

IN RE: BOARD OF
EDUCATION OF HOWARD
COUNTY V. RENEE FOOSE
AND RENEE FOOSE v.
BOARD OF EDUCATION
OF HOWARD COUNTY

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION

Opinion No. 17-08

OPINION

INTRODUCTION

The Board of Education of Howard County (local board) filed a Petition for Declaratory Ruling to which Dr. Renee Foose, local superintendent, responded. Thereafter, the local superintendent filed her own Petition for Declaratory Ruling and moved to consolidate the two cases. Both parties filed briefs addressing the jurisdiction of this Board to adjudicate the Petitions. This memo addresses the consolidation and jurisdictional issues only.

FACTUAL BACKGROUND

On January 11, 2017, the local superintendent filed a complaint in Howard County Circuit Court against the local board and its members seeking declaratory and injunctive relief. Dr. Foose requested that the Circuit Court issue an Order declaring:

- (1) The contract entered into by the Board of Education and Daniel Furman [Esq.] on December 21, 2016 is void.
- (2) That the resolution passed by the Board on December 5, 2016 granting the Board authority to engage, direct, communicate with, or contract for legal services with any law firms or lawyers on behalf of HCPSS of the Board is void.
- (3) That the resolution passed by the Board on December 5, 2016 granting the Board authority to substitute its own designee for the Superintendent's designee on the Budget Review Committee is void.
- (4) That the resolution passed by the Board on December 5, 2016 requiring the Board staff, including the Board Administrator, secretarial staff, and Internal Auditor, to report to and be directed by the Board is void.
- (5) Dr. Foose has the right to be notified of and attend all meetings of the Board of Education and board committees except those considering the tenure, salary, or administration of the office of the county superintendent and that meetings held by Board or

board committees discussing Dr. Foose's performance do not fall under this exception.

On January 23, 2017, the local board filed a Petition for Declaratory Ruling with the State Board. It requested this Board to declare that:

- (1) the local board has the authority to engage legal counsel [Daniel Furman, Esq.] of its choice;
- (2) the local board's contract with its legal counsel is not subject to the approval of the local superintendent;
- (3) the local board has the authority to hire, fire, and oversee Board staff that serve and report only to the Board.

On February 6, 2017, Dr. Foose filed an amended complaint in Howard County Circuit Court adding breach of contract and anticipatory breach of contract claims. Then on February 7, 2017, the local superintendent filed her own Petition for Declaratory Ruling with this Board seeking nine declaratory rulings:

- (1) The local superintendent has the authority to manage and administer the day-to-day administration of HCPSS.
- (2) The local board does not have the authority to require that the superintendent and her staff provide advance notice to the board of meetings with county and State officials.
- (3) Dr. Foose has the right to be notified of and to attend all meetings of the board and board committees, except the parts of meetings considering her tenure, salary, or administration.
- (4) Pursuant to *Venter v. Board of Education of Howard County*, 15 Md. App. 64, cert. denied 419 Md. 561 (2009), the board has no authority to terminate non-certificated employees, including those employees over whom the board has attempted to assert such authority.
- (5) The board chair and other board members do not have the authority to direct the Ethics Panel to reschedule hearings, communicate with parties to ongoing Ethics Panel proceedings about the proceedings, or otherwise interfere with ongoing Ethics Panel matters.
- (6) The board does not have the authority to order reimbursement to Barbara Krupiarz for monetary sanctions that were imposed on her by the Circuit Court for Howard County.

- (7) The provision, Section 4-205(d) of the Education Article, which provides that a contract is not valid “without the written approval of the county superintendent,” applies to HCPSS contracts, including the contract with attorney Daniel Furman.
- (8) The board does not have the authority to prevent the local superintendent from engaging, directing, communicating with, or contracting for legal services with any law firms or lawyers on behalf of HCPSS.
- (9) Daniel Furman does not have the authority to be given unfettered access to student and employee records.

The local superintendent asked that both Petitions be consolidated into one matter.

During the course of the filings in this case, the Board directed both parties to address the jurisdiction of the Board to hear and proceed with this matter given the pending proceeding in Howard County Circuit Court.¹

STANDARD OF REVIEW

In declaring the true intent and meaning of education law, the State Board exercises its independent judgment on the record before it. COMAR 13A.01.05.05E.

LEGAL ANALYSIS

A. Consolidation

Both cases shall be consolidated. The legal issues are substantially similar and consolidation will “foster clarity, efficiency, and avoidance of confusion and prejudice.” *Allfirst Bank v. Process Rail Services Corp.* 178 F. Supp. 513, 520 (D. Md. 2001). Consolidation will also avoid unnecessary delay and repetitive filings.

B. Jurisdiction

We have grappled with jurisdictional issues in at least two recent cases in which proceedings were pending simultaneously both in State court and before the State Board. In those cases, the State Board deferred to the rulings the courts had issued that concurrent jurisdiction existed and, thus, the courts would proceed to decide the cases on their merits. Specifically, in *Montgomery Soccer Inc. v. Montgomery County Bd. of Educ.*, MSBOE Op. No. 15-14, Montgomery Soccer simultaneously filed suit in Circuit Court and an appeal before the State Board. Before the State Board could consider the case, the Circuit Court ruled that it had concurrent jurisdiction with the State Board. Thus, on the grounds that parallel proceedings were

¹ In the Circuit Court, Dr. Foose filed a request for the issuance of a show cause order. The Circuit Court issued an Order to Show Cause on January 18, 2017, requiring the local board to show cause by filing a written response on or before March 17, 2017 why the superintendent’s requested relief should not be granted and setting a hearing on March 30, 2017.

not appropriate in the context of judicial economy, the State Board deferred to the ruling of the Circuit Court and stayed the case before it.

The State Board followed the same course in *Baltimore City Board of School Commissioners v. Afaya Baltimore, Inc.*, MSBOE Opin. No. 16-04, deferring to a prior Circuit Court’s ruling that it, not the State Board, had jurisdiction to proceed in the matter. Neither of those cases, however, resulted in a definitive ruling, binding on this Board concerning concurrent jurisdiction between the courts and the Board. Here, the Circuit Court has not ruled on jurisdiction. We take this opportunity to do so.

In a very recent case, the Court of Special Appeals addressed jurisdiction generally and specifically as it relates to the State Board. *Monarch Academy Baltimore Campus, Inc. v. Baltimore City Board of School Commissioners*, _____ Md. App. _____ No. 404, Sept. Term, 2016 (filed February 2, 2017). The Court first explained the three types of jurisdictional relationships between an administrative forum and judicial forum. It said:

[T]he administrative remedy may be exclusive, thus precluding any resort to an alternative [judicial] remedy. Under this scenario, there simply is no alternative cause of action for matters covered by the statutory administrative remedy.

[T]he administrative remedy may be primary but not exclusive. In this situation, a claimant must invoke and exhaust the administrative remedy, and seek judicial review of an adverse administrative decision, before a court can properly adjudicate the merits of the alternative judicial remedy.

[T]he administrative remedy and the alternative judicial remedy may be fully concurrent, with neither remedy bring primary, and the plaintiff at his or her option may pursue the judicial remedy without the necessity of invoking and exhausting the administrative remedy.

Id., slip op. at 13, citing *United Ins. Co. v. Maryland Ins. Admin.*, 450 Md. 1, 14-15 (2016) (quoting *Prince George’s County v. Ray’s Used Cars*, 398 Md. 632, 644-45 (2007)).

The appellate courts of Maryland have consistently held that the State Board has primary jurisdiction over all State educational provisions. *See, e.g., Patterson Park Public Charter School, Inc. v. Baltimore Teachers Union*, 399 Md. 174, 202 (2007); *Arroyo v. Board of Education of Howard County*, 381 Md. 646, 663 (2004). This is particularly true in cases in which a claim requires the interpretation and application of the provisions of the Education Article. *Clinton v. Board of Education of Howard County*, 315 Md. 666, 675-78 (1989). Indeed, the State Board is given the authority by statute to explain “the true intent and meaning” of State education law. Md. Educ. Code Ann. §2-205(e). As the Court of Special Appeals noted in *Monarch Academy*, one of the ways the State Board exercises its statutory duty to explain ‘the true intent and meaning of the public school laws is by adjudicating petitions for declaratory

rulings. *Monarch Academy*, slip op. *passim*.²

The local board asserts that the State Board has exclusive or primary jurisdiction to adjudicate the matters raised in its Petition. In essence, the local board first argues that, because the State Board's jurisdiction is "exclusive," the Superintendent is legally precluded from filing her complaint in the Circuit Court. Alternatively, the local board argues that the State Board has primary jurisdiction which requires the superintendent to exhaust her administrative remedy before this Board prior to seeking relief in court. The local superintendent argues that the State Board's jurisdiction is concurrent with the Circuit Court. Thus, she argues that the local superintendent need not bring her case to the State Board at all but could choose, as she did, to file her complaint in the judicial forum.

After considering the rulings of the appellate courts and the arguments of both parties, we concluded that the State Board has primary jurisdiction over this matter. It involves the meaning of certain education laws and the proper administration of public education in Maryland. While it would be the easier course for us to defer to the Circuit Court to resolve these contentious matters, we are compelled by the words of the Court of Appeals written in 1879 to accept jurisdiction and exercise our visitatorial power to resolve this matter as best we can. The Court said:

If every dispute or contention among those entrusted with the administration of the system, or between the functionaries and the patrons or pupils of the schools, offered an occasion for a resort to the Courts for settlement, the working of the system would not only be greatly embarrassed and obstructed, but such contentions before the Courts would necessarily be attended with great costs and delay, and likely generate such intestine heats and divisions as would, in a great degree, counteract the beneficent purposes of the law. It is to obviate these consequences that the visitatorial power is conferred; and wherever that power exists, and is comprehensive enough to deal with the questions involved in an existing controversy, as is the case here, Courts of equity decline all interference, and leave the parties to abide the summary decision of those clothed with the visitatorial authority.

² The local superintendent argues, however, that the State Board cannot decide "legal questions." We consider this argument in the context of the law that gives this Board not only the authority to explain "the true intent and meaning" of the provisions of education law, Md. Educ. Code Ann. §2-205(e), but also invests the State Board with "a visitatorial power of such comprehensive character as to invest the State Board 'with the last word on any matter concerning educational policy or the administration of the system of public education'" *Board of Educ. of Prince George's County v. Waeldner*, 298 Md. 354 (1984). Certainly, the plain language of the law envisions that this Board will opine on legal questions involving the education laws and the proper administration of the public education system.

Courts have, however, on rare occasions stated that the State Board's comprehensive visitatorial power is not without limit in that the State Board "does not have the power to decide purely legal issues." *Resetar v. State*, 284 Md. 537, 556 (1979); *See also Wilson v. Board of Educ. of Montgomery County*, 234 Md. 561, 565 (1964); *School Comm'nrs. v. Henkel*, 117 Md. 97, 102-105 (1912); *Duer v. Dashiell*, 91 Md. 660, 671 (1900). Courts have also explained what a purely legal issue is. An example of a purely legal issue is whether or not the passage of an education law resulted in the implied repeal of an existing education law. *Duer v. Dashiell*, 91 Md. 660; *Henkel*, 117 Md. 97. In this narrow band of cases, the courts have jurisdiction because the legal issue in the case is not an education-related legal issue.

Wiley v. School Commissioners, 51 Md. at 406.

CONCLUSION

For all these reasons, we consolidate both cases and conclude that the State Board has jurisdiction over this matter.

Signatures on File:

Andrew R. Smarick
President

Chester E. Finn, Jr.
Vice-President

Michele Jenkins Guyton

Laurie Halverson

Stephanie R. Iszard

Rose Maria Li

Barbara J. Shreeve

Madhu Sidhu

Guffrie M. Smith, Jr.

Laura Weeldreyer

February 28, 2017