

VICTORIYA AND
MIKHAIL SHPIGELMAN
(#26)

Appellant,

v.

HOWARD COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION

Opinion No. 21-30

OPINION

Appellants filed an appeal of the November 21, 2019 decision of the Howard County Board of Education (“local board”) approving the Attendance Area Adjustment Plan for School Year 2020-2021 (“Redistricting Plan”). Appellants maintained that the Redistricting Plan was arbitrary or unreasonable based on its impact to Polygon 2053, and argued that the local board failed to consider bus transportation safety as part of the redistricting decision in violation of local policy.

On January 16, 2020, we transferred the case pursuant to COMAR 13A.01.05.07A(1) to the Office of Administrative Hearings for review by an Administrative Law Judge (“ALJ”). The local board filed a Motion for Summary Decision maintaining that its decision was not arbitrary, unreasonable or illegal, and that the Appellants had failed to demonstrate any material dispute of fact regarding the appeal. On June 24, 2020, the ALJ issued a Recommended Order to grant, in part, the local board’s motion for summary decision.

The ALJ conducted a virtual hearing on July 22, 2020.

On October 5, 2020, the ALJ issued a Proposed Decision concluding that the Appellants failed to show, by a preponderance of the evidence, that the local board’s redistricting decision was arbitrary or unreasonable or illegal. The ALJ explained that Policy 6010 addresses school attendance areas and that there is nothing that requires the local board to justify each decision at the polygon level. As for bus transportation safety, it is not a factor listed in Policy 6010 for consideration in a redistricting. The ALJ correctly found Appellants failed to show that the local board disregarded any transportation factor covered by Policy 6010. Further, she explained that the Transportation Office designed bus routes using safety as its guiding goal in each decision. The ALJ recommended that we dismiss the appeal.

Appellants did not file exceptions to the ALJ’s Recommended Order or the ALJ’s Proposed Decision.

Based on our review of the record, we concur with the ALJ’s Recommended Order on the local board’s motion for summary decision and the ALJ’s Proposed Decision and adopt them with one modification. In the Proposed Decision, the ALJ found that the Appellants did not meet their burden of proof in the case and, therefore, recommended dismissal of the appeal. Because

the Appellants failed to satisfy their burden of demonstrating that the local board's decision was arbitrary, unreasonable or illegal, we decline to dismiss the appeal and instead affirm the decision of the local board

Signatures on File:

Clarence C. Crawford
President

Jean C. Halle
Vice-President

Shawn D. Bartley

Gail H. Bates

Charles R. Dashiell, Jr.

Susan J. Getty

Vermelle Greene

Rose Maria Li

Rachel McCusker

Joan Mele-McCarthy

Lori Morrow

Warner I. Sumpter

Absent:
Holly C. Wilcox

April 27, 2021

VIKTORIYA M. AND
MIKHAIL SHPIGELMAN,
APPELLANTS

v.

HOWARD COUNTY
BOARD OF EDUCATION

* BEFORE JOY L. PHILLIPS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
*
* OAH No.: MSDE-BE-09-20-01677 (File #26)

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACTS
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On or about November 21, 2019, the Howard County Board of Education (Local Board, Board or Respondent) passed the Attendance Area Adjustment Plan for School Year 2020-2021 (Redistricting Plan). On December 26, 2019, the Appellants filed an appeal on behalf of the polygon in which they live, 2053 (Appeal).¹ They asked that the four students in Polygon 2053 be reassigned to Clemens Crossing Elementary School (ES), rather than staying at Swansfield ES.

By letter dated January 16, 2020, the Maryland State Board of Education (State Board) transmitted the appeal to the Office of Administrative Hearings (OAH) for a contested case

¹ A. This was one of thirty-six appeals challenging the Redistricting Plan. B. The term polygon is defined later in this Proposed Decision.

hearing and to issue a proposed decision containing findings of facts, conclusions of law, and recommendations.² Code of Maryland Regulations (COMAR) 13A.01.05.07A(1), E.

On February 20, 2020, I held an in-person prehearing conference on the appeal at the OAH in Hunt Valley, Maryland. Claude de Vastey Jones, Esquire, and Judith S. Bresler, Esquire, represented the Local Board. The Appellants represented themselves. A motions schedule was agreed upon and later extended at the request of the parties. On March 6, 2020, the Appellants filed a Motion for Default on the basis that the Local Board failed to file a timely response to the Appeal. On March 26, 2020, I issued a Ruling denying the Motion for Default.

On May 4, 2020, the Local Board filed a Motion for Summary Decision. On June 22, 2020, I convened a prehearing conference via videoconferencing.³ The prehearing conference was continued to July 6, 2020. On June 24, 2020, I issued a Ruling denying the Local Board's Motion for Summary Decision on two issues and recommending the Motion for Summary Decision be granted on one issue.⁴ At the July 6, 2020 prehearing conference, the remaining issues were scheduled for hearing.

On July 22, 2020, I convened a contested case hearing via videoconferencing. Claude de Vastey Jones, Esquire, and Judith S. Bresler, Esquire, represented the Local Board. The Appellants represented themselves.

The contested case provisions of the Administrative Procedure Act, the procedural regulations for appeals to the State Board of Education, and the Rules of Procedure for the OAH

² The letter transmitting the appeals to the OAH requested the hearings be expedited, but the parties did not file any such motion, as was permitted pursuant to Code of Maryland Regulations 28.02.01.06. Nevertheless, I scheduled the matters as soon as practical, as per the regulation.

³ This matter was conducted remotely because of closures due to the COVID-19 pandemic.

⁴ I recommended the Motion for Summary Decision be granted on the issue of whether the Appellants were provided an opportunity to be heard regarding Polygon 2053 before the Redistricting Plan was adopted on November 21, 2019.

govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); COMAR 13A.01.05; COMAR 28.02.01.

ISSUES

Was the Local Board's Redistricting Plan, adopted on November 21, 2019, arbitrary or unreasonable as it impacted Polygon 2053?

Did the Local Board fail to consider bus transportation safety regarding Polygon 2053, in violation of Howard County Public School System (HCPSS) Policy 6010 and HCPSS Policy 5200?

SUMMARY OF THE EVIDENCE

Exhibits

A list of the parties' exhibits is attached to this Proposed Decision as an Appendix.

Testimony

The parties submitted a list of stipulated facts regarding the timeline of the redistricting process. I have adopted those facts which are relevant to this Recommended Decision and incorporated them into my Findings of Fact.⁵

Appellant V. Shpigelman testified and explained her exhibits. The Appellants did not present additional witnesses.

The Local Board presented the testimony of the following witnesses:

- Renee Kamen, HCPSS Former Manager of School Planning,⁶ admitted as an expert in school planning
- David Ramsay, HCPSS Director of Transportation

⁵ Many of the stipulations set forth the dates of each step in the redistricting process. Some of those dates were relevant to the issues disposed of in the Ruling on Local Board's Motion for Summary Decision, but not to the remaining issues. Furthermore, the stipulations refer to exhibits that were submitted as part of the Local Board's Motion for Summary Decision and not to exhibits admitted as part of this hearing. I have reworded the stipulations as necessary to remain consistent with this Recommended Decision.

⁶ At a hearing on September 3, 2020, Ms. Kamen announced that she had resigned from HCPSS.

FINDINGS OF FACTS

I find the following facts by a preponderance of the evidence:

1. On January 24, 2019, the Local Board initiated a county wide school boundary review that potentially impacted every school and neighborhood in Howard County, Maryland.
2. On June 13, 2019, the annual Feasibility Study was presented to the Local Board and the boundary review process was officially started.
3. On August 22, 2019, the Superintendent presented his Proposed Attendance Area Adjustment Plan to the Local Board.
4. On November 21, 2019, the Local Board voted on the final Redistricting Plan for the HCPSS 2020-2021 school year.
5. A school attendance area is a large geographical area that feeds into a school.
6. Polygons are smaller units within an attendance area that are used only for redistricting purposes. HCPSS maintains statistics on students living within each polygon. Polygons are used to quickly provide the numbers needed for the Local Board to assess the results of school reassignments during redistricting deliberations.
7. In the Redistricting Plan, no change was made affecting the elementary school students residing in Polygon 2053; thus, those students remained assigned to Swansfield ES.⁷
8. Some of the polygons adjacent to Polygon 2053 were reassigned to Clemens Crossing ES in the Redistricting Plan.
9. Bus routes are not determined until after a redistricting plan has been voted on.
10. Two buses traverse the streets in Polygon 2053 to transport elementary school students to school.

⁷ In the Ruling on Motion for Summary Decision I issued on June 24, 2020, I erroneously wrote that the students were assigned to Swansfield ES, when, in fact, they remained assigned to that school, as they had been in previous years.

11. Bus transportation safety is not a factor to be considered by the Local Board in making reassignment decisions under Policy 6010.

DISCUSSION

Legal Framework

Standard of Review

The standard of review applicable to school redistricting is set forth in COMAR

13A.01.05.06A, as follows:

Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal.

COMAR 13A.01.05.06B defines “arbitrary or unreasonable” as follows:

A decision may be arbitrary or unreasonable if it is one or more of the following:

- (1) It is contrary to sound educational policy; or
- (2) A reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached.

COMAR 13A.01.05.06C defines “illegal” as satisfying one or more of the following six criteria:

- (1) Unconstitutional;
- (2) Exceeds the statutory authority or jurisdiction of the local board;
- (3) Misconstrues the law;
- (4) Results from an unlawful procedure;
- (5) Is an abuse of discretionary powers; or
- (6) Is affected by any other error of law.

A redistricting decision is subject to a presumption of correctness. COMAR 13A.01.05.06A. To prevail, an appellant must show, by a preponderance of the evidence, that the challenged redistricting decision was arbitrary, unreasonable, or illegal. COMAR 13A.01.05.06A and D. To prove an assertion by a preponderance means to show that it is “more likely so than not so” when all

the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

Review of Redistricting Plans

County boards determine the geographical attendance area for each school. Md. Code Ann., Educ. § 4-109(c) (2018). In *Bernstein v. Board of Education of Prince George's County*, 245 Md. 464 (1967), the court held that absent a claim of deprivation of equal educational opportunity or unconstitutional discrimination because of race or religion, there is no right or privilege to attend a particular school. *Id.* at 472. The courts of Maryland will not ordinarily substitute their judgment for the expertise of school boards acting within the limits of the discretion entrusted to them. *Id.* at 476. The court in *Bernstein* wrote:

The point is whether the move was reasonable and within the discretion of the Board. The test is not even that there may have been other plans that would have worked equally well, or may, in the opinion of some, have been better; the test is whether the action which was taken was arbitrary, capricious or illegal.

Id. at 479.

The Court further noted that it “is a thankless job that the Board of Education has when it finds it necessary to move students from one school to another,” but in “a rapidly growing county, however, that is sometimes necessary. The paramount consideration is the proper education of the students.” *Id.* In 1974, the State Board noted that it “is not enough for [the appellants] to show that their [p]lan is better, they must show that the Board’s Plan is so totally lacking in merit as to have been adopted without any rational basis.” *Concerned Parents of Overlea v. Bd. of Educ. of Baltimore Cty.*, MSBE Op. No. 74-13 (1974).

Local boards determine what constitutes sound educational policy for their county. It is defined by the public through their elected Board of Education members. They are elected specifically to formulate educational policy for the county using their own judgment. While many people may disagree with the resulting conclusions, decisions made through the proper

process are the result of the community speaking through the democratic process. *Shah v. Howard Cty. Bd. of Educ.*, MSBE Op. No. 02-30 (2002). Promoting demographic diversity in a school setting has been approved as sound educational policy. *Jones, et al. v. Montgomery Cty. Bd. of Educ.*, MSBE Op. No. 06-38 (2006).

There is no right to a school attendance area remaining “as is.” In *Stishan v. Howard County Board of Education*, MSBE Op. No. 05-33 (2005), a family opposed the county board’s redistricting decision which resulted in the family’s children being reassigned to a different high school. The redistricting plan was upheld by the State Board, which found there is no liberty or property interest in a school in one’s district remaining “as is,” without changes resulting from closure or consolidation. The decision to close or consolidate schools is a quasi-legislative matter and the rights to be afforded to interested citizens are limited.

The reviewer of the Local Board’s decision may not substitute their judgment for that of the Local Board. If substantial evidence exists to support the decision, even if the reviewer disagrees with it, the decision must be upheld. *Montgomery Cty. Educ. Assoc., Inc. v. Bd. of Educ. of Montgomery Cty.*, 311 Md. 303, 309-10 (1987).

Analysis

Arbitrary and Unreasonable Decision

The Appellants complained in their Appeal that the Redistricting Plan as it related to Polygon 2053 created an “island” and a small feed to the middle school, contrary to some of the goals of Policy 6010. They asserted the final decision was arbitrary and unreasonable. They said the decision affecting Polygon 2053 did not fulfill any of the goals set forth in Policy 6010. They argued the boundary change affected only four students, which has a minimal impact on any school’s capacity utilization, feed to the middle school, or Free and Reduced Meals (FARM) participation rate. Thus, they argued, the boundary change that affected Polygon 2053 negatively

impacted the goal of community stability without producing any benefit. The friends of the four students in Polygon 2053 will attend a different elementary school, having a negative effect on the neighborhood, they said.

Policy 6010 is the governing policy for redistricting actions taken by the Local Board. (Jt. Ex. 1). It sets forth three main factors to be considered when developing an attendance area adjustment plan and notes that it “may not be feasible to reconcile each and every school attendance area with each and every factor.” *Id.*, p. 3. The factors are: Facility Utilization, Community Stability, and Demographic Characteristics of Student Population. *Id.*, § IV.B. The factors apply to developing attendance areas; polygons within those attendance areas are not mentioned in Policy 6010. Attendance areas are made up of contiguous communities or neighborhoods. *Id.*, § IV.B.2.b.

Ms. Kamen testified that an attendance area is a large geographical area that feeds into a school. Polygons are smaller units within an attendance area that are used only for redistricting purposes to quickly provide the numbers needed for the Local Board to assess the results of school reassignments. Ms. Kamen explained that attendance areas are not defined by neighborhood streets. This explains why the Appellants’ Polygon remained in the same attendance area as a neighboring polygon that is separated by a wooded area and has no connecting street to the Appellants’ Polygon. Polygons are generally, but not always, reassigned with polygons that are contiguous with the school, and there is no requirement that there must be a connecting street between the polygons, she said.

Ms. Kamen testified that the Local Board, in considering boundary changes, requested numerical information regarding different polygons, but that it would not have requested statistics for polygons that were not being considered for reassignment, such as Polygon 2053. Thus, even though there are only four elementary school aged children in Polygon 2053, the

Local Board would not have considered how many children from that Polygon remained at the same elementary school after redistricting because that Polygon was never considered for reassignment. As to the Appellants' argument that adding four students to Clemens Crossing ES would not significantly impact the percentages of FARM participation rates or feeds to the middle school, Ms. Kamen agreed the change would be only a fraction of a percent.

At the hearing, the Appellants submitted their written statement made to the Local Board in November 2019 in lieu of testimony. (App. Ex. 12). They pleaded with the Board to consider keeping nearby polygons together, whether at Swansfield ES or Clemens Crossing ES, in order to keep students from adjacent neighborhoods together.

The Appellants submitted written statements of two neighbors that were also presented to the Local Board. Will Campbell wrote that he felt Polygon 2053 would become an island, sending neighbors to different schools. He requested his Polygon be moved with an adjacent polygon and expressed his belief that a move to Clemens Crossing ES was not optimal. (App. Ex. 11). Chris and Jackie Deichmeister wrote that Polygon 2053 would become an island and that friends would be separated. They requested nearby polygons be assigned to the same school, whether that be Swansfield ES or Clemens Crossing ES. (App. Ex. 10).

The Appellants bear the burden of proving that "the Board's Plan is so totally lacking in merit as to have been adopted without any rational basis." *Concerned Parents of Overlea*, MSBE Op. No. 74-13. The Appellants have not shown this to be the case regarding their Polygon, which remained in the same school district as it had been in previous years. They argued the Local Board should have to justify why it did not reassign their Polygon. This argument impermissibly shifts the burden to the Local Board. The Appellants have not cited any authority for this argument. Nor have the Appellants cited any authority to support their argument that they have a right to be redistricted.

The Appellants argued that the Local Board took over fifty individual votes in passing the Redistricting Plan and that each vote should be justified. The Local Board responded that the votes were parts of a whole and that defining the geographical areas by taking multiple votes, as it did on November 21, 2019, simply breaks down the larger Plan into manageable parts. The Local Board also noted that Policy 6010 does not require the Local Board to justify each decision at the level of a polygon, but only as to each attendance area, which is much larger and comprises numerous polygons. As I have set forth above, that position is correct. Policy 6010 addresses attendance areas, not polygons. Polygons were created by HCPSS as a tool to use during redistricting to quickly obtain statistics based on the students of a given smaller area. Policy 6010 does not impose on the Local Board the burden of justifying the move of every polygon under every factor listed. Nor does it create the right to have one's polygon redistricted.

Bus Transportation Safety

The Appellants were very concerned about bus transportation safety in their neighborhood. They pointed out that under the routes developed for the 2020-2021 school year, one bus, serving Clemens Crossing ES, would pick up students at the top and bottom of Watch Chain Way, while a different bus serving Swansfield ES would drive on Watch Chain Way to the middle portion of that road, pick up four children, then turn around and drive out the way it came.⁸ They were troubled by the number of cars that are parked on Watch Chain Way and wondered whether buses could pass in opposite directions on that road.

David Ramsay, the HCPSS Director of Transportation, testified that Policy 6010 does not make bus transportation safety a factor in redistricting decisions made by the Local Board. In that Policy, transportation is only mentioned as a consideration in paragraph IV.B.1.d. under the

⁸ The parties indicated that new bus routes had been proposed just prior to the hearing, eliminating the need for the bus turnaround on Watch Chain Way, but I declined to consider the new evidence, as the issue before me was the action of the Local Board when it passed the Redistricting Plan.

Facility Utilization factor as follows: “The number of students that walk or receive bus services and the distance and time based students travel.” Policy 5200, which addresses Pupil Transportation and governs the work of the Transportation Office, is mentioned in Policy 6010 solely as a reference, along with numerous other policies that apply to the Local Board. (Jt. Ex. 1, p. 5).

Safety is embedded in Policy 5200. (Jt. Ex. 2). That policy provides, in pertinent part:

IV.D. When considering the need for and/or implementing school bus service, the staff shall consider:

1. Reasonable levels of safety.
2. Program efficiency.
3. Economy of operations.
4. Equity of service.
5. IEP or 504 plan requirements.

Providing a reasonable level of safety shall be the major staff consideration.

The work of the Transportation Office cannot begin in earnest until the attendance areas are announced. For the 2020 fall semester, HCPSS had 346 buses. By staggering start and end times, the buses can be used for multiple school levels. (Resp. Ex. 1). Mr. Ramsay’s office develops routes that comply with Policy 5200, optimizing safe bus stops for children boarding the buses. To most efficiently use the bus fleet, his office must sometimes route buses through neighborhoods to get to another area, without picking up children in that area. Creating bus routes is a complicated process that must be flexible to account for children who live in homeless shelters or participate in special programs such as JumpStart, for example, or for other special assignments.

Mr. Ramsay also responded to the Appellants’ concern about Watch Chain Way being crowded with parked cars on either side and buses passing in opposite directions. He said two buses have historically traversed that road and the drivers are professionally trained to safely address obstacles. Bus routes are designed to avoid difficult situations such as apartment

complex parking lots, but the drivers' job is to drive defensively and safely no matter where they are.

“Administrative agencies possess an ‘expertise’ and, thus, have a greater ability to evaluate and determine the matters and issues that regularly arise, or can be expected to be presented, in the field in which they operate or in connection with the statute that they administer.” *Adventist Health Care Inc. v. Maryland Health Care Comm’n*, 392 Md. 103, 118–19 (2006). The Court of Appeals has also stated, “[A] ‘court’s task in review is not to substitute its judgment for the expertise of those persons who constitute the administrative agency.’ . . . [T]he expertise of the agency in its own field should be respected.” *Bd. of Phys. Quality Assur. v. Banks*, 354 Md. 59, 68–69 (1999).

The Appellants essentially took issue with Policy 6010 for not making bus transportation a factor in redistricting decisions. They argued that Policy 6010 does not allow the Local Board to disregard other policies, such as Policy 5200. The Local Board reasonably responded that bus routes cannot be determined until school assignments are made and that once the Transportation Office is tasked with designing bus routes, safety is a guiding goal in each decision. In designing bus routes, Mr. Ramsay’s staff utilized its expertise, which has not been questioned. Even after they were created, the routes continued to be tweaked to take into consideration new information. The Local Board correctly argued that there is no evidence showing it disregarded any transportation factor covered by Policy 6010 it was required to consider. Any further complaints about bus transportation in Polygon 2053 are not relevant to an appeal of the Redistricting Plan under COMAR 13A.01.05.06.

Summary

Many of the appellants who appealed the Redistricting Plan did so because their children were reassigned to attend a different school. In this case, the Appellants appealed because some

of the surrounding neighborhoods were reassigned, but their neighborhood was *not* reassigned. Thus, their children will attend the same elementary school as they previously attended, although some of their friends will attend a different school. The children in Polygon 2053 rode the bus previously and will continue to do so. There were previously two buses traversing the neighborhood and that will continue to be the case. In other words, there was no change made by the Local Board regarding the Appellants' Polygon. The Appellants argued their Polygon was simply overlooked, but there is no evidence of that and concluding this was the case would be based on speculation. Further, as stated above, the Appellants have no right to attend a certain school or to have their polygon reassigned, although I certainly understand why the Appellants desired a different outcome.

The Appellants have also failed to show the Local Board acted arbitrarily or unreasonably in implementing Policy 6010 when it did not consider bus transportation safety in voting on the Redistricting Plan. The Policy does not include this as a factor in redistricting decisions and once the Plan was voted on, the Transportation Office designed routes with safety as a guiding factor in its decisions. Any further complaint the Appellants have with bus transportation in Polygon 2053 is outside the scope of an appeal of the Redistricting Plan.

CONCLUSIONS OF LAW


I conclude that the Appellants have failed to prove, by a preponderance of the evidence, that the Redistricting Plan adopted by the Howard County Board of Education on November 21, 2019, was arbitrary or unreasonable as it impacted Polygon 2053. *Bernstein v. Bd. of Educ. of Prince George's Cty.*, 245 Md. 464 (1967); *Montgomery Cty. Educ. Assoc., Inc. v. Bd. of Educ. of Montgomery Cty.*, 311 Md. 303, 309-10 (1987); *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002); COMAR 13A.01.05.06A and D; HCPSS Policy 6010.

I further conclude that the Appellants failed to prove, by a preponderance of the evidence, that the Redistricting Plan adopted by the Howard County Board of Education on November 21, 2019 violated HCPSS Policy 6010 or Policy 5200. *Bernstein v. Bd. of Educ. of Prince George's Cty.*, 245 Md. 464 (1967); *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002); COMAR 13A.01.05.06A and D; HCPSS Policy 6010 and Policy 5200.

RECOMMENDED ORDER

I RECOMMEND that the Appeal filed December 26, 2019 by the Appellants be **DISMISSED**.

October 5, 2020
Date Decision Issued



Joy L. Phillips
Administrative Law Judge

JLP/dlm
#186832

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this Proposed Decision has the right to file written exceptions within fifteen days of the date of the Proposed Decision; parties may file written responses to the exceptions within fifteen days of the date exceptions were filed. Both the exceptions and the responses shall be filed with the Maryland State Department of Education, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, with a copy to the other party or parties. COMAR 13A.01.05.07F.

The Office of Administrative Hearings is not a party to any review process.

Copies Mailed and Emailed To:*

Viktoriya M. Shpigelman
Mikhail Shpigelman

[REDACTED]
[REDACTED]
[REDACTED]

Claude de Vastey Jones, Esquire
Judith S. Bresler, Esquire
Carney, Kelehan, Bresler, Bennett & Scherr, LLP
10715 Charter Drive, Suite 200
Columbia, MD 21044
cdv@CarneyKelehan.com
jsb@CarneyKelehan.com

*In addition to mailing the Proposed Decisions, I emailed copies of the Proposed Decisions to the Appellants because of the recent slow-down of mail delivery. The parties had opted throughout this appeal process to communicate via email. Emailing the Proposed Decisions was appropriate given the short time for filing exceptions with the State Board.

**VIKTORIYA M. AND
MIKHAIL SHPIGELMAN,
APPELLANTS**

v.

**HOWARD COUNTY
BOARD OF EDUCATION**

*** BEFORE JOY L. PHILLIPS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
*
* OAH No.: MSDE-BE-09-20-01677 (File #26)**

* * * * *

**RULING ON THE LOCAL BOARD'S
MOTION FOR SUMMARY DECISION**

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
UNDISPUTED FACTS
DISCUSSION
CONCLUSIONS OF LAW
ORDER
RECOMMENDED ORDER

STATEMENT OF THE CASE

On or about November 21, 2019, the Howard County Board of Education (Local Board) passed the Attendance Area Adjustment Plan for School Year 2020-2021 (Redistricting Plan). Multiple appeals were filed by parents and concerned citizens to challenge the Redistricting Plan.

By letter dated January 16, 2020, the Maryland State Board of Education (State Board) transmitted the appeals to the Office of Administrative Hearings (OAH) for a contested case hearing and to issue a proposed decision containing findings of facts, conclusions of law, and recommendations. Code of Maryland Regulations (COMAR) 13A.01.05.07A(1), E.

On February 20, 2020, I held an in-person prehearing conference on the appeals at the OAH in Hunt Valley, Maryland. Claude de Vastey Jones, Esquire, and Judith S. Bresler,

Esquire, represented the Local Board. The Appellants represented themselves. A motions schedule was agreed upon and later extended at the request of the Local Board and some of the appellants.

On May 4, 2020, the Local Board filed a Motion and Memorandum in Support of County Board's Motion for Summary Decision (Motion) with twenty-five exhibits. On May 19, 2020, the Appellants filed a Response to the Motion (Response). On June 1, 2020, the Local Board filed a Reply to the Appellants' Response (Reply) with one exhibit. No one requested oral argument.

ISSUE

Should the Local Board's Motion for Summary Decision be granted because there is no genuine dispute as to any material fact and it is entitled to judgment as a matter of law?

SUMMARY OF THE EVIDENCE

Exhibits

In support of its Motion, the Local Board relied upon affidavits, links to archived video footage, and documentary exhibits. In support of its Motion, the Appellants referred to exhibits which were attached to their initial appeal. A complete list is attached to this Ruling as an Appendix.

UNDISPUTED FACTS

The following facts are undisputed:

1. Local Board Policy 6010 defines the conditions and processes by which school attendance area adjustments will be developed and adopted in Howard County. (Motion, Ex. 1).
2. On January 24, 2019, the Local Board initiated a system wide school boundary review.

3. As part of her duties in the Office of School Planning and the boundary review and redistricting planning process, Renee Kamen, Manager of School Planning for the Local Board, produced a Feasibility Study with other school system staff. (Motion, Ex. 3).

4. The Feasibility Study was presented to the Local Board on June 13, 2019. The Attendance Area Committee reviewed the Feasibility Study and provided feedback to the superintendent through a series of meetings held on June 18, 2019, June 25, 2019, July 2, 2019, and July 9, 2019. (Motion, Ex. 2).

5. Four community meetings were conducted in July 2019. Input was solicited via an online form and survey collected between June 14 and August 1, 2019. (Motion, Ex. 2).

6. The superintendent's recommended plan was presented at a public board meeting on August 22, 2019. (Motion, Exs. 2 and 4).

7. Seven regional public hearings and nine public work sessions were held to consider the proposed boundary adjustments between September 17, 2019 and November 21, 2019, when the final vote was taken. (Motion, Ex. 2).

8. Prior to the final vote on November 21, 2019, the Local Board developed its own Redistricting Plan. (Motion, Ex. 22).

9. In the Redistricting Plan, the elementary school children living in Polygon 2053 were assigned to Swansfield Elementary School. Those children will ride the bus to school.

DISCUSSION

Legal Framework

Motion for Summary Decision

COMAR 28.02.01.12D governs motions for summary decision. It provides as follows:

- (1) A party may file a motion for summary decision on all or part of an action on the ground that there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law.

- (2) A motion for summary decision shall be supported by one or more of the following:
 - (a) An affidavit;
 - (b) Testimony given under oath;
 - (c) A self-authenticating document; or
 - (d) A document authenticated by affidavit.
- (3) A response to a motion for summary decision:
 - (a) Shall identify the material facts that are disputed; and
 - (b) May be supported by an affidavit
- (4) An affidavit supporting or opposing a motion for summary decision shall:
 - (a) Conform to Regulation .02 of this chapter;
 - (b) Set forth facts that would be admissible in evidence; and
 - (c) Show affirmatively that the affiant is competent to testify to the matters stated.
- (5) The ALJ may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

Maryland appellate cases on motions for summary judgment under the Maryland Rules are instructive regarding similar motions under the procedural regulations of the OAH. In a motion for summary judgment or a motion for summary decision, a party may submit evidence that goes beyond the initial pleadings, asserts that no genuine dispute exists as to any material fact, and shows that they are entitled to prevail as a matter of law. *Compare* COMAR 28.02.01.12D and Maryland Rule 2-501(a); *see Davis v. DiPino*, 337 Md. 642, 648 (1995).

A party may move for summary decision “on all or part of an action.” COMAR 28.02.01.12D(1). The principal purpose of summary disposition, whether it is for summary decision or summary judgment, is to isolate and dispose of litigation that lacks merit. Only a genuine dispute as to a material fact is relevant in opposition to a motion for summary judgment or summary decision. *Seaboard Sur. Co. v. Kline, Inc.*, 91 Md. App. 236, 242 (1992). A material fact is defined as one that will somehow affect the outcome of the case. *King v. Bankerd*, 303 Md. 98, 111 (1985); *Washington Homes, Inc. v. Interstate Land Dev. Co.*, 281 Md.

712, 717 (1978). If a dispute does not relate to a material fact, as defined above, then any such controversy will not preclude the entry of summary judgment or decision. *Salisbury Beauty Sch. v. State Bd. of Cosmetologists*, 268 Md. 32, 40 (1973). Only where the material facts are conceded, are not disputed, or are uncontroverted and the inferences to be drawn from those facts are plain, definite, and undisputed does their legal significance become a matter of law for summary determination. *Fenwick Motor Co. v. Fenwick*, 258 Md. 134, 139 (1970).

When a party has demonstrated grounds for summary disposition, the opposing party may defeat the motion by producing affidavits, or other admissible documents or evidence, which establish that material facts are in dispute. *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737-38 (1993). In such an effort, an opposing party is aided by the principle that all inferences that can be drawn from the pleadings, affidavits, and admissions on the question of whether there is a dispute as to a material fact must be resolved against the moving party. *Honacker v. W.C. & A.N. Miller Dev. Co.*, 285 Md. 216, 231 (1979).

Even where there is no dispute as to material facts, the moving party must demonstrate that it is entitled to judgment as a matter of law. *See Richman v. FWB Bank*, 122 Md. App. 110, 146 (1998). *Richman* held in pertinent part that:

[T]he trial court must determine that no genuine dispute exists as to any material fact, and that one party is entitled to judgment as matter of law. In its review of the motion, the court must consider the facts in the light most favorable to the non-moving party. It must also construe all inferences reasonably drawn from those facts in favor of the non-movant.

To defeat a motion for summary judgment, the non-moving party must establish that a genuine dispute exists as to a material fact. A material fact is one that will somehow affect the outcome of the case. If a dispute exists as to a fact that is not material to the outcome of the case, the entry of summary judgment is not foreclosed.

Id.; *see also Bankerd*, 303 Md. at 110-11.

In considering a motion for summary decision, it is not my responsibility to decide any issue of fact or credibility but only to determine whether such issues exist. *See Eng'g Mgmt. Servs., Inc. v. Md. State Highway Admin.*, 375 Md. 211, 228-29 (2003). Additionally, “the purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried.” *Jones v. Mid-Atlantic Funding Co.*, 362 Md. 661, 675 (2001) (citing *Goodwich v. Sinai Hosp., Inc.*, 343 Md. 185, 205-06 (1996); *Coffey v. Derby Steel Co.*, 291 Md. 241, 247 (1981); *Berkey v. Delia*, 287 Md. 302, 304 (1980)).

Standard of Review

The standard of review applicable to school redistricting is set forth in COMAR 13A.01.05.06A, as follows:

Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal.

COMAR 13A.01.05.06B defines “arbitrary or unreasonable” as follows:

A decision may be arbitrary or unreasonable if it is one or more of the following:

- (1) It is contrary to sound educational policy; or
- (2) A reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached.

COMAR 13A.01.05.06C defines “illegal” as satisfying one or more of the following six criteria:

- (1) Unconstitutional;
- (2) Exceeds the statutory authority or jurisdiction of the local board;
- (3) Misconstrues the law;
- (4) Results from an unlawful procedure;
- (5) Is an abuse of discretionary powers; or
- (6) Is affected by any other error of law.

A redistricting decision is subject to a presumption of correctness. COMAR 13A.01.05.06A. To prevail, an appellant must show, by a preponderance of the evidence, that the challenged redistricting decision was arbitrary, unreasonable, or illegal. COMAR 13A.01.05.06A and D. To prove an assertion by a preponderance means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). If this matter goes to a full merits hearing, the Appellants have the burden of proof. However, as noted earlier, the Local Board, as the moving party in the Motion, has the burden to establish it is entitled to a summary decision as to each issue raised in the Motion.

Review of Redistricting Plans

County boards determine the geographical attendance area for each school. Md. Code Ann., Educ. § 4-109(c) (2018). In *Bernstein v. Board of Education of Prince George’s County*, 245 Md. 464 (1967), the court held that absent a claim of deprivation of equal educational opportunity or unconstitutional discrimination because of race or religion, there is no right or privilege to attend a particular school. *Id.* at 472. The courts of Maryland will not ordinarily substitute their judgment for the expertise of school boards acting within the limits of the discretion entrusted to them. *Id.* at 476. The court in *Bernstein* wrote,

The point is whether the move was reasonable and within the discretion of the Board. The test is not even that there may have been other plans that would have worked equally well, or may, in the opinion of some, have been better; the test is whether the action which was taken was arbitrary, capricious or illegal.

Id. at 479.

The Court further noted that it “is a thankless job that the Board of Education has when it finds it necessary to move students from one school to another,” but in “a rapidly growing county, however, that is sometimes necessary. The paramount consideration is the proper education of the students.” *Id.* In 1974, the State Board noted that it “is not enough for [the

appellants] to show that their [p]lan is better, they must show that the Board's Plan is so totally lacking in merit as to have been adopted without any rational basis." *Concerned Parents of Overlea v. Bd. of Educ. of Baltimore Cty.*, MSBE Op. No. 74-13 (1974).

Local boards determine what sound educational policy is for their county. It is defined by the public through their elected Board of Education members. They are elected specifically to formulate educational policy for the county using their own judgment. While many people may disagree with the resulting conclusions, decisions made through the proper process are the result of the community speaking through the democratic process. *Shah v. Howard Cty. Bd. of Educ.*, MSBE Op. No. 02-30 (2002). Promoting demographic diversity in a school setting has been approved as sound educational policy. *Jones, et al. v. Montgomery Cty. Bd. of Educ.*, MSBE Op. No. 06-38 (2006).

There is no right to a school attendance area remaining "as is." In *Stishan v. Howard County Board of Education*, MSBE Op. No. 05-33 (2005), a family opposed the county board's redistricting decision which resulted in the family's children being reassigned to a different high school. The redistricting plan was upheld by the State Board, which found there is no liberty or property interest in a school in one's district remaining "as is," without changes resulting from closure or consolidation. The decision to close or consolidate schools is a quasi-legislative matter and the rights to be afforded to interested citizens are limited.

The reviewer of the Local Board's decision may not substitute their judgment for that of the Local Board. If substantial evidence exists to support the decision, even if the reviewer disagrees with it, the decision must be upheld. *Montgomery Cty. Educ. Assoc., Inc. v. Bd. of Educ. of Montgomery Cty.*, 311 Md. 303, 309-10 (1987).

Analysis

Arbitrary and Unreasonable Decision

The Appellants complained in their appeal that the Redistricting Plan as it related to Polygon 2053 created an island and a small feed to the middle school, contrary to some of the goals of Policy 6010. They asserted the final decision was arbitrary and unreasonable. The Local Board moved for summary decision on the basis that there is no guarantee students will be not be separated from their friends and that the Redistricting Plan “carried out the mission of balancing capacity utilization and FARM^[1] participation rates.” (Motion, p. 11). The Appellants responded that the Local Board failed to show how the decision affecting Polygon 2053 fulfilled any of the goals set forth in Policy 6010. Instead, they argued, it was an arbitrary, unreasonable decision that created an island of four students, which has a minimal impact on any school’s utilization or FARM participation rate. As it does not further those goals but instead negatively impacts the goal of community stability, the decision was arbitrary and unreasonable, they wrote. (Response, pp. 8-11).

The Appellants noted that the Local Board chose to proceed with the vote by voting on individual neighborhood moves and not by voting on the overall Redistricting Plan. Thus, it must be able to show each move is not arbitrary, unreasonable, or illegal. (Response, p. 8). In the Motion, the Local Board mentioned that the decision regarding Polygon 2053 impacted Hollifield Station Veterans and Northfield Elementary Schools, when in fact, it impacted Swansfield Elementary School. This may have been written in error, but as a result, the Motion fails to address how this decision fulfilled the goals of Policy 6010 as it regards Swansfield Elementary School. Nor did the Local Board clear up the confusion in the Reply.

¹ Free and Reduced Meals

In its Reply, the Local Board repeated the arguments that the moves impacting Polygon 2053 were part of the larger Redistricting Plan and that just because the Appellants are dissatisfied with the Plan does not make it arbitrary, unreasonable, or illegal. It argued that each move included in the Plan took into consideration all the factors of Policy 6010 and constituted sound educational policy. (Reply, p. 3).

The Appellants raised legitimate questions relating to how the final boundary change, as it impacted four students in Polygon 2053, addressed utilization and balancing FARM participation rates. Resolving all inferences in favor of the non-moving party, I find the Appellants have raised a genuine dispute of material fact regarding whether the decision relating to Polygon 2053 was arbitrary or unreasonable.

Bus Transportation Safety

The Appellants alleged in their appeal that the resulting bus traffic will create an unsafe situation for their small neighborhood. They set forth in detail how the busses will enter and leave their neighborhood. In their Response, they wrote that:

Because the Swansfield bus would now be skipping the northern portion of Watch Chain Way in Polygon 53, a second bus from Clemens Crossing would now be traversing the same small neighborhood streets to bypass Polygon 2053 in order to pick up kids in Polygon 53. Moreover, the Swansfield bus will need to turn around in the middle of the small residential area on Watch Chain Way when it reaches the end of Polygon 2053.

(Response, p. 13).

The Appellants also submitted statements from neighbors who noted the possible safety issues in the bus transportation arrangements for their polygon. (Response, Ex. H).

The Local Board moved for summary decision on the basis that the Appellants failed to submit any evidence to support their assertion. The Local Board attached to its Reply an affidavit signed by David Ramsey, the Director of Transportation. (Reply, Ex. 26). He asserted that he had consulted with traffic engineers for the Howard County Department of Public Works

and “determined that the new bus routes meet a reasonable level of safety” pursuant to Local Policy 5200, which was attached to his affidavit as exhibit A. That policy, entitled Pupil Transportation, provides, in pertinent part,

IV.D. When considering the need for and/or implementing school bus service, the staff shall consider:

1. Reasonable levels of safety.
2. Program efficiency.
3. Economy of operations.
4. Equity of service.
5. IEP or 504 plan requirements.

Providing a reasonable level of safety shall be the major staff consideration.

Mr. Ramsey’s affidavit does not answer the specific questions raised by the Appellants about bus transportation safety in Polygon 2053. By contrast, the Appellants have illustrated potential problems with specificity. The Appellants will have the burden of proof at the hearing on the merits, but at this stage, the Local Board must show there is no genuine dispute of material fact. Resolving all inferences in favor of the non-moving party, I conclude the Motion should be denied on this issue.

Opportunity to be Heard

The Appellants alleged in their appeal that they were not given an opportunity to be heard during the boundary review process. The Local Board responded that, in fact, the Appellants’ written testimony was received.² (Motion, p. 12). The Appellants countered that the Local Board has never said the statement was actually reviewed or considered. (Response, p. 13). Further, the Appellants asserted that in a conversation with the Local Board’s Administrator, Kathleen Hanks, on the morning of November 19, 2019, the last day to submit written testimony, Ms. Hanks said no written testimony filed after the straw vote was taken on November 18 would be considered. (Appellant’s Response, p. 14). I have looked at the Appellants’ statement and it

² In its Response to Appeal, filed on March 5, 2020, the Local Board submitted the Appellants’ written statement as Exhibit 6.

is not dated, but according to the initial appeal, they submitted it on November 16, 2019, five days before the final vote was taken. Thus, whether Ms. Hanks cut off the time for submitting written testimony by a day is irrelevant to the Appellants. The only way to conclude the Local Board did not read their statement is to speculate that so many statements were submitted, the Board was unable to read them all. That speculative reasoning is insufficient to raise a genuine issue of material fact.

As to whether the Appellants had an opportunity to be heard verbally, their complaint that the issue of keeping Polygon 2053 at Swansfield Elementary School came up in the discussions too late to allow them to appear personally and testify does not raise a genuine issue of material fact. Chair Ellis announced at each work session that written statements were given equal weight to live testimony. The Appellants said they did not have as much time to respond to the Redistricting Plan as the Superintendent did in writing his plan. (Response, p. 14). That is abundantly true. That does not raise a genuine issue of material fact as to whether they had an opportunity to be heard, however. As to this issue, the Motion will be granted.

Superintendent's Plan

The Local Board raised a final issue in its Motion: that the Appellants appealed the Redistricting Plan in part because they believe the Local Board should have adopted the Superintendent's plan. In their response to the Motion, the Appellants denied they raised this issue in their appeal. (Response, p. 14, fn. 4). I have reviewed the Appellants' appeal and do not find that issue raised.

Summary

Taking the evidence in the light most favorable to the non-moving party, I have concluded the Appellants have raised a genuine issue of material fact as to whether the decision

regarding Polygon 2053 was arbitrary or unreasonable and whether it complies with Local Policy 5200. Accordingly, the Appellants may proceed to hearing on those issues.

There is no genuine issue of material fact as to whether the Appellants had an opportunity to be heard during the boundary review process. Construing all inferences in the Appellants' favor, I find the Board is entitled to prevail as a matter of law on that issue. *Beatty*, 330 Md. at 737-38.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Local Board's Motion for Summary Decision should be denied as to the issues of whether the decision regarding Polygon 2053 was arbitrary and unreasonable and whether it complies with Local Policy 5200 because there is a genuine dispute as to some material facts related to these issues. COMAR 28.02.02.12D(5); COMAR 13A.01.05.06.

I further conclude as a matter of law that the Local Board's Motion for Summary Decision should be granted as to the issue of whether the Appellants had an opportunity to be heard regarding Polygon 2053 because there is no genuine dispute as to the material facts related to this issue and the Local Board is entitled to judgment as a matter of law. COMAR 28.02.02.12D(5); COMAR 13A.01.05.06.

ORDER

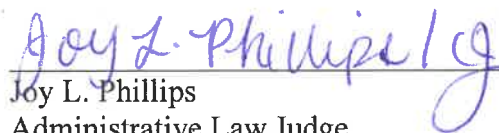
I ORDER that the Motion for Summary Decision filed by the Howard County Board of Education is **DENIED** as to the issues of whether the boundary decision regarding Polygon 2053 was arbitrary or unreasonable and whether it complied with Local Policy 5200.

RECOMMENDED ORDER

I **RECOMMEND** that the Motion for Summary Decision filed by the Howard County Board of Education be **GRANTED** as to the issue of whether the Appellants were provided an opportunity to be heard regarding Polygon 2053 before the Redistricting Plan was adopted on November 21, 2019.³

June 24, 2020
Date Decision Issued

JLP/cmj
#186034


Joy L. Phillips
Administrative Law Judge

Copies Mailed To:

Viktoriya M. Shpigelman
Mikhail Shpigelman
[REDACTED]
[REDACTED]

Claude de Vastey Jones, Esquire
Judith S. Bresler, Esquire
Carney, Kelehan, Bresler, Bennett & Scherr, LLP
10715 Charter Drive, Suite 200
Columbia, MD 21044

³ This Recommended Ruling will be transmitted to the State Board when I issue a Recommended Decision after a hearing on the merits. The parties retain their rights to file exceptions at that time. Those rights are:

Any party adversely affected by this Recommended Ruling has the right to file written exceptions within fifteen days of receipt of the decision; parties may file written responses to the exceptions within fifteen days of receipt of the exceptions. Both the exceptions and the responses shall be filed with the Maryland State Department of Education, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, with a copy to the other party or parties. COMAR 13A.01.05.07F. The Office of Administrative Hearings is not a party to any review process.