AVINASH DEWANI (#31)	BEFORE THE
Appellant,	MARYLAND
v.	STATE BOARD
HOWARD COUNTY BOARD OF EDUCATION	OF EDUCATION
Appellee.	Opinion No. 21-15

OPINION

INTRODUCTION

Appellant is one of the many individuals who filed an appeal of the November 21, 2019 decision of the Howard County Board of Education ("local board") approving the Attendance Area Adjustment Plan for School Year 2020-2021 ("Redistricting Plan").

On January 13, 2020, we transferred the case pursuant to COMAR 13A.01.05.07(A)(1)(a) to the Office of Administrative Hearings ("OAH") for review by an Administrative Law Judge ("ALJ").

On February 20, 2020, the ALJ conducted a prehearing conference during which the ALJ determined that the local board could file its response to the appeal by March 5, 2020. The local board filed its response on that date. On March 6, 2020, Appellant filed a Motion for Default for Untimely Response of Respondent and to Strike Respondent's Prehearing Conference Statement. On March 26, 2020, the ALJ denied the Appellant's Motion. On June 24, 2020, the ALJ issued a Recommended Order to grant, in part, the local board's motion for summary decision.

The ALJ conducted a consolidated hearing on July 23, 24, 29, and 30, 2020 for the Free and Reduced-Price Meals ("FARM") data issue and on August 3, 11, 17, and 20, 2020 for the Open Meetings Act ("OMA") issue.

On October 14, 2020, the ALJ issued a Proposed Decision finding that Appellant failed to demonstrate that the local board's decision was arbitrary or unreasonable as a result of using incorrect or faulty data, or that the decision was illegal as a result of a violation of the OMA. The ALJ recommended that the State Board dismiss the Appellant's appeal.

Appellant filed exceptions to which the local board responded. Oral argument on the exceptions was held on April 26, 2021.

FACTUAL BACKGROUND

The facts of this case are set forth in the Proposed Decision at pp. 4-11.

STANDARD OF REVIEW

For decisions of the local board involving a local policy, the local board's decision is 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.01.05.06A.

The State Board transferred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify or remand the ALJ's proposed decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications or amendments to the proposed decision. *See* Md. Code Ann., State Gov't. §10-216. In reviewing the ALJ's proposed decision, the State Board must give deference to the ALJ's demeanor based credibility findings unless there are strong reasons present that support rejecting such assessments. *See Dept. of Health & Mental Hygiene v. Anderson*, 100 Md. App. 283, 302-303 (1994).

LEGAL ANALYSIS

Motion for Default and to Strike

Appellant maintains that the ALJ erred in denying the Motion to Dismiss for Default for Untimely Response of Respondent and Motion to Strike Respondents Prehearing Conference Statement when the local board failed to file a timely response to the appeal. COMAR 13A.01.05.03A states that a local board "shall file a memorandum response to the appeal or a motion to dismiss" in response to an appeal to the State Board "[w]ithin 20 days after the State Board sends a copy of the appeal to the local superintendent." Appellant argues that since the appeal was sent to the local superintendent on January 13, 2020, the local board was required to file a response to the appeal or motion to dismiss by February 5, 2020. The local board filed its response on March 5, 2020. Appellant argues, therefore, that the ALJ erred in allowing the late submission, should have granted the Appellant's Motion, and should have stricken the local board's Prehearing Conference Statement.

On March 26, 2020, the ALJ issued an order on this matter. She found that once the State Board transmits the appeal to OAH, the OAH Rules of procedure govern. She distinguished the cases cited by Appellant, including *Michael D. v. Anne Arundel County Bd. of Educ*., MSBE Op. No. 20-07 (2000), finding them inapposite here. As a matter of law, she found the Appellant's Motion to Strike and Motion for Default had no merit. Once the State Board delegates its authority to OAH in a case, the ALJ has the power to oversee the action, including filings. *See* COMAR 28.02.01.11B(11) and (12). We have reviewed the ALJ's Ruling and Order on the Appellant's Motion and concur with the ALJ's decision and reasoning.

FARM Data

Appellant presents various exceptions concerning the ALJ's determinations about the FARM participation rate data used by the local board and how that data rendered the local board's decision arbitrary and unreasonable. In its essence, Appellant contends that the ALJ erred by failing to accept the argument that the local board relied on substantial portions of faulty or inaccurate data in making its decision and that the local board members were confused about how the FARM rate was calculated.

For the 2019 Feasibility Study, the Office of School Planning calculated FARM percentages at each school by using the FARM participation count on October 30, 2018, and dividing it by the September 30, 2018 official enrollment number.[1] (*See* Transcript (8/3/2020) at 295-296, 323). This calculation used static student addresses as of September 30, 2018. The same calculation was used for the Superintendent's Plan on the redistricting. During the local board work sessions when the board members were modeling various test scenarios and receiving FARM data on those scenarios, however, the board members received data from the Office of Student Information Services ("SIS") and that data included certain factors that the Office of School Planning had not included.[2] The SIS data included Pre-K students and reflected student mobility, meaning it was "live" data that included current student addresses as of the date of the work session rather than the static September 30 addresses. These are factors that can impact school enrollment. Board members questioned discrepancies in the data at the November 18, 2019 meeting. At the November 21, 2019 meeting, the board members received updated data that removed the Pre-K numbers and "neutralized" the mobility factor so that they would have consistent data for comparison to the data used in the Feasibility Study and Superintendent's Plan. The data discrepancy was explained at that time and board members had the opportunity to review the information and ask questions of school system staff.

Appellant maintains that the differences in the FARM data provided by SIS to the local board during its work sessions and the data provided by the Office of School Planning as used in the Feasibility Study and Superintendent's Plan, as well as the use of live data during the work sessions, means that the local board relied on incorrect data in its decision. However, as the ALJ explained, Appellant failed to prove that any of the data used during the redistricting process was faulty or inaccurate. (ALJ Proposed Decision at 26-27). The work session data included the Pre-K and mobility counts that the Feasibility Study data did not. The Office of School Planning provided updated data to the local board members at the November 21, 2019 board meeting by adjusting the calculation to remove the Pre-K and mobility counts so that the data was comparable to the data used in the Feasibility Study and Superintendent's Plan. The ALJ noted that any decreases in the FARM rates between the straw vote on November 18 and the final vote on November 21 align with the local board's goal of balancing the FARM rates among the

[1] This is a correction to the ALJ's Findings of Fact #11 and #12, which mistakenly reverse the numbers in the explanation of the calculation for the Office of School Planning and MSDE. (ALJ Proposed Decision at 6). This has no effect on the decision in the case.

[2] Due to privacy concerns, during the work sessions the data was not provided at the polygon level and was suppressed for percentages less than 5% or greater than 95%. The board members were advised of this at the time they were working with the data.

schools closer to the average of 22%, and any increases did not have substantial or an overall negative impact. (*Id*. at 23-24).

The Appellant maintains that the ALJ misunderstood the implication of the "live" data as the variables changed at each work session, which in turn affected the comparisons being made during the test scenarios. We are not convinced of that fact. The ALJ determined that the data was not incorrect, and at its November 21, 2019 meeting the local board had before it comparable data to view the FARM participation rates in schools. The fact that "live" data was used to run the test scenarios for the work sessions does not render the local board's decision arbitrary or unreasonable. The data was accurate data even if it did not provide for perfect comparisons. The local board's reliance on the data ultimately got it to a place where it was sufficiently satisfied with the FARM participation percentages to support the Redistricting Plan. Prior to the redistricting vote on November 21, the local board received the updated comparable FARM data and was presented with an explanation about the revised data, and it had the opportunity to review the data and ask questions of staff from the Office of School Planning. After a recess, board members asked additional questions and then proceeded to vote. At the November 21 meeting, none of the board members asked for additional time or to postpone the vote. None of the board members asked to rerun the work session test scenarios. None of them changed their vote based on the revised FARM data.

The Appellant maintains that the board did not have sufficient time to reflect on the revised FARM data and its impact to the proposed boundary decision before voting. As the ALJ pointed out, Appellant fails to consider the alternative, that the difference and the explanation provided regarding the FARM participation percentages "were so minor that the Board members did not deem them sufficient to change or delay their votes." (ALJ Proposed Decision at 24). The fact that two board members stated they did not understand or did not have sufficient time to review the data, does not constitute proof that the board, as a decision-making body, acted arbitrarily or unreasonably.

Appellant raises the difference between the methodology used to calculate the FARM participation rate by the Office of School Planning and MSDE and argue that this makes the data used by the Office of School Planning incorrect. The Office of School Planning uses the October 30 FARM participation and the official September 30 enrollment count while MSDE uses the October 30 date for both. The ALJ addressed this in the Proposed Decision finding that the only thing Appellant proved was that MSDE and the Office of School Planning use different enrollment dates to calculate the FARM participation rate. Appellant did not prove that the methodology used by the Office of School Planning was incorrect. (Proposed Decision at 26-27). Despite Appellant's contentions, simply because a board member may have wondered why the methodology used was not the same as MSDE's does not render the local board's decision arbitrary or unreasonable. The methodology and the reason for it were explained to the board. There is no mandate that school systems use MSDE's methodology for FARM calculations in redistricting decisions.

Our review of this issue is supported by our decision in *Dipti Shah, et al v. Howard County Bd. of Educ*., MSBE Op. No. 02-30 (2002). In *Shah,* we also considered a claim that the local board based its assumptions on incorrect data in making a redistricting decision. Any

errors in the data were corrected before the board's plan was adopted. Although appellants disagreed with the data, they did not prove it to be substantially incorrect. Thus, we found the use of the data was not arbitrary or unreasonable. Like the *Shah* case, Appellant here has failed to show that the data relied upon by the local board in making its decision was substantially incorrect. Moreover, the local board had the updated data before it when it made its decision.

Open Meetings Act

This Board has long held that the State Board is not the appropriate forum for redress of OMA violations. *Ben Carson Charter School et. al. v. Harford County Bd. of Educ.,* Op. No. 05-21 (2005); *Danner v. Carroll County Bd. of Educ.*, Op. No. 02-45 at 2-3 (2002). We do not here abandon those prior rulings. In this case, however, the Open Meetings Compliance Board ("OMCB") already determined that there was a violation at the local board's November 21, 2019 meeting. We believe the ALJ appropriately considered if the violation of procedure impacted the redistricting process to such an extent as to render the decision illegal.[3]

Appellant argues that the ALJ erred by disallowing the testimony of four board members regarding the violation of the OMA. The ALJ found that the testimony of local board member Coombs was the only testimony material to the issue because she was the only board member who changed her vote following the recess.[4] The testimony of other board members was irrelevant because it would simply relate their subjective opinions as to the impact on board member Coombs.[5] Such testimony would be of no probative value. Indeed the ALJ stated that "[e]ven taking the descriptions of the other written statements as true, as requested by the Appellants, I do not find that the Board members bullied Ms. Coombs into changing her vote. Rather, her own reasoning led her to the conclusion she had already reached prior to when the final vote took place: she had to vote in favor of moving the 32s to a different school in order to make the other moves impacting other elementary schools work." (Proposed Decision at 41-42).

Appellant asks the State Board to discount the ALJ's assessment of the credibility of Ms. Coombs and substitute their own characterizations. In reviewing the ALJ's proposed decision, the State Board must give deference to the ALJ's demeanor based credibility findings unless there are strong reasons present that support rejecting such assessments. *See Dept. of Health & Mental Hygiene v. Anderson*, 100 Md. App. 283, 302-303 (1994). Here, the ALJ specifically rejected the Appellant's argument that she should disregard Ms. Coombs' testimony as not credible, noting that the testimony was not remarkably different from her written statement and that Ms. Coombs was capable of being rational and emotional at the same time. (Proposed Decision at 41-42). As stated by the ALJ:

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[3] Prior to the evidentiary hearing, the ALJ determined that the sole question to be resolved was what if any impact did the recess have on the decision to reconsider the vote. (Ruling on Summary Decision, 4/28/20).

[4] The OMCB found that the local board violated the OMA when it conducted public business during the local board's recess after a failed vote on the polygons known as the 32s. (App. Ex. 1). More than four local board members entered the meeting room where they were not in public view or recorded. Upon return to the meeting in the board room, Ms. Coombs, who had voted against the proposed boundary change, moved to reconsider the vote and the vote on the 32s passed.

[5] The ALJ allowed the written statements of the four board members to be admitted into evidence. The statements documented what occurred during the recess from the perspective of the writer. (Proposed Decision at 30). She also admitted the decision of the OMCB, issued on February 14, 2020.

> Despite grilling from counsel, Ms. Coombs remained adamant that she did not change her vote on the 32s because of pressure from fellow Board members. She thought about whether Clemens Crossing ES could handle the additional students but realized it could not. She realized the impact the failed vote would have on the rest of the Plan and knew that for the Plan to pass, she would have to be the one to change her vote. She offered to move for reconsideration of the vote, which she did when the Board returned to the Board room.

(Proposed Decision at 35). In addition, the ALJ pointed to facts outside of the recess to conclude that the violation did not illegally impact the vote. We decline to reject the ALJ's determination that Ms. Coombs was a credible witness.

Appellant also disagrees with the ALJ's decision not to allow rebuttal evidence, but the ALJ's basis for disallowing it was because there was nothing to rebut. Ms. Coombs was Appellant's witness. The local board did not present a case on this issue, thus, there was simply no basis to allow rebuttal evidence.

For these reasons, we agree with the ALJ that the evidence does not show that the OMA violation impacted the process to the extent that it rendered the redistricting decision illegal.

CONCLUSION

We have reviewed the ALJ's Proposed Decision and concur with the determination that 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 arbitrary, unreasonable or illegal. We adopt the ALJ's Recommended Order on the local board's motion for summary decision and the ALJ's Proposed Decision as modified herein. Although the ALJ recommended dismissal of the case in the Proposed Decision, we instead affirm the decision of the local board because the Appellant failed to satisfy Appellant's burden of proof in the appeal.

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

AVINASH DEWANI,	*	**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-09-20-01773 (File #31)**

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PROPOSED DECISION

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

STATEMENT OF THE CASE

On November 21, 2019, the Howard County Board of Education (Local Board or Board) passed the Attendance Area Adjustment Plan for School Year 2020-2021 (Redistricting Plan). On December 26, 2019, the Appellant, who lives in Polygon 276, 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.

[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. Lorraine Lawrence-Whittaker, Esquire, and Mary S. Poteat, Esquire, represented the Appellant.[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 Appellant filed a Motion for Default on the basis that the Local Board failed to file a timely response 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 March 27, 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 May 4, 2020, the Local Board filed a Motion for Summary Decision. On May 7, 2020, the Appellant filed a Motion for Partial Summary Decision. On June 10, 2020, I heard oral argument on the issue raised by the Appellant. On June 22, 2020, I convened a prehearing conference via videoconferencing.[6] The prehearing conference was continued to July 6, 2020. On June 24, 2020, I issued a ruling on the motions for summary decision.[7] At the July 6, 2020 prehearing conference, the remaining issues were scheduled for hearing.

On July 23, 24, 29, and 30, 2020, and August 3, 11, 17, and 20, 2020, I convened a contested case hearing via videoconferencing to address whether the Local Board used faulty or

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[3] These representatives appeared for their clients at all proceedings.
[4] I frequently extended deadlines for filing in the appeals 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 denied the Appellant's Motion for Partial Summary Decision and the Local Board's Motion for Summary Decision on the issue of the impact of the Open Meetings Act violation and the Local Board's use of faulty data. I recommended the Motion for Summary Decision be granted on the issues of whether the Appellant received notice and whether the Local Board impermissibly used racial classifications in developing the Redistricting Plan.

inaccurate Free and Reduced Meals (FARM) data during the redistricting process and the impact of an Open Meetings Act violation on the Redistricting Plan. The Appeal was consolidated with other appeals for hearing.[8]

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2020); the procedural regulations for appeals to the State Board of Education, COMAR 13A.01.05; and the Rules of Procedure for the OAH, COMAR 28.02.01, govern the procedure in this case.

ISSUES

Was the Redistricting Plan adopted by the Local Board on November 21, 2019, arbitrary or unreasonable as a result of using incorrect or faulty data, or illegal as a result of a violation of the Open Meetings Act?

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
- Timothy J. and Stephanie K. Mummert (File #15) (Appellants in MSDE-BE-09-20-01599)

[8] A. For certain issues, I consolidated the following appeals for hearing: Neidermyer (File #09), MSDE-BE-09-20-01502; Mummert (File #15), MSDE-BE-09-20-01599; 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; Tucker (File #34), MSDE-BE-09-20-01834; and Alacron (File #30), MSDE-BE-09-20-01769.
B. At the consolidated hearing, 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.

- Jim and Archana Neidermyer (File #09) (Appellants in MSDE-BE-09-20-01502)
- Dr. Jill Tayter (File #32) (Appellant in MSDE-BE-09-20-01781)
- Local Board Members:

  Kirsten Coombs

  Christina Delmont-Small

  Vicky Cutroneo

  Mavis Ellis (Chair)

  Jennifer S. Mallo

The Local Board presented the testimony of the following witness:

- Timothy Rogers, Planning Analyst, Office of School Planning (on the issue of data)

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 Area 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 percentages. 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 asking 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 new 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.

Open Meetings Act

32. At the November 14, 2019 work session, Ms. Mallo and Board Member Dr. Chao Wu presented alternative plans from the Superintendent's Plan. The Local Board voted to use Ms. Mallo's plan as a base and work from it (Consolidated Plan).

33. In the Consolidated Plan, the students in polygons known as "the 32s" (132, 1132, 2132) were moved from Clemens Crossing Elementary School (ES) to Bryant Woods ES, a school much farther away from the neighborhoods comprising the 32s. The Board had lengthy discussions about this move, in addition to discussing several nearby elementary schools in the region known as Columbia West that were overcapacity. Several times Ms. Coombs questioned whether it was necessary to move the 32s and she made suggestions for avoiding the move. The 32s were in play during discussion, but ultimately the move to Bryant Woods ES was incorporated into the Consolidated Plan.

34. On November 18, 2019, the Board continued to address the elementary schools. Ms. Coombs expressed her view that she did not want to move the 32s. Finally, the Board took a straw vote on the Consolidated Plan, which had been revised during the work sessions. In the straw vote, Ms. Coombs voted in favor of the Consolidated Plan.

35. On November 21, 2019, during the final vote on the 32s, Ms. Coombs voted against the move, along with three other Board members, and the motion on that move failed. Ms. Mallo quickly moved for a recess and the Board recessed. More than four of the members, including Ms. Coombs, entered the Board meeting room, adjacent to the Board hearing room; thus, a quorum was present. The members discussed that the failed vote on the 32s would cause the entire Plan to "fall apart." The members were highly upset and emotional, with Ms. Coombs crying. Some decried Ms. Coombs' vote and others cautioned against bullying her. Ms. Coombs mentioned she felt bullied by both sides, referring to public pressure. Ms. Coombs again wondered whether Clemens Crossing ES could accommodate the additional students. Ms. Coombs realized hers was the swing vote and she said she would move to reconsider the vote.

36. When the members reentered the hearing room after a four-minute recess and the meeting resumed, Ms. Coombs moved to reconsider the last vote and a new vote was taken. She

said she was voting in favor of the move because otherwise, the entire Plan would fall apart. She was tearful and emotional at the time. Ms. Coombs voted in favor of moving the 32s to Bryant Woods ES and the votes on the Redistricting Plan continued without further delay.

37. On December 17, 2019, Ms. Coombs voted with three other Board members to ratify the vote on the 32s.

38. On February 14, 2020, the Open Meetings Compliance Board issued a written decision finding that the Local Board had violated the Open Meetings Act when a quorum met in the meeting room on November 21, 2019 and discussed Board business outside of the public eye.

39. On March 26, 2020, the Open Meetings Compliance Board cautioned the Local Board against texting each other privately during public meetings, as two Board members did on November 18, 2019.

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. Dr. 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 new 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.

[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.

The Appellants 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 Local 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 Local Board noted that Policy 6010 does not require the Local 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.

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 Appellants 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).

[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.

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 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.

Ms. 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, 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 said 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 numbers. 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 data 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 its 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 votes anyway. Simply asserting that the Board did not adequately review the revised data 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 that 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 were 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 were shown to be dynamic and they were 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*, No. 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 were 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]

Open Meetings Act

Background

On April 28, 2020, I issued a Ruling permitting the parties to raise a violation of the Open Meetings Act as a basis for showing the acts of the Local Board in passing the Redistricting Plan were illegal, as that term is contemplated in COMAR 13A.01.05.06C. Md. Code Ann., Gen. Provisions, Title 3 (2019). In my Ruling, I acknowledged that the State Board has historically declined to consider violations of the Open Meetings Act. *Kurth v. Montgomery Cty. Bd. of Educ.*, MSBE Op. No. 12-23 (2012); *Harper v. Frederick Cty. Bd. of Educ.*, MSBE Op. No. 02-15 (2002). However, I found that a final decision of the Open Meetings Compliance Board was relevant to whether the violation impacted the process so as to render it illegal. My position accords with *Beverly G. Kelley v. Queen Anne's County Board of* Education, MSBE Op. No. 18-24, p. 5 (2018), in which the State Board found that although it has "declined to make independent findings about Open Meetings Act violations," it has "accepted final decisions of the Open Meetings Compliance Board as evidence in other cases."

The Appellants argued that the State legislature found it so critical that HCPSS be directed to comply with the Open Meetings Act that it was one of only a handful of jurisdictions that are specifically required to conduct open meetings and abide by the Act. For this reason,

[14] The Appellants attempted to show that the data used by the Local Board had only a 7.21% 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.

they said, a violation of the Act *is* a proper issue for the State Board to address. Education Article section 3-704, applying to Howard County, provides:

> (b) Except for those actions authorized by subsection (c) of this section, all actions of the county board shall be taken at a public meeting and a record of the meeting and all actions shall be made public.
> (c) The county board may take actions in closed session in accordance with § 3-305 of the General Provisions Article, including action to close a meeting.

Without a doubt, the Local Board must comply with the Open Meetings Act and conduct public meetings. It does not argue otherwise. As found by the Open Meetings Compliance Board on February 14, 2020, the Local Board failed to abide by that mandate on November 21, 2019. (App. Ex. 1). For these reasons, the Appellants were permitted to present evidence regarding Act violations and the impact, if any, on the votes taken on the Redistricting Plan. The Appellants noted this language from page 17 of that decision:

> Calling a recess to aid in the "crystallization of opinion" may be a routine and acceptable practice for "societies" that are not subject to the Act. Public bodies, however, should proceed with caution. The Maryland Court of Appeals has repeatedly made clear that the purpose of the Act is "to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance." *New Carrollton v. Rogers*, 287 Md. 56, 72 (1980) (quoting and adopting the language of the Supreme Court of Florida in *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (1974)) (emphasis added; quotation marks omitted).

The Court of Appeals in *New Carrollton* reversed a lower court's ruling that a city council had violated the Open Meetings Act during an annexation process, holding that the public was sufficiently notified of the council's actions and the meetings were sufficiently open. As I discuss below, the facts underlying the violation in this appeal do not come close to constituting a "crystallization of secret decisions to a point just short of ceremonial acceptance."

The evidence regarding the Open Meetings Act violation centered on the events of the Board meeting of November 21, 2019, at which the final vote on the Redistricting Plan was taken. The Detailed Agenda and a thumb drive containing the recording of that meeting were admitted into evidence. (App. Exs. 2 and 9, respectively). The Board recessed for approximately four

minutes after a failed vote on the polygons known as the 32s. Up to six Board members filtered out of the Board room into an adjoining meeting room. The gathering was not recorded and was conducted outside of the public eye. When the Board members returned to the Board room, Ms. Coombs, who had voted against the proposed boundary change, moved to reconsider the vote and the vote on the 32s passed. On December 17, 2019, Ms. Coombs voted in favor of ratifying the vote on the 32s.

The Appellants called Renee Kamen and Kirsten Coombs as witnesses.[15] The Appellants Mummert, Neidermyer, and Tayter also testified. I admitted the written statements of three Board members: Vicky Cutroneo, Jennifer Mallo, and Kirsten Coombs. (Exs. 3, 7, and 8, respectively). Those statements documented what occurred during the recess from the perspective of the writer. I admitted a decision from the Open Meetings Act Compliance Board, issued on February 14, 2020. (App. Ex. 1).

The Appellants also raised the issue of two Board members texting each other during a meeting.[16] (App. Ex. 4). I admitted a decision from the Open Meetings Compliance Board, issued on March 26, 2020, finding the issue to be one of first impression. (App. Ex. 5). Additional facts are discussed below.

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[15] The Appellants sought to present the testimony of four additional Local Board members on this issue: Vicky Cutroneo, Christina Delmont-Small, Mavis Ellis, and Jennifer Mallo. I granted the Local Board's motion to exclude the testimony of these four witnesses on the basis that they would not be capable of testifying to the motivations of the member who changed her vote following the recess that formed the basis of the Open Meetings Act violation, that is, Kirsten Coombs. The Appellants reserved the right to call those Board members in rebuttal to the Local Board's evidence. The Local Board put on no evidence in this portion of the hearing and therefore, these witnesses did not testify on this issue. I denied the Appellants' motion to call them in rebuttal to Ms. Coombs' testimony.

[16] I overruled the Board's objection to the admission of evidence regarding these texts because even though it was not raised in any appeal, the Appellants Mummert disclosed the evidence in their prehearing conference statement filed February 14, 2020, explaining it only came to their attention after they filed their appeal. As the texts were addressed without objection in the motion for summary decision filed by the Board, I allowed evidence of them to be admitted at the hearing.

Testimony

Appellant Timothy Mummert testified that his family moved to Howard County so that their daughter could attend the public schools there. She is now a rising third grader. In 2012, their polygon, number 1018, was assigned to Hammond ES. He said it was not in play during the 2019 redistricting process until the night of the straw vote, on November 18, 2019. His child was given the option of remaining at Hammond ES, which the Mummerts decided to take because it allows her to continue with karate day care, something critical to her development.[17] But this decision meant she was separated from her friends and the family will have to provide transportation for her. The way the Board handled the vote on the 32s had an impact not only on his daughter, he said, but on him, as well. He is politically active but decided against running for the Local Board because of the Open Meetings Act violation. He said he was too upset about the process and did not want to participate on a board where decisions were made in back rooms. He decried as bullying how some Board members talked to Ms. Coombs during the recess and pointed out that discussions took place outside of the public eye, violating the law.

Appellant Stephanie Mummert testified that she participated in the public sessions of the redistricting process and believed her polygon would be safe from a boundary change because many other polygons were on the edges of attendance areas and therefore, more likely to be considered for a change. Her daughter's exemption will last only until the end of elementary school, she said, at which time she will be moved to Patuxent Valley Middle School (MS). This will occur even though Hammond ES is on the same grounds as Hammond MS. Ms. Mummert wanted to pursue the appeal to speak up about keeping public bodies honest and accountable, she said. The redistricting process moved so quickly that Board members were rushed and made mistakes, despite their good motives, she noted. She was disappointed that Ms. Coombs changed

[17] This option was given to students with an Individualized Education Program or 504 Plan.

her vote and would have liked to have seen how the Board would have responded had she not changed it.

Appellant Archana Neidermyer testified that her family has lived in Howard County for twenty-four years and has two children in public school there. The older is a rising eleventh grader who attends Hammond HS. The younger is a rising eighth grader who attends Patuxent Valley MS and will attend Reservoir HS for her freshman year, 2021-2022. Because of the Redistricting Plan, the younger child will have to attend a different high school than her older sibling during their overlapping year. Ms. Neidermyer testified they were shocked when their polygon was sent to a different high school. Such a move did not come up until very late in the process and no one was prepared for it. Their entire family is devastated and disappointed. Ms. Neidermyer emailed Board members and the Superintendent but received no response. She said the peculiarities with the vote on the 32s caused her to lose her confidence in all of the decisions the Local Board and the school system made. She felt the final decisions were random and not communicated well. The changes tore their lives apart.

Appellant Jim Neidermyer testified to the importance of school stability in the foster care system, where he works as an attorney. He complained that the change impacting their family came so late in the process, many residents did not know about it until they registered their children for school. The private meeting on November 21, 2019, culminating in Ms. Coombs' changing her vote, illustrated how Board members must follow the party line, he said. That flawed vote cast doubt on all of the votes coming afterward; the exact impact on subsequent votes is unknowable, he testified. He said as an attorney, he has respect for legislative and judicial bodies, but this process disgusted him and made him lose faith in the Board's direction.

Appellant Dr. Jill Tayter testified that she has two children with the HCPSS, a rising sixth grader and a rising first grader. Her family lives on Jerry Drive, a street in one of the 32s. As a

direct result of the 32s being redistricted, she said, every family on Jerry Drive except one is moving out of the area. What was an extremely close, friendly, family-oriented neighborhood that was a model of the Columbia planned community has been completely decimated, she said. Because her street had always attended Clemens Crossing ES, where the children could bike or walk to school, she never anticipated it would be redistricted to another school. The move caused her to lose faith in the Local Board and she no longer trusts HCPSS to teach her children or make decisions in their best interests.

Dr. Tayter pointed to a suspicious move that caused three other polygons to be moved into Clemens Crossing ES while the 32s, which are close to the school and have always gone to that school, were moved to Bryant Woods ES on the opposite side of Merriweather Post Pavilion and the Columbia Mall. She believes the decision was self-serving and benefited a Board member. As a result of everything that happened, Dr. Tayter's family is moving to Michigan, she said.

Ms. Coombs testified that she has been on the Local Board since December 2016. There was an election in 2020, after the vote on the Redistricting Plan, and districts were redrawn. As a result, she ran in the District 4 primary and lost to Ms. Mallo in 2020. She said she received training on the Open Meetings Act when she first became a Board member, but numerous times noted that she is not an expert on it.

Ms. Coombs said there were many considerations in deciding whether to change the boundaries of Clemens Crossing ES, Swansfield ES, and Bryant Woods ES and recalled discussion on splitting up the Simpson Mill polygon as part of these moves. She said it was difficult for her to recall them in detail, but she did recall that she voted to put the 32s at Clemens Crossing ES. She said the 32s were at Bryant Woods ES in what she referred to as the Base Plan but is referred in this Proposed Decision as the Consolidated Plan.

Ms. Coombs said that when she walked into the side meeting room during the recess, she was not thinking about the Open Meetings Act. She did not know whether it was an open session, a closed session, or an administrative session, although because they did not vote to have a closed session, she did not think it qualified as such. During the recess, she said she was thinking about the impact of her vote on the 32s, the other schools, the Route 29 corridor, and how coming development would strain schools' capacity. She was stressed, frustrated, and tired, she said. She was not keeping track of the number of people in the meeting room. She heard people talking but said she did not know to whom the comments were directed. It became clear to her, she said, that she needed to change her vote impacting the 32s. She said she would move to reconsider the vote. No new information was provided to the Board during the recess, she said.

Ms. Coombs agreed that she was tearing up and crying, although she did not characterize it as tears flowing down her cheeks, despite counsel's attempts to get her to concede that. She said she cried at other times during her tenure as a Board member, at both happy events and stressful events. She wears her heart on her sleeve. She denied that anything said during the recess caused her to cry or to change her vote. Any pressure she felt came from the community, not other Board members.

Throughout the redistricting process, Ms. Coombs felt bullied by the community. As examples of the community pressure, she pointed to a protest march that took place at the Columbia Mall followed by some citizens marching on her street, which is near the Mall, emails that were sent to Board members, general acrimony from the public, and threats to go to Board members' homes. She recalled Ms. Delmont-Small saying during the recess to stop bullying her but testified she did not know to whom that comment was directed. Many people were talking,

she said, and she does not know who said what to whom. She did not recall anyone "pleading" with her to change her vote, as described by Ms. Mallo in her written statement.

Despite grilling from counsel, Ms. Coombs remained adamant that she did not change her vote on the 32s because of pressure from fellow Board members. She thought about whether Clemens Crossing ES could handle the additional students but realized it could not. She realized the impact the failed vote would have on the rest of the Plan and knew that for the Plan to pass, she would have to be the one to change her vote. She offered to move for reconsideration of the vote, which she did when the Board returned to the Board room.

Written Statements

A typed statement from Ms. Coombs regarding what occurred during the recess was admitted on behalf of the Appellants. (App. Ex. 8). She wrote that Ms. Mallo was angry with the failed vote, slammed her files down on the table in the meeting room, and said, "Now what?" Ms. Mallo was staring at her. Other Board members walked in, including Sabina Taj, who asked her what she was doing. Ms. Mallo and Ms. Taj continued to talk about the impact of the vote, saying it ruins West Columbia and that "without this, the plan fails." Ms. Coombs wrote she may have, but was not sure if she had, said something about Clemens Crossing ES being able to handle it (that is, the increased student numbers). She wrote she was teary and that she agreed to move to reconsider it. She heard Ms. Delmont-Small say "Stop bullying her." Ms. Coombs wrote that she said, "I've been bullied the entire time by both sides as everyone knows I'm the swing vote." She was teary as they returned to the Board room.

A handwritten statement written on November 21 and 22, 2019 by Ms. Cutroneo was admitted on behalf of the Appellants. (App. Ex. 3). Ms. Cutroneo noted there was a quorum in the meeting room. She wrote that Ms. Mallo (referred to by her initials) was "screaming" at Ms. Coombs: "What are we going to do," "The whole plan falls apart," and "West Columbia plan

falls apart." She wrote that Ms. Coombs asked about capacity at Clemens Crossing ES. She wrote that Ms. Taj joined Ms. Mallo in yelling at Ms. Coombs and Ms. Delmont-Small said to "Stop bullying her, don't let them bully you." She noted Ms. Coombs offered to move to reconsider and told others coming into the room she was going to change her mind.

A typewritten statement written on November 21 and 22, 2019 by Ms. Mallo was admitted on behalf of the Appellants. (App. Ex. 7). Ms. Mallo described the recess as one akin to other recesses the Board had taken to consider information, in this case, the impact of the failed vote on the 32s. When she entered the meeting room, Ms. Taj and Ms. Coombs were already in the room discussing the impact of the vote. Ms. Mallo was at one end of the room, she wrote. She wrote that Ms. Taj "pleaded with Ms. Coombs to reconsider the vote." Ms. Coombs responded that "she was being bullied by the left and the right because she was the swing vote (referring, I believe, to the political spectrum)." She wrote that the Board returned to the Board room after less than four minutes, and that Chair Ellis referred to the meeting as an administrative session and later corrected the record to indicate it was not an administrative session.

Video recordings of Board meeting

I watched the video recordings of the Board meetings on October 17, 2019, November 14, 2019, November 18, 2019, November 21, 2019, and December 17, 2019.[18] At the first work session, on October 17, 2019, following numerous public sessions, Chair Ellis addressed the factors of Policy 6010, reminding the audience that each Board member could prioritize whatever factor they felt was important, but that overall, the Board was going to focus on capacity and equity. Ms. Coombs made a statement to the audience, chiding them about the ugly comments that had been made toward the Board and certain minority groups. She said capacity

[18] October 17, 2019 (App. Ex. 25), November 14, 2019 (App. Ex. 23), November 18, 2019 (App. Ex. 18), November 21, 2019 (App. Ex. 9), and December 17, 2019 (App. Ex. 10).

was the driving force of the redistricting effort and that the Board must optimize the use of the existing buildings. She expressed concern about the high concentration of FARM rates in certain schools. She requested civility throughout the process.

Dr. Wu thanked the public for their input during the public sessions but denounced the anonymous letters that were sent, spewing hatred and racism. He also requested civility during the process and spoke about his priorities. Ms. Mallo presented statistics regarding overcrowded schools and opined it was an unconscionable situation. Ms. Delmont-Small reminded them that the needs of the school system outweighed their budget.

On November 14, 2019, the Board voted to use a plan proposed by Ms. Mallo as a base from which to work. (App. Ex. 23, Video at 1:41). It incorporated changes proposed by Dr. Wu. Ms. Coombs voted in favor of adopting the Consolidated Plan as the base from which to work. The Board spent several hours discussing elementary school moves, including those affecting the 32s. In the Consolidated Plan, the 32s had been redistricted to attend Bryant Woods ES from Clemens Crossing ES. There was specific discussion regarding whether Clemens Crossing ES could handle the student population if the 32s were not moved. Ms. Coombs opined that she thought Clemens Crossing ES could handle it and favored keeping the 32s at there. Ms. Cutroneo mentioned that Bryant Woods ES was overcapacity and had a small, old building. Different philosophies were discussed regarding whether it was better to keep communities together by moving them all to a different school or move fewer students by moving only those neighborhoods that absolutely had to be moved to address capacity issues. There was some confusion during the discussions as to which neighborhoods were headed to which school under the Consolidated Plan, but the Board members always got it straightened out.

On November 18, 2019, the Local Board continued to work on the Consolidated Plan. (App. Ex. 18). Ms. Coombs revisited the issue of keeping the 32s at Clemens Crossing ES, but

acknowledged capacity there was high. A discussion ensued, with various factors considered, such as which building was larger, older, or more crowded. The Board acknowledged that keeping the 32s at Clemens Crossing ES would increase capacity to 128%. When the 32s were raised, Chair Ellis noted that the Board could not continue to revisit every vote, saying it was not easy, but they would have to stop at some point. The motion to keep the 32s at Clemens Crossing ES failed, with Ms. Coombs voting for the motion.

Hours after that vote, Ms. Coombs stated at the same Board meeting that she agreed with Chair Ellis that they could not continue to flip back and forth on the moves. She said many schools would be overcapacity and the Board would just have to prepare staff and the community. She said there is no perfect balance for this system. (App. Ex. 18, Video at 10:44). Dr. Wu agreed that the Board had to compromise. Ms. Coombs voted in favor of casting a straw vote on the Plan the Board had created. In the three votes constituting the straw vote, the Board voted to accept the working plan as to the high schools, the middle schools, and the elementary schools. Knowing the 32s would be redistricted to Bryant Woods ES under the straw vote, Ms. Coombs herself moved to proceed on the elementary school straw vote and voted in favor of it.

Between the November 18, 2019 straw vote and the final meeting on November 21, 2019, the Office of School Planning drafted individual motions for each boundary change, reflecting the streets providing egress from each neighborhood. There were fifty-five different votes on the boundary changes prepared. (App. Ex. 2). Those motions were presented on November 21, 2019 for a final vote. (App. Ex. 9, Video at 4:06). Ms. Mallo and Ms. Coombs read each of the motions. The fourth vote involved moving the 32s to Bryant Woods ES. Ms. Mallo read the motion and Chair Ellis seconded it. Four members voted against it: Ms. Delmont-Small, who voted against all of the boundary changes; Ms. Cutroneo, who voted against all of the elementary school motions, all but one of the middle school motions, and one

of the high school motions; Dr. Wu, who cast five nay votes total and abstained in several votes; and Ms. Coombs, who did not vote against any other motion. Ms. Coombs cast a nay vote on the motion regarding the 32s, then moved to reconsider that vote when the Board returned from its recess. She was tearful when she returned to the hearing room. Nevertheless, she moved to reconsider the vote, which was seconded by Ms. Mallo. Chair Ellis then read the motion regarding the 32s again and the motion passed, with Ms. Cutroneo, Ms. Delmont-Small, and Dr. Wu voting nay. When Ms. Coombs voted in favor of the motion, she noted that otherwise, the whole plan would fall apart. Her voice caught as she said this, and she was tearful. The motions continued thereafter without interruption, read by Ms. Coombs and Ms. Mallo.

Analysis

The Appellants argued that the only reason Ms. Coombs would have changed her vote on the 32s was in response to the bullying and screaming that took place during the recess by other Board members. They noted she had, throughout the discussions, been opposed to moving the 32s out of Clemens Crossing ES. They argued passionately that the closed-door session was illegal as violating the Open Meetings Act and that it constituted a dangerous threat to democracy. They said it tainted all the other votes that followed that evening, as no one else would have bucked the Board after what occurred in the meeting room. The Board's behavior took a personal toll on their families and their lives. It violated a sacred trust the Board has with the public of Howard County, they said. They urged me to void the Redistricting Plan as the ultimate sanction, as anything less than that would encourage the Board to continue to violate the Act. At a minimum, they asked that I overturn the vote regarding the 32s.

In analyzing those arguments to determine the impact the violation had on the vote, I looked at the larger context of Ms. Coombs' changed vote and not just the four-minute recess. Although Ms. Coombs wanted to keep the 32s at Clemens Crossing ES, once it was clear to her

that the move was required in order to reduce capacity in other nearby elementary schools along the 29 corridor, she reluctantly accepted the fact that the 32s had to change schools. She signaled this by voting to move forward with the straw vote on November 18, 2019 and stating her agreement with Chair Ellis that at some point, they would have to stop making changes to the plan they were working from. That same night, she advocated against adding work sessions. On November 21, 2019, she, along with Ms. Mallo, presented the motions for all the boundary changes. It is obvious she knew going into the final vote that the 32s would be redistricted to Bryant Woods ES, despite her desire to make a different choice.

In her testimony, she did not explain why she initially voted against the motion regarding the 32s on November 21, 2019. Since she wanted to move forward with the plan as it was adopted by the Board on November 18, 2019, it seems she would have voted in favor of that motion. Instead, she apparently voted with her initial opinion that the 32s should not be moved. Had Dr. Wu not also voted against the motion, the motion would have passed. As it was, the motion failed. Ms. Coombs immediately realized that for the motion to pass and the entire plan to move forward, she would have to change her vote, as she also realized the other members would not. During the recess, she repeated her earlier question about whether Clemens Crossing ES could handle the additional students but realized immediately it could not. She offered to move to reconsider the vote.

Based on the evidence before me, I find Ms. Coombs was not threatened by other Board members to change her vote. No one forced her to do it. She came to that realization on her own. She was crying or tearful because, she testified, she was tired, stressed, and frustrated. Those were descriptions also used by other Board members during the final meetings. Those emotions came to a head for her over the failed vote on the 32s. The tears do not, as argued by the Appellants, mean Ms. Coombs was bullied into changing her vote.

Ms. Coombs is an elected official. She displayed a forceful personality during the meetings and was an active participant in the discussions. She was aware of the proposed moves going into the vote on November 21, 2019 and was prepared to vote in favor of the Plan. Under those circumstances, I disagree with the Appellants' assessment that the only reason she changed her vote was due to bullying by Ms. Mallo or Ms. Taj. In her testimony, Ms. Coombs outright denied any bullying took place, other than, as she described it, the pressure put on Board members by the public throughout the redistricting process. Additionally, I take the description provided by Ms. Cutroneo that Ms. Mallo was "screaming" with a grain of salt, given that Ms. Cutroneo was in the opposite camp regarding the elementary schools, voting against every one of those motions, and that neither Ms. Coombs, Chair Ellis, nor Ms. Mallo described the conversation using that term. The Appellants asked me to find Ms. Coombs' testimony not to be credible based on the differences of her description of what occurred during the recess, arguing she was too emotional to know what was going on, but her testimony did not differ remarkedly from her statement. She wrote Ms. Mallo "walks quickly and angrily off the dais" and "slams her stuff down" and testified to that. (App. Ex. 8). She was confused about who said what to whom because she was thinking about the failed vote and its ramifications, just as she wrote in the statement. She disagreed with Ms. Mallo's description about Ms. Taj "pleading" with her to change her vote, testifying that it was a matter of perception. Several times she testified that she changed her vote because of the impact it would have on the surrounding schools, not because she felt forced to do so by other Board members.

I do not discount Ms. Coombs' testimony or her own perceptions about what she was thinking and feeling that night just because she was crying. The Appellants argued that it was clear Ms. Coombs was highly emotional and, therefore, her perspective of what occurred during the recess was the least reliable account. I find it somewhat offensive to posit that because

someone is crying, their will is necessarily overborne by another's or that a person cannot be emotional and rational at the same time. Even taking the descriptions in the other written statements as true, as requested by the Appellants, I do not find that the Board members bullied Ms. Coombs into changing her vote. Rather, her own reasoning led her to the conclusion she had already reached prior to when the final vote took place: she had to vote in favor of moving the 32s to a different school in order to make the other moves impacting other elementary schools work.

The Appellants argued Ms. Coombs downplayed her response to the other Board members that night because she is a politician and would not want to come across as looking weak to her constituents. However, at the time she testified at the hearing, the primary had already taken place and Ms. Mallo received more votes than Ms. Coombs. This result is somewhat ironic given the Appellants' arguments since it was in Ms. Mallo's plan that the 32s were moved to a different school. In other words, more of the public in District 4 approved of Ms. Mallo's plan regarding the moves. Under those circumstances, one could hardly conclude that Ms. Coombs did not want to appear weak by voting with Ms. Mallo on this motion.

The Appellants attempted to discredit Ms. Coombs during her testimony by implying she had no reason to feel she had been bullied by the public during the process because the public never actually picketed her home or sent her a personal threat. I note, however, that at the beginning of the first work session, on October 17, 2019, Ms. Coombs made a public statement chiding the public about the ugly comments that had been made. She asked them to proceed with civility, as did Dr. Wu. I also heard Chair Ellis and other Board members frequently tell the public during the meetings to be civil in their discourse. Even the Board Administrator, who kept track of the motions and votes, had to tell the audience to be quiet and respectful because the process was so difficult. Clearly there was tremendous pressure put on the Board members,

and it was not always civil. I found Ms. Coombs' explanation for why she felt pressured and stressed, even at the late date of November 21, 2019, to be understandable under those circumstances.

Ms. Coombs testified about the complexity of the changes that affected the 32s. Several other schools were impacted by adjoining moves. A large percentage of the student body at Clemens Crossing ES and Bryant Woods ES was changed as a result of the Redistricting Plan. There were many factors to consider. She was abundantly aware on the night of the final vote of the many competing values and issues. The stress and frustration she displayed that night do not reflect weakness, but a natural response to what the Board had been experiencing for several months. Her strength is shown in her willingness to change her vote to make the Plan happen and her ability to continue with the motions and the votes on the night of November 21, 2019.

Nor was there any indication that any other Board member felt pressured to vote with either side on subsequent motions after Ms. Coombs changed her vote, as argued by the Appellants. The Board members voted in line with their votes on the moves that comprised the straw vote. Ms. Cutroneo and Dr. Wu voted different ways on different motions. It is pure speculation to conclude all of the subsequent votes were tainted because of Ms. Coombs' experience.

In the interest of thoroughness, I will address some additional arguments made by the parties. The Local Board argued that regardless of the finding of the Open Meetings Compliance Board that there was a violation of the Open Meetings Act on November 21, 2019, to void the vote, the Appellants must show the violation was willful and there cannot be any other remedy that is adequate. *Frazier v. McCarron*, 466 Md. 436 (2019). Also citing the *Frazier* case, the Appellants argued that no violation of the Act is ever harmless and the only remedy for the egregious violation is voiding the entire Redistricting Plan. In *Frazier*, a lawsuit was filed in

Circuit Court against a city council for violating the Act. In discussing the importance of public meetings and the Act, the Court of Appeals held at 449-50:

> Violations of those mandates are not "technical" in nature; nor are they ever harmless. A violation may not cause specific demonstrable injury to individual members of the public, but it does necessarily clash with and detract from the public policy that the Legislature declared in § 3-102 is "essential to the maintenance of a democratic society," that "ensures the accountability of government to the citizens of the State," and that "enhances the effectiveness of the public in fulfilling its role in a democratic society." Conduct that has that demeaning effect can be contagious and cannot be considered harmless. It strikes at the core of our democracy – the right and power of the citizens to control their government – even if its harm is not immediately perceptible.
>
> That does not mean that an axe must fall upon every, or any particular, violation. The Legislature wisely provided a range of remedial and punitive options in §§ 3-401 and 3-402, established conditions on imposing the more serious of them, and, subject to those conditions, left the choice largely to the discretion of the court. It is within that discretionary framework that the sanction, if any, can be made to fit the offense, and that framework goes beyond the remedies set forth in those sections. Section 3-401(a)(3) expressly provides that the section does not affect or prevent the use of "any other available remedies."
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> Most of the debate in this appeal centers on the meaning of "willful" or "willfully." In that regard, it first is important to note that, of the various remedies listed in §§ 3-401 and 3-402, only two are conditioned on the violation being willful – voiding final actions by the public body and the imposition of civil penalties. The authority to void final actions is subject to the further condition that no other remedy is adequate. Issuance of an injunction, the assessment of counsel fees and litigation costs, the posting of a bond, and the granting of other appropriate relief do not require a finding of willfulness.

Whether the violation of the Open Meetings Act was willful or what penalty should be imposed is a matter for the courts to decide. It is beyond the scope of this appeal. I permitted it to be raised only as it may have caused the redistricting process to be illegal. For the reasons stated, I do not find that it did.

Texts

The Appellants also argued that certain texts exchanged between two members of the Board during public sessions on November 18, 2019 violated the Open Meetings Act and should void the Redistricting Plan as illegal. (App. Ex. 4). The texts were between Ms. Taj and

another, unnamed Board member. They discuss various moves, how they could vote, who might live in a certain district, and reducing capacity at one school. A complaint was filed with the Open Meetings Compliance Board, which found, in a case of first impression, that the Act:

> does not explicitly prohibit two members of a public body, when two is less than a quorum, from having side conversations with each other that the public cannot hear or read...However, the Act does impose on public bodies the duty to meet openly, and each member, as part of the collective whole, shares in the public body's duty to avoid interfering with the ability of the public to observe the members' conduct of public business during a public meeting...[A]ll substantive communications among members, during a public meeting of a quorum, regarding the topic then under discussion, are subject to the Act regardless of whether a quorum is actually involved in the particular communication.

(App. Ex. 5, p. 31).

Without more, I cannot conclude the texts offered establish an illegal impact on the redistricting process. While they may have violated the Open Meetings Act, even the Open Meetings Compliance Board recognized this is a new wrinkle in the Act's coverage and the members were probably not aware they were violating the Act. Furthermore, there is no evidence linking the texts to a particular vote in the process that was rendered illegal as a result.

Appellants' Motion for Judgment

The Appellants moved for Judgment after the Board did not put on evidence regarding the Open Meetings Act violations. COMAR 28.01.02.12E. I took the motion under advisement and will address it here. The Appellants argued Ms. Kamen proved the Redistricting Plan was integrated and therefore, an illegal vote on one motion invalidates the entire Plan. They called the motions a "house of cards," meaning each motion depended on every other motion. They referred to the "backroom dealing" that took place during the recess. Given that the Local Board violated the Act and it presented no evidence to rebut that, they said, they are entitled to judgment on this issue.

The Local Board responded that Ms. Coombs testified she did not change her vote due to pressure from fellow Board members during the meeting and that only she can speak to her intent. The vote on the 32s was part of a larger plan, it noted, and the individual motions of November 21, 2019 were based on the straw vote passed on November 18, 2019. The Local Board said it routinely takes recesses and that there was not a "secret cabal" at which the Board made secret decisions, pointing out that Dr. Wu did not even enter the meeting room. The Board noted that Ms. Coombs was the Appellants' own witness and her credibility was not successfully challenged. The Board argued that even were I to believe that Ms. Coombs was unduly influenced by other Board members, the Board ratified the vote on December 17, 2019, thereby curing any illegality. (App. Ex. 10).

In an earlier hearing, I informed the parties that I would not consider the December 17, 2019 ratification when determining the legality of the Open Meetings Act violation, either to show that process was illegal or to show the ratification cured the violation. It is relevant, however, as it regards Ms. Coombs' intention. I note that it was Ms. Coombs who made the motion "to ratify the vote taken with respect to Clemens Crossing" ES on December 17, 2019. There was discussion about why the ratification was necessary and a statement was read by Chair Ellis that related to what occurred during the recess on November 21, 2019. Three Board members took issue with that statement. Nevertheless, the Board voted, four to three, in favor of Ms. Coombs' motion to ratify the vote. In other words, almost one month later, out of the heat of the moment, Ms. Coombs remained persuaded of the wisdom – or at least, the necessity – of moving the 32s out of Clemens Crossing ES.

The Local Board conceded that the Open Meetings Compliance Board did find a violation of the Open Meetings Act had occurred when the Board recessed on November 21, 2019. (App. Ex. 1). As I have made clear, however, it is not the violation alone that matters, but

the impact on the process. I have outlined why I find Ms. Coombs to be credible and why I do not conclude that Ms. Coombs was bullied into changing her vote as a result of the illegal meeting. She reconsidered her vote, made that motion, and changed her vote in order to make the Plan work.

Furthermore, there was no "backroom deal." There were backroom discussions that took place while a quorum of the Board was present, and the Board has admitted error in doing that.[19] The Appellants overdramatize what occurred by characterizing it as a backroom deal. It was a recess, like many other recesses the Local Board took, that became a closed meeting when a quorum appeared in the meeting room to hash out the previous vote. It should not have happened, and I do not defend it, but the fact that it happened does not automatically entitle the Appellants to judgment. I deny the Appellants' Motion for Judgment on this issue.

In sum, although the Appellants made excellent arguments for why the Local Board should comply with the letter—and the spirit—of the Open Meetings Act, the evidence does not show that the violation of the Act impacted the redistricting process to the extent that the process was rendered illegal pursuant to COMAR 13A.01.05.06. 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.

[19] The Appellants argued that the Local Board should have provided an explanation and an admission that it violated the law, why it was violated, and why there was no impact. I understand why the Appellants seek an admission and explanation, but as evidenced from the Discussion here, the Board did admit error and explained the circumstances of the violation, and I have found there was no impact such as would render the process illegal.

As I have discussed, I do not conclude the Redistricting Plan satisfies any of the criteria, even though there were violations of the Open Meetings Act during the November 18, 2019 and November 21, 2019 meetings.

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 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 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 illegal as a result of a violation of the Open Meetings Act. *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); Md. Code Ann., Gen. Provisions, Title 3 (2019); 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
#187787

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 was appropriate given the short time for filing exceptions with the State Board.

AVINASH DEWANI	*	**BEFORE JOY L. PHILLIPS,**
DAVID MACCORMACK AND JILL TAYTER	*	**AN ADMINISTRATIVE LAW JUDGE**
	*	**OF THE MARYLAND OFFICE OF**
QIAN LI XUE, ET AL.	*	**ADMINISTRATIVE HEARINGS**
LAVERNE L. TUCKER	*	
APPELLANTS	*	**OAH No.: MSDE-BE-09-20-01773 (File #31)**
v.	*	**MSDE-BE-09-20-01781 (File #32)**
HOWARD COUNTY	*	**MSDE-BE-09-20-01821 (File #33)**
BOARD OF EDUCATION	*	**MSDE-BE-09-20-01834 (File #34)**

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

RULING ON APPELLANTS' MOTION FOR PARTIAL SUMMARY DECISION AND RULING ON THE LOCAL BOARD'S MOTION FOR SUMMARY DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
UNDISPUTED FACTS
DISCUSSION
CONCLUSIONS OF LAW
ORDER ON APPELLANTS' MOTION FOR PARTIAL SUMMARY DECISION
ORDER ON LOCAL BOARD'S MOTION FOR SUMMARY DECISION (TWO ISSUES)
RECOMMENDED ORDER ON LOCAL BOARD'S MOTION FOR SUMMARY DECISION (THREE ISSUES)

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 Appellants. 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 (Board's Motion) with twenty-five exhibits. On May 7, 2020, the Appellants filed a Motion for Partial Summary Decision (Appellants' Motion) with five exhibits. On May 21, 2020, the Local Board filed a Response to the Appellants' Motion (Board's Response) with three exhibits. On May 22, 2020, the Appellants filed an Opposition to Local Board's Motion for Summary Decision (Appellants' Response) with two exhibits. On June 2, 2020, the Local Board filed a Reply to the Response. On June 4, 2020, the Local Board filed an Amended Reply to the Appellants' Response (Amended Reply).[1] The Appellants requested oral argument on the one issue raised in the Appellants' Motion.

Oral argument was held on June 10, 2020 by remote video conferencing[2] on the issue of the impact of the Open Meetings Act[3] violation on the Redistricting Plan.

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[1] The Amended Reply restated the Local Board's discussion, on page 3, of *Armstrong v. Mayor and City Council of Baltimore*, 976 A.2d 349, 360 (2009).

[2] Due to the closures necessitated by the coronavirus, no in-person hearings were being held at the Office of Administrative Hearings in June 2020.

[3] Md. Code Ann., Gen. Provisions, Title 3 (2019).

ISSUES

Should the Appellants' Motion be granted because there is no genuine dispute as to any material fact and it is entitled to judgment as a matter of law?

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

SUMMARY OF THE EVIDENCE

Exhibits

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

UNDISPUTED FACTS

The following facts are undisputed:

1. Local Board Policy 6010 defines the conditions and processes by which school attendance area adjustments will be developed and adopted in Howard County. (Board's 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. (Board's Motion, Ex. 3).

4. The Feasibility Study was presented to the Local Board on June 13, 2019. The Attendance Area Committee reviewed the Feasibility Study and provided feedback to the

superintendent through a series of meetings held on June 18, 2019, June 25, 2019, July 2, 2019, and July 9, 2019. (Board's Motion, Ex. 2).

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

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

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

9. The Appellants live in Polygons[4] 276, 2132, 132, 129, 64, or 148.

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] Howard County refers to its school districts as polygons.

(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). "There is abundant support for a holding that a mere general denial of a plaintiff's claim is not enough, as claimed by appellant, to show that there is a genuine dispute as to a material fact." *Frush v. Brooks*, 204 Md. 315, 320 (1954).

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).

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).

Issues Raised in Appellants' Appeals

The Appellants raised the following issues in their appeals:

1. The Local Board violated the Open Meetings Act. (All four files).
2. The Appellants did not receive appreciable notice of the Local Board's intent to change the boundaries of their schools. (Files #31 and #34).
3. The Local Board improperly used racial classifications in assigning schools and used FARM[5] data as a proxy for those classifications. (All four files).
4. The Local Board knowingly relied on significant amounts of faulty data. (All four files).
5. Chair Ellis violated her ethical requirements, thereby abusing her discretionary power. (Files #32 and 33).

Cross Motions for Summary Decision

Open Meetings Act

The Appellants moved for partial summary decision on one issue: that the Local Board violated the Open Meetings Act, Md. Code Ann., Gen. Provisions, Title 3 (2019), when it went into recess on November 21, 2019 after a motion involving two elementary schools failed. The violation was intentional and not harmless, they argued. (Appellants' Motion, pp. 6-8). The Local Board also moved for summary decision on this issue, arguing the violation does not make the attendance area adjustments illegal; if it is illegal, the OAH cannot reverse what occurred because the violation was inadvertent; and in any event, the vote was ratified on December 17, 2019. (Board's Motion, pp. 13-14). The Local Board submitted an affidavit in support of its position. (Board's Response, Ex. 1).

[5] Free and Reduced Meals

In support of its Motion, the Appellants attached an opinion of the Open Meetings Compliance Board finding that the Local Board did violate the Open Meetings Act. (Appellants' Motion, Ex. 4). The Appellants also submitted a letter written by counsel for the Local Board in which the Local Board recounted its version of events and acknowledged that a violation of the Open Meetings Act had occurred, but that the violation was inadvertent. (Appellants' Motion, Ex. 5, pp. 4-5).

Attached to the Appellants' Motion are three additional documents. COMAR 28.02.01.12D requires a motion for summary decision to be supported by (a) an affidavit; (b) testimony given under oath; (c) a self-authenticating document; or (d) a document authenticated by affidavit. Exhibit 1 consists of handwritten and typed notes containing the signature of Local Board member Vicky Cutroneo. Because member Cutroneo's signature appears clearly on both the handwritten and typed notes, I find they are self-authenticating and will accept them as supporting evidence. Exhibits 2 and 3 submitted by the Appellants do not meet the threshold required to be considered. Exhibit 2 is a typed, unsigned, undated narrative. Exhibit 3 is a typed, unsigned document with the date "11/22/2019" on top. Neither is testimony given under oath, self-authenticating, or accompanied by an affidavit.

The Appellants take the position that the violation of the Open Meetings Act on November 21, 2019 invalidated the entire Redistricting Plan. "The votes to redistrict the Howard County Public School System taken on November 21, 2019 … are, in their totality, illegal, as they resulted from unlawful procedure and frankly, way beyond just error of law—blatant and deliberate violations of law as enumerated herein." (Appellants' Motion, p. 8). They cited to a recent Court of Appeals decision, *Frazier v. McCarron*, 466 Md. 436 (2019), for the proposition that a violation of the Open Meetings Act is never harmless. Thus, it concluded, because the

Local Board has admitted it violated the Open Meetings Act, there is no genuine dispute as to material fact and they are entitled to judgment as a matter of law.

In the *Frazier* decision, the Court of Appeals rejected the notion that violations of the Open Meetings Act could be excused because they were found to be technical or harmless. It held, however, that all sanctions under the Open Meetings Act were discretionary with the trial court and the court could not impose civil penalties or void actions of the public body unless the violations were willful. In *Frazier*, where the actions of a city council were at issue, the Court of Appeals found that declining to impose requested sanctions was not an abuse of the trial court's discretion. It held, at pages 449-50:

> Violations of those mandates are not "technical" in nature; nor are they ever harmless. . . . Conduct that has that demeaning effect can be contagious and cannot be considered harmless. It strikes at the core of our democracy – the right and power of the citizens to control their government – even if its harm is not immediately perceptible.
>
> That does not mean that an axe must fall upon every, or any particular, violation. The Legislature wisely provided a range of remedial and punitive options in §§ 3-401 and 3-402, established conditions on imposing the more serious of them, and, subject to those conditions, left the choice largely to the discretion of the court. It is within that discretionary framework that the sanction, if any, can be made to fit the offense, and that framework goes beyond the remedies set forth in those sections. Section 3-401(a)(3) expressly provides that the section does not affect or prevent the use of "any other available remedies."
>
> Most of the debate in this appeal centers on the meaning of "willful" or "willfully." In that regard, it first is important to note that, of the various remedies listed in §§ 3-401 and 3-402, only two are conditioned on the violation being willful – voiding final actions by the public body and the imposition of civil penalties. The authority to void final actions is subject to the further condition that no other remedy is adequate.

The Appellants' conclusion that the *Frazier* decision entitles them to judgment simply because there was a violation of the Open Meetings Act during the course of the vote on the Redistricting Plan is misplaced. The fact that a violation occurred may raise a question of

whether it impacted the vote, but it does not determine what, if any, remedy is adequate. Further, the *Frazier* decision relates to remedies imposed by the trial court and does not contemplate an administrative hearing before the State Board.

The Local Board argued that the Open Meetings Act violation:

> had no impact on the countless hours and time the Board spent considering the redistricting plans or on its ultimate decision. The purpose and reason behind the redistricting, which was to balance utilization and FARM rate participation amongst Howard County Public Schools, was unaffected. It is regrettable that the process was not perfect, but that did not taint the entire decision-making process as Appellants alleged.

(Board's Response, p. 1).

The Local Board argued that the claim of a violation of the Open Meetings Act does not establish a violation of State education law or regulations and thus, the State Board of Education lacks jurisdiction to review them, citing to Maryland Code Annotated, Education Article, section 2-205(e). (Board's Motion, p. 14; Board's Response, p. 5).[6] It argued that even if the violation of the Open Meetings Act went to the "core value" of the redistricting process, it does not amount to an illegal proceeding and noted that a violation of the Open Meetings Act by itself does not entitle the Appellants to judgment as a matter of law. (Board's Motion, p. 14; Board's Response, p. 9).

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[6] I have already ruled the Appellants could raise the issue of a violation of the Open Meetings Act in this appeal. That decision is buttressed by a State Board opinion cited by the Local Board in oral argument. In *Beverly G. Kelley v. Queen Anne's County Board of Education*, MSBE Op. 18-24 (2018), the State Board recognized that, although it declines to make independent findings about violations of the Open Meetings Act, there are times when it will accept a decision of the Open Meetings Compliance Board as evidence. The *Kelley* appeal involved a censure of an employee, which normally would not be reviewed by the State Board. In that case, however, the State Board found, at page 4:

> the smooth administration of local boards of education – including the circumstances under which local boards seek to remove or express disapproval of their members – is a matter of statewide education policy and of interest beyond Queen Anne's County. Accordingly, we shall exercise our jurisdiction to review the appeal.

The State Board found its jurisdiction in that appeal in Education Article section 2-205 that "permits us to determine the true intent and meaning of state education law and to decide all cases and controversies that arise under the State education statute and State Board rules and regulations." (*Kelley*, p. 4).

In oral argument on the Appellants' Motion, the Appellants said that a "local politician had been crying because she'd been bullied in the back room" and argued that "nothing worse could happen." The Appellants conceded that if the back-room conversation had not caused the one member to change her vote, this might not be "such a big deal." As it is, the changed vote "affected everything."

The Appellants are not entitled to summary decision on this issue. Although a violation of the Open Meetings Act was established through an admission by the Local Board and a finding by the Open Meetings Compliance Board (Board's Motion, Ex. 25), the Appellants failed to show how those facts entitle them to judgment as a matter of law. There remains a question of the impact of the violation on the Redistricting Plan.

For the same reason, the Local Board is not entitled to judgment on this issue. The Appellants submitted evidence in support of their arguments that the Open Meetings Act violation may have impacted the final vote. At a hearing on the merits, there may be insufficient evidence that the violation had any impact on the vote or, if so, what remedy, if any, is appropriate. At this point in the proceedings, however, there is a genuine dispute over fact and therefore, neither side is entitled to judgment.

Local Board's Motion for Summary Decision

Notice

The Local Board moved for summary decision on whether the Appellants had been given sufficient notice of the impending boundary changes (raised in File #31 and #34). Appellant Dewani wrote in his appeal that he received no appreciable notice that redistricting of his polygon was being considered until later October 2019, after all of the public comment sessions had finished. Appellant Tucker asserted in her appeal that at the time redistricting was being

announced by the Local Board on social media and in emails to parents of children already enrolled in school, her child was not yet enrolled. Thus, she missed many of the notices that went to other parents. Furthermore, she wrote that her polygon was not in play until October 28, 2019, only three weeks before the final vote and after public sessions were completed.

Local Policy 6010, at section IV.C, provides that:

> 4. The Board, in accordance with Policy 2040 Public Participation in Meetings of the Board, will hold a public hearing(s) regarding the school attendance area adjustment plan(s) submitted by the Superintendent. In addition, and as necessary, work sessions(s) will be scheduled to consider public hearing testimony. The board may schedule additional hearings and/or work sessions at its discretion.

(Board's Motion, Ex. 1, p. 4).

Policy 6010 requires the Local Board to hold public hearings on redistricting plans only after the Superintendent has submitted their plan. Although it would be preferable to hear from all affected residents each time the plan was altered in order to fully appreciate the impact of a revised plan, it is neither practicable nor required by the Policy. The Board heard from many constituents at the public hearings over several months and received thousands of pages of comments. (Board's Motion, Ex. 2). Chair Ellis told the audience at every work session that written statements were being given the same weight as oral testimony.

The Appellants' polygons were not considered for a boundary change until late in the process. That does not mean, however, the Local Board would not have considered the written input of the residents, even at that late date. "[A]dministrative agencies must have the discretion reasonably to regulate the length of time afforded parties to present their evidence." *Bernstein*, 245 Md. at 475 (discussing the practicality of group representation by a specified spokesmen). As argued by the Local Board, "[t]he fact that some interested parties only became concerned in the redistricting once their polygon was potentially affected does not make the notice

requirement less effective." (Board's Motion, p. 11). I do not find the Appellants' arguments alone raise a genuine dispute of material fact on this issue.

Improper Use of Racial Classifications

The Local Board moved for summary decision on the issue of whether it improperly used racial classifications in assigning schools. It argued that the Local Board focused on capacity utilization and the FARM rate in making the boundary changes. It noted that Policy 6010 does not prioritize one standard over another, and the Policy recognizes socioeconomic composition of school populations as a demographic characteristic to be considered. (Board's Motion, p. 12).

The Appellants responded that racial composition of schools was at the center of the boundary changes. They highlighted comments made by individual Board members during the process which, they argued, prove the FARM data was used as a proxy for race. (Appellants' Response, pp. 7-8). 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." (Appeal, Ex. 9[7]). 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." (Appellants' Response, p. 8). The other quotes are from members of the County Council.

The Appellants 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. (Appellants' Response, p. 8). I listened to member Taj's speeches.[8] At minute 23:50, she discussed poverty, students with high needs, resource allocation, and a history of economic

[7] This exhibit was not attached to the Appellants' Response, but I have considered it.
[8] 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.

segregation. The quote cited by the Appellant came at minute 44:40. Although Taj 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."

The Appellants 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. (Appellants' Response, pp. 9-10). 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." (Appellants' Response, p. 10). 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." (Appellants' Response, p. 10). By placing FARM participation rates as its highest priority, the Appellants 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, "racial/ethnic and socioeconomic composition of the student body are specifically mentioned." (Amended Reply, p. 2). It also argued 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." (Amended Reply, p. 3). 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. Furthermore, classifications based on socioeconomic status do not create a suspect class for purposes of invoking the strict scrutiny standard. *Hornbeck, et al. v. Somerset Cty. Bd. of Educ., et al.*, 295 Md. 597, 653 (1983).

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 boundary 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 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 to 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.

Faulty Data

The Local Board moved for summary decision on the issue of whether the Board knowingly relied on significant amounts of faulty data and, if so, whether its use was arbitrary. It asserted the Appellants failed to support their argument with sworn statements, 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 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." (Board's Motion, p. 13; Ex. 24). It also asserted the "variance in the data was not significant." (Board's Motion, p. 13, Ex. 24).

The Local Board pointed to the affidavits it submitted from Renee Kamen, Manager of School Planning. (Board's Motion, Ex. 2 and 24). It argued Ms. Kamen confirmed the reliability of the FARM data used by the Board and explained that the data was based on September 30, 2018 enrollment and October 31, 2018 FARM participation. (Board's Motion, p. 13).

The Appellants 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. They argued there was "an 85.2% rate of inaccuracy" when analyzing the data for fourteen of the schools. (Appellants' Response, p. 14).

I have reviewed the evidence submitted by the parties, including the recorded meetings held by the Local Board.[9] 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 Appellants have illustrated possible inaccuracies in the data in their Response.

Construing all inferences in the Appellants' 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.

Chair Ellis' Ethical Requirements and Abuse of Discretionary Powers

The Local Board moved for summary decision in two cases on the issue of whether Chair Ellis violated ethical requirements and abused her discretionary power (raised in File #32 and #33). It argued no evidence exists that the home values were considered by Chair Ellis in making boundary decisions. It wrote, "The State Board has long held that, 'an appellant must

[9] 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 Board's Motion as Exhibits 6-22.

support allegations of illegality with factual evidence.'" *Lockwood v. Howard Cty. Bd. of Educ.*, MSDE Op. 17-42 (2017), p. 3.

The Appellants in these two files asserted in their appeals that Chair Ellis stood to increase the value of her home as a result of some of the school boundary changes. They speculated on this result based on a 2016 study done by the Local Board. Despite the existence of an exhaustive record, both documented and video recorded, no evidence was submitted to challenge Chair Ellis' publicly stated motivations for voting for the final Redistricting Plan. The Appellants' speculative conclusions fail to raise a dispute of material fact. *Frush*, 204 Md. at 320. Accordingly, the Local Board's Motion as to this issue will be granted.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Appellants' Motion for Partial Summary Decision should not be granted because there is a genuine dispute as to a material fact and the Appellants' have not shown that they are entitled to prevail as a matter of law. COMAR 28.02.02.12D(5); COMAR 13A.01.05.06.

I further conclude as a matter of law that the Local Board's Motion for Summary Decision regarding the issues of the impact of the Open Meetings Act violation and the Local Board's use of faulty data should not be granted because there 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.01.05.06.

I further conclude as a matter of law that the Local Board's Motion for Summary Decision regarding the issues of whether the Appellants Dewani and Tucker received notice of the proposed changes, whether socioeconomic factors were used as a proxy for race, and whether, as to Appellants MacCormack and Tayter and Xue, et al., Chair Ellis abused her

discretionary powers 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.01.05.06.

ORDER ON APPELLANTS' MOTION FOR PARTIAL SUMMARY DECISION

I ORDER that the Motion for Partial Summary Decision filed by the Appellants is **DENIED**.

ORDER ON LOCAL BOARD'S MOTION FOR SUMMARY DECISION (TWO ISSUES)

I ORDER that the Motion for Summary Decision filed by the Howard County Board of Education on the issues of the impact of the Open Meetings Act violation and the Local Board's use of faulty data is **DENIED**.

RECOMMENDED ORDER ON LOCAL BOARD'S MOTION FOR SUMMARY DECISION (THREE ISSUES)

I RECOMMEND that the Motion for Summary Decision filed by the Howard County Board of Education be **GRANTED** as to the issues of whether Appellants Dewani and Tucker received notice; whether the Local Board impermissibly used racial classifications in developing the Redistricting Plan; and whether, as to Appellants MacCormack and Tayter and Xue, et al., Chair Ellis violated her ethical requirements or abused her discretion.[10]

June 24, 2020
Date Decision Issued

Joy L. Phillips
Administrative Law Judge

JLP/cmg
#186093

[10] 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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