MARTA ALACRON (#30)	BEFORE THE
Appellant,	MARYLAND
v.	STATE BOARD
HOWARD COUNTY BOARD OF EDUCATION	OF EDUCATION
Appellee.	Opinion No. 21-21

OPINION

Appellant 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. Appellant maintained that the redistricting decision is arbitrary, unreasonable or illegal because the local board relied on inaccurate Free and Reduced-Price Meal ("FARM") data in making its decision and the local board failed to provide adequate notice of the redistricting in Spanish to Appellant and others who have limited English proficiency.

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"). On June 23, 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 30, 2020, and August 3 and 17, 2020 regarding the FARM data issue. The ALJ conducted a virtual hearing on August 6, 2020, and September 3 and 4, 2020 regarding the notice issue.

On October 14, 2020, the ALJ issued a Proposed Decision concluding that the Appellant failed to show, by a preponderance of the evidence, that the local board's redistricting decision was arbitrary, unreasonable or illegal. The ALJ found that the Appellant failed to demonstrate that the local board's decision resulted from reliance on incorrect or faulty data.[1] The ALJ further found that the Appellant failed to demonstrate that the local board did not provide adequate notice of the redistricting to the Appellant or other Spanish speakers with limited English proficiency. The ALJ recommended that we dismiss the appeal.

Appellant did not file exceptions to the ALJ's recommended Order or 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 as modified herein. In the Proposed Decision, the ALJ found that the Appellant did not meet her

[1] The ALJ's Findings of Fact #11 and #12 mistakenly reverse the numbers in the explanation of the calculation for the FARM percentages by the Office of School Planning and MSDE. (ALJ Proposed Decision at 6). FARM percentages at each school were calculated by using the FARM participation count and dividing it by school enrollment. This has no effect on the decision in the case.[1] (*See* Transcript (8/3/2020) at 295-296, 323).

burden of proof in the case and, therefore, recommended dismissal of the appeal. Because the Appellant failed to demonstrate 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

_____
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

Dissent of Shawn D. Bartley:

The persuasive techniques of the board members should be thoroughly examined via direct examination when considering the curious vote change of the affected board member; especially taking into consideration the questionable data that was changed on the day of the decisive vote, without thorough contemplation and evaluation of the same.

April 27, 2021

MARTA ALACRON,	*	**BEFORE JOY L. PHILLIPS,**
APPELLANT	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE OF**
HOWARD COUNTY	*	**ADMINISTRATIVE HEARINGS**
BOARD OF EDUCATION	*	**OAH No.: MSDE-BE-09-20-01769 (File #30)**

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

PROPOSED DECISION

STATEMENT OF THE CASE

On 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 Appellant, who lived in Polygon 1142 at that time, filed an appeal challenging the Redistricting Plan (Appeal).[1]

By letter dated January 16, 2020, the Maryland State Board of Education (State Board or MSDE) transmitted the appeal 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.[2] Code of Maryland Regulations (COMAR) 13A.01.05.07A(1), E.

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

[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 matter as soon as practical, as per the regulation.

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 Appellant was represented by Lorraine Lawrence-Whittaker, Esquire, and Mary S. Poteat, Esquire.[3] A motions schedule was agreed upon and later extended at the request of the parties.[4]

The Local Board filed motions to dismiss in twelve cases on or about February 29, 2020. My rulings were issued on March 20 and 25, 2020. On March 5, 2020, the Local Board filed a Response to Appeal, accompanied by twenty-five exhibits, in each case in which no motion to dismiss had been filed.[5] On March 4, 2020, the Appellant filed a Motion for Default on the basis that the Local Board failed to timely respond to the Appeal. The Motion for Default was later amended. On March 26, 2020, I issued a Ruling denying the Amended 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.[6] The prehearing conference was continued to July 6, 2020. On June 23, 2020, I issued a ruling on the Motion for Summary Decision.[7] At the July 6, 2020 prehearing conference, the remaining issues were scheduled for hearing.

On July 30, 2020, and August 3 and 17, 2020, I convened a contested case hearing via videoconferencing to address whether the Local Board used inaccurate or faulty Free and Reduced Meals (FARM) data. The Appellant's appeal was consolidated with other appeals for

[3] These representatives appeared for their clients at all proceedings.
[4] I frequently extended deadlines for filing in the appeals at the request of both sides due to the constraints imposed by the COVID-19 pandemic.
[5] One copy of those exhibits will be forwarded to the State Board with the files for all appeals.
[6] This matter was conducted remotely because of closures due to the COVID-19 pandemic.
[7] I recommended the Motion for Summary Decision be granted on the issue of whether the Local Board impermissibly considered race.

hearing on this issue.[8] On August 6, 2020, and September 3 and 4, 2020, I convened a separate contested case hearing via videoconferencing on the remaining issue in the Appellant's appeal, regarding whether the Local Board failed to provide the Appellant with adequate notice in Spanish based on her limited English proficiency (also referred to as LEP).

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 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 Redistricting Plan adopted by the Local Board on November 21, 2019 arbitrary or unreasonable as a result of the Local Board using inaccurate or faulty data, or illegal as a result of the Local Board failing to provide the Appellant with adequate notice in Spanish based on her limited English proficiency?

SUMMARY OF THE EVIDENCE

Exhibits

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

Testimony

The Appellants presented the testimony of the following witnesses:

- Renee Kamen, Howard County Public School System (HCPSS) Former Manager of School Planning,[9] who was recognized as an expert in school planning

[8] A. For this issue, I consolidated the following appeals for hearing: Alacron (File #30), MSDE-BE-09-20-01769; Dimitrov (File #27), MSDE-BE-09-20-01684; Dewani (File #31), MSDE-BE-09-20-01773; MacCormack and Tayter (File #32), MSDE-BE-09-20-01781; Xue, et al., (File #33), MSDE-BE-09-20-01821; and Tucker (File #34), MSDE-BE-09-20-01834.
B. In the consolidated hearings, I accepted on behalf of all of the Appellants all exhibits introduced by any of the Appellants and I considered on behalf of all of the Appellants all of the arguments and objections made by any of the Appellants.
[9] At a hearing on September 3, 2020, Ms. Kamen announced that she had resigned from HCPSS.

- Local Board Members (on the issue of data):

  Christina Delmont-Small

  Vicky Cutroneo

  Mavis Ellis (Chair)

  Jennifer S. Mallo

- The Appellant

The Local Board presented the testimony of the following witnesses:

- Timothy Rogers, Planning Analyst, Office of School Planning (on the issue of data)
- Dr. Caroline Walker (on the issue of languages)

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. The resulting school area adjustment would take effect during the 2020-2021 school year.

2. There are forty-two elementary schools, twenty middle schools, and twelve high schools in Howard County, for a total of seventy-four schools.

3. The impetus for the boundary review was the number of schools in Howard County that were or would soon be overcapacity. "Capacity" is the number of student seats in a school.

4. HCPSS Policy 6010 sets a range of 90% to 110% as the capacity utilization goal for each school. "Capacity utilization" is how many students attend a school in relation to official capacity.

5. The HCPSS Office of School Planning annually produces a Feasibility Study for the Local Board that covers the needs of the school system, projections for coming years, infrastructure needs, planned capital improvements, and when necessary, suggests a boundary review to address projected needs.

6. On June 13, 2019, the annual Feasibility Study, prepared by the Office of School Planning, was presented to the Local Board and the boundary review process was officially started.

7. Data generated from student and school information, tracked in a software program called Synergy, were used in the Feasibility Study and the Proposed Attendance Adjustment Plan (Superintendent's Plan) to guide proposals for boundary changes. Synergy tracks multiple data points on each student in Howard County. The data are compiled by Student Information Services (SIS), an office within HCPSS.

8. The SIS office uses Synergy to track students using current, live addresses, recording when students move during the year. In this way, the SIS office tracks the mobility of Howard County students.

9. The Office of School Planning submits official enrollment figures to MSDE as of September 30 of each school year. The actual number is not reported on September 30, but is generally available closer to Thanksgiving, once a rectification process has been completed.

10. The Howard County Superintendent and the Local Board hired a consulting agency, Cooperative Strategies, Inc., to assist in compiling data and making recommendations for redistricting. The data they reported related primarily to capacity utilization, feeds, and FARM. The consultants received data from the SIS office during Board work sessions to run "test scenarios" of the impact of proposed boundary changes.

11. FARM participation data are reported by Food and Nutrition Services as of October 30 of each year.[10] FARM participation rates are historically calculated by the Office of School Planning by using the official enrollment number as of September 30 and dividing it by the FARM participation rate as of October 30. This was the calculation used by the Office of School Planning in developing the 2019 Feasibility Study.

12. MSDE calculates its FARM participation rates by using official enrollment as of October 30 and dividing it by the FARM participation rate as of October 30. These rates are published for schools statewide by MSDE sometime in June of each year. The Local Board does not use the MSDE FARM rate calculation method in making redistricting decisions.

13. The Office of School Planning provides ten-year projections of enrollment to the HCPSS in order to plan for future capital project and staffing needs. Enrollment projections not only include cohort survival rates, that is, the number of students moving up from grade to grade, school to school, and level to level, but also housing projections, taking into account housing resales, apartment turnover, and development. These projections also incorporate Pre-K enrollment and birth-to-five years of age survival rates. Projections are developed for attendance areas.

14. A school "attendance area" is a large geographical area from which students are assigned to a school.

15. The Office of School Planning also engages in an eighteen-month capital planning process, compiling projection data and reporting that data to the Local Board which in turn reports, via the Adequate Public Facilities Ordinance, to the Howard County Council annually.

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[10] Because the official FARM participation numbers are calculated by the Food and Nutrition Services office and no one from that office testified at the hearing, none of the witnesses who did testify could confirm whether the October date used officially by Food and Nutrition Services is the 30th or the 31st. For simplicity, I have used the 30th. The difference has no impact on my decision.

16. On August 22, 2019, the Superintendent presented the Superintendent's Plan to the Local Board. Under this plan, almost 7,400 students would be redistricted.[11]

17. Polygons are smaller units within an attendance area that are so designated only for redistricting purposes. Polygons are used to quickly provide the numbers needed for the Local Board to determine enrollment and other data for a school based on a suggested boundary change during redistricting deliberations.

18. Feeds refer to how students move up through the system. A feed at a middle school is the portion of students it receives from a particular elementary school, for example.

19. The Office of School Planning developed its 2019 Feasibility Study using the static addresses of students as of September 30, 2018.

20. From September 17, 2019 to October 15, 2019, the Local Board held seven sessions at which the public could speak regarding the proposed boundary changes.

21. From October 17, 2019 to November 18, 2019, the Local Board held nine work sessions to develop new attendance areas.

22. At the work sessions, the Local Board considered numerous factors set forth in Policy 6010 in evaluating the merits of each suggested boundary change. Factors included capacity utilization, equity, FARM participation rates at each school, walkers becoming bus riders, whether communities would be divided as a result of a boundary change, feeds to schools, transportation costs, and planned housing development.

23. Throughout the work sessions, the Board was guided by the staff from the Office of School Planning and the consultants from Cooperative Strategies.

[11] This might mean that a rising ninth grader would attend a different high school than they would have attended had no redistricting taken place, or a rising third grader would attend a different elementary school for fourth grade, for instance.

Data

24. During the work sessions, the SIS office provided updated, live data to the consultants, who provided it to the Local Board in response to the Board's queries on proposed boundary changes.

25. At the November 18, 2019, meeting, the Local Board reviewed changes in FARM percentages as a result of its proposed boundary changes. It noted that for some schools in which no boundary change had been proposed, the FARM rates were nevertheless different from the base percentages reported by the Office of School Planning in the Feasibility Study. The Board asked for an explanation.

26. At the next meeting, on November 21, 2019, the Office of School Planning provided an explanation to the Board. It had discovered that the numbers provided during the Board's work sessions included certain factors that the Office of School Planning did not use in calculating its base percentages early in the process. During work sessions, the SIS office provided the consultants and the Office of School Planning data that included Pre-K and "mobility" numbers in calculating FARM rates. In addition to factoring in Pre-K students, the data reflected current addresses of students rather than the static enrollment calculated as of September 30, 2018. In order to provide a consistent data set for comparison purposes, the Office of School Planning removed the Pre-K numbers and neutralized the mobility numbers. This brought the methodology used to generate data at the beginning of the process in line with what was used to generate data before the final vote on November 21, 2019.

27. During the work sessions, the Office of School Planning was not permitted to access FARM data at the polygon level. This resulted from an opinion of counsel for the Local Board in September or October 2019 that privacy concerns should prevent that data being

provided to the Office of School Planning. Instead, the SIS office maintained that data and provided it to the consultants and the Local Board in a redacted form.

28. At 3:29 hours into the meeting on November 21, 2019, the Local Board began hearing from Dan Lubeley, Director of Capital Planning and Construction, regarding the revised numbers. A chart was distributed showing the revised numbers. The Board members reviewed them and asked questions of the members of the Office of School Planning at the meeting and during a recess that lasted approximately eighteen minutes. When the meeting resumed, Board members continued to ask questions and either voiced concerns about the data or expressed an understanding of why the numbers were revised.

29. At 4:06 hours into the meeting, the Local Board proceeded to vote on motions comprising the Redistricting Plan for the HCPSS 2020-2021 school year. No votes changed as a result of the revised data. The final Plan reflected the boundary changes that had been included in the straw vote on November 18, 2019.

30. The votes on the Redistricting Plan were based on fifty-five individual motions addressing the polygons that were being moved to different schools, but it constituted one plan. The motions referred with specificity to where streets egress. This is the traditional way HCPSS identifies attendance areas.

31. Under the Redistricting Plan, approximately 5,400 students were redistricted. The school attendance areas of fifty-six schools were adjusted.

Notice in Spanish

32. The Appellant speaks only Spanish and understands limited English. She is the mother of three students in HCPSS, including a son who is a rising fourth grader at Longfellow Elementary School (ES). As a result of the Redistricting Process, her polygon was moved to

Clarksville ES. She has since moved her family to a different neighborhood that will allow her son to remain at Longfellow ES.

33. The Appellant's husband is the primary contact person for the school; she is the secondary contact.

34. Neither the Appellant nor her husband knew about the redistricting process while it was going on and only heard about it from friends around December 14, 2019. The Appellant does not always check her son's backpack for notices from the school, but after hearing about the school change from a friend on December 14, 2019, she checked and found a notice in English explaining that her son would be moved to Clarksville ES. She had to ask a neighbor to translate the notice. She did not have an email account at that time.

35. The Appellant talks to her son's teachers and has used the Spanish liaison services provided at the school.

36. HCPSS translated some documents regarding the redistricting process explaining how the public could get involved in the process, providing dates of public meetings, and listing telephone numbers for interpretation. The final boundary changes were also translated. All of these documents and the information provided were translated into Spanish, Chinese, and Korean.

37. To determine the percentage of the public who has limited English proficiency, HCPSS uses the most recently available U.S. Census data.

38. HCPSS made interpreters available at the public meetings upon request. The only request for an interpreter was for Mandarin Chinese, which was provided.

39. The HCPSS website contained links to publications and information regarding redistricting. The website is primarily in English. One publication regarding redistricting was not listed on the Spanish Publications list, but it was accessible through the boundary review

page. To access materials in Spanish, one must click through three or more pages on the website.

40. Language lines are available through the school system for the public to call in their own language and ask questions.

41. Liaisons who speak various languages are used by HCPSS in schools with high populations of non-native English-speaking families. A Spanish liaison is present at Longfellow ES twice weekly. Liaisons assist families in accessing instruction, providing families with information about the school, and answering questions. HCPSS prepared the liaisons to answer questions from immigrant communities about the redistricting process.

42. School principals are charged with ensuring families in their school are notified of the redistricting process and of boundary changes to a school. They routinely send home notes in students' backpacks and provide information to families at back-to-school nights.

43. At some schools, Spanish/English flyers about the redistricting process were sent home. At others, Chinese/English flyers were sent home.

44. HCPSS sent information to numerous community groups, press outlets, churches, and Parent-Teacher Administrations in an effort to inform the public of the redistricting process.

45. Despite these efforts, some people in Howard County, including families of school-age children, did not know about the process or how to participate. When HCPSS learned that some families did not know their child's school was being changed, staff called individual families in December 2019 and January 2020 to ensure they knew.. The Appellant was notified personally on January 9, 2020.

46. Alterations to the working Plan were being made by the Local Board up to taking the straw vote on November 18, 2019, making up-to-the-minute notifications to individual parents regarding changes to their polygon impractical.

DISCUSSION

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). As the Appellants acknowledged several times, they face an uphill battle to have the Redistricting Plan overturned.

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).

The 2019 Redistricting Process and Policy 6010

Policy 6010 is the governing policy for redistricting actions taken by the Local Board. (App. Ex. 6). It provides, in pertinent part:

> IV.B. The Board, Superintendent/designee and the AAC will consider the impact of the following factors in the review or development of any school attendance area adjustment plan. While each of these factors will be considered, it may not be feasible to reconcile each and every school attendance area adjustment with each and every factor.
>
> 1. Facility Utilization. Where reasonable, school attendance area utilization should stay within the target utilization for as long a period of time as possible through the consideration of:
>
> a. Efficient use of available space. For example, maintain a building's program capacity utilization between 90% and 100%.
>
> b. Long-range enrollment, capital plans and capacity needs of school infrastructures (e.g., cafeterias, restrooms and other shared core facilities).
>
> c. Fiscal responsibility by minimizing capital and operating costs.
>
> d. The number of students that walk or receive bus service and the distance and time bused students travel.

e. Location of regional programs, maintaining an equitable distribution of programs across the county.

2. Community Stability. Where reasonable, school attendance areas should promote a sense of community in both the geographic place (e.g., neighborhood or place in which a student lives) and the promotion of a student from each school level through the consideration of:

a. Feeds that encourage keeping students together from one school to the next. For example, avoiding feeds of less than 15% at the receiving school.

b. Areas that are made up of contiguous communities or neighborhoods.

c. Frequency with which any one student is reassigned, making every attempt to not move a student more than once at any school level or the same student more frequently than once every five years.

3. Demographic Characteristics of Student Population. Where reasonable, school attendance areas should promote the creation of a diverse and inclusive student body at both the sending and receiving schools through the consideration of:

a. The racial/ethnic composition of the student population.

b. The socioeconomic composition of the school population as measured by participation in the federal FARMS program.

c. Academic performance of students in both the sending and receiving schools as measured by current standardized testing results.

d. The level of English learners as measured by enrollment in the English for Speakers of Other Languages (ESOL) program.

e. Number of students moved, taking into account the correlation between the number of students moved, the outcomes of other standards achieved in Section IV.B. and the length of time those results are expected to be maintained.

f. Other reliable demographic and diversity indicators, where feasible.

Policy 6010 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.* The factors are: Facility Utilization, Community Stability, and Demographic Characteristics of Student Population. *Id.* The factors apply to developing "attendance areas," defined as the geographic area from which a school's students are drawn. *Id.*, § III.R. Attendance areas are made up of contiguous communities or neighborhoods. *Id.*, § IV.B.2.b. Polygons, 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, are not mentioned in Policy 6010.

The 2019 redistricting process was the most comprehensive in the history of Howard County. The Local Board noted throughout its meetings in 2019 that the driving force behind the redistricting process was schools that were overcapacity. Thus, capacity utilization was the primary focus of the Board. Board member Dr. Chao Wu noted at the October 17, 2019 work session that 1,000 new students arrive in Howard County Public Schools every year, although according to the Feasibility Study, that number is closer to 770. (App. Ex. 21, pp. 7-8). Few school buildings are being constructed, with the exception of a new high school slated to open for the 2023-2024 school year and a new elementary school expected to open for the 2024-2025 school year.

The Local Board was tasked with redistricting some school boundaries to best use existing facilities, while keeping enrollment in each school between the target utilization rate of 90% to 110%. (App. Ex. 6, § III.S and § IV.B.1). Reaching that utilization rate often took precedence over the stability that comes from keeping a neighborhood assigned to a particular school.

Another primary focus throughout the redistricting process was equity. The Local Board mentioned numerous times its intention to address inequities between schools based on the socioeconomic circumstances of the students. This is in accord with Policy 6010 § IV.B.3, which provides that "where reasonable, school attendance areas should promote the creation of a diverse and inclusive student body at both the sending and receiving schools." The indicator used by the Local Board for this consideration was the FARM rate at each school.

Policy 6010 provides that the Board should encourage keeping students together as they move from level to level by avoiding feeds of less than 15%. (App. Ex. 6, § IV.B.2). Some Board members opined during the process that moving entire neighborhoods to a different school and creating a new feeder system promoted community stability by keeping friends together,

albeit at different schools. Others did not want to change existing feeds, arguing it was more important to create larger, secure feeds that families could count on for future years. Some of the boundary changes made by the Local Board strengthened existing feeds and some weakened them. The Board was not successful in reaching the 15% goal for each school. Capacity utilization often took precedence over maintaining strong feeds. Nevertheless, the Board consistently considered feeds when reviewing potential boundary changes.

Other factors considered by Board members included allowing existing walkers to remain walkers, although they were not always successful in doing so. They looked at the costs of transportation. They discussed proposed housing development and where the greatest influx of new students would come from. They looked at the age of existing school buildings, the number of portable classrooms in use, and the frequency with which students from a given school would be reassigned within a five-year period. (Policy 6010 sets the goal at not moving a student more than once at any school level. (App. Ex. 6, § IV.B.2.c)).

I reviewed all of the Board's work sessions online and found that Board members attempted to hew closely to the directives of Policy 6010. Dr. Wu, realizing the constraints of Policy 6010, suggested making changes to the policy in the future to prevent some of the difficulties the Board faced during this process. For example, he suggested expanding the target utilization above 110% so that boundary changes would not have to be made so frequently. Some Board members cared more about feeds than utilization, while others focused on equity more than keeping students in a walkable zone. Each member was able to voice their positions and arguments. Each member was able to suggest changes or introduce plans. Many members cautioned that there would be no perfect plan and that the community should be prepared for change. An issue was raised, but not resolved, whether it was better to move more students now

so that they would not have to be moved again in a few years, or fewer students now to preserve community stability.

The Board began the process using the Superintendent's Plan, introduced on August 22, 2019, which contained alternative scenarios.[12] Seven public hearings were held to permit the public to speak before the Board and public comment via email was solicited. From October 17, 2019 to November 18, 2019, the Board held nine public work sessions. The Board worked on the high schools and middle schools first. On November 14, 2019, the Board voted to use a plan submitted by Ms. Mallo as a base. (App. Ex. 23, Video at 1:41). Ms. Mallo's plan, called the Consolidated Plan by the Board, moved fewer students than the Superintendent's Plan, but more than a plan proposed by Dr. Wu. The final Redistricting Plan, adopted on November 21, 2019, moved approximately 5,400 students to different schools.

The Appellant argued that the Local Board took fifty-five individual votes in passing the Redistricting Plan and that each vote should be justified under the factors of Policy 6010. The Board responded that the votes were parts of the whole and that defining the geographical areas by taking multiple votes simply breaks down the larger Plan into manageable parts. The Board noted that Policy 6010 does not require the Board to justify its actions at the level of each polygon, but only as to the attendance areas, which are much larger and comprise numerous polygons. The Board is correct that Policy 6010 addresses attendance areas, not polygons. Polygons were created by HCPSS as a tool to quickly obtain statistics during the redistricting process based on the student population of a given smaller area. While they are an important tool and one used throughout the redistricting process, it is the impact of boundary changes on attendance areas that matters under Policy 6010, not the impact on individual polygons.

[12] A timeline of the entire redistricting process is included in Renee Kamen's affidavit submitted with the Board's Response to Appeals as Board's Exhibit 2.

Policy 6010 does not impose on the Local Board the burden of justifying the move of every polygon under every factor listed. It does not even require the Board to address every factor listed or achieve every goal. The language of Policy 6010 is aspirational. It sets parameters for decisions, using words such as "will consider," "where reasonable," and "should promote." It does not set mandates.

The Board members made clear at the work sessions their frustration with having to serve all the students of Howard County while not having the resources or schools to do so. The booming population of Howard County drove this redistricting process, with the Board having to make changes to overpopulated elementary schools knowing there was not a new school that would open for four more years. As a result of the moves, families found their children attending different schools, communities were uprooted and sent several miles away to a different school, and before and after school care plans were disrupted.

The process was contentious and frustrating for all involved, as evidenced by the comments of the Board members to the public during the work sessions. Beginning from the first work session, Board members reminded the public to be civil during and outside of the meetings. Board members mentioned protests, emails, phone calls, and social media postings. Families showed up at the work sessions wearing tee shirts from their respective polygon and carrying signs. Board members met with communities outside of work hours.

Given the comprehensive nature of this redistricting, combined with the lack of capacity to adequately accommodate all Howard County students and the time constraints for conducting the redistricting work, it was, no doubt, a difficult, frustrating process that left many families unhappy.

Data

The Appellant appealed the Redistricting Plan on the basis that the FARM data used by the Local Board in voting on various boundary changes was faulty or inaccurate. They based this argument on events of November 18, 2019, when the Local Board realized that some of the FARM rate percentages were different in the Consolidated Plan even in schools where no boundary change had occurred. For example, in Deep Run ES, the FARM rate changed from the base rate of 55% in the Feasibility Study to 54% under the final Plan; Wilde Lake High School (HS) changed from 46% to 41%.[13] In both cases, there was no boundary change. The Local Board questioned the staff from the Office of School Planning why there would be a different percentage under the new Plan when there was no boundary change proposed. On November 18, 2019, one Board member requested a "written explanation from the Superintendent so we can completely understand the problems with the FARMs data." (App. Ex. 18, Video at 9:58).

At the next meeting, on November 21, 2019, Dan Lubeley, Director of Capital Planning and Construction, told the Board that in running the numbers during previous work sessions, Pre-K students and "mobility," meaning students moving in and out of school areas, were included in the calculations being given to the Board and that caused the numbers to reflect student addresses in real time, as opposed to reflecting student addresses on September 30, 2018, which is what the Office of School Planning used in formulating the Feasibility Study.

The Office of School Planning recalculated the FARM data to "neutralize" mobility and exclude Pre-K. This did not change the underlying data but affected the process by which the totals were derived. By adjusting these two factors, the methodology used to derive the data

[13] To determine which schools underwent no boundary change, the Appellants introduced Exhibit 16, which was the list of schools that did undergo a boundary change. From that list, the Appellants were able to name eighteen schools NOT mentioned, indicating they underwent no boundary change. I have noted those schools in the chart attached as Appendix II.

provided to the Board on November 21, 2019 was in line with the original methodology. This allowed for a more accurate comparison of FARM rates before and after boundary changes.

Renee Kamen testified that her office used 2018 FARM data in the Feasibility Study that were not calculated using Pre-K numbers or "mobility," which reflect children who move in and out of districts. Mobility may reflect transient families or families with agricultural workers, for example. She said HCPSS has always used the static figures from the prior year in planning for the future, which explained why 2018 numbers were used and not 2019. The Feasibility Study and the Superintendent's Plan had to be developed long before the 2019 numbers would be available, she said, so her office does not provide the most recent numbers to the Local Board, but rather, uses numbers from the prior year. In this case, to obtain the FARM percentage for a given school, September 30, 2018 enrollment is divided by October 30, 2018 FARM participants, yielding the FARM rate.

On November 21, 2019, revised rates used by the Office of School Planning were provided to the Local Board prior to the final vote. The members reviewed those rates, asked public questions of staff, recessed to privately review the numbers and privately question staff, returned for more public questions and comments, and then proceeded to vote on the final Plan. The discussion of FARM numbers that evening spanned from 3:29 hours into the meeting to 4:06 hours, when the voting began. (App. Ex. 9, Video). No Board member changed their vote as a result of receiving the revised numbers.

The Appellants called four Board members to testify in support of their appeal on this issue, announcing these witnesses would be able to show the data used by the Local Board were known to be inaccurate or, failing that, that the Local Board should have known they were inaccurate. Ms. Delmont-Small's recollections were hazy, but she recalled believing the data they had been given during the work sessions were not accurate. She was not able to explain

why any data they used were inaccurate. She said she did not have enough time on November 21, 2019 to review the revised data.

Ms. Cutroneo testified that she raised the issue of data discrepancies numerous times during work sessions but never received satisfactory answers. As discussed below, she never understood why the Office of School Planning did not use the official MSDE data.

Chair Ellis testified she understood why the data sets used different factors and how that would impact the data set. Those differences would not render the data inaccurate, however.

Ms. Mallo did not recall the source of the data used during the work sessions but did remember they received revised data on November 21, 2019. She said some of the Board members did not understand how the data were accurate even though different. She accepted the explanation that the revised data set reflected the removal of Pre-K and mobility factors. The final FARM percentages still reflected the Board's overall goal, she said.

The Local Board called Tim Rogers to testify as part of the school planning team. He testified that throughout the work sessions, the methodology in calculating the FARM rate was the same, but that after the November 18, 2019 session, they modified the methodology to be in line with how his office calculated the rates originally; that is, using the static numbers from 2018 instead of the "live" numbers of where students lived and were moving in 2019. He recalled answering questions of Board members during a recess on November 21, 2019 in the main Board room. After the recess, the Board proceeded to vote on the final Plan. Like Ms. Kamen, he understood that what was meant by "accurate" data in the discussions was data which aligned with that used by the Superintendent and the Office of School Planning at the beginning of the process, making it consistent for comparison purposes.

Ms. Kamen and Mr. Rogers explained that some schools, such as Wilde Lake HS, have higher rates of mobility than other schools, where the student population is more stable. As a

result of removing the mobility factor in the schools where students tend to be more mobile, the FARM rate went down. This explains why some schools that underwent no boundary change nevertheless showed a change in the FARM rate.

When the Office of School Planning recalculated these data, it did not have access to polygon level information as it did when the process began. That access was changed sometime during the process due to privacy concerns. Thus, when it recalculated the data removing mobility, the resulting number could be different from what it was when the Office had more precise data to work with. This did not make any of the data used inaccurate or faulty; the data simply reflected different factors from those used during work sessions.

From Appellants' Exhibits 14, 15, and 16, I have created a chart comparing the FARM participation rates prior to the start of the boundary review (Feasibility Study, June 2019), in the Superintendent's Plan (original and as revised), in the plan when the straw vote was taken on November 18, 2019 (before numbers were revised to account for Pre-K and mobility), and in the final plan using the revised numbers provided by the Office of School Planning (removing Pre-K and neutralizing for mobility). It is attached as Appendix II.

Out of all of the schools, the FARM rates decreased by over 5% in four schools between the straw vote on November 18 and the final vote on November 21, 2019: Deep Run ES (60% to 54%); Guilford ES (47% to 41%); Phelps Luck ES (47% to 41%); and Stevens Forest ES (62% to 52%). In each of these cases, the FARM percentage was fairly high (between 47% and 62%) and came down as a result of the adjusted data. These decreases align with the Local Board's goal of balancing the FARM rates among the schools closer to the average of 22%. Mr. Rogers and Ms. Kamen explained in their testimony that the changes reflected the removal of Pre-K numbers and neutralizing the mobility factor.

In twelve schools, the FARM rate increased from November 18, 2019 to November 21, 2019 as a result of using the adjusted data. In those schools, the increase did not exceed two percentage points except in two instances: Oakland Mills MS increased by four percentage points (from 42% to 46%) and Patuxent Valley MS increased by three percentage points (33% to 36%). In other words, out of all of the schools in the county, the revised numbers made available to the Local Board on November 21, 2019 showed an increase in the FARM percentages of more than 2% in only two schools as a result of the boundary changes. Thus, even if I were to conclude the data used by the Local Board during its work sessions were incorrect, which I do not, I would nevertheless conclude the error did not have substantial or an overall negative impact.

One complaint voiced by the Appellants is that the Board never defined what "success" in FARM rates would be. Two Board members raised the same question at the November 21, 2019 meeting. (App. Ex. 9, Video at 4:01). It is true there was no precise measurement used. Throughout the redistricting process, the Superintendent and Board members talked about equity for lower income students and addressing Title I schools that were overcapacity. To that end, throughout the work sessions, the Board attempted to bring FARM participation rates closer to the countywide average of 22%, whether that meant increasing or decreasing the rates at a given school. The Board did not always succeed in making a big impact. Talbott Springs ES moved from a FARM participation rate of 50% to 49% under the Redistricting Plan. Cradlerock ES moved from 55% to 54%. Oakland Mills MS moved from 48% to 46%.

Board members frequently noted at the meetings that there would be no perfect Plan and that not all of the factors in Policy 6010 could be fulfilled in every school and by every boundary change. But throughout the process, overall, the Board kept focused on capacity utilization and socioeconomic equity. The changes in the numbers provided to the Board on November 21,

2019, before the final vote was taken, did not negatively impact the Board's goals. In fact, as I noted above, in only two schools did the FARM participation rate increase by more than 2% between the straw vote and the final vote.

Just prior to taking the final vote on November 21, 2019, two Board members asked whether the revised data would change any member's vote. A Board member expressed concern that the data they used to make decisions were not accurate. After a bit of discussion wherein no Board member indicated the revised data would change their vote and no member moved to delay the final vote, the vote proceeded. There were no changes to the final Redistricting Plan from the straw vote taken on November 18, 2019.

The Appellants pointed to the fact that the revised data did not impact the final vote as proof that the Local Board was acting arbitrarily when it considered the data. They complained that the short recess to consider the data is proof their reliance on the data was arbitrary. A different conclusion could reasonably be drawn, however: that the differences in the data were so minor that the Board members did not deem them sufficient to change or delay their votes. As I noted above, the Board discussed and questioned the revised data from 3:29 hours into the meeting until 4:06, when the voting started. Only two Board members testified they were uneasy with the change in the FARM numbers and those two would have voted in line with their straw vote anyway. Simply asserting that the entire Board did not adequately review the revised numbers fails to constitute proof the Board's actions were arbitrary.

The Feasibility Study (App. Ex. 21, p. 35) and the Superintendent's Plan (App. Ex. 20, p. 5) contain the following cautionary language: "These numbers are for planning purposes, and may not exactly match other reported numbers due to differences in timing and methodology." At the first work session on October 17, 2019 (App. Ex. 25), Mr. Rogers and Ms. Kamen explained to the Board that many factors entered into deriving projected enrollment numbers.

The Board wanted official 2019 enrollment numbers, but those numbers were not ready to be released until November or December 2019. Throughout the work sessions, the staff from the Office of School Planning reminded the Board that if it wanted current numbers, they would be estimates. This frustrated Ms. Delmont-Small, who said it was "insane" to proceed in this way and called the process "discombobulated." (App. Ex. 25, Video at 6:07).

This discussion at the first work session centered on enrollment figures, not FARM data, although the Appellants argued that even at this meeting, Ms. Delmont-Small was requesting the most accurate FARM data. Of course, enrollment data impact FARM percentages. But the staff from the Office of School Planning explained to the Board why 2019 numbers could not be used in running test scenarios of boundary changes. There were simply too many variables inputted from too many agencies and that official information would not be available in time for the Board to use during its redistricting process. By the end of the hearing, the Appellants were essentially arguing using 2018 enrollment numbers made the entire process flawed. Some of the Board members may have agreed with that argument. However, using official data from the prior school year has always been the method used by HCPSS to effect boundary changes and the staff provided a reasonable explanation for why they needed to continue using the same methodology.

The Appellants cited the Maryland State Board of Education *Shah* opinion in support of their assertion that where data relied upon by a Board of Education was known to be incorrect and substantial portions of it were relied upon in making boundary changes, those changes would be rendered arbitrary and unreasonable pursuant to COMAR 13A.01.05.06A. In *Shah*, there were at least two instances where data supplied to the board through the superintendent's office were flawed. Those flaws were pointed out by citizens before the final redistricting vote was taken. The data was shown to be dynamic and it was updated before the board made its decision.

Thus, there was no error in the process and the appellants in *Shah* failed to show the decision was arbitrary or unreasonable. *Shah.*, Op. 02-30, at 17. This decision does not support the Appellants' arguments in the instant case.

The Appellants also argued that the difference in how the Office of School Planning calculates the FARM percentages from how MSDE calculates them necessarily renders the data used by the Office of School Planning inaccurate. At the November 21, 2019 meeting, it was explained to the Board that the FARM rates used in the MSDE reports reflect enrollment and FARM participation numbers in October of each year. By contrast, the Office of School Planning has always determined FARM participation rates by using enrollment figures as of September 30 each year and FARM participation numbers as of October 30 each year. Thus, the FARM data reported by MSDE cannot be compared to the data used by the Office of School Planning. The Appellants sought to compare the rates as proof the data used in this process was inaccurate, but it does not prove that at all. The data were simply calculated using a different enrollment date.

Ms. Cutroneo objected to this difference at a couple of Board meetings, wondering why the method used by the Office of School Planning is different from that used by MSDE. Staff explained that HCPSS has always done it that way and in 2019, they maintained this methodology in order to be consistent with prior years. The Appellants have not shown that the methodology used by the Office of School Planning is faulty. It is just different from that used by MSDE. It did not render the data used by the Board inaccurate. This is a non-issue.

The Local Board argued that the Maryland State Board of Education, in the *Jones* opinion, cited above, has addressed the issue of incorrect data being considered by a school board but corrected prior to the final vote. In that case, data were corrected about thirty days prior to the final vote. The Appellants responded that this is a far cry from the brief recess the

Board took on November 21, 2019 to consider the revised data. Thus, they argued, the *Jones* decision gives the Board no support. I note, however, that the data used by the Local Board during the redistricting process were never shown to be incorrect, as it was in *Jones*. Instead, as I have already noted, the data simply included additional factors that were later removed. Furthermore, the Board had an opportunity to review the revised numbers, could have requested additional time had it needed it, and the members did not change their vote after reviewing the numbers. For all of these reasons, the *Jones* opinion does not change my decision.

In their opening statement, the Appellants said they would show the base rate used by the Office of School Planning was never correct and that the Board never had the correct data until the night of the final vote. The evidence does not support that assertion. Although the Board received figures during work sessions that included additional factors not used in the base rate, once those figures were adjusted to exclude Pre-K and neutralize mobility, the rates were comparable, allowing the Board to accurately compare the FARM participation rates in schools after certain boundary changes were made. No vote was changed as a result of the revised data. The Appellants failed to show any of the data were "faulty," but only that different processes were used to derive certain percentages during work sessions.[14]

Lack of Notice for Spanish Speaking Persons with Limited English Language Proficiency

The Appellant speaks only Spanish and understands limited English. She is the mother of three students in HCPSS, including a son who is a rising fourth grader at Longfellow ES.[15] As

[14] The Appellants attempted to show that the data used by the Local Board had only a 7.2% accuracy rate because in thirteen of the eighteen schools in which the FARM rate was over 5% and which experienced no boundary change, there was a different FARM rate reported in the Feasibility Study from the number provided to the Board on November 21, 2019 before the final vote. This argument presumes the data used were inaccurate. As I have explained, that is not the case. Accordingly, this argument has no merit.

[15] In her Appeal and supporting Affidavit, which was written for her, the Appellant asserted her son was a rising fifth grader who was denied the opportunity to request an exemption to stay at Longfellow ES because she did not know their polygon had been redistricted until after the deadline for seeking an exemption had passed. At the hearing, however, she corrected that information and the Affidavit was edited, with her permission, to reflect that her son is a rising fourth grader and therefore, he was not eligible for an exemption available to rising fifth graders. (App. Ex. A-4).

a result of the Redistricting Process, her family's polygon was moved to Clarksville ES. She said her son was so upset at having to change schools, she moved her family to a different neighborhood that would allow him to remain at Longfellow ES.

The Appellant said she did not know anything about the redistricting process while it was going on and only heard about it from friends around December 14, 2019. Her husband is the primary contact person for the school; she is the secondary contact. She said that she does not always check her son's backpack for notices from the school, but after hearing about the change from a friend on December 14, 2019, she checked and found a notice there in English explaining that her son would be moved to Clarksville ES. She had to ask a neighbor to translate the notice. She said she did not have an email account at that time. The Appellant testified that teachers sent notes home from school with her son, but she did not say whether those notes were in English or Spanish. She said she talks to her son's teachers and has used the Spanish liaison services provided at the school.

The Appellant argued that the Local Board violated several provisions of the law during the redistricting process by failing to ensure notification of the process and information on how to participate was provided to every person in Howard County, including those for whom English is not their primary language.[16] In her Appeal, the Appellant pointed to the Equal Protection Clauses of both the Maryland and U.S. Constitutions, quoting the Fourteenth Amendment guarantee that "no state shall deprive any person life, liberty or property without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Appeal, p. 8). She also referred to Maryland Code Annotated, State Government Article sections 10-1102 and 1103. At the hearing, the Appellant focused on Title VI of the Civil Rights Act of 1964 and added Education Article section 4-137 as grounds for her position.

[16] The Appellant expanded her argument from the Appeal, which addressed non-English speakers, to every person in Howard County, as concerned, tax-paying citizens.

Maryland's Equal Access to Public Services for Individuals with Limited English Proficiency Act is found in the State Government Article, sections 10-1101, et. seq. Section 10-1103 mandates that each "State department, agency, or program . . . shall take reasonable steps to provide equal access to public services for individuals with limited English proficiency." It defines reasonable steps, addressing both oral language services and the translation of vital documents. As applied to the Maryland State Department of Education, it was made effective July 1, 2005. *Id.*, (c)(3)(v).

In that Act, the following terms are defined in section 10-1102:

> (b) "Equal access" means to be informed of, participate in, and benefit from public services offered by a State department, agency, or program, at a level equal to English proficient individuals.
> (c) "Limited English proficiency" means the inability to adequately understand or express oneself in the spoken or written English language.
> . . . .
> (f) "Vital documents" means all applications or informational materials, notices, and complaint form offered by State departments, agencies, and programs.
> . . . .

The Local Board pointed out that the Equal Access Act in the State Government Article applies to *State* departments and agencies, not local, independent, county-level agencies such as the Local Board. For local school boards, Maryland Code Annotated, Education Article section 4-137, effective July 1, 2019, applies. It provides as follows:

> (a) Each county board shall take reasonable steps to provide equal access to public services for individuals with limited English proficiency.
> (b) Reasonable steps to provide equal access to public services under subsection (a) of this section include:
> (1) The provision of oral language services for parents and guardians with limited English proficiency, which must be through face-to-face, in-house oral language services if in-person contact is on a weekly or more frequent basis; and
> (2) The translation of vital documents[17] ordinarily provided to the public into any language spoken by any limited English proficient population that constitutes at least 3% of the overall population within the county as measured by the United States Census.

[17] The term "vital documents" is not defined.

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of national origin and requires that persons with limited English proficiency have meaningful access to programs conducted by a recipient of federal funds. *Lau v. Nichols*, 414 U.S. 563 (1974); 42 U.S.C. § 2000d-2000d-7 (2012 & Supp. 2020); 34 C.F.R. 100.3(a) and (b). As recipients of federal funds, public school systems must follow this mandate and provide language assistance to individuals with LEP. "The United States Office of Civil Rights (OCR) has taken the position that this includes language assistance not only for students enrolled in public school systems but to parents of students, as well. *See* OCR 11/5/10 Guidance: Title VI Standards for Communication with Limited English Proficient Parents." *Violeta G. v. Howard Co. Bd. of Educ.*, MSBE Op. No. 15-13, p. 3 (2015).

The OCR 2010 Guidance recognized that school systems are required to take reasonable steps to ensure that individuals with LEP have meaningful access to programs and services. It provided that "schools and districts can be held to reasonable expectations about their efforts to determine the presence of LEP parents, and to provide assistance to these parents once identified." *Id.* at 4. As examples of the efforts expected of schools and districts, the OCR listed conducting home language surveys, interacting in the person's language, and remembering that LEP students may have LEP parents. The State Board in *Violeta G.* recognized that school systems have discretion regarding the matter of providing meaningful access to LEP parents but emphasized that they must let LEP parents know services are available at no charge in a language they will understand. The State Board also addressed what documents must be translated, by quoting from the OCR 2010 Guidance, where it defined the term vital documents: "A document will be considered vital if it contains information that is critical for obtaining federal services and/or benefits, or is required by law." *Id.* at 5.

The Appellant also asked that the OCR January 7, 2015 "Dear Colleague" letter be considered.[18] That letter provided guidance to assist schools and districts "in meeting their legal obligations to ensure that [LEP] students can participate meaningfully and equally in educational programs and services." OCR, January 7, 2015 Dear Colleague letter, p. 2. Toward the end of the letter, the OCR addresses communicating with LEP parents. As argued by the Appellant, it addresses the four areas of language proficiency: speaking, listening, reading, and writing. The letter directs schools and districts to "ensure meaningful communication with LEP parents in a language they can understand and to adequately notify LEP parents of information about any program, service, or activity of a school district or [State educational agency] that is called to the attention of non-LEP parents." *Id.*, p. 37. It lists examples of documents that should be translated, cautions against using interpreters and translators who are not fully trained and knowledgeable, warns that schools and districts should not rely on siblings and friends to translate or interpret for parents, and notes that a failure to identify LEP parents would be an example of noncompliance with Title VI.

The Local Board did not dispute its obligation to comply with Title VI or fulfill the directives of the *Violeta G.* opinion and the Dear Colleague letter. It did not take issue with the applicability of the Equal Protection Clause to all persons. Rather, it asserted that it did fulfill its mandates to take reasonable steps to ensure meaningful participation by LEP parents in Howard County throughout the redistricting process. It pointed to Dr. Walker's and Ms. Kamen's testimony in support of the conclusion that oral language services were provided throughout the redistricting process. It argued the Appellant failed to show the Spanish-speaking LEP population of Howard County exceeds 3% as that term is defined in the U.S. Census, thereby alleviating the requirement that all vital documents be translated into Spanish. Nevertheless, it

[18] Although not admitted into evidence, this letter is included in the file.

said, many documents were translated into Spanish and directed readers to language lines they could access to have other documents explained to them in Spanish. Information was provided in Spanish on the website and in certain flyers that explained how to request an interpreter. The Local Board pointed to the guidance provided in the *Violette G.* opinion for what documents should be considered vital and thus, translated, and argued that the evidence shows HCPSS complied with that guidance. Essentially, documents that are "student-centered" and assist in providing services and benefits must be translated, it argued, while documents reflecting the business of the Local Board do not.

Regarding the *Lau* Supreme Court opinion, which addressed the denial of benefits or services for an improper reason, the Local Board argued that there has been no denial of benefits or services in this case. Instead, students are simply being moved to a different school. Per *Bernstein*, students have no right to be educated at a particular location and therefore, Howard County students have not been denied any benefit or service. Essentially, the Local Board distinguished the redistricting process from the types of services and benefits students require to access instruction and argued the law does not require it to translate all documents related to the redistricting process. Furthermore, it argued that the Appellant failed to show that the Spanish-speaking LEP population in Howard County exceeds 3%, which would then mandate translation of vital documents. Even under those circumstances, the Local Board did not concede that documents regarding the redistricting process would qualify as vital documents.

The Appellant called Ms. Kamen to testify. Her office relied on the Communications Team to determine what documents needed to be translated. She said the LEP population in Howard County is relatively small, so they were more concerned with making translation services available upon request than attempting to translate all documents. Questions that were emailed in Spanish were answered using a Spanish speaking interpreter. Her office received

only five emails in Spanish after the Redistricting Plan was voted on. Emails go into a central inbox and are monitored by an HCPSS employee, who determines the correct language for the response, she said. Ms. Kamen testified that there were no requests for Spanish interpretation at public work sessions and only two for any other language—Mandarin Chinese. She said certain documents were translated into three common languages, including certain fact sheets about the redistricting process. The English and Spanish versions of that fact sheet were admitted into evidence. (App. Ex. A-1 and A-2).

Ms. Kamen testified regarding the various outreach efforts made during the process. A survey was released online and announced in the press and through schools asking the public for feedback. It was released in English and no one requested it be translated into Spanish. Announcements regarding the process were pushed out to every constituency, she said, including in email and through the press. Information regarding public hearings, instructions on how to be involved in the process, and a flyer about the process were translated into Spanish. Those documents were admitted into evidence by the Local Board. (Resp. Exs. A-2, A-3, A-4). Ms. Kamen said school principals know how to reach out to LEP parents to instruct them on how to request translation services, as that is something that is routinely done.

At the hearing, Ms. Kamen navigated the website to identify where certain documents regarding the redistricting process could be found. One document that was available on the English language publications page related to the redistricting process. That document was not listed on the Spanish language publications page but was accessible through a link on another page listing information on the boundary review.

Dr. Walker testified her office is very proud of the work they do with international students in the HCPSS. They provide interpretation and translation services, specific language liaisons in schools with higher populations of LEP families, and services for international

students. When students are registered, parents are invited to disclose their preferred language at home and that information is tracked in the Synergy system.

Dr. Walker testified she directed principals to notify families in backpack notices of the boundary changes, and to provide language liaisons at all school events, in an attempt to get the word out about the redistricting process and the final changes. In some schools, the fact sheet was distributed with English on one side and Spanish on the other. In other schools, it was English and Chinese. The fact sheets were also attached to emails and posted on the website. Dr. Walker knows the principals implemented that plan because she personally saw interpreters at some school functions, such as back-to-school nights, talking about redistricting, and the contracts for interpreters and liaisons were approved by the principals. Based on the efforts HCPSS made to inform the community and reach everyone related to the school community, Dr. Walker said she was surprised to learn that some people had not heard about the redistricting process.

Dr. Walker listed local organizations HCPSS contacted with information regarding the redistricting process: FERN,[19] an immigrant resource center; Connexionus, a Spanish language organization that does outreach in the community and cooperates with HCPSS; Black Student Achievement Program; Chinese language schools; St. John's Church at Wilde Lake; People Acting Together in Howard, also known as PATH; Horizon Foundation; libraries; and Parent-Teacher Associations. Principals were directed to send information home in students' Wednesday or Friday folders and to email families. They used press releases and made announcements on television. They set up a call center using various languages, including Spanish, for people to call with questions and comments.

[19] The letters FERN no longer are an abbreviation for other words but are simply the name of the organization.

Dr. Walker described the work of language liaisons as assigned to different schools two days per week to interact with families and assist them in accessing instruction. They reach out to families a couple of times per year. She noted the Appellant had never called the language line, which is monitored, but has reached out to the liaison at the school of her children on several occasions. The Appellant had attended a parent-teacher conference in November 2019 using an interpreter.

Dr. Walker testified that HCPSS learned after the Redistricting Plan was voted on that many people did not know about the redistricting process and were surprised to learn their child's school had been changed. Thus, it sent a liaison in any needed language to meet personally with each family to explain the changes. A Spanish language liaison met with the Appellant on January 9, 2020. (Affidavit, Ex. B from Respondent's Reply to Appellant's opposition to Local Board's Motion for Summary Decision; T. 9/3/2020, p. 163).

Dr. Walker determined the percentage of LEP families in Howard County using the most recently available U.S. Census data. That information was culled from 2017 statistics. (App. Ex. A-10, p. 8). Those statistics are also linked in the Howard County Demographic and Socioeconomic Data website available online and introduced into evidence. (App. Ex. A-9). The relevant chart is reproduced in Appendix III attached to this Proposed Decision. Dr. Walker noted that the category used by the U.S. Census is not "limited English proficient" as used in Education Article section 4-137, but "speak[s] English less than 'very well.'" Census participants self-identify regarding their proficiency. The most recently available information, dated 2017, shows that in Howard County, 1% (with a margin of error of +/-0.3%) of the Spanish speaking population self-identified as speaking English less than very well. Accordingly, HCPSS interpreted this to mean it was not required to translate all vital documents into Spanish.

The Appellant asked me to look instead to a chart contained on page 15 of Appellant Exhibit A-9, the Howard County page on Demographic and Socioeconomic Data. The chart shows that in 4% of the homes in Howard County, Spanish is spoken. That percentage is not further broken down into the level of proficiency. The Appellant asked that I infer the statistic means that in those homes, there are LEP parents; therefore, vital documents, including all documents related to the redistricting process as well as any documents produced by the Office of School Planning (such as the Feasibility Study) must be translated into Spanish. Dr. Walker took issue with the Appellant's interpretation of the 4% statistic, testifying that in her home, they speak Spanish to perpetuate her family's Cuban culture, but they were all quite proficient in English. (T. 9/3/2020, p. 204).

The Appellant also asked that I admit the January 2020 version of HCPSS' FAST FACTS, a one-page document showing certain facts about the school system; for example, it includes a racial breakdown of student, attendance and graduation rates, some budget information, and some test score information. She attached to her Appeal the FAST FACTS sheet from April 2019 which included this fact: "Ltd. English Proficient 5.7%." (Appeal, Ex. 6). It was not further broken down into languages but appears to total *all* LEP students enrolled in HCPSS.[20] This document fails to establish the 3% threshold for Spanish speaking LEP families in Howard County.

Howard County's website links to the official U.S. Census data which provides greater detail in the level of language proficiency. As I have already set forth and as is shown in the chart in Appendix III, those official data show 1% of the Spanish speaking population of Howard

[20] At the hearing, the Appellant asked that I admit the January 2020 version of the document. (App. Ex. A-6). It did not use LEP as a category but did include this fact: "English Learners 5.9%." I did not admit this document into evidence because it was not provided to the Local Board until just before closing arguments were to begin, no witness was called to explain the difference in the category designation, and it would not have been current during the 2019 redistricting process.

County self-identifying as speaking English less than very well. With such a clear statistic at our disposal, there is no reason to infer that all Spanish-speaking homes are LEP, as argued by the Appellant. The Appellant produced no evidence showing 3% or more of the Spanish speaking population of Howard County is LEP. Thus, I cannot conclude HCPSS was required to translate all vital documents into Spanish.

The Appellant argued that the phrase "less than very well" is subject to interpretation and that families self-report, therefore, the percentage reported to the U.S. Census might not be accurate. I cannot give this argument any weight, particularly given the lack of credible evidence refuting the 1% statistic.

The Appellant produced one additional piece of evidence: the video recording of the Board meeting on November 7, 2019. (App. Ex. A-11). She drew attention to the link from 2:28 to 2:45 into the meeting. I have reviewed that clip. The Local Board was discussing high school moves. A couple of Board members raised the issue of whether language supports would be made available to students moving to the different school. The Superintendent responded that there would be a robust process to inform everyone once the plan was finalized and that language supports would go with the students. Dr. Wu then mentioned that many families were unaware of the moves and were not connected in a way that allowed them to know their neighborhood was being moved. Kirsten Coombs said this was her concern as it affected students at every school. Ms. Delmont-Small said that she wanted the robust process in place prior to the moves being made to allow families to have more input into the process. She said "shame on us" for failing to involve families more and pointed to the compressed timeline as a reason why people who are not connected did not know they were being moved. She asked that the Board come up with a way to make sure parents were informed about what was going on beyond posting

information on social media. She voiced her unhappiness with the time constraints of the process.

Board member Sabina Taj then asked how they could inform the community of the decisions and suggested using liaisons to hold sessions to help students heal after the process was over. The Superintendent recognized that the concerns of Ms. Taj were different from those voiced by Ms. Delmont-Small. Dr. Wu asked what the Board could do now to overcome the language barrier and suggested emailing families or sending a letter to every family whose school might be changed. Chair Ellis responded that there were only two weeks before the plan would be finalized, and she said sending letters could be expensive. Ms. Coombs reminded the Board that everyone had been told early in the process that every school might be considered for a boundary change and it was not practical to tell families individually that their neighborhood was in play.

Ms. Delmont-Small then discussed the budget implications of the Redistricting Plan and referred to the "millions of dollars" spent communicating with parents and that the Board should, therefore, know which polygon every family is in. She said that schools know best how to communicate with families, implying they should inform families through their school on the front end of the process instead of the back end.

Chair Ellis brought the Board back to the matter at hand, namely, moving high school boundaries for five polygons. A vote was taken, and the Board moved on. No one made a motion related to communicating with families in their own language. No one asked the Superintendent or his staff what efforts were made to inform LEP families of the redistricting process. Although Dr. Wu raised the problem of LEP families being unaware of the process, he did not mention the specifics of how that issue came to his attention or make a motion to address the problem.

From this somewhat random discussion, the Appellant concluded the Local Board knew there was a significant population in Howard County that was disconnected from the process and were being denied their constitutional rights to be notified of and to be heard regarding the redistricting process. The Board argued that the context of the conversation was about providing services to students once they were at their newly assigned school. It is true that is where the conversation started, but it veered into other territory, to wit, the budget. Speeches were made, but, for example, no motion was made to send a letter to every family whose school might be changed, as suggested by Dr. Wu. He was rightly concerned about whether LEP families knew about the redistricting process, but the Board moved on to the business at hand and did not return to the topic, either in that meeting or subsequent meetings.

I agree with the Appellant that this conversation raised a vague concern by the Board, but it does not provide evidence in this hearing that supports her appeal. Had the Board asked staff members from the Office of School Planning and the Communications Team at that meeting about efforts to communicate with families, it would have received the same information provided at the hearing by Dr. Walker. If it then determined the efforts by the HCPSS staff were insufficient, the Board could have acted as it deemed necessary. I give far more weight to the testimony introduced at the hearing under oath than I do to the speculative concerns voiced by one or two Board members and then dropped as the Board continued to conduct its business.

In her closing argument, the Appellant's counsel discussed the difficulty she had in finding more than one client who would come forward to publicly complain that communication with LEP parents throughout the redistricting process was inadequate to the point of being illegal and unconstitutional. Counsel asked that I make many inferences to support her appeal: Others did not come forward, either to appeal or to speak to the Local Board during the redistricting process, due to fears of jeopardizing their immigration status. The Local Board got no requests

for Spanish interpretation during the work sessions, which should have alerted it that the Spanish LEP community was "locked out" of the process. The Spanish speaking community was not "disconnected" because, after the fact, HCPSS received emails asking about the boundary changes. There were only two requests for interpretation, and both were for Mandarin Chinese, so I should infer all immigrant communities were locked out of the process. The HCPSS website was unnecessarily complicated, requiring LEP parents to click through several pages before finding any page in their language. Where Spanish is reported to be the dominant language at home, I should infer the parents are necessarily LEP. The Appellant is representative of the larger Hispanic community and the lack of communication during the process with the Appellant is sufficient to show the entire community was illegally silenced by the Local Board.

The Local Board responded that inferences are derived from evidence, not the lack of evidence. The Appellant failed to produce evidence in support of her Appeal, it argued, so she is resting on impermissible inferences to prove her case. The Board argued that it is unreasonable to infer that because one parent did not receive notification in Spanish of the redistricting process, no one in the Hispanic community received it. There was no evidence at the hearing of anyone who was afraid to come forward during the redistricting process or in the appeal. Nor was there evidence that there is a 3% or greater Spanish speaking LEP community in Howard County. Thus, translation of vital documents is not even required, it argued. It took reasonable steps to notify everyone, including LEP families, as required by law. Even though some families were missed in the process, it said, the Local Board did not violate the law.

I do not find the inferences the Appellant asks me to make to be reasonable. Even if I accepted as true that other Spanish speaking families were reluctant to get involved in the process or file an appeal out of fear of deportation, that would not constitute proof the Board failed to fulfill its legal obligations to communicate with LEP families in their own language.

The proposition that if Spanish is the primary language in the home, I should infer the family is LEP is not reasonable and is offensive to many families, as testified to by Dr. Walker. That the Appellant received a notice about her son's school in English after the process was completed is unfortunate but is not evidence that Spanish notices were not previously sent home in her son's backpack or that no LEP family in Howard County received notices in their own language. There is no evidence from which to infer that the HCPSS website is too difficult for a Spanish-speaking person to navigate. Further, just because one had to click through several pages on a website, in English, does not mean the Local Board failed in its obligation to take reasonable steps to provide equal access to public services by communicating in different languages. In sum, the evidence is vague or nonexistent that the Local Board failed to fulfill the mandates of state or federal law.

As set forth above, the State Board may only substitute its judgment if the decision of a Local Board is arbitrary, illegal, or unreasonable. In this case, the decision is the Redistricting Plan. To be illegal under COMAR 13A.01.05.06C, the decision must satisfy 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.

As I have discussed, I do not conclude the Redistricting Plan satisfies any of the criteria, even though some families remained unaware of the redistricting process. HCPSS took reasonable steps to get the word out regarding the process and the public's right to participate in the process.

CONCLUSIONS OF LAW

I conclude that the Appellant has 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 a result of the Local Board using incorrect or faulty data. *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); *Shah v. Howard Cty. Bd. of Educ.*, MSBE Op. No. 02-30 (2002); *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 Appellant 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 illegal as a result of the Local Board failing to provide adequate notice to the Appellant or other Spanish speakers with limited English proficiency. *Bernstein v. Bd. of Educ. of Prince George's Cty.*, 245 Md. 464 (1967); *New Carrollton v. Rogers*, 287 Md. 56 (1980); *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002); *Violeta G. v. Howard Co. Bd. of Educ.*, MSBE Op. No. 15-13 (2015); Md. Code Ann., Educ. § 4-137 (Supp. 2020); Md. Code Ann., State Gov't, §§ 10-1101, et. seq. (2014 & Supp. 2020); COMAR 13A.01.05.06A and D.

RECOMMENDED ORDER

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

October 14, 2020
Date Decision Issued

Joy L. Phillips
Administrative Law Judge

JLP/dlm
#187666

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.

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

MARTA ALACRON,	*	**BEFORE JOY L. PHILLIPS,**
APPELLANT	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE OF**
HOWARD COUNTY	*	**ADMINISTRATIVE HEARINGS**
BOARD OF EDUCATION	*	**OAH No.: MSDE-BE-09-20-01769 (File #30)**

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

RULING ON THE LOCAL BOARD'S MOTION FOR SUMMARY DECISION

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. Lorraine Lawrence-Whittaker, Esquire, and Mary R.

Poteat, Esquire, represented the Appellant. 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 22, 2020, the Appellant filed a Response to the Motion (Response) with five exhibits. On June 2, 2020, the Local Board filed a Reply to the Appellant's Response (Reply) with two exhibits. 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 and Reply, the Local Board relied upon affidavits, links to archived video footage, and documentary exhibits. The Appellant attached four exhibits and incorporated by reference an affidavit that was attached to the appeal which I have marked as a fifth exhibit. A complete list is attached to this Recommended Decision 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. 2).

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. 3).

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. The Appellant lives in Polygon 1142.

10. The Appellant speaks very little English and speaks exclusively Spanish in her home.

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, 676 (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 Appellant has 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.

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.* at 479. 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).

Local Board's Motion for Summary Decision

The Appellant appealed the Redistricting Plan on the bases that the Local Board failed to provide notice of its process to non-English speakers, that it knowingly relied on significant amounts of faulty data, and that it improperly considered race in making the boundary changes. The Local Board moved for summary decision on each issue.

Sufficiency of Notice

The Local Board moved for summary decision on the basis that general notice was provided to the community at large and within each school; parents were provided an opportunity to comment; and a detailed fact sheet was printed in four languages, including Spanish. (Motion, p. 11; Exs. 2 and 24). It wrote that there was "expansive coverage in the news" regarding the redistricting process and that "[e]veryone was aware that the redistricting in Howard County potentially could affect every school in the county." (Motion, p. 11).

The Appellant responded that as a non-English speaker or reader, she did not know about the redistricting process until after it was accomplished. She denied that the Local Board took "reasonable steps to provide equal access to all of the operations and/or services of the department for individuals with limited English proficiency." (Response, p. 7). In support of her argument, she cited to section 10-1103 of the State Government Article, which provides, in pertinent part:

> (a) Each State department, agency, or program listed or identified under subsection (c)[1] of this section shall take reasonable steps to provide equal access to public services for individuals with limited English proficiency.
> (b) Reasonable steps to provide equal access to public services include:
> (1) the provision of oral language services for individuals with limited English proficiency, which must be through face-to-face, in-house oral language services if contact between the agency and individuals with limited English proficiency is on a weekly or more frequent basis;
> (2)(i) the translation of vital documents ordinarily provided to the public into any language spoken by any limited English proficient population that constitutes 3% of the overall population within the geographic area served by a local office of a State program as measured by the United States Census; and
> (ii) the provision of vital documents translated under item (i) of this item on a statewide basis to any local office as necessary; and
> (3) any additional methods or means necessary to achieve equal access to public services.

[1] The State Department of Education is listed under subsection (c).

The Appellant took issue with the Board's use of one Spanish-language flyer, arguing this constituted only minimum notice and was not readily available on the Board's website. (Response, pp. 9-18). She noted that the flyer is not listed as available on the Board's Spanish language publications webpage, using screenshots in her Response to illustrate her argument. (Response, p. 12). The Attendance Area Maps and Redistricting publication was only available in English, she wrote. (Response, p. 16). She called "unsupportable" the Board's assertion that "[e]veryone was aware" of the redistricting process (Response, p. 16). She reaffirmed her lack of notice by referring to her affidavit.[2] (Response, Ex. E).

The Local Board replied that the Board's timeline, available on its website, provided the Appellant with sufficient notice. It also noted the Appellant was contacted by an Hispanic Achievement Liaison on January 9, 2020, approximately six weeks after the Redistricting Plan was approved. (Reply, p. 3; Ex. A and B).

The Appellant has raised significant questions regarding whether the Local Board took reasonable steps to provide meaningful notice to the Appellant in Spanish. Construing all inferences in the Appellant's favor, I find there exist genuine disputes of material fact and the Board is not entitled to prevail on this issue. *Beatty*, 330 Md. at 737-38.

Use of Faulty FARM Data

The Local Board moved for summary decision on the basis that the FARM[3] data used by the Local Board was not faulty, and it submitted affidavits from Renee Kamen in support of that assertion. (Motion, p. 12; Exs. 2 and 24). It noted the Appellant failed to produce any sworn statements in support of her assertion, but COMAR 28.02.01.12D(2) does not require an affidavit to defeat a summary decision motion, as set forth above. The Board explained that the

[2] The Appellant referred to her child as a fourth grader during the 2019-2020 school year and asserted she was unable to request an exemption available to fifth graders as a result of her lack of notice. The Local Board replied that the child is actually a rising fourth grader. (Reply, p. 2; Ex. B, ¶4).
[3] Free and Reduced Meals

differences in the FARM data presented to the Board arose when the data was modified "to account for the effects of PreK and student mobility." (Motion, p. 12; Ex. 24). It also asserted the "variance in the data was not significant." (Motion, Ex. 24).

The Appellant responded that the boundary changes that had been discussed by the Local Board for months were based on one set of data which was substantially changed during the November 21, 2019 meeting and the Board members took only thirty-seven minutes to consider it. She argued there was "an 85.2% rate of inaccuracy" when analyzing the data for fourteen of the schools. (Response, p. 20).

I have reviewed the evidence submitted by the parties, including the recorded meetings held by the Local Board.[4] There were numerous discussions during the final meetings regarding the accuracy of the FARM data and the impact the revised data might have on the boundary changes. Two Board members mentioned the deliberations were rushed and based on incomplete or faulty information. The Appellant has illustrated possible inaccuracies in the data in her Response.

Construing all inferences in the Appellant's favor, I find there exist genuine disputes of material fact and the Board is not entitled to prevail on this issue. *Beatty*, 330 Md. at 737-38.

Improper Use of Race

The Local Board moved for summary decision on the Appellant's complaint that race was used as an impermissible factor in redistricting considerations. The Board denied that race was considered, asserting the Board used capacity utilization and FARM data to make the boundary changes. (Motion, p. 13). It wrote that classifications based on socioeconomic status do not create a suspect class for purposes of invoking the strict scrutiny standard. *Hornbeck, et al. v.*

[4] The video/audio recordings of the Board of Education meetings are the official record of the meetings, as noted in the Meeting Summaries attached to the Motion as Exhibits 6-22.

Somerset Cty. Bd. of Educ., et al., 295 Md. 597, 653 (1983). The "redistricting decision is facially neutral, and all students were reassigned based on their place of residency." (Reply, p. 6).

The Appellant highlighted comments made by individual Board members during the process which, she argued, prove the FARM data was used as a proxy for race. (Response, p. 24). A press release on August 13, 2019 referred to a resolution "calling on the Howard County Public School System to develop a county-wide integration plan to desegregate schools." (Response, p. 11; Ex. 9 to the appeal). Included in that press release is a quote from Chair Ellis: "As Chair of the Howard County Board of Education, capable of casting only one vote, I support this resolution that focuses on the socioeconomic and racial desegregation of Howard County Public Schools." (Response, p. 12). The other quotes are from members of the County Council.

The Appellant set out two quotes made by Board members during public meetings. Board member Taj spoke during the public work session held on November 5, 2019. (Response, p. 24-25). I listened to member Taj's speeches.[5] At minute 23:50, she discussed poverty, students with high needs, resource allocation, and a history of economic segregation. The quote cited by the Appellant came at minute 44:40. Although she mentioned a history of slavery and segregation, she primarily addressed economic diversity and inequities. Chair Ellis followed up on some of member Taj's comments where, at minute 45:00, she talked about growing up in Chicago where they had *de facto* segregation with the result that if one lived in a poor neighborhood, one attended a poor school. She said Howard County was rich in resources, but "not rich for everyone." (November 5, 2019 work session at minute 46:56). At minute 53:00, member Taj discussed wanting to create equal opportunity, recounting how long it took Howard County schools to desegregate. She said the Board was elected to address the inequities of the school system by a community that "was founded on the principles of inclusion and diversity."

[5] I correct the Appellant's references to where those quotes may be found on the recording of that work session. They appear at minutes 44:40 and 53:00.

The Appellant also referred to a memorandum written by Board counsel, Mark Blom, in which he discussed the use of socioeconomic factors instead of race to determine student attendance zones. In the memo, Mr. Blom encouraged the use of race-neutral criteria, which might include "general educational considerations, financial factors such as transportation costs, building utilization, feeds between school levels, neighborhood continuity, natural geographic boundaries, etc." (Response, p. 26). He went on to write, "[D]iversity factors such as socio-economic status, race, educational attainment of parents, disability status, English as a second language, etc. may be added as considerations." (Response, p. 26). By placing FARM participation rates as its highest priority, the Appellant argued, the Local Board failed to use race-neutral considerations as its primary consideration.

The Local Board replied that Policy 6010 provides for three main factors to be considered during an attendance area adjustment: facility utilization, community stability, and demographic characteristics of the student population. Thus, as a demographic characteristic, FARM data constitute a "distinct and independent category." (Reply, p. 5). It also wrote that the Board has a "lawful right to consider actions that reduce levels of poverty in schools and considering the impact race has on a redistricting proposal is not automatically presumed to be unconstitutional." (Reply, p. 5). This is in accord with my understanding of the law. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 234–35 (5th Cir. 2011), vacated and remanded, 570 U.S. 297 (2013); *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253, 279 (S.D.N.Y.), aff'd, 788 F. App'x 85 (2d Cir. 2019); *Bernstein*, 245 Md. at 477.

I disagree that socioeconomic factors were used as a proxy for race in the development of the Redistricting Plan. The Local Board did not ignore the racial implications of the boundary changes nor does the law require it to. Throughout the discussions on the changes, the Local

Board sought information on utilization and FARM data, as well as whether students would be able to walk to school, how far the bus trips were, and where future housing developments were planned, to name a few of its considerations. The Board did seem to focus on FARM data and utilization in its final vote, but other than the comments I have discussed above, I heard no mention of race. FARM data and utilization considerations are race neutral.

The comments made by members of the County Council in August 2019 do not govern the discussions by the Local Board during the process. Nor does acknowledging a history of segregation during discussions raise a dispute of material fact on whether the use of FARM data was a proxy for discriminatory intent. "[I]f the Board's action was taken in the reasonable exercise of its discretion, in an effort to relieve overcrowded conditions, it is immaterial that an incidental effect of that action was to adjust a racial imbalance." *Bernstein*, 245 Md. at 477. The same conclusion can be drawn if the effort was to balance the FARM participation rates in schools.

Furthermore, as found by the Court of Appeals in *Williams v. McCardell*, 198 Md. 320, 330 (1951), sometimes the opinion of a board or testimony of one of its members may show that its action was arbitrary or unlawful, but ordinarily courts review the action of the board, not its opinion. The Court of Appeals has also found that the remark of one member of the Board during the proceeding, repudiated on behalf of the Board at the end of the hearing, and, in any event, not applicable to the majority of the children affected by the Board's action, is not to be deemed the opinion of the Board or as affecting the validity of its action. *Bernstein*, 245 Md. at 477.

For all of these reasons, I conclude there is no genuine dispute of material fact on the issue of whether the Board used FARM data as a proxy for race in developing the Redistricting Plan. As to this issue, the Local Board is entitled to judgment.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Local Board's Motion for Summary Decision on the issues of notice (based on language) to the Appellant and the use of faulty FARM data should be denied because there is are genuine disputes as to material facts and the Local Board has not shown that it is entitled to prevail as a matter of law. COMAR 28.02.02.12D(5); COMAR 13A.01.05.06A.

I further conclude as a matter of law that the Local Board's Motion for Summary Decision on the issue of the use of race as a factor in developing the Redistricting Plan should be granted because there is no genuine dispute as to any material fact and the Local Board has shown that it is entitled to prevail as a matter of law. COMAR 28.02.02.12D(5); COMAR 13A.01.05.06A.

ORDER

I **ORDER** that the Motion for Summary Decision filed by the Howard County Board of Education on the issues of notice to the Appellant (based on language) and the use of faulty Free and Reduced Meals data is **DENIED**.

RECOMMENDED ORDER

I RECOMMEND that the Motion for Summary Decision filed by the Howard County Board of Education on the issue of whether race was a factor in the Redistricting Plan be **GRANTED**.[6]

June 23, 2020
Date Decision Issued

Joy L. Phillips (LHB)
Joy L. Phillips
Administrative Law Judge

JLP/cmg
#186087

[6] 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.

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