MARINA AND STAN VORNOVITSKY (#13)

MADHAV AND MONICA RAO (#16)

RUSSELL PENTZ (#25)

Appellants,

v.

HOWARD COUNTY BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 21-20

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"). As is required by COMAR 13A.01.05.07(A)(1)(a), this Board referred the case to the Office of Administrative Hearings for review by an Administrative Law Judge ("ALJ"). The local board filed a motion to dismiss the Appellants from the case based on lack of standing to pursue the appeal. On March 25, 2020, the ALJ issued a Proposed Ruling on Motion to Dismiss recommending that the State Board grant the local board's motion and dismiss the Appellants for lack of standing. None of the Appellants filed exceptions to the Proposed Ruling.

We have reviewed the ALJ's decision and concur with the recommendation. Accordingly, we adopt the ALJ's Proposed Ruling on Motion to Dismiss as the Opinion of this Board and dismiss the Appellants from the redistricting appeal.

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

MARINA and STAN VORNOVITSKY (File # 13),	*	**BEFORE JOY L. PHILLIPS,**
	*	**AN ADMINISTRATIVE LAW JUDGE**
MADHAV and MONICA RAO (File #16),	*	**OF THE MARYLAND OFFICE**
and	*	**OF ADMINISTRATIVE HEARINGS**
RUSSELL PENTZ (File #25),	*	
	*	
APPELLANTS	*	**OAH No: MSDE-BE-09-20-01550 (#13)**
v.	*	**MSDE-BE-09-20-01603 (#16)**
HOWARD COUNTY	*	**MSDE-BE-09-20-01631 (#25)**
BOARD OF EDUCATION,	*	
RESPONDENT	*	

* * * * * * * * * * * * *

PROPOSED RULING ON MOTION TO DISMISS

BACKGROUND
ISSUE
DISCUSSION
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RIGHT TO FILE EXCEPTIONS

BACKGROUND

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, including the Appellants listed above.

By letter dated January 13, 2020, the Maryland State Board of Education (State Board) transmitted the appeals to the Office of Administrative Hearings (OAH) with the request to

conduct a consolidated contested case hearing and 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 14, 2020, the Local Board filed a Motion to Dismiss (Motion) because the Appellants lack standing to bring the appeal.[1]

On February 20, 2020, I conducted an In-Person Prehearing Conference (Conference), at which time I scheduled dates for the filing of motions. Appellants Vornovitsky and Rao did not attend the Conference. Appellant Pentz did attend the Conference. On February 26, 2020, I issued a Prehearing Conference Report outlining the discussion at the Conference. The Appellants were directed to respond to the Motion no later than February 29, 2020. The Local Board was given until March 10, 2020 to reply to the Appellants' responses.

On February 28, 2020, Appellant Pentz filed a written request for an extension of time until March 5, 2020 in which to file his response. The OAH forwarded his request to the Local Board with a request to respond by March 16, 2020. On March 9, 2020, the Local Board consented to an extension. Given the personal issues raised by Appellant Pentz in his request, I found good cause and extended his time to file a response. On March 10, 2020, I notified Appellant Pentz and the Local Board in writing that his time for responding to the Motion was extended to March 17, 2020. He did not file a response.

The other two Appellants did not respond to the Motion. I will rule on the Motion without a hearing as no one requested oral argument.

Procedure is governed by the Administrative Procedure Act, the regulations of the State Board, and the OAH Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226

[1] A fourth Appellant, Rebecca Shakespeare (File #12), was included in the Motion but she withdrew her appeal of the Redistricting Plan on February 21, 2020 and her case has been closed.

(2014); COMAR 13A.01.05; COMAR 28.02.01. Any dispositive decision by the Administrative Law Judge (ALJ) will be a recommendation in the form of a proposed decision to the State Board. COMAR 13A.01.05.07E.[2]

ISSUE

Should the Appellants' appeals be dismissed because they lack standing to proceed?

DISCUSSION

The State Board's regulations provide for a motion to dismiss in response to appeals in COMAR 13A.01.05.03B, as follows:

> (1) A motion to dismiss shall specifically state the facts and reasons upon which the motion is based that may include, but are not limited to, the following:
>
> (a) The county board has not made a final decision;
> (b) The appeal has become moot;
> (c) The appellant lacks standing to bring the appeal;
> (d) The State Board has no jurisdiction over the appeal; or
> (e) The appeal has not been filed within the time prescribed by Regulation .02B of this chapter.
>
> (2) The State Board may, on its own motion, or on motion filed by any party, dismiss an appeal for one or more of the reasons listed in §B(1) of this regulation.

OAH's Rules of Procedure similarly provide for consideration of a motion to dismiss under COMAR 28.02.01.12, which provides as follows:

> C. Upon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim for which relief may be granted.

In considering a motion to dismiss, an administrative law judge may not go beyond the "initial pleading," defined under COMAR 28.02.01.02B(7) as "a notice of agency action, an appeal of an agency action, or any other request for a hearing by a person." The initial pleading in this case is the appeal filed by the Appellants to the State Board.

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[2] In an appeal of a school redistricting, the Administrative Law Judge shall submit in writing to the State Board a proposed decision containing findings of fact, conclusions of law, and recommendations, and distribute a copy of the proposed written decision to the parties. COMAR 13A.01.05.07E.

COMAR 28.02.01.12C parallels Maryland Rule 2-322(b)(2) (failure to state a claim upon which relief can be granted) and, therefore, case law construing that rule is helpful in analyzing a similar motion under the procedural regulations of the OAH. In a motion to dismiss, the moving party must establish that it is entitled to relief. *See Lubore v. RPM Assocs., Inc.*, 109 Md. App. 312 (1996); *Rossaki v. NUS Corp.*, 116 Md. App. 11 (1997). Furthermore, when construing a motion of this nature, the ALJ is required to examine the evidence in the light most favorable to the non-moving party. Case law establishes several relevant rules. First, the properly pleaded allegations contained in a complaint are accepted as true. Second, reasonable inferences favorable to the complainant are drawn from the properly pleaded facts. Third, any ambiguity or uncertainty in the allegations is construed against the complainant. *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 344-45 (2000).

Numerous cases have addressed what is required before a party has standing. *Flast v. Cohen*, 392 U.S. 83, 99 (1968) addressed the concept of standing, in general. Acknowledging the amorphous or fluid nature of the jurisdictional concept, the Court explained that the

> fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' (citations omitted).

The explanation of standing in *Flast* is instructive. The key is whether the party has a sufficient personal stake in the outcome of a case to establish the right to be a party to the proceeding.

The Supreme Court clarified its position on standing in federal court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In that case, the Court announced that standing

requires a showing of three elements, including: (1) injury in fact;[3] (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood "that the injury will be 'redressed by a favorable decision.'" *Id.* at 560-61. The Court determined that environmental groups did not have standing to challenge a regulation of the Secretary of the Interior that required other agencies to confer only with him regarding federally funded projects in the United States and on the high seas.

The Maryland Court of Appeals addressed the issue of standing in administrative proceedings in *Sugarloaf Citizens' Association, et al. v. Department of Environment*, 344 Md. 271 (1996). This case involved the issuance of construction permits by the Department of Environment for an incinerator that was to be located adjacent to property owned by association members. The Court explained that, unlike the requirements to establish standing for judicial review, the standard to establish standing in an administrative hearing is substantially lower. The Court:

> recognize[d] a distinction between standing to be a party to an administrative proceeding and standing to bring an action in court for judicial review of an administrative decision. Thus, a person may properly be a party at an agency hearing under Maryland's "relatively lenient standards" for administrative standing but may not have standing in court to challenge an adverse agency decision.

Id. at 285-86. *See also Handley v. Ocean Downs, LLC*, 151 Md. App. 615, 628 (2003) (holding that "[m]ere presence at an administrative proceeding, without active participation, is sufficient to establish oneself as a party to the proceeding"); *Morris v. Howard Res. & Dev. Corp.*, 278 Md. 417, 423 (1976); *Mid-Atlantic Power Supply Ass'n v. Public Service Comm'n of Maryland*, 361 Md. 196, 213 (2000). The Court in *Sugarloaf* continued:

> The requirements for administrative standing under Maryland law are not very strict. Absent a statute or a reasonable regulation specifying criteria for

[3] This injury is defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual and imminent." *Id.* at 560 (citations omitted).

> administrative standing, one may become a party to an administrative proceeding rather easily.

Id. at 286 (internal citations omitted).

The Court has established through these cases that, absent a statute or regulation requiring some additional basis for standing, an administrative hearing before an agency requires only the more lenient requirement that a person or entity have participated in some fashion before the agency to establish that the person has standing to challenge an agency decision. In the instant case, the statutes and regulations regarding a local board's decision to redistrict schools place no restriction on who may appeal the local board's decision to the State Board.

COMAR 13A.01.05.01 addresses the definitions of "appellant" and "party."[4] COMAR 13A.01.05.02 discusses the contents of an appeal. The standard of review in these cases, that the local board's decision was arbitrary, unreasonable, or illegal, is provided in COMAR 13A.01.05.05. That regulation also places the burden of proof on the appellant by a preponderance of the evidence. COMAR 13A.01.05.05D. The hearing procedures are addressed in COMAR 13A.01.05.07.

The Education Article authorizes local county boards, with the advice of the county superintendent, to determine the geographical attendance area of public schools. Md. Code Ann., Educ. § 4-109(c) (2018). The applicable Education statute and regulations do not address the standing of a party to bring an administrative appeal of a local board's school redistricting plan. The Education statute and regulations do not require an appellant to be "aggrieved" to appeal the decision of a local board to close schools to the State Board of Education. Absent such a regulation, one might infer that the rather lenient standard announced in *Sugarloaf* controls, and so long as the Appellants participated in some manner before the local board or

[4] "'Appellant' means the individual or entity appealing a final decision of a local board." COMAR 13A.01.05.01B(1). "'Party' means either an appellant, respondent, or any person or entity allowed to intervene or participate as a party." COMAR 13A.01.05.01B(8).

asserted an interest in the outcome, they shall have standing to challenge the local board's redistricting decision at the administrative level.

However, notwithstanding the absence of a statute or a regulation regarding standing, the State Board has consistently held that an Appellant must assert a "direct interest" or "injury in fact" in order to have standing to challenge a decision of the local board.[5] Pursuant to the Administrative Procedure Act, I am required to follow "any agency regulation, declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or would have been bound if it were hearing the case." Md. Code Ann., State Gov't § 10-214(b) (2014). Through its decisions, the State Board has established a long-standing policy that an appellant must assert a "direct interest" or "injury in fact" to have standing to challenge a decision of the local board. It has found,

> In order to be an aggrieved party, a person ordinarily must have an interest such that he is personally and specifically affected [by the agency's final decision] in a way different from . . . the general population.

Krista Kurth, et. al., v. Montgomery County Bd. of Educ., MSDE Op. No. 11-38, p. 5 (2011), citing *Sugarloaf*, 344 Md. at 287-88.

By statute, I am obligated to follow the State Board's preexisting policy to determine the standing of a party to appeal the decision of the Local Board. Therefore, the question becomes whether the Appellants named in the Motion have asserted a direct interest or injury in fact to bring this appeal.

A series of cases in which the State Board has established and refined this policy are instructive in demonstrating the characteristics which determine whether a party has standing to pursue an appeal of this nature. Essentially, the State Board has limited standing to appeal a

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[5] *See Marshall v. Baltimore City Board of School Commissioners,* MSBE Opinion No. 03-38 (2003); *Regan v. Washington County Board of Education*, MSBE Opinion No. 03-13 (2003); *Bellotte v. Anne Arundel County Board of Education*, MSBE Opinion No. 03-08 (2003).

local board's decision to a definable group of parents whose children will be directly affected by the decision, that is, parents whose children attend the specific schools or programs so affected. *See Clarksburg Civic Association v. Montgomery County Bd. of Educ.*, MSBE Op. No. 07-34 (2007); *Joan & Michael Taylor, et al. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 07-32 (2007).

Additionally, any alleged "taxpayer" standing is also insufficient to provide the Appellants standing if it is not based on more than a generalized interest because even taxpayer standing must be based on an injury that is "concrete and particularized." *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006).

Appellants Vornovitsky (File #13) alleged only that they are concerned citizens. They have not responded to the Motion nor did they appear at the Conference to speak. I have no reason to conclude they were involved in the process below or have children who will be impacted by the Redistricting Plan.

Appellants Rao (File #16) alleged in their appeal that they are concerned Howard County Public School parents, but they provided no information regarding whether they have children currently enrolled. They have not responded to the Motion nor did they appear at the Conference to speak. I have no reason to conclude they were involved in the process below or have children who will be impacted by the Redistricting Plan.

Appellant Pentz (File #25) alleged only that he is a concerned citizen. I have no reason to conclude, based on the contents of his appeal or his presentation at the Conference, that he was involved in the process below or has children who will be impacted by the Redistricting Plan. In his Request for Extension of Time, he mentioned that he does not have children who attend school in Howard County. He wrote that he wanted to add families from his neighborhood to his appeal. In my Order issued March 10, 2020 granting the extension of time, I noted that any

amendment to his appeal may only be done with leave of the State Board or by written consent of the Local Board. COMAR 13A.01.05.04A(2). He has not submitted anything indicating the State Board or the Local Board has consented to amending his appeal.

Summary

The Appellants have not demonstrated any legally cognizable injury in fact or direct connection to the Redistricting Plan. The State Board has set parameters to define affected parties on whom standing may be conferred, and without these reasonable limitations, virtually anyone or any entity who believes itself aggrieved, to any degree, could bring an action challenging the Redistricting Plan. There is no all-inclusive right to appeal. Therefore, absent meeting the established standards, the Appellants lack standing to appeal.

CONCLUSION OF LAW

I conclude, as a matter of law, that Appellants Vornovitsky, Appellants Rao, and Appellant Pentz do not have standing to pursue an appeal of the Local Board's Redistricting Plan. COMAR 13A.01.05.03B; COMAR 28.02.01.12C; *Krista Kurth, et. al., v. Montgomery County Bd. of Educ.*, MSDE Op. No. 11-38 (2011); *Clarksburg Civic Association v. Montgomery County Bd. of Educ.*, MSBE Op. No. 07-34 (2007).

PROPOSED ORDER

I **PROPOSE** that the Howard County Board of Education's Motion to Dismiss the appeals filed by the Appellants be **GRANTED**.

March 25, 2020
Date Ruling Mailed

Joy L. Phillips
Administrative Law Judge

JLP/dlm
#184994

RIGHT TO FILE EXCEPTIONS

A party objecting to the administrative law judge's proposed decision may file exceptions with the State Board within 15 days of receipt of the findings. A party may respond to exceptions within 15 days of receipt of the exceptions. As appropriate, each party shall append to the party's exceptions or response to exceptions filings copies of the pages of the transcript that support the argument set forth in the party's exceptions or response to exceptions. If exceptions are filed, all parties shall have an opportunity for oral argument before the State Board before a final decision is rendered. Oral argument before the State Board shall be limited to 10 minutes per side. COMAR 13A.01.05.07.

Copies Mailed To:

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