCW, as now or hereafter amended, each common school district board of directors shall be vested with the final responsibility for the setting of policies ensuring quality in the content and extent of its educational program and that such program provide students with the opportunity to achieve those skills which are generally recognized as requisite to learning.

RCW 28A.150.230. In addition, the legislature has granted powers to school boards, including the powers "[t]o, in addition to the minimum requirements imposed by this title establish and maintain such grades and departments, including night, high, kindergarten, vocational training . . .

[5] During the 2009 legislative session, the legislature amended RCW 28A.225.160 to include language addressing the education of children of military families. The new language does not implicate this case.

as in the judgment of the board, best shall promote the interests of education in the district." RCW 28A.330.100(6). Final policymaking authority for schools in Washington rests with the school district's board of directors. *See* RCW 28A.320.015(1)(a) (board of directors have "broad discretionary power to determine and adopt written policies not in conflict with other law that provide for the development and implementation of programs, activities, services, or practices.")[6]

The District here has adopted policies for the development and implementation of its programs, activities, and practices. *See* RCW 28A.320.015(1)(a). One such policy is Policy No. 2421, the District's promotion and retention policy. It states in pertinent part:

> After a student has successfully completed a year of study at a specific grade level, he/she will be promoted to the next grade. Retention at the same grade may be beneficial to the student when he/she is not demonstrating minimum competency in basic skill subjects in relation to ability and grade level. Retention should not be considered, except in these instances where there is a strong likelihood that the student will benefit with minimum social and emotional disruption.

AR at 123.

It was under this policy that the District made the decision to promote Ted to the ninth grade. The District determined that Ted successfully completed the middle school curriculum, no additional academic coursework would further Ted's middle school education, and thus, Ted was ready for promotion to the ninth grade. Indeed, McColl has agreed that there was no reason to retain Ted in the eighth grade based on his coursework.

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[6] This is not a novel concept. Many courts have similarly recognized that the operations of schools should be left to local school authorities' discretion. *See, e.g., Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982) ("The Court has long recognized that local school boards have broad discretion in the management of school affairs.").

Upon entry to the ninth grade, the District assigns an estimated graduation date to each student according to WAC 180-51-035. WAC 180-51-035 states in pertinent part:

> (1) All students entering a high school program in Washington state shall be assigned an expected graduation year as required by federal law and this section. Once students are assigned a graduation year, they will be aligned to the requirements for that specific graduating class and subject to the provisions of this section.
>
> (a) Students shall be assigned an expected graduation year based on the year they commence 9th grade . . . .
>
> (b) Students shall have the right and the obligation to meet the minimum graduation requirements in place for their expected graduation year designated at the time they enter a district high school, regardless of what year they actually graduate.
>
> (2) A student under age twenty-one shall have the right to graduate in accordance with the standards in effect for the school of graduation for any year since such student commenced the ninth grade or the equivalent of a four-year high school program and until the student turns age twenty-one.

McColl contends that by promoting Ted to the ninth grade and assigning him an estimated graduation date of 2012, as opposed to 2013, the District denied Ted's constitutional right to access the public school system until age 18. But plainly, the District has not violated any of Ted's constitutional rights by refusing to hold him back in the eighth grade.

Under WAC 180-51-035, Ted's estimated graduation date is exactly that—*estimated*. If the graduation requirements become too onerous, McColl maintains the right to be amply educated by the public school up until age 21. *See* Wash. Const. art. IX, § 1; former RCW 28A.225.160; WAC 180-51-035(2). McColl has failed to show that Ted will not be afforded the opportunity to attend public school until the age of 21 to meet his graduation requirements. Mere speculation that the District will force Ted to graduate before turning 18 is not sufficient to defeat

summary judgment. *See Seven Gables*, 106 Wn.2d at 13.

Likewise, McColl's implied contention that Ted should be afforded a special eighth grade designation because he has participated in the District's highly capable program is insufficient to defeat summary judgment. WAC 392-170-015[7] establishes that school districts may adopt a program for highly capable students. Indeed, the District here has chosen to implement such a program. That program, however, does not include a policy that calls for grade acceleration of highly capable students. By all accounts, the McColls requested Ted's acceleration from the fourth grade to the sixth grade as a result of his parents' request. And there is no evidence in the record supporting McColl's implied contention that Ted is entitled to an eighth grade designation, even though he has successfully completed the eighth grade coursework. *See, e.g.*, 1953 Op. Atty. Gen. No. 53, at 1 (citing *People ex rel. Ulrich v. Bd. of Educ.*, 4 N.Y.S. 102 (1888) (New York court refused to compel readmission to the first grade of a pupil who had completed that grade)).

In sum, there is insufficient evidence in the record to support McColl's contention that there are genuine issues of material fact as to whether the District violated Ted's constitutional right to be amply provided with an education. *See* Wash. Const. art. IX, § 1. The District has not violated any of Ted's constitutional rights by refusing to hold him back in the eighth grade. Therefore, we hold that the trial court properly granted summary judgment in the District's favor. *See* CR 56(c).

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[7] WAC 392-170-015 states in pertinent part:

> The offering of a program by a school district to serve highly capable students with categorical state funds is optional.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.