TIMOTHY J. AND STEPHANIE K. MUMMERT (#15)	BEFORE THE MARYLAND
Appellant,	STATE BOARD
v.	OF EDUCATION
HOWARD COUNTY BOARD OF EDUCATION	Opinion No. 21-27
Appellee.	

OPINION

Appellants filed an appeal of the November 21, 2019 decision of the Howard County Board of Education ("local board") approving the Attendance Area Adjustment Plan for School Year 2020-2021. Appellants argued that the redistricting decision was arbitrary, unreasonable because the local board violated the Open Meetings Act and because the movement of Polygons 1018 and 18 to different schools violated Policy 6010.

On January 16, 2020, we transferred the case pursuant to COMAR 13A.01.05.07A(1) to the Office of Administrative Hearings for review by an Administrative Law Judge ("ALJ"). On June 24, 2020, the ALJ issued a Recommended Order to grant, in part, the local board's motion for summary decision.

The ALJ conducted virtual hearings on July 23, 24, and 29, 2020, and August 11, 2020. On October 14, 2020, the ALJ issued a Proposed Decision concluding that the Appellants failed to show, by a preponderance of the evidence, that the local board's redistricting decision was arbitrary, unreasonable or illegal. The ALJ recommended that we dismiss the appeal.

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

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

Signatures on File:

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Clarence C. Crawford
President

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Jean C. Halle
Vice-President

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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

TIMOTHY J. MUMMERT AND	*	**BEFORE JOY L. PHILLIPS,**
STEPHANIE K. MUMMERT,	*	**AN ADMINISTRATIVE LAW JUDGE**
APPELLANTS	*	**OF THE MARYLAND OFFICE OF**
v.	*	**ADMINISTRATIVE HEARINGS**
HOWARD COUNTY	*	
BOARD OF EDUCATION	*	**OAH No.: MSDE-BE-09-20-01599 (File #15)**

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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 or about 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 18, 2019, the Appellants filed an appeal challenging the Redistricting Plan on numerous grounds (Appeal).[1] They asked that the decision to move their neighborhood (Polygon 1018[2]) from Hammond Elementary School (ES) and Hammond Middle School (MS) to other schools be reversed.

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

[1] This was one of thirty-six appeals challenging the Redistricting Plan.
[2] A. The term polygon is defined later in this Proposed Decision. B. Polygon 18 was discussed as part of this appeal, as the two polygons have traditionally been kept together.

hearing and to issue a proposed decision containing findings of facts, conclusions of law, and recommendations.[3] Code of Maryland Regulations (COMAR) 13A.01.05.07A(1), E.

On February 20, 2020, I held an in-person prehearing conference on the appeal at the OAH in Hunt Valley, Maryland. Claude de Vastey Jones, Esquire, and Judith S. Bresler, Esquire, represented the Local Board. The Appellants represented themselves. A motions schedule was agreed upon and later extended at the request of the parties.[4]

On February 18, 2020, the Appellants filed a Motion for Default on the basis that the Local Board failed to respond to the Appeal within twenty days. On March 5, 2020, the Local Board filed a Response to Appeal, accompanied by twenty-five exhibits.[5] The Motion for Default was amended on March 13, 2020. On March 25, 2020, I issued a Ruling denying the Amended Motion for Default.

On May 4, 2020, the Local Board filed a Motion for Summary Decision. On May 11, 2020, the Appellants filed a Motion for Partial Summary Decision. On June 22, 2020, I convened a prehearing conference via videoconferencing.[6] The prehearing conference was continued to July 6, 2020. On June 24, 2020, I issued rulings 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, and 29, 2020, and August 11, 2020, I convened a contested case hearing via videoconferencing to address the impact of an Open Meetings Act violation on the

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[3] 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.

[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 recommended the Motion for Summary Decision be granted on the issues of whether the Local Board used socioeconomic data as a pretext for race, whether the Local Board violated the Appellants' right to protest as guaranteed by the First Amendment to the United States Constitution, and whether the Local Board denied the Appellants an opportunity to be heard.

Redistricting Plan. The Appellants' appeal was consolidated with other appeals for hearing on this issue.[8] Claude de Vastey Jones, Esquire, and Judith S. Bresler, Esquire, represented the Local Board. The Appellants represented themselves.

On July 28, 2020, I convened a separate contested case hearing via videoconferencing on the remaining issue in the Appellants' appeal, regarding whether the Redistricting Plan as it impacted the Appellants' polygon was arbitrary or unreasonable. Claude de Vastey Jones, Esquire, and Judith S. Bresler, Esquire, represented the Local Board. The Appellants represented themselves.

The contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 and 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, illegal as a result of a violation of the Open Meetings Act or arbitrary or unreasonable as it related to Polygon 1018?

SUMMARY OF THE EVIDENCE

Exhibits

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

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[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. As the hearings were consolidated, 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.
C. Although I had denied the Local Board's Motion for Summary Decision on the issue of whether the Local Board used faulty or inaccurate data during the redistricting process, on July 28, 2020 the Appellants withdrew their appeal on that issue.

Testimony

The Appellants testified on their own behalf and presented the testimony of the following witnesses:

- 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 Member Kirsten Coombs

The Local Board presented the testimony of the following witness:

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

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.

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

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. 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.

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

9. Attendance areas sometimes include commercial zones.

10. 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.

11. On August 22, 2019, the Superintendent presented his Proposed Attendance Area Adjustment Plan (Superintendent's Plan) to the Local Board. Under this plan, almost 7,400 students would be redistricted.[10]

12. 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.

13. 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.

14. 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.

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

16. 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, Free and Reduced Meals (FARM) participation rates at each school, walkers becoming bus riders, whether neighborhoods would be divided as a result of a boundary change, feeds to schools, transportation costs, and planned housing development.

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

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

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[10] 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.

19. The Local Board kept to its goal of finalizing the process by November 21, 2019, over the objection of some members who desired additional work sessions.

Open Meetings Act

20. At the November 14, 2019 work session, Board members Jennifer Mallo and 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).

21. 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.

22. 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.

23. 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.

24. 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.

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

26. 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.

27. On March 26, 2020, the Open Meetings Compliance Board cautioned the Local Board against texting each other privately during public meetings.

Polygons 1018 and 18

28. There are about 113 students in Polygons 1018 and 18. This high number would have a noticeable impact on capacity utilization in any receiving school.

29. As a result of the Redistricting Plan, the FARM participation rate changed from 25% to 16% at Hammond ES, 46% to 41% at Guilford ES, and 5% to <5% at Fulton ES. The rate at Bollman Bridge ES remained the same as there was no change to its boundary.

30. As a result of the Redistricting Plan, the capacity utilization changed from 95% to 108% at Hammond ES, 79% to 103% at Guilford ES, and 122% to 98% at Fulton ES. The rate at Bollman Bridge ES remained the same as there was no change to its boundary.

DISCUSSION

Legal Framework

Standard of Review

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

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

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

> A decision may be arbitrary or unreasonable if it is one or more of the following:
>
> (1) It is contrary to sound educational policy; or
>
> (2) A reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached.

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

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

A redistricting decision is subject to a presumption of correctness. COMAR 13A.01.05.06A. To prevail, an appellant must show, by a preponderance of the evidence, that the challenged redistricting decision was arbitrary, unreasonable, or illegal. COMAR 13A.01.05.06A and D. To

prove an assertion by a preponderance means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). 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.

The Policy 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 different school and creating a new feeder system promoted community stability by keeping friends together, albeit at new 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.[11] Seven public hearings were held to permit the public to speak before the Board and public comment via email was solicited. From October 17, 2019 to November 18, 2019, the Board held nine public work sessions. The Board worked on the high schools and middle schools first. On November 14, 2019, the Board voted to use a plan submitted by Ms. Mallo as a base. (App. Ex. 23, Video at 1:41). Ms. Mallo's plan, called the Consolidated Plan by the Board, moved fewer students than the Superintendent's Plan, but more than a plan proposed by Dr. Wu. The final Redistricting Plan, adopted on November 21, 2019, moved approximately 5,400 students to different schools.

The 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

[11] 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.

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.

Open Meetings Act

Background

On April 28, 2020, I issued a Ruling permitting the parties to raise whether a violation of the Open Meetings Act may be 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 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, 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 the 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.[12] 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 also admitted a decision from the Open Meetings Act Compliance Board, issued on February 14, 2020. (App. Ex. 1). Finally, I reviewed the video recordings of four Board meetings. (App. Exs. 9, 10, 18, and 23).

The Appellants also raised the issue of two Board members texting each other during a meeting.[13] (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.

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

[12] 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.
[13] 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.

was given the option of remaining at Hammond ES, which the Mummerts decided to accept because it allowed her to continue with karate day care, something critical to her development.[14] 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 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

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

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 Christina 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 Mavis 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.[15] 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 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

[15] 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).

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 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

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 *Frazier*, 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 the *Frazier* case, 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."
>
> 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.[16] 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.

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.

[16] 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.

Arbitrary or Unreasonable Decision

The Appellants complained that the decision to move Polygons 1018 and 18 from Hammond ES to Guilford ES and from Hammond MS to Patuxent Valley MS violates HCPSS Policy 6010 and was therefore arbitrary or unreasonable because the moves resulted in a small (7%) feed from Guilford ES to Patuxent Valley MS, the polygon is separated from Guilford ES by a commercial zone and is not contiguous, the Local Board took an under capacity school (Guilford ES) and pushed it near the maximum capacity, and the move to Patuxent Valley MS will split up friends at Guilford from other polygons who will have to attend a different middle school. The Appellants posited the moves were made to appease developers who needed to open up capacity at Fulton ES in order to receive permits to build new housing developments.

The Local Board responded that Policy 6010 does not require the Local Board to reconcile every polygon with every factor, and that the moves that impacted Polygon 1018 fulfilled the utilization goal of the policy. A move resulting in a small feed does not in and of itself render the move arbitrary, it said. The Board had to address utilization first and Guilford ES was underutilized, requiring some neighborhoods to be moved into Guilford ES. That took priority over feeds, it argued. It also said the FARM rate decreased at Guilford ES from 46% to 41% as a result of the move, a positive result.

Testimony and Evidence

Appellant Stephanie Mummert testified as a life-long Marylander and mother of a child in HCPSS. She has a PhD in Molecular Biology and has become very involved in school advocacy and local elections, currently serving as a Chief Election Judge. Their neighborhood has no dedicated elementary or middle school. The area has two parks, three pools with swim teams, and is diverse. Their polygon, 1018, and the adjoining polygon, 18, have been redistricted previously and have been kept together. Students in these polygons will now be sent

to three different elementary schools, she said. She said their daughter has attended Hammond ES which is in the same building as Hammond MS. This results in continuity for the children. Now the bus for Hammond ES will go through their neighborhood, while the children there will be bused to Guilford ES, traveling under busy Route 32 and on several very busy streets. Polygon 1018 is next to two large areas known as Polygon 2048 and 2050. (App. M. Ex. 1). These two areas are completely commercial and non-residential. No students are projected to live in these polygons for at least through 2025. (App. M. Ex. 7). Guilford ES is situated in the polygon on the other side of these two polygons.

Ms. Mummert testified that prior to the moves, Fulton ES was overcapacity, but Hammond ES and Guilford ES were not. The Appellants mentioned that Polygons 1018 and 18 could have been sent to Bollman Bridge ES. She asked that I review the capacity utilization of four schools. I have set forth the relevant numbers here:

Capacity Utilization in 2020-2021

School	No Redistricting	Adopted Board Plan
Hammond ES	95%	108%
Guilford ES	79%	103%
Bollman Bridge ES (No boundary change)	103%	103%
Fulton ES	122%	98%

Ms. Mummert said that prior to the Redistricting Plan, Hammond ES was a "model" of Policy 6010 goals, but now it is out of balance. Capacity utilization will continue to increase, she said, as shown in the projection contained in the Adequate Public Facilities Ordinance (APFO) charts. (App. M. Ex. 5). She believes that relocatable classrooms will now have to be added to Guilford ES because, as a Title 1 school, it has limits on its capacity. I will address that in more detail below.

Appellant Timothy Mummert testified that Route 32 is essentially a four-to-six lane highway and his family lives south of Route 32. Guilford ES is north of Route 32 and across two commercial zones. Guilford ES has different swim teams and different social circles. By sending Polygons 1018 and 18 to Guilford ES, the Local Board has essentially created an island, which goes against the aspirations of Policy 6010. He said that if his polygon had been redistricted to Bollman Bridge ES, which is south of their neighborhoods but contiguous to them, he would not be able to raise a complaint against the Redistricting Plan. Moving the polygons out to Guilford ES is a completely different situation, he said.

Ms. Kamen, former Manager of the Office of School Planning, testified that the Local Board looks at attendance areas, not individual polygons, when making long-range decisions about capacity. Policy 6010 acknowledges that not all factors can be achieved in every move, she pointed out. She testified that Guilford ES was under capacity and going down, that Hammond ES and Fulton ES would be overcapacity in the next ten years. (T. 7/28/2020 p. 49). As a result of these projections, the Local Board modeled a couple of scenarios with and without Bollman Bridge ES and Guilford ES. Ultimately, the Board decided to use Guilford ES, as it had the capacity for the additional students. Ms. Kamen noted there are about 113 students in Polygons 1018 and 18 and so, moving them into certain schools would have immediately pushed capacity utilization up too high. (T. 7/28/2020 p. 55). Ms. Kamen said the Board knew the move to Guilford ES would create a small feed, but that it simply could not account for every factor of Policy 6010 in every move.[17]

Regarding the commercial zones, Ms. Kamen said that the Office of School Planning includes every part of the county in a polygon, including commercial zones, as zoning for a

[17] The Appellants argued that Ms. Kamen testified at another hearing that capacity utilization at Title I schools such as Guilford ES is limited to 100% but testified differently at the Appellants' hearing. I searched my notes and the transcript from the other hearing and did not find testimony to support the Appellants' argument on this point.

given area could change in the future. She agreed that Polygons 2048 and 2050 are entirely commercial but said that they nevertheless create a contiguous area from Guilford ES to Polygons 1018 and 18. Commercial zones are considered contiguous polygons to the same extent as residential polygons. Ms. Kamen cautioned against using the APFO charts to compare projections, as those charts relate to new development and use different capacity measurements than does HCPSS. For example, if planned development does not happen, the projections on the APFO charts could be incorrect. (T. 7/28/20 p. 64). When making redistricting decisions, the Local Board uses only the capacity utilization percentages, not the projections from the APFO chart.

In questioning Ms. Kamen, the Appellants noted that the final changes could not be justified by using the FARM percentages. (T. 7/28/20 p. 84-85). Again, I have set forth here the three schools they addressed:

FARM Percentages

School	No redistricting	Adopted Board Plan
Hammond ES	25%	16%
Guilford ES	46%	41%
Fulton ES	5%	<5%

As evidenced by this chart, the Redistricting Plan had a slightly favorable impact on the FARM rate at Guilford ES, a favorable impact at Hammond ES to the extent that it brought the FARM rate well below the countywide average of 22%, and little to no impact at Fulton ES.

The Appellants pointed to Bollman Bridge ES as a better school to send Polygons 1018 and 18 to, if they had to be moved. That school is closer to their neighborhood and contiguous with residential neighborhoods. Other polygons could have been moved from Bollman Bridge

ES to Hanover Hills ES, which had only 89% capacity and experienced no boundary change. This would have freed up space at Bollman Bridge ES, they said. The Local Board responded that the 113 students coming from those two polygons would have had too large of an impact on the receiving school and Guilford ES had the capacity to absorb them.

Analysis

Overall, the Appellants argued that the Local Board abrogated its responsibilities under Policy 6010 by sending Polygons 1018 and 18 to Hammond ES and Patuxent Valley MS. The only factor it considered was capacity utilization to the detriment of other factors such as community stability and strong feeds, they argued. By violating its own policy, the Local Board was, by definition, arbitrary and unreasonable, they concluded.

As set forth above, COMAR 13A.01.05.06B defines "arbitrary or unreasonable" as a decision that is contrary to sound educational policy or which a reasoning mind could not have reasonably reached. It is a high standard. The Local Board made clear at the outset of the redistricting process that capacity utilization was its primary focus. As I have noted, the crowded schools and ever-increasing student population severely limited the Local Board's options. Although it attempted to consider some other factors of Policy 6010, in some situations it looked at capacity utilization to the exclusion of community stability and strong feeds. Capacity utilization and a slightly favorable impact on the FARM rate at Guilford ES appear to have been the guiding factors in the boundary changes affecting Polygons 1018 and 18. Thus, although the Appellants are understandably distraught over the loss of community stability, there is a reason for what the Board did.

Furthermore, as I noted earlier, in determining whether it has reached its goals under Policy 6010, the Local Board considers attendance areas, not polygons. Unfortunately for the Appellants, attendance areas sometimes include commercial zones such as Polygons 2048 and

2050, which sit between Polygon 1018 and Guilford ES. Omitting such zones from what the Local Board considers to be a contiguous community would require a change in the language of Policy 6010. The Board's action was neither arbitrary nor unreasonable under this policy.

The Appellants posited that the decision to reduce capacity utilization at Fulton ES was related to the needs of developers, to make room for a new development that would serve that school. As that argument rests solely on speculation, I cannot give it the weight required to show the Plan was arbitrary, unreasonable, or illegal under COMAR 13A.01.05.06A.

I do not necessarily disagree with the Appellants' suggestion of a better boundary change, but, as the State Board noted, 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). On this record, I cannot find the Redistricting Plan as it impacted Polygon 1018 was so totally lacking in merit as to have been adopted without any rational basis.

CONCLUSIONS OF LAW

I conclude that the Appellants failed to prove, by a preponderance of the evidence, that the Redistricting Plan adopted by the Howard County Board of Education on November 21, 2019 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.

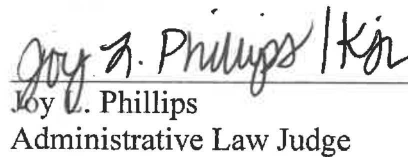
I further conclude that the Appellants have failed to prove, by a preponderance of the evidence, that the Redistricting Plan adopted by the Howard County Board of Education on November 21, 2019, specifically as it relates to Polygon 1018, was arbitrary or unreasonable. *Bernstein v. Bd. of Educ. of Prince 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.

RECOMMENDED ORDER

I RECOMMEND that the Appeal filed December 18, 2019 by the Appellants be **DISMISSED.**

October 14, 2020
Date Decision Issued



Joy L. Phillips
Administrative Law Judge

JLP/dlm
#187551

NOTICE OF RIGHT TO FILE EXCEPTIONS

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

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

Copies Mailed and Emailed* To:

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

TIMOTHY J. MUMMERT AND	*	**BEFORE JOY L. PHILLIPS,**
STEPHANIE K. MUMMERT,	*	**AN ADMINISTRATIVE LAW JUDGE**
APPELLANTS	*	**OF THE MARYLAND OFFICE OF**
v.	*	**ADMINISTRATIVE HEARINGS**
HOWARD COUNTY	*	
BOARD OF EDUCATION	*	**OAH No.: MSDE-BE-09-20-01599 (File #15)**

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

RULING ON APPELLANTS' MOTION FOR PARTIAL SUMMARY DECISION AND 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 (THREE ISSUES)
RECOMMENDED ORDER ON LOCAL BOARD'S MOTION FOR SUMMARY DECISION (TWO 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. The Appellants represented themselves. A motions schedule was agreed upon and later extended at the request of the Local Board and some of the appellants.

On May 4, 2020, the Local Board filed a Motion and Memorandum in Support of County Board's Motion for Summary Decision (Board's Motion) with twenty-five exhibits. On May 7, 2020, the Appellants filed Motion for Partial Summary Decision (Appellants' Motion) with nineteen exhibits. On May 21, 2020, the Local Board filed a Response to Appellants' Motion for Partial Summary Decision (Board's Response) with seven exhibits. On May 21, 2020, the Appellants filed a Response to the Board's Motion (Appellants' Response) with fourteen exhibits. On June 1, 2020, the Local Board filed a Reply to the Appellants' Response. On June 2, 2020, the Appellants filed a Reply to the Board's Response. On June 4, 2020, the Local Board filed an Amended Reply to the Appellants' Response (Amended Reply).[1] On June 15, 2020, the Appellants submitted a Supplement to the Record with one exhibit attached. On June 19, 2020, the Local Board filed a Motion to Strike the Supplement (Motion to Strike), with one exhibit. I have addressed the Supplement and Motion to Strike below. No one requested oral argument.

ISSUES

Should the Appellants' Motion be granted because there is no genuine dispute as to any material fact and they are 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?

[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).

SUMMARY OF THE EVIDENCE

Exhibits

In support of their Motions and Responses, the Local Board and the Appellants 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. 2).

4. The Feasibility Study was presented to the Local Board on June 13, 2019. The Attendance Area Committee reviewed the Feasibility Study and provided feedback to the superintendent through a series of meetings held on June 18, 2019, June 25, 2019, July 2, 2019, and July 9, 2019. (Board's Motion, Ex. 3).

5. Four community meetings were conducted in July 2019. Input was solicited via an online form and survey collected between June 14 and August 1, 2019. (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. On November 21, 2019, during a vote on Polygons 132, 1132, and 2232, the Local Board violated the Open Meetings Act. This violation was acknowledged by the Open Meetings Compliance Board on February 14, 2020. (Board's Motion, Ex. 25).

10. The Appellants live in Polygon 1018.

DISCUSSION

Legal Framework

Motion for Summary Decision

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

> (1) A party may file a motion for summary decision on all or part of an action on the ground that there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law.
> (2) A motion for summary decision shall be supported by one or more of the following:
> (a) An affidavit;
> (b) Testimony given under oath;
> (c) A self-authenticating document; or
> (d) A document authenticated by affidavit.
> (3) A response to a motion for summary decision:
> (a) Shall identify the material facts that are disputed; and
> (b) May be supported by an affidavit.
> (4) An affidavit supporting or opposing a motion for summary decision shall:
> (a) Conform to Regulation .02 of this chapter;
> (b) Set forth facts that would be admissible in evidence; and
> (c) Show affirmatively that the affiant is competent to testify to the matters stated.
> (5) The ALJ may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

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

A party may move for summary decision "on all or part of an action." COMAR 28.02.01.12D(1). The principal purpose of summary disposition, whether it is for summary decision or summary judgment, is to isolate and dispose of litigation that lacks merit. Only a genuine dispute as to a material fact is relevant in opposition to a motion for summary judgment or summary decision. *Seaboard Sur. Co. v. Kline, Inc.*, 91 Md. App. 236, 242 (1992). A material fact is defined as one that will somehow affect the outcome of the case. *King v. Bankerd*, 303 Md. 98, 111 (1985); *Washington Homes, Inc. v. Interstate Land Dev. Co.*, 281 Md. 712, 717 (1978). If a dispute does not relate to a material fact, as defined above, then any such controversy will not preclude the entry of summary judgment or decision. *Salisbury Beauty Sch. v. State Bd. of Cosmetologists*, 268 Md. 32, 40 (1973). Only where the material facts are conceded, are not disputed, or are uncontroverted and the inferences to be drawn from those facts are plain, definite, and undisputed does their legal significance become a matter of law for summary determination. *Fenwick Motor Co. v. Fenwick*, 258 Md. 134, 139 (1970).

When a party has demonstrated grounds for summary disposition, the opposing party may defeat the motion by producing affidavits, or other admissible documents or evidence, which establish that material facts are in dispute. *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737-38 (1993). In such an effort, an opposing party is aided by the principle that all inferences that can be drawn from the pleadings, affidavits, and admissions, on the question of

whether there is a dispute as to a material fact, must be resolved against the moving party. *Honacker v. W.C. & A.N. Miller Dev. Co.*, 285 Md. 216, 231 (1979).

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

> [T]he trial court must determine that no genuine dispute exists as to any material fact, and that one party is entitled to judgment as matter of law. In its review of the motion, the court must consider the facts in the light most favorable to the non-moving party. It must also construe all inferences reasonably drawn from those facts in favor of the non-movant.
>
> To defeat a motion for summary judgment, the non-moving party must establish that a genuine dispute exists as to a material fact. A material fact is one that will somehow affect the outcome of the case. If a dispute exists as to a fact that is not material to the outcome of the case, the entry of summary judgment is not foreclosed.

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

In considering a motion for summary decision, it is not my responsibility to decide any issue of fact or credibility but only to determine whether such issues exist. *See Eng'g Mgmt. Servs., Inc. v. Md. State Highway Admin.*, 375 Md. 211, 228-29 (2003). Additionally, "the purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried." *Jones v. Mid-Atlantic Funding Co.*, 362 Md. 661, 676 (2001) (citing *Goodwich v. Sinai Hosp., Inc.*, 343 Md. 185, 205-06 (1996); *Coffey v. Derby Steel Co.*, 291 Md. 241, 247 (1981); *Berkey v. Delia*, 287 Md. 302, 304 (1980)).

Standard of Review

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

> Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall be

> considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal.

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

> A decision may be arbitrary or unreasonable if it is one or more of the following:
>
> (1) It is contrary to sound educational policy; or
>
> (2) A reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached.

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

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

A redistricting decision is subject to a presumption of correctness. COMAR 13A.01.05.06A. To prevail, an appellant must show, by a preponderance of the evidence, that the challenged redistricting decision was arbitrary, unreasonable, or illegal. COMAR 13A.01.05.06A and D. To prove an assertion by a preponderance means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

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 their 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).

<u>Appeal</u>

The Appellants filed an appeal on December 18, 2019 that raised several issues. They wrote that they were dissatisfied with the decision to change the boundaries of their polygon because the final decision divided their community and created a smaller feed to the middle school; the Local Board based the final Plan on racial considerations, using the pretext of balancing for socioeconomic factors; the residents of their polygon were not provided adequate opportunity to be heard because it was raised so late in the discussions; the Local Board violated the Open Meetings Act[2]; and the Local Board violated the First Amendment of the United States Constitution by preventing peaceful and respectful protest. As a remedy, the Appellants asked that the decision of Polygon 1018 be reversed, keeping students in that polygon at Hammond Elementary School and Hammond Middle School.

The Local Board moved for summary decision on each of the issues raised by the Appellants. The Appellants moved for partial summary decision.

---

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

Cross Motions for Summary Decision

Open Meetings Act

The Appellants moved for partial summary decision on two issues. First, they argued the Local Board violated the Open Meetings Act multiple times during the discussions on the Redistricting Plan and, as a result, the Redistricting Plan is illegal. They referred to the decision of the Open Meetings Compliance Board finding the Local Board violated the Act by conducting a brief closed meeting on November 21, 2019. (Appellants' Response, Ex. 30). They also referred to an instance wherein two members of the Board were texting during a public meeting. The Open Meetings Compliance Board also found a violation in that situation. (Appellants' Response, Ex. 31). As a result of these documented violations, they wrote, "Appellants are entitled to the only remedy to send the clear message that violation will not be tolerated is to void the action, which the General Assembly clearly stated pursuant to § 3-041(b)(1)(iii)."[3] (Appellants' Motion, p. 15).

The Local Board also moved for summary decision on this issue, arguing that the violation of the Open Meetings Act does not prove the Board acted illegally in making the attendance area adjustments. It also wrote,

> [e]ven if such an illegality occurred, this body cannot reverse the correction made by an inadvertent action. It is not within this body's power to legislate the decision made by the Board while acting in a quasi-legislative capacity. That would require a violation of the separation of powers.

(Board's Motion, p. 14).

[3] The Appellants were referring to Maryland Code Annotated, General Provisions section 3-401(b)(1), which reads:

> If a public body fails to comply with § 3-301, § 3-302, § 3-303, § 3-305, or § 3-306(c) of this title, any person may file with a circuit court that has venue a petition that asks the court to:
> (i) determine the applicability of those sections;
> (ii) require the public body to comply with those sections; or
> (iii) void the action of the public body.

In its Response, the Local Board argued the vote that led to the finding of an Open Meetings Act violation, which regarded Polygons 132, 1132, and 2132, does not render the entire process illegal. It asserted the violation was unintentional. It pointed to the ratification of the vote on December 18, 2019 as curing any defect in the vote. (Board's Response, pp. 12-14). In its Reply, the Local Board wrote that the State Board has consistently reaffirmed its view that it is not the proper forum for bringing an Open Meetings Act complaint and that it will exercise its "jurisdiction in a quasi-legislative matter only to decide whether the local board's decision violated State education law, regulation or a statewide education policy." (Board's Amended Reply, p. 2).

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. The evidence reveals the Local Board returned to the public meeting after an approximately four-minute recess and reconsidered its vote, with one Board member changing her vote and stating her reasons for doing so on the record. There are many arguments that might be made and evidence that might be produced at hearing regarding the effect or import of that vote. The inferences to be drawn from the facts are disputed and thus, their legal significance is not a matter of law for summary determination. *Beatty*, 330 Md. at 737-38, and *Fenwick Motor Co.*, 258 Md. at 139.

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. There is still a question regarding the impact the violation had on the final vote. At a hearing on the merits, there may be insufficient evidence that the violation had any impact on the vote that affected the Appellants' polygon. At this point

in the proceedings, however, there is a genuine dispute over this fact and therefore, the Board is not entitled to judgment.[4]

Secondly, the Appellants argued that the Local Board violated Robert's Rules of Order on December 17, 2019 by voting to ratify the vote on November 21, 2019 that came after the Open Meetings Act violation. (Appellant's Motion, p. 1). The Appellants did not raise that issue in their original appeal, nor have they provided any legal authority for the proposition that an administrative law judge charged with holding a contested case hearing is authorized to void a school board's action because it violated Robert's Rules of Order during its deliberations. As to that issue, the Appellants' Motion will be denied.

Local Board's Motion for Summary Decision

Violation of Policy 6010

The Local Board moved for summary decision on the Appellant's complaint that the Redistricting Plan violated Local Policy 6010 by separating students and creating a small feed to the middle school. The Local Board wrote that, during the redistricting process, "the Board considered a number of possibilities, reviewed numerous proposals, and ultimately voted on a plan that accomplished the Board's stated goals." (Board's Motion, p. 9). It wrote that the Board considered the factors of Policy 6010 and its decisions were not contrary to sound educational policy, even though not all factors were accounted for in each move. In voting on the final Redistricting Plan on November 21, 2019, the Board considered the capacity of all schools, stabilization of FARM[5] rates, and moving fewer students. (Board's Motion, p. 10). The Local Board argued separating students is inevitable in redistricting schools countywide and there were no options that would address all the concerns for all communities.

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[4] Regarding the Local Board's other arguments that this is not the proper forum in which to allege a violation of the Open Meetings Act, I have already ruled that I will permit the parties to proceed on this issue despite the State Board of Education's history of declining to review such violations.

[5] Free and Reduced Meals

The Local Board acknowledged that the feed from Patuxent Valley Middle School from Guilford Elementary School will be 7% under the Redistricting Plan, smaller than the goal of a 15% feed. It argued the Local Board chose to accept a small feed to "achieve the overall goals of balancing utilization and FARM rates." (Board's Motion, p. 11). It showed the following changes relevant to the Appellants' appeal:

UTILIZATION

NAME	No redistricting	Adopted Board Plan
Hammond Elementary	95%	108%
Guilford Elementary	79%	103%
Bollman Bridge Elementary	103%	103%

FARM

NAME	No redistricting	Adopted Board Plan
Hammond Elementary	25%	16%
Guilford Elementary	46%	41%
Bollman Bridge Elementary	51%	50%

(Board's Motion, Ex. 5, p. 10).

The Appellants responded that the process was much shorter than the Local Board reported it to be, as a bid for a consultation team was not even put out until April 2019. (Appellants' Response, p. 2; Ex. 21). The data used by the Local Board was not created until June 2019 (Appellants' Response, Ex. 20), and was later discovered to be "flawed." The Appellants wrote that the Board "admitted the FARM data was flawed" in paragraph 43 of

Renee Kamen's March 5, 2020 affidavit. (Appellants' Response, p. 3). In fact, that is not what the affidavit reads. I have reprinted that paragraph and the preceding paragraph in full here:

> 42. The data points used by the Office of School Planning to calculate the projected enrollment and FARMs enrollment were based on the official September 30, 2018 enrollment date and the October 30, 2019 official FARMs reporting date.
>
> 43. Two methodologies were utilized during the boundary review process in the calculation of the FARM data. It was discovered in work session 7 that the methodology in use inadvertently led to a variation on the FARM rate calculation. Once discovered, steps were taken to more closely align the data with the method previously used and those adjustments were made in time for the board's straw votes and final boundary review in work sessions 8 and 9. The methodology revision did not affect the overall attendance area adjustment plans.

(Board's Motion, Ex. 2).

The Appellants also repeated many comments of the Board members during the final meetings which indicated the Board did not have accurate data or time to properly review and apply updated data. (Appellants' Response, p. 3). In essence, the Appellants argued that the process was rushed and resulted in arbitrary decisions being made regarding some polygons.

Having watched the recordings of the work sessions held during the redistricting process, I am familiar with the comments made by Board members regarding the rushed process and with the data changes that took place very late in the process. Taking into account all of this information, I find there do exist genuine issues of material fact regarding the process. The question of how the changing, updated data impacted the final votes remains unresolved. The statistics offered by the Board and set forth above raise a question as to the arbitrariness of the decisions regarding the Appellants' polygon, as the feed the move established is considerably smaller than the Board's goal. Construing all inferences in favor of the Appellants as the non-moving parties, the motion for summary decision on this issue must be denied. *Beatty*, 330 Md. at 737-38.

Use of Race as a Factor and Socioeconomics as Pretext

The Local Board moved for summary decision on the basis that the Appellant's allegation that the race was a factor in some of the boundary changes was not supported by evidence. "Nothing in the board deliberations supports the Appellants' allegations." (Board's Motion, p. 12). The Board noted that "Policy 6010 identifies facility utilization, community stability and demographic characteristics as factors to be considered while developing an attendance area adjustment plan." And, it wrote, "[t]he policy does not prioritize (or weigh) one standard over another." (Board's Motion, p. 12).

In their response, the Appellants argued that because the Board failed to "present any statistics or facts to justify that the use of FARM participation data, equity, and socioeconomic reasons were not pretext for a race based policy, its Motion should be denied as incomplete." (Appellants' Response, p. 11).

The Appellants made a bald assertion in their appeal that the use of FARM data, that is, socioeconomic data, was a pretext for race in the Board's discussions over boundary changes. The only evidence they presented in support of this opinion is a screenshot of Howard County Public School System Superintendent Martirano's twitter feed from June 14, 2020, which they submitted as part of their Supplement, filed on June 15, 2020. The Superintendent appears to have "liked" someone else's tweet containing a photograph of people protesting "disruptive redistricting" and holding signs reading "kids before politics." The original tweeter wrote "Remember this Howard County? This is systemic racism. Nothing changes without sacrifice. Thanks again to @mjmsuper for trying. We can do better." (Supplement, Ex. 35). The photo is not dated and there is no time stamp on the screenshot. The Superintendent did not add a comment. The Local Board moved to strike the Supplement on June 19, 2020, arguing that it came too late in the process, the screenshot was not authenticated, and "liking" someone's tweet

is not tantamount to acting on behalf of the Local Board. (Motion to Strike, p. 2). The Local Board also submitted a screenshot of the Superintendent's Twitter page on June 15, 2020 at 11:47 p.m. which does not show the same "liked" tweet as presented by the Appellants.

I agree with the Local Board that the "liked" tweet comes late in the process and does not reflect the views of the Local Board. However, out of an abundance of fairness toward the Appellants, I decline to strike the Supplement and have considered the screenshot. I have also considered the screenshot submitted by the Local Board. I do not give the screenshot submitted by the Appellants any weight. As I noted above, the photo in the tweet is not dated. The screenshot has no time stamp on it and a later screenshot, submitted by the Local Board, does not show the same "liked" tweet. In any event, the "liked" tweet would have had no impact on whether the Local Board unconstitutionally used socioeconomic data as a pretext for race in developing the Redistricting Plan in November 2019 and provides no "smoking gun." This exhibit fails to raise a genuine dispute of material fact on this issue.

Construing the evidence in the light most favorable to the Appellants as the non-moving party, I conclude the Local Board has shown it entitled to judgment on the issue of whether socioeconomic factors were used as a pretext for race. *Beatty*, 330 Md. at 737-38.

First Amendment Violation

The Local Board moved for summary decision on the Appellants' complaint that the Board deprived members of the public of their First Amendment right to peacefully and respectfully protest. The Board argued the Appellants failed to identify specific instances of such a violation.

The Appellants attached to their Motion a statement read by Board member Mallo on November 7, 2019 hearkening to the Local Board's Policy 1000 on Civility and on how the Board members themselves treat each other. She instructed the audience to hold signs no higher

than their chin in order not to block persons behind them and not to wave the signs. She asked persons needing to talk to step outside. She asked the public to stop attacking them on social media and stop showing up at people's homes. (Appellant's Motion, Ex. 6). The Appellants also pointed to the affidavit they submitted in which Appellant Stephanie Mummert recounted the Board telling the audience they "could not show pleasure with a decision by holding up a sign with a happy face, and show displeasure by holding up a sign with a sad face." (Appellants' Response, Ex. 34, ¶17). The Appellants illustrated their point by writing that one Board member sarcastically said the audience was "real mature" after many attendees booed the Board and that Chair Ellis said they were "not being civil." (Appellants' Response, p. 13).

These examples do not support the Appellants' contention that they were deprived of their right to protest during the redistricting process. By my count, there were seven public sessions at which the Board took testimony from members of the public who signed up to speak. (Board's Motion, Ex. 2, ¶16). The Board received over 12,000 pages of public comment on the boundary review. (Board's Motion, Ex. 2, ¶38). It was evident from the recordings that not everyone was able to speak at the public hearing or say everything they wished to say. Nevertheless, Chair Ellis reminded the public at the beginning of each session that the Board was giving equal weight to written statements as to oral testimony.[6] The audience did hold signs and were permitted to wave their hands in the air as a gesture of agreement.

The Appellants did not feel they were able to adequately protest or respond to Board discussions during the process. This complaint is not borne out by the evidence. The evidence shows the Board did not infringe on their First Amendment rights.[7] The Appellants have raised

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[6] Links to recordings of public sessions are provided in the Board Summary for each meeting. (Board's Motion, Exs. 6-22).

[7] "Plaintiffs also suggest that any interested citizen has a First Amendment right to speak in person to school officials. The answer is that the right to petition government does not extend so far." *Welch v. Bd. of Ed. of Baltimore Cty.*, 477 F. Supp. 959, 968, fn. 10 (D. Md. 1979).

no genuine issue of material fact and, construing all inferences in their favor, I conclude the Board is entitled to judgment on this issue. *Beatty*, 330 Md. at 737-38.

Opportunity to Be Heard

The Appellants complained that because their polygon was not included in the Superintendent's Plan and was only brought into play late in the process, after the time for presenting oral testimony had ended, the Board should have reopened the public comment process to permit affected residents to testify. The Local Board moved for summary decision on this issue, arguing the public had months of notice that the Board was conducting a countywide review of schools and that it provided numerous public sessions to residents. They noted that families could present written as well as oral testimony and that all was considered by the Board. They wrote, "[i]f after every proposed move the Board had to hold additional public hearings, redistricting would become impossible, let alone is not the policy." (Board's Motion, p. 14).

The Appellants responded that the Board violated Local Policy 2040 by considering moving the boundaries in their polygon after cutting off oral testimony from the public. In support of this argument, they attached Policy 2040, Public Participation in Meetings of the Board. (Appellants' Response, Ex. 32). Specifically, they cited Section IV.C at paragraph 13, which states:

> Community members may provide written testimony in addition to, or in lieu of, public testimony after a formal Board Report is presented to the Board. Equal consideration will be given to written and oral testimony. Written testimony will be accepted via letter or email up to 48 hours prior to the meeting at which the Board is scheduled to take action.

This paragraph is in the section regarding public hearings. It comes after a long list of directives on how a member of the public might present testimony at a hearing. It offers an alternative to an oral presentation: submission of written testimony, which will be accepted up to 48 hours prior the meeting at which the Board is scheduled to act. In this case, that means the

Local Board would have accepted written statements until November 19, 2019, which is two days before the final vote was taken. It does not require the Board to "reopen oral testimony" after a new Board redistricting plan is brought into the discussion, as argued by the Appellant.

The Local Board replied that Policy 6010 directs the Board to hold public hearings regarding the school attendance area adjustment plans submitted by the Superintendent. Specifically, it provides at Section IV.C, paragraph 4:

> The Board, in accordance with Policy 2040 Public Participation in Meetings of the Board, will hold a public hearings(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; Appellants' Response to Motion, Ex. 23).

The plain language of Policy 6010 IV.C.4 is that public hearings are required after the Superintendent has presented their attendance area adjustment plan to the Local Board. The Local Board has the discretion to hold additional public hearings, for instance, after new plans are developed. When Local Board members developed their own plans in this case, the Board chose not to hold additional public hearings. Nevertheless, as noted above, it did accept written testimony up until 48 hours before the final vote on November 21, 2019.

The Appellants argued it is the burden of the Local Board to show all written and oral comments were, in fact, considered by the Board. (Appellants' Response, p. 15). There is no reason to conclude they were not considered, other than that the sheer number of comments would have made it difficult. That speculation fails to raise a genuine dispute of fact. Construing all inferences in the Appellants' favor, I conclude the Board is entitled to judgment on this issue. *Beatty*, 330 Md. at 737-38.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Appellants' Motion for Summary Decision should be denied 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.01.05.06A.

I conclude as a matter of law that the Local Board's Motion for Summary Decision on the issues of the impact of the Open Meetings Act violation and whether the Redistricting Plan violated Policy 6010 should be denied because there is a genuine dispute as to a material fact and the Local Board has not shown that it is entitled to prevail as a matter of law. COMAR 28.02.02.12D(5); COMAR 13A.01.05.06A.

I conclude as a matter of law that the Local Board's Motion for Summary Decision on the issues of whether the Board used socioeconomic data as a pretext for race, whether the Board violated the Appellants' right to protest as guaranteed by the First Amendment to the United States Constitution, and whether the Board denied the Appellants an opportunity to be heard should be granted because there is no genuine dispute as to any material fact and the Local Board has shown that it is entitled to prevail as a matter of law. COMAR 28.02.02.12D(5); COMAR 13A.01.05.06A.

ORDER

I ORDER that the Appellants' Motion for Partial Summary Decision be **DENIED**.

I ORDER that the Motion for Summary Decision filed by the Howard County Board of Education be **DENIED** on two issues: the impact of the Open Meetings Act violation on the Redistricting Plan and whether the Redistricting Plan violated Policy 6010.

RECOMMENDED ORDER

I RECOMMEND that the Motion for Summary Decision filed by the Howard County Board of Education be **GRANTED** on three issues: whether the Local Board used socioeconomic data as a pretext for race, whether the Local Board violated the Appellants' right to protest as guaranteed by the First Amendment to the United States Constitution, and whether the Local Board denied the Appellants an opportunity to be heard.[8]

June 24, 2020
Date Decision Issued

Joy L. Phillips
Administrative Law Judge

JLP/cmg
#186203

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[8] 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.