MELISSA van HERKSEN, et al.,	BEFORE THE
Appellant,	MARYLAND
v.	STATE BOARD
MONTGOMERY COUNTY BOARD OF EDUCATION	OF EDUCATION
Appellee.	Opinion No. 20-45

OPINION

INTRODUCTION

Melissa van Hersken and various other individuals[1] ("Appellants") are parents of children who attend Pre-K, Clarksburg Elementary School, Rocky Hill Middle School, and Clarksburg High School in Montgomery County Public Schools ("MCPS"). Appellants file this appeal of the November 26, 2019 decision of the Montgomery County Board of Education ("local board") to approve a redistricting plan which changes school boundaries for the Clarksburg, Northwest, and Seneca Valley Clusters.

On January 15, 2020, we transferred the case pursuant to COMAR 13A.01.05.07A(1) to the Office of Administrative Hearings ("OAH") for review by an Administrative Law Judge ("ALJ").[2] There ensued a series of preliminary motions filed by the parties, including Appellants' Motion for Default Judgment denied by the ALJ, which we will discuss further below.

At an April OAH scheduling conference, both parties stated their intent to file Motions for Summary Decision. The ALJ agreed to accept a motion and response from each party for a total of four filings.

On May 18, 2020, the local Board filed its Motion and the Appellants filed a Motion for Summary Decision (Cross-Motion). On May 26, 2020, Appellants issued a corrected Cross-Motion. On June 2, 2020 the local board filed a Response to the Cross-Motion and Appellants filed a Response to the local board's Motion.

On June 15, 2020, Appellants emailed a Reply to the OAH. On June 23, 2020, the local board filed a Motion to Strike Appellants' Reply ("Motion to Strike"). On June 26, 2020, Appellants filed a brief in opposition of the local board's Motion to Strike.[3]

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[1] Appellants also include Jan Jelle van Hersken, Desmond Byrd, Qiuhua Zhuang, Juan Wu, Feifei Wang, Louella Matarazzo, William A. Matarazzo, Michaela Krucka, and Nalini K. Muppala.

[2] ALJ Klauber was originally assigned to the case but went out on extended leave. ALJ Breslow took over on April 17, 2020 and conducted the remainder of the case.

[3] The State Board did not receive a copy of Appellants' June 26, 2020 opposition filing likely due to the fact that the ALJ issued his decision the same day, concluding the matter for the OAH. We will discuss this filing below.

Also on June 26, 2020, the ALJ issued his 35 page Recommended Ruling ("RR"). As a preliminary matter, the ALJ declined to consider the Appellants' Reply emailed on June 15, 2020 and, thus, the local board's Motion to Strike. The ALJ then decided the parties' Motion and Cross-Motion for Summary Decision. The ALJ recommends that the State Board grant the local board's Motion for Summary Decision, deny the Appellants' Cross-Motion for Summary Decision, and affirm the local board's redistricting plan.

Appellants' filed exceptions to which the local board responded. Appellants subsequently filed a Supplement to the Exceptions, and the local board responded.

Oral argument on the exceptions was held on December 8, 2020.

FACTUAL BACKGROUND

The relevant facts of this case are set forth in the ALJ's RR at Facts ##1, 26–57 on pages 4, 7–12. They concern the November 26, 2019 decision of the local board to approve a redistricting plan which changed school boundaries for the Clarksburg, Northwest, and Seneca Valley Clusters.

The ALJ determined that on November 27, 2017, the local board authorized the MCPS to explore reassignment for Clarksburg, Northwest, and Seneca Valley High Schools to address projected overutilization at Clarksburg and Northwest High Schools. This process was expanded by the local board on November 27, 2018 to include all the middle schools in the clusters.

The boundary reassignment study process initially included eight options with an additional six options considered based off community feedback. Online surveys were developed and distributed. The local board met with Clarksburg area community members, while the MCPS staff met with the NAACP Parent's Council and the Identity, Inc. Statistics were compiled for each of the schools, including percentages of the student population based on race, Free and Reduced-Priced Meals ("FARM") eligibility[4], and participation in English for Speakers of Other Languages ("ESOL") program.

On October 16, 2019, the MCPS Superintendent released his recommendations. The Superintendent had three goals in making his recommendation: reducing utilization rates at the schools to the maximum extent possible, minimizing the FARMS disparities at both the middle and high school levels, and maximizing walkers attending their current school. The local board subsequently held work sessions and a public hearing to discuss the recommendations. On November 26, 2019, the local board adopted the Superintendent's recommendations.

This appeal followed.

STANDARD OF REVIEW

For decisions of the local board involving a local policy, the local board's decision is considered *prima facie* correct, and the State Board may not substitute its judgment for that of

[4] FARM eligibility is based on family income parameters set forth in 7 CFR §245.2.

the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.06A.

The State Board exercises its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations. COMAR 13A.01.05.06E.

The State Board transferred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify or remand the ALJ's proposed decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications or amendments to the proposed decision. *See* Md. Code Ann., State Gov't §10-216.

LEGAL ANALYSIS

Appellants filed this appeal asking the State Board to overturn the Clarksburg, Northwest, and Seneca Valley Clusters boundary reassignments on the basis that (1) the local board exceeded its authority under local board Policy FAA – Educational Facilities Planning; (2) the boundary plan is illegal because it was decided based on Policy FAA, which Appellants contend was illegally adopted; (3) the decision is arbitrary because it was not based on sound educational policy; (4) the decision is unconstitutional because it reassigns students based on race by using FARM rates as a proxy for race; and (5) the boundary process violated the Opens Meeting Act, thus invalidating the decision.

In this case, no hearing was held on the matter because the ALJ decided the case on the parties' Motion and Cross-Motion for Summary Decision. The ALJ may grant a summary decision when there is no genuine issue of material fact and a party is entitled to prevail as a matter of law. *See* COMAR 28.02.01.12D. Using this standard, the ALJ found (1) the local board did not illegally adopt Policy FAA; (2) the local board did not exceed its authority under Policy FAA; (3) the local board did not violate the Open Meetings Act; (4) the local board did not adopt an unconstitutional boundary reassignment; and (5) the local board boundary reassignment was not arbitrary or unreasonable.

Appellants request in their exceptions that we (1) reconsider their Motion for Default Judgment denied by the ALJ; (2) reconsider their June 15, 2020 Reply and June 26, 2020 Opposition brief; and (3) disapprove the RR and grant summary decision in Appellants' favor.

Motion for Default Judgment

Appellants request that we reconsider their Motion for Default Judgment, contending that the merits of the case should have been decided on Appellants' filings alone. Citing COMAR 13A.01.05.03A, Appellants' argue that since their appeal was transmitted to the OAH on January 15, 2020, the local board was required to file either a memorandum in response to the appeal or a motion to dismiss by February 7, 2020. The local board filed their Motion to Dismiss in Part on February 18, 2020. Appellants argue that under COMAR 13A.01.05.03A, since the local board did not file its response or motion to dismiss by February 7, 2020, the ALJ should not have considered the local board's filings.

On April 7, 2020, ALJ Klauber issued orders on this matter. She found that Appellants misapplied the language of COMAR 13A.01.05.03A and failed to consider the power of the ALJ to oversee the action, including filings. *See* COMAR 28.02.01.11B(11) and (12). As a matter of law, she found the Appellants' Motion to Strike and Motion for Default Judgment had no merit. We have reviewed the ALJ's April 7, 2020 orders on the Appellants' Motion to Strike and Motion for Default Judgment and concur with the ALJ's decision and reasoning.

Appellants' Reply and OAH Discretion

Appellants request that this Board consider their electronically submitted June 15, 2020 Reply. ALJ Breslow in his RR stated that he did not consider the Reply for two reasons: (1) the filing was not submitted in a timely fashion, and (2) there was no discussion of or authorization given by the ALJ to submit a Reply. Appellants argue this decision is fundamentally unfair and biased against them.

Appellants claim they were entitled to file their Reply pursuant to COMAR 13A.01.05.04E(2); however, the Appellants fail to consider the narrowing language of COMAR 13A.01.05.04E(1), which states "[m]otions, memoranda, and responses shall be *filed with the State Board*…" (emphasis added). This section of the regulations is specific to filings with this Board. When we transfer an appeal to the OAH, the administrative rules of the OAH govern the proceedings, unless State Board appeal regulations dictate otherwise. *See* COMAR 13A.01.05.07E. The ALJ is given the authority to regulate the proceedings "in a manner suited to ascertain the facts and safeguard the rights of the parties…" and "[c]onsider and rule upon motions[.]" COMAR 28.02.01.11B(12) and (4). Therefore, we find Appellants' argument that their Reply was filed timely pursuant to COMAR 13A.01.05.04E(2) lacks merit as that provision did not apply once we transferred the matter to OAH.

Additionally, in the RR, ALJ Breslow states that at the Scheduling Conference the parties agreed they would both file Motions for Summary Decision and Responses for a total of four filings. There was no discussion of subsequent replies. He clarified that the schedule of motions was designed to allow him time to issue rulings on the motions by July 2, 2020. Both parties were given the opportunity to request the ability to file a reply at the Scheduling Conference, but neither did. Furthermore, both parties were allowed two filings each. We do not find anything fundamentally unfair about this process or the decision of the ALJ to limit filings to two in order to ensure the case moved forward in a timely fashion. Thus, we decline to overturn his decision not to consider Appellants' Reply, which also makes consideration of the June 26, 2020 Opposition filing moot.

Policy FAA and Procedural Defect

Appellants ask this Board to reject the RR and find that the deliberative rules of the local board were not followed in passing Policy FAA, thereby rendering the policy null and void. Although the ALJ addressed the merits of this argument, we decline to decide this issue on the basis that any appeal challenging the validity of the process utilized to enact Policy FAA is untimely. There is no dispute that the local board adopted Policy FAA on September 24, 2018. Any appeal maintaining that the policy was illegally passed by the local board should have been filed with the State Board within 30 calendar days of the action taken by the local board. COMAR 13A.01.05.02B(1)(a). As this appeal was filed December 26, 2019, more than a year

after the passage of Policy FAA, we will not consider an appeal on the basis that the passage of Policy FAA was procedurally defective.

Policy FAA and Race-Based Constitutional Concerns

Relying on *Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999), Appellants in their exceptions renew their argument that the boundary decision functions as an unconstitutional racial balancing scheme. Appellants claim that the Court found local board Policy ACD – Quality Integrated Education unconstitutional, and therefore, argue that Policy FAA's reference to Policy ACD invalidates Policy FAA.

The *Eisenberg* case involved the local board's transfer policy in place at the time, which denied a student's request to transfer to a magnet school solely because of his race. The Court held that the transfer policy as applied was unconstitutional because it employed race classification as the determining factor for student transfers, and there was no evidence to support that the use of racial classifications served a compelling governmental interest and was narrowly tailored to achieve that interest. *Id.* at 129.

As the ALJ explained, "[t]o be conscious of or consider racial composition in decision making, as opposed to using race as a determinative factor, is not a presumptively unconstitutional racial classification." RR at p. 26 (referencing *Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-89 (2007)). Policy FAA requires consideration of four factors, including the demographic characteristics of the student population, geography, stability of school assignments over time, and facility utilization. Demographics include not only the racial/ethnic composition of the school, but also socioeconomic status, participation in ESOL programming and other reliable indicators. Appellants argue that the goal of reducing FARM rate disparities among schools is really racial balancing because, as they contend, FARM rates in this instance are a proxy for race. The ALJ rejected this argument and found this did not constitute impermissible racial balancing, and we concur.

In reviewing the record, we note that the Superintendent articulated three goals motivating his proposed boundary reassignment: reducing utilization rates at the schools to the maximum extent possible, minimizing the FARMS disparities at both the middle and high school levels, and maximizing walkers attending their current school. Therefore, we do not see evidence to suggest that the boundary decision engages in racial balancing which would result in an unconstitutional practice. We accept the ALJ's findings on this issue.

ALJ Findings

Appellants did not file exceptions related to the ALJ's findings on whether the local board exceeded its authority, whether the boundary decision was based on unsound education policy, and whether the local board violated the Open Meetings Act in such a way as to invalidate the boundary decision-making process. We address these in turn.

In the RR, the ALJ found that the local board had not exceeded its authority under Policy FAA. The ALJ ruled that Policy FAA "includes analysis of non-capital strategies to address capacity requirements and facility needs." (RR, p. 22). In order to address overcapacity at the high schools, the local board needed to also consider the middle schools, which articulate to the

high schools. The ALJ found that there were no restrictions under Policy FAA on including the middle schools and their inclusion was a valid redistricting consideration. We agree and adopt the ALJ's findings on this matter.

The ALJ also found that the local board's boundary plan was not arbitrary or unreasonable. To make this determination, the ALJ considered the four factors under Policy FAA considered by the Superintendent and local board, the extensive process undertaken by MCPS to gather community feedback and input (e.g., twelve community meetings, surveys, etc.), and the Superintendent's reasoning for his recommendation. The Superintendent stated his recommendation was intended to reduce split articulation[5] from the middle schools, provide some capacity relief, maintain walkers at the various schools, and reduce the FARMS rates. Based on this reasoning, the ALJ found that the boundary reassignment was not arbitrary or unreasonable, and did not violate sound educational policy. We concur.

Finally, the ALJ addressed the Appellants' allegation that the local board violated the Open Meetings Act, thus invalidating the boundary reassignment decision. The local board argued that this Board lacks jurisdiction over alleged violations of the Opens Meeting Act. ALJ Klauber ruled on April 16, 2020 that it was appropriate to consider these issues in the context of the challenged boundary assignment, and ALJ Breslow agreed in his RR. We do not find this ruling to be in keeping with prior State Board decisions.

This Board has consistently declined to hear claims involving the Open Meetings Act for lack of jurisdiction. See *Murphy, et al. v. Anne Arundel County Bd. of Ed.*, MSBE Op. No. 15-36 (2015); *Kurth, et al. v. Montgomery County Bd. of Ed*., MSBE Op. No. 12-23 (2012); and *Harper v. Frederick County Bd. of Educ.,* MSBE Op. No. 02-15 (2002). The appropriate venue for remedying a violation of the Open Meetings Act is for a party to either file a complaint with the Open Meetings Compliance Board or file a petition with an appropriate circuit court requesting the action of the local board be voided. *See* MD Gen. Provis. § 3-205 and § 3-401. As such we do not adopt the ALJ's ruling on this claim and decline to make a ruling on the basis that we lack jurisdiction to decide violations of the Open Meetings Act.

CONCLUSION

In our view, the record supports the conclusions reached by the ALJ and the local board's decision. Accordingly, except to the extent modified in this Opinion, we adopt the ALJ's Recommended Order. We do not find that the local board acted in an arbitrary, unreasonable, or illegal manner in approving the redistricting plan for the Clarksburg, Northwest, and Seneca Valley Clusters.

Signatures on File:

_____
Clarence C. Crawford
President

_____
Gail H. Bates

[5] Split articulation refers to a situation when some students feed into one school, while other students feed into another school in the same or different cluster.

_____
Charles R. Dashiell, Jr.

_____
Susan J. Getty

_____
Vermelle D. Greene

_____
Rose Maria Li

_____
Rachel McCusker

_____
Joan Mele-McCarthy

_____
Lori Morrow

_____
Warner I. Sumpter

_____
Holly C. Wilcox

Dissent: Shawn D. Bartley

While I recognize that Summary Decision is allowed by the regulations governing the Office of Administrative Hearings review process and it is an efficient tool for judicial economy, it leaves citizens who seek an opportunity for redress without complete opportunity for full development of facts and contest of opposing facts. Facts relied upon in the administrative law judge's decision related to the redistricting "goals" of the Superintendent, and ultimately the local board, should have been fully tested in a hearing. I am concerned that if "goals" become the primary determinative in an appeal of a local board decision, will "goals" be carefully crafted well in advance to disguise the true intent of individuals who have administrative decision-making powers? Based on my review of the record, despite the stated goals, the redistricting appears to integrate students whose parents did not proactively seek integration; the education goals are secondary to the socio-economic goals; and the minority populations are decreased. For these reasons, I dissent.

Absent: Jean C. Halle

December 8, 2020

MELISSA VAN HERKSEN, ET AL.,	*	**BEFORE STUART G. BRESLOW,**
APPELLANTS	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE OF**
BOARD OF EDUCATION OF	*	**ADMINISTRATIVE HEARINGS**
MONTGOMERY COUNTY	*	**OAH CASE No.: MSDE-BE-09-20-01453**

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RECOMMENDED RULING ON RESPONDENT'S MOTION FOR SUMMARY DECISION AND APPELLANTS' CROSS MOTION FOR SUMMARY DECISION

STATEMENT OF THE CASE

On or about November 26, 2019, the Montgomery County Board of Education (Respondent, Local Board, or MCBOE) approved a school redistricting plan that reassigned the public school boundaries for the Clarksburg, Northwest, and Seneca Valley Clusters. On December 27, 2019, the Appellants filed this appeal challenging the redistricting plan approved by the Respondent. The nine Appellants are parents of children who attend Clarksburg Elementary School, Rocky Hill Middle School, and Clarksburg High School. By letter dated January 15, 2020, the Maryland State Board of Education (State Board) transmitted this matter to the Office of Administrative Hearings (OAH) to hold a contested case hearing and issue a proposed decision. Code of Maryland Regulations (COMAR) 13A.01.05.07A(1), E.

On February 18, 2020, the Respondent filed a Motion to Dismiss in Part (Motion to Dismiss) the Appellants' appeal for lack of jurisdiction. The Respondent argued the State Board

does not have jurisdiction to hear two issues raised by the Appellants' appeal: That the Respondent did not properly adopt Policy FAA or that the Respondent violated the Open Meetings Act. On March 9, 2020, the Appellants filed an Opposition to the Motion to Dismiss (Opposition). On March 27, 2020, the Respondent filed a Reply to the Appellants' Opposition. On April 16, 2020, Administrative Law Judge (ALJ) Geraldine A. Klauber issued a Ruling denying the Respondent's Motion to Dismiss.

On April 21, 2020, the parties were advised that ALJ Klauber was on extended leave and that I was assigned this case, effective April 17, 2020. On April 30, 2020, I held a Scheduling Conference (Conference) with the parties. John R. Garza, Esquire, represented the Appellants. Judith S. Bresler and Claude de Vasty Jones, Esquire, represented the Respondent. Among other matters discussed during the Conference, the parties indicated that they each intended to file Motions for Summary Decision. As a result of Governor Lawrence J. Hogan, Jr.'s Executive Order of March 12, 2020 (Executive Order), addressing the COVID-19 pandemic, implementing "Elevated Level II of the Pandemic Rule and Other Infectious Diseases Attendance and Leave Policy" for State agencies, the OAH was closed to the public, and the hearing scheduled to begin on May 11, 2020 was cancelled. Accordingly, I granted the parties an extension for filing Motions for Summary Decision until May 15, 2020. Counsel for the Respondent subsequently requested an additional business day, without objection by the Appellants, to file its Motion for Summary Decision (Motion), which I granted.

On May 18, 2020, the Respondent filed its Motion. On May 18, 2020, the Appellants filed its Motion for Summary Decision (Cross-Motion) and issued a Corrected Cross-Motion on

May 26, 2020. The Respondent filed its Response to the Cross-Motion on June 2, 2020. The Appellants filed their Response to the Respondent's Motion on June 2, 2020.[1]

ISSUE

Should either the Respondent's Motion or the Appellants' Cross-Motion be granted?

SUMMARY OF THE EVIDENCE

The Respondent and Appellants relied upon affidavits and documentary exhibits to support their Motion, Cross-Motion, Responses, and Reply.[2] A complete list is attached to this Recommended Decision as an Appendix.

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[1] On June 11, 2020, the Appellants filed a Line to the OAH stating that they would file a timely reply brief on June 15, 2020. The Appellants asserted that under the MSDE's regulations, COMAR 13A.01.05.04E(2), they are entitled to file a reply to a response within ten days of the date on which the response is filed. The Appellants stated that they received the Respondent's Response to the Cross-Motion via email on June 3, 2020; therefore, the Appellants calculated that the Reply was due on June 13, 2020. Since June 13, 2020 fell on a Saturday, however, the Appellants asserted that under the OAH's regulations the Reply was due on the next business day, which was Monday, June 15, 2020.

On June 15, 2020, the Respondent sent a letter stating that their Response to the Cross-Motion was filed with the OAH on June 2, 2020, arguing that the Appellants cannot measure the filing date by the setting of the Appellants' counsel's computer, which limited the size of attachments and rejected the Respondent's service copy of their Reply. The Respondent's Response to the Cross Motion was filed on June 2, 2020 in accordance with OAH regulations. If replies were contemplated by the parties at the Conference, the Appellants' reply would have been due by the close of business on June 12, 2020. However, and most importantly, there was never any discussion during the Conference, nor any provision in the Conference report, to file replies to either party's responses.

The Appellants emailed the Reply to the Respondent's Response at 10:58 p.m. on June 15, 2020, after the close of OAH business hours. I received the filing on June 16, 2020. COMAR 28.02.01.04D(3). The Appellants filed a late reply despite their unsupported assertion that it was timely. COMAR 13A.01.05.04B(1) provides that for "good cause," the *State Board* may shorten or extend time limitations. The Appellants never requested an extension of time to file their Reply.

The State Board delegated its authority to decide the appeal to the OAH. Upon transmittal to the OAH, the case was first assigned to ALJ Klauber, who became responsible for ensuring the fair and expeditious determination of this action. COMAR 28.02.01.01B. As ALJ Klauber discussed in her April 7, 2020 Ruling denying the Appellants' Motion to Strike the Board's Motion to Dismiss in Part, "the OAH regulations empower the presiding ALJ to regulate the course of this matter by issuing orders as are necessary to procure procedural simplicity and administrative fairness, eliminate unjustifiable expense and delay, and conduct the hearing in a manner suited to ascertain the facts and safeguard the rights of the parties to the hearing." COMAR 28.02.01.11B(11) and (12). At the Conference, I stated that I would accept a motion for summary judgment and a reply to the motion from both parties, for a total of four filings. The parties agreed at the Conference to specific timeframes for motions and responses to motions. The parties complied with these timeframes. The objective was to enable me to issue a ruling on motions by July 2, 2020. Filing replies would change the timeframes set forth in the Conference report, which was never considered by the parties. In accordance with my delegated authority for the expeditious determination of this action, I will not consider the Appellants' Reply in my Recommended Ruling.

[2] On June 23, 2020, the Respondent filed a Motion to Strike Appellants' Reply to County Board's Response to Appellants' Motion for Summary Decision. I will not issue a ruling on this motion because I have already fully addressed, considering both parties' arguments, whether to accept the Reply. *See id.*

UNDISPUTED FACTS

1. On November 27, 2017, the MCBOE authorized the Montgomery County School System (MCPS) to explore reassignments for Clarksburg, Northwest, and Seneca Valley high schools to address projected overutilization at Clarksburg and Northwest high schools.

2. Policy BFA, *Policy Setting*, provides for the implementation of formal policies identifying principles to set forth the vision and goals of the school system, specify rights and responsibilities of the school community, and guide the development and implementation of educational programs and/or management of the school system.

3. Policy BFA establishes consistent processes for developing and implementing policies adopted by the MCBOE.

4. A Policy Committee (PC) consisting of not less than three members of the MCBOE reviews and presents drafts to the MCBOE for adoption.

5. Following consideration of eight factors, as appropriate, the PC will present the proposed policy measure to the MCBOE for discussion, and/or amendment, and tentative action.

6. If the MCBOE takes tentative action on the policy, the tentatively approved policy will lie on the table for at least twenty-one days before being voted upon for final action by the MCBOE.

7. During the time the tentatively approved policy lies on the table, opportunity for citizen and staff comment will be allowed along with public hearings if allowed by the MCBOE to provide the Superintendent of the MCPS to give advice and recommendations.

8. Before taking final action on the tentative policy, the MCBOE will consider public comments, staff responses, and committee recommendations. It will also consider amendments proposed by MCBOE members.

9. The PC first considered amending Policy FAA, Section G, Factors to be Considered, on March 19, 2018. The four factors included demographic characteristics of student population, geography, stability of school assignments over time, and facility utilization.

10. MCBOE staff proposed a revision to the language in the demographic characteristics of student population factor in Policy FAA, Section G, to include, "Where reasonable, options should promote the creation of a diverse student body in each of the affected schools." The student member of the MCBOE suggested that the phrase "especially strive" be included in the revised language, but the chair of the PC did not want that language included. By consensus, the Committee agreed to the following revised language: "Options *should strive* to promote the creation of a diverse student body in each of the affected schools." (emphasis added). Demographic data under this option includes "racial/ethnic composition of the student population, the socioeconomic composition of the student population, the level of English language learners, and other reliable demographic indicators and participation in specific educational programs."

11. On April 12, 2018, during an MCBOE meeting, the student member of the MCBOE suggested that the phrase "especially, and in particular, strive to create" be included in the revised language. The student member discussed African American history, including *Brown v. Board of Education* and integration in Montgomery County. There were discussions and suggestions among committee members to make demographics a priority factor.

12. On April 12, 2018, the PC recommended and the MCBOE tentatively adopted by a five to three vote revisions to Policy FAA, including retaining the original language in the demographic factor stating, "Options *should strive* to promote the creation of a diverse student body in each of the affected schools." (emphasis added).

13. The MCBOE tentatively adopted revisions to Policy FAA, triggering the twenty-one day period in which the policy must lie on the table for comment.

14. The MCBOE posted the tentatively adopted Policy FAA on the MCPS website; advertised it in the MCPS newsletter, the *MCPS Bulletin*; notified community forums; tweeted through its and the MCPS twitter handle; and sent a press release.

15. On April 25, 2018, a posting on the *MCPS Bulletin* stated that the tentatively approved Policy FAA was available for public comment through September 7, 2018. Seventy-eight comments were received through September 10, 2018.

16. The PC is assigned to review comments submitted in response to the tentatively approved Policy FAA.

17. In accordance with Policy BFA, Section 2(f), the PC makes recommendations to the MCBOE based on the comments, staff responses, and amendments proposed by MCBOE members.

18. There was no further action on the tentatively approved policy by the MCBOE between its tentative adoption and September 13, 2018.

19. On September 13, 2018, the PC recommended revisions to the tentatively approved FAA policy based on comments received from the public and recommendations received from staff.

20. Policy FAA section G(2)(a), Demographic characteristics of student population, was revised by the PC by adding a reference to Board Policy ACD, Quality Integrated Education. The word "especially" was added to Policy FAA section G(2)(a) as well. The final language stated, "Options should *especially* strive to create a diverse student body in each of the

affected schools *in alignment with Board Policy ACD, Quality Integrated Education*." (emphasis added).

21. Policy FAA section E(2) was added to the policy and provides that "staff developed options put forward for community input will reflect a range of approaches to advance each of the factors set forth in section G below and provide a rationale that demonstrates the extent to which any option advances each of those factors."

22. Ninety-six comments were received between the time the PC sent the revised Policy FAA to the MCBOE on September 13, 2018 and September 24, 2018.

23. The public comment period ended on September 24, 2018.

24. Neither the PC nor the full MCBOE discussed whether to send the tentatively approved Policy FAA out for public comment before adopting the Policy on September 24, 2018.

25. PC chair Patricia O'Neill forwarded the PC report to the MCBOE with a formal resolution.

26. The MCBOE adopted the revisions to Policy FAA on September 24, 2018.

27. The MCPS staff met with communities at all three high schools during the comment period. There were twelve such meetings. The MCPS staff met with PTA leadership from Seneca Valley High School. MCPS staff answered questions through emails with leadership from each of the three high school clusters.

28. On October 29, 2018, the Superintendent recommended expanding the boundary study to include all middle schools in the Clarksburg and Northwest clusters along with the Seneca Valley cluster.

29. On November 27, 2018, the MCBOE authorized expanding the scope of the high school boundary study to include all middle schools in the Clarksburg, Northwest, and Seneca Valley clusters.

30. The Superintendent directed staff to develop options for boundary changes. Eight options were provided for community input. As a result of community input, six additional options were presented to the community for input.

31. MCPS provided community outreach through online surveys in seven languages, flyers, telephone messages, an interactive map on the Division of Capital Planning (DCP) website, and a "Frequently Asked Questions" online mailbox at the DCP.

32. In April 2019, the MCBOE met with Clarksburg area community members.

33. Dr. Andrew Zuckerman, Chief Operating Officer for MCPS, approached the NAACP Parents' Council, Montgomery County, and Identity, Inc.[3] to gain feedback on the boundary study. On September 19, 2019, MCPS staff met with the NAACP Parent's Council and Identity, Inc.

34. The Fox Chapel Elementary School PTA and Little Bennett Elementary School PTA, in the Clarksburg cluster, submitted position papers to the MCBOE and Superintendent. No PTA position statements were included in the Boundary Study Report. The Seneca Valley High School PTA submitted a reassignment proposal, which was included in a supplement to the Boundary Study Report.

35. Statistics were compiled for each high school and middle school in the boundary study for the 2018 to 2019 school year that included the percentage of Black or African

[3] The purpose of the NAACP Parents' Council is to "provide a forum through which interested citizens may offer assistance, guidance, and support to African American parents and students of [MCPS]." https://naacppc-md.org. Identity, Inc. "creates opportunities for Latino and other historically underserved youth to realize their highest potential and thrive." https://identity-youth.org.

American students, the percentage of Asian students, the percentage of Hispanic/Latino students, the percentage of White students, the percentage of Two or More Races, the percentage of students in FARMS,[4] and the percentage of students in the ESOL[5] program.

36. At Neelsville Middle School in the 2018 to 2019 school year, 34.3% of the population was Black or African American, 8.8% was Asian, 49.6% was Hispanic/Latino, 4.3% was White, 2.5% was Two or More Races, 66.7% was in FARMS, and 18.0% was in the ESOL program. At Rocky Hill Middle School in the 2018 to 2019 school year, 24.3% of the population was Black or African American, 29.0% was Asian, 17.9% was Hispanic/Latino, 21.7% was White, 6.9% was Two or More Races, 22.5% was in FARMS, and 4.5% was in the ESOL program.

37. Based upon 2018 to 2019 school year statistics, each boundary option included changes that would result to the race/ethnic composition, FARMS, and ESOL in the affected high school and middle school.

38. Under Option 11a at Neelsville Middle School, the boundary reassignment would result in the following change to the student population: 26.2% Black or African American, 17.3% Asian, 41.6% Hispanic/Latino, 10.3% White, 4.6% Two or More Races, 53.9% FARMS, and 16.9% in the ESOL program. At Rocky Hill Middle School, the boundary reassignment would result in the following change to the student population: 32.3% Black or African American, 19.3% Asian, 29.6% Hispanic/Latino, 14.2% White, 4.6% Two or More Races, 40.1% FARMS, and 7.8% in the ESOL program.

[4] Free and Reduced-price Meals System
[5] English for Speakers of Other Languages

39. On October 16, 2019, the Superintendent released his recommendations for boundary adjustments to high schools and middle schools for the Clarksburg, Northwest, and Seneca Valley clusters.

40. On October 28 and November 4, 2019, the MCBOE held work sessions that were open to the public to consider and analyze the Superintendent's boundary recommendation.

41. On November 13, 2019, the MCBOE held a public hearing to obtain community input on the Superintendent's boundary recommendation.

42. On November 19, 2019, the MCBOE held a work session that was open to the public to further consider and analyze the Superintendent's boundary recommendation.

43. On November 20, 2019, at 7:11 a.m., Allison Cullinane, a Montgomery County parent who attended the November 19, 2019 work session, sent an email to MCBOE Member Jeanette Dixon. Ms. Cullinane wrote, in part, that she "felt the utter powerlessness we have as citizens at the whim of the officials we have elected," was "shocked at the complete disregard shown to [MSBOE Member] Mrs. Smondrowski at the work session," and that the MCBOE is "truly leaving behind a dwindling and important part of Montgomery County: the rural population."

44. On November 20, 2019, at 7:29 a.m., Ms. Dixon responded to Ms. Cullinane's email as follows:

> I do wish I could share with you what went on behind the scenes related to all of this. It is not what you surmise especially how you perceive Mrs. Smondroski [sic] was treated. She knew what she was doing related to all of this. As I said we do wish we could give everyone what they wanted but that is not possible when having to populate a new school. We also understand that parents want what is best for their child and family. Our responsibility was to do the best we can for all students, realizing we are not going to be able to please everyone. Believe me we heard it seemed from everyone. I feel confident we did the best we could with the options that we were given and I understand that you don't agree.

45. The MCBOE adopted the Superintendent's recommendations on November 26, 2019.

46. In formulating a recommendation for high school redistricting, the Superintendent had three goals: reducing utilization rates at the schools to the maximum extent possible, minimizing the FARMS disparities at both the middle school and high school levels, and maximizing walkers attending their current school.

47. The greatest FARMS disparity for the 2018-2019 school year among the high schools was the disparity between FARM students at Seneca Valley High School and Northwest High School at 16.5%.

48. The greatest FARMS disparity for the 2018-2019 school year among the middle schools was the disparity between FARMS students at Neelsville Middle School and Rocky Hill Middle School at 44.2%.

49. In applying the four factors in Policy FAA, the Superintendent considered the stability of school assignment over time as he stated in his recommendation to the MCBOE. Hallie Wells Middle School opened in 2016. When it was opened, student reassignments occurred to populate the school. Because of the recent reassignment, none of the students were recommended to be reassigned thereby maintaining long term stability for that school.

50. The Seneca Valley Cluster community indicated that their preferred boundary recommendations were Options 11 and 11a.

51. The Superintendent's recommendation to the MCBOE, a variation of Option 11a, reduced the overutilization of Clarksburg and Northwest High Schools. His recommendation reduced the underutilization of Seneca Valley High School.

52. Clarksburg, Northwest, and Seneca Valley High Schools have contiguous boundaries.

53. Students who can walk to their high school are not reassigned and are able to continue to walk to their schools based on the Superintendent's recommendation.

54. The Superintendent's recommended plan reduces the FARMS disparity in the three high schools. Furthermore, the FARMS disparity between Neelsville and Rocky Hill middle schools was reduced.[6]

55. The recommended plan eliminates a split articulation for Great Seneca Creek Elementary School.

56. Although Option 4 reduced the FARMS disparity among the three high schools more than the option recommended by the Superintendent, it was not recommended by the Superintendent because its selection would adversely affect the geographic factor.

57. Policy FAA recognizes that "it may not be feasible to reconcile each and every recommendation with each and every factor."

DISCUSSION

Legal Framework

The law applicable to this matter is the contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the OAH, and the COMAR regulations governing appeals to the State Board. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp 2019); COMAR 28.02.01; COMAR 13A.01.05.02 through 13A.01.05.09. Relevant case law and State Board decisions are also applicable.

[6] In 2018-2019, the FARMS population at Northwest, Clarksburg, and Seneca Valley was, respectively, 22.5%, 27.5%, and 39.0%, a range of 16.5% With the recommended change, the FARMS population at Northwest, Clarksburg, and Seneca Valley was, respectively, 21.6%, 28.5%, and 34.5%, a range of 12.9%.

The OAH's Rules of Procedure provide for consideration of a motion for summary decision under COMAR 28.02.01.12D. This regulation provides as follows:

> D. Motion for Summary Decision.
>
> (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.

Summary decision is appropriate where there is no genuine issue of material fact and a party is entitled to prevail as a matter of law. The requirements for summary decision under COMAR 28.02.01.12D are virtually identical to those for summary judgment under Maryland Rule 2-501, which contemplates a "two-level inquiry." *See Richman v. FWB Bank*, 122 Md. App. 110, 146 (1998). The *Richman* court 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. (citations omitted); *see also King v. Bankerd, Inc.*, 303 Md. 98, 111 (1985).

When ruling on a motion for summary decision, an administrative law judge may also consider admissions, exhibits, affidavits, and sworn testimony for the purpose of determining whether a hearing on the merits is necessary. COMAR 28.02.01.12D(2); *see also Davis v. DiPino*, 337 Md. 642, 648 (1995).

In reviewing a motion for summary decision, an administrative law judge may be guided by case law that explains the nature of a summary judgment in court proceedings. The Supreme Court has noted, regarding the standard for summary judgment, "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). A mere scintilla of evidence in favor of a nonmoving party is insufficient to defeat a summary judgment motion. *Id.* at 251. A judge must "draw all justifiable inferences in favor of the nonmoving party." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991).

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 Mgt. Servs., Inc. v. Md. State Highway Admin.*, 375 Md. 211, 226 (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. *See Goodwich v. Sinai Hosp. of Balt., 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). Only where the material facts are "conceded, undisputed, or 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).

The Court of Special Appeals has discussed what constitutes a "material fact," the method of proving such facts, and the weight a judge ruling upon such a motion should give the information presented:

> "A material fact is a fact the resolution of which will somehow affect the outcome of the case." "A dispute as to a fact 'relating to grounds upon which the decision is not rested is not a dispute with respect to a *material* fact and such dispute does not prevent the entry of summary judgment.'" We have further opined that in order for there to be disputed facts sufficient to render summary judgment inappropriate "there must be evidence on which the jury could reasonably find for the plaintiff."
>
> . . . The trial court, in accordance with Maryland Rule 2-501(e), shall render summary judgment forthwith if the motion and response show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. The purpose of the summary judgment procedure is not to try the case or to decide factual disputes, but to decide whether there is an issue of fact that is sufficiently material to be tried. Thus, once the moving party has provided the court with sufficient grounds for summary judgment, "[i]t is . . . incumbent upon the other party to demonstrate that there is indeed a genuine dispute as to a material fact. He does this *by producing factual assertions, under oath*, based on the personal knowledge of the one swearing out an affidavit . . . . Bald, unsupported statements or conclusions of law are insufficient."

Tri-Towns Shopping Ctr., Inc. v. First Fed. Sav. Bank of W. Md., 114 Md. App. 63, 65-66 (1997) (citations omitted) (emphasis in original).

Standard of Review

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.*

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 the 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. To prevail, an appellant must show, by a preponderance of the evidence, that a challenged redistricting decision was arbitrary, unreasonable, or illegal. COMAR 13A.01.05.06D. To prove an assertion by a preponderance means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). If this matter goes to a full merits hearing, the Appellants have the burden of proof. However, as noted earlier, the Respondent, as the moving party in the Motion, and the Appellants as the moving party in its Cross-Motion, have the burden to establish it is entitled to a summary decision.

A. The MCBOE Did Not Illegally Adopt Policy FAA

A central issue in this case is the development and implementation of Policy FAA as it relates to the redistricting of schools in the MCPS. Policy BFA, *Policy Setting*, is the implementing policy and identifies the rights and responsibilities of the school community and guides the development and implementation of educational programs and/or management of the MCPS. At the time this review was first considered, Policy FAA, section G(2), included four factors to be considered: (a) demographic characteristics of the student population, (b) geography, (c) stability of school assignments over time, and (d) facility utilization.

When revisions to Policy FAA section G(2) were first considered on or about March 18, 2018, it was reviewed by the Policy Committee (PC) of the MBCOE. The PC consists of no less than three members of the MCBOE. There were discussions among the members on what the revisions should look like. There were discussions and suggestions among committee members to make demography a priority factor. Ultimately, the PC recommended to the MCBOE that options should strive to promote the creation of a diverse student body in each of the affected schools. Upon recommendation of the PC, the PC sent its revisions to the MCBOE. Again,

discussions were held among its members whether to make demography a priority factor, but the MCBOE rejected these proposals at its April 12, 2018 meeting.

On April 12, 2018, the MCBOE tentatively approved the revision to Policy FAA. This triggered the twenty-one day period in which the tentatively approved policy must lie on the table. Comments were received by the public. Although only required to keep the tentatively approved policy revision on the table for twenty-one days, many months passed until the PC, after receiving comments from the community and staff, recommended certain changes to the tentatively approved Policy FAA. The revised Policy FAA was adopted by the MCBOE on September 24, 2018. The Appellants claim that they are entitled to Summary Decision because the boundary plan is illegal as it was based on an illegally adopted FAA. The MCBOE claims it is entitled to Summary Decision because it followed all the required procedures and the FAA was not revised illegally.

Policy BFA provides that the PC sends the proposed policy revisions to the MCBOE for "discussion, and/or amendment, and tentative action." (Bd. Ex. 1, § C(2)(d), at 2.)[7] There is no dispute of fact that this took place on April 12, 2018. The MCBOE took tentative action, thus triggering the twenty-one day comment period. (*Id.* § C(2)(e)(1), at 3.) This was the only time the MCBOE took tentative action on this policy following April 12, 2018. Had it taken another tentative action either at the September 13, 2018 meeting or at any other meeting, a new twenty-one day period would have been triggered.

The Appellants argue that the changes made by the PC to the tentatively approved Policy FAA were substantive policy item revisions and should have triggered another twenty-one day

[7] Policy BFA is also Appellant Exhibit 16. The parties provided many duplicate exhibits. For ease of reference, I will cite Board exhibits for MCPS documents.

period. It is not what the Appellants believe is significant or substantial that is determinative of this issue, but rather what the MCBOE considers in order to trigger the twenty-one day period.

Policy BFA provides the following:

> When taking final action, the Board will review public comments, staff responses, and committee recommendations and consider amendments proposed by Board members.

(*Id.* § C(2)(f), at 3.) Policy BFA was revised in April 9, 2019 as follows:

> The Board may, or the Policy Management Committee may make a recommendation to the Board to send the policy back out for public comment if substantial changes are made to the policy after the initial public comment period.

Policy BFA § (C)(2)(f), revised Apr. 9, 2019.

First, the MCBOE has discretion whether to send the policy back for public comment. It is not required to do so. There was never any discussion whether the changes required that the policy be tentatively approved and another twenty-one day period should occur. Since no mention of whether the changes were significant or substantial was discussed during either the September 13 meeting or the September 24, 2018 meeting, it follows that the MCBOE did not deem the changes either significant or substantial. Even if the Appellants could establish that the changes were substantive, the MCBOE still had discretion whether to go forward with final action—based upon public comments, staff responses, committee recommendations, and MCBOE proposed amendments—or to again tentatively adopt the revised policy, thus triggering the twenty-one day period. Tentative approval is the only means of triggering the twenty-one day period provided in Policy BFA. As no vote was taken to tentatively approve the revised policy, the twenty-one day period simply did not apply. The revised FAA was not adopted illegally.

The Appellants contend that the MCBOE, having agreed to adopt *Robert's Rules of Order* to govern its proceedings, did not follow the proper procedure of moving, seconding, and voting on motion to adopt Policy FAA. As a result, the Appellants raise another argument that Policy FAA is illegal. Rule 52 of *Robert's Rules of Order* provides the following:

> When committees are appointed to investigate, or to report upon, certain matters, the report should close with, or be accompanied by formal resolutions covering all recommendations, so that when their report is made no motion is necessary except to adopt the resolutions.

As a committee of the MCBOE, the PC reviewed the public comments, staff responses, and amendments proposed by staff members. The PC Chairwoman, Patricia O'Neill, forwarded the PC report to the MCBOE along with a formal resolution. In accordance with Rule 52, no motion is necessary except to adopt the resolution, which it did on September 24, 2018.

The Appellants accuse the MCBOE of violating the *Accardi* doctrine[8] by failing to follow its own procedures. Subsequent Supreme Court cases have limited *Accardi* by providing an exemption for "agency housekeeping regulations" unless a violation of such regulations causes substantial prejudice. The case of *Pollock v. Patuxent Institution Board of Review*, 374 Md. 463 (2003), is instructive. The *Pollock* court did not adopt a *per se* rule invalidating agency action when an agency does not follow its own rules, regulations, and procedures. The court held that an inflexible adherence to *Accardi* could be too strict or general, and that even if an agency failed to comply with its own rules, "claimants must demonstrate prejudice resulting from the violation to have the agency action invalidated." *Id.* at 495-96. Here, however, the *Accardi* doctrine and its exceptions, as adopted by the *Pollock* court, do not apply because the MCBOE followed its procedures in adopting the revised Policy FAA.

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[8] *See United States ex rel. Accardi v. Shaugnessy*, 347 U.S. 260, 268 (1954) (holding that federal agencies must follow their own rules and that a failure to do so invalidates regulatory agency action).

In the Appellant's Response to the MCBOE's Motion, the Appellants claim that Regulation FAA-RA was adopted improperly and was therefore illegal. A careful review reveals that the MCBOE did not address this matter in its Motion or Response to the Appellants' Cross-Motion. The reason why the MCBOE did not address it was because the issue was never raised by the Appellants in its Appeal or Cross-Motion. Both parties were required to file their motions for Summary Decision at the same time, which they both did. It is fundamentally unfair to raise an issue that was not raised in the Appellants' Appeal or Cross-Motion without providing the opposing party an opportunity to respond. The Appellants failed to raise the issue in its Cross-Motion and cannot now raise it in its Response to the Motion, especially since the Respondent had no opportunity to respond. Whether this was intentional or not on the part of the Appellants is irrelevant. Fundamental fairness requires that I not consider this issue as part of my review of the Appellants' Cross-Motion.

B. The MCBOE Did Not Exceed Its Authority Under Policy FAA

The Appellants argue that the MCBOE exceeded its authority under Policy FAA to change the boundaries for middle schools that were either not slated for capital improvement or were under- or over-utilized.

A careful reading of Policy FAA does not support the Appellants' argument. Additionally, the authority of the MCBOE to establish school boundaries derives specifically from statute. Md. Code Ann., Educ. § 4-109(c) (2018). Nonetheless, the Appellants' argument that Policy FAA only limits school boundary adjustments to capital projects or under- or over-utilized schools is inconsistent with a fair reading of Policy FAA and its application.

> The fundamental goal of educational facilities planning is to provide a sound educational environment amid changing student enrollment, variations in the

> geographic distribution of students across schools, and the effects of racial, ethnic, and other socioeconomic and demographic diversity on educational programing.

(Bd. Ex. 2, § C(3), at 2.)

Facility planning also includes analysis of non-capital strategies to address capacity requirements and facility needs. (*Id.* § D(1)(e), at 4.) It may include boundary changes. This is specifically what is being addressed in the school redistricting case at issue in this case. Although it is conceded that there is no significant under- or over-capacity issue at either Rocky Hill or Neelsville Middle Schools, there is a significant issue at the high school level involving Clarksburg High School, Northwest High School, and Seneca Valley High School. In the 2024-2025 school year, Clarksburg High School is projected to be overcapacity by 900 students, Northwest High School will be overcapacity by 400 students, and Seneca Valley High School will have additional space for 1,304 students. Since all middle school students eventually articulate to high school, any study and analysis must include middle schools. For example, the students from Neelsville, Rocky Hill, and Hallie Wells middle schools currently articulate to Clarksburg High School. If the middle schools were not part of the boundary consideration using the Appellants' argument, the MCBOE would be powerless to make changes to relieve the overcrowding at Clarksburg High School without a costly capital improvement project. The MCBOE cannot be restricted in this matter. Both by statute and by Policy FAA, the MCBOE can relieve the over- and under-utilization issues at the high school level without having to burden the citizens of Montgomery County with funding an expensive capital project. Accordingly, Policy FAA places no restriction on including all middle schools, and in particular, Neelsville and Rocky Hill, in the MCBOE's redistricting considerations.

C. The MCBOE Did Not Violate the Open Meetings Act

In the Appellants' appeal, they argued that the Respondent "appears to have violated the Open Meetings Act . . . during the deliberations for the boundary plan." Appeal at 14. The Respondent argued in a Motion to Dismiss that the State Board lacks jurisdiction over the Open Meetings Act. On April 16, 2020, ALJ Klauber ruled that it is "appropriate for the OAH to consider Open Meetings Act issues raised in the context of the challenged redistricting action." Although the Respondent requests reconsideration of this Ruling in its Motion, I will not disturb that Ruling for the reasons set forth below.

The State Board has stated in certain opinions that it has "consistently declined to address issues related to the Open Meetings Act, holding that the State Board is not the appropriate forum for redress of such claims." *Murphy v. Anne Arundel Cty. Bd. of Educ.*, No. 15-36, at 8 (MSBE Oct. 27, 2015); *see also Kelley v. Queen Anne's Cty. Bd. of Educ.*, No. 18-24, at 5 (MSBE July 24, 2018) ("We have previously held that the Open Meetings Compliance Board, rather than the State Board, is the proper forum for bringing an Open Meetings Act complaint. We have accepted final decisions of the Open Meetings Compliance Board as evidence in other cases, but we have declined to make independent findings about Open Meetings Act violations.").

This case was not delegated to the OAH as an Open Meetings Act complaint. I do not need to decide whether the State Board has jurisdiction to decide an Open Meetings Act complaint. I may decide, however, whether an alleged violation of the Open Meetings Act bears directly on whether the challenged redistricting plan resulted from an unlawful procedure, in violation of COMAR 13A.01.05.06C(4).

The Open Meetings Act applies to "public bodies" and requires that "business be conducted openly and publicly." Md. Code Ann., Gen. Provisions § 3-102(a)(1), (c) (2019). To "meet" means "to convene a quorum of a public body to consider or transact public business." *Id.* § 3-101(g). Every conversation between members of a public body is not a meeting in which business is considered or transacted.

Ms. Cullinane wrote to MCBOE Member Dixon the morning after the November 19, 2019 open work session. In response to Ms. Cullinane's concerns, Ms. Dixon stated that she wished she could "share with you what went on behind the scenes related to all of this." (Bd. Ex. 5.) While this statement might be cryptic, the Appellants broadly speculate that the MCBOE conducted clandestine meetings to transact business. Taken in context, the simple interpretation is that Ms. Dixon is referring to a private conversation related to the work session held the previous night. Indeed, Ms. Dixon states in an affidavit that "[i]n the email I refer to 'behind the scenes,' which referred to a private conversation that I had with Member Smondrowski, prior to the November 26, 2019 vote" and "at no time between 2018 and 2019 were there any 'closed sessions' regarding the boundary review process for Clarksburg, Northwest and the Seneca Valley clusters."[9] (Bd. Ex. 8.)

In a Motion for Summary Decision, the opposing party must produce some competent evidence to rebut the facts and thereby cause a dispute of facts in order to withstand a ruling against them. Unsupported allegations and supposition are insufficient to withstand a

[9] In her affidavit, Ms. Dixon provides an incorrect date. She states, "Soon after the *November 26, 2019* open meeting, I sent a response email to a constituent explaining the perceived treatment of Board Member Rebecca Smondrowski at the open session." (Bd. Ex. 8) (emphasis added). Ms. Dixon's email was sent on November 20, 2019, the morning after the November 19, 2019 work session. (Bd. Ex. 6.) Because the vote for the boundary proposals took place on November 26, 2019, soon after the work session meeting on November 19, 2019, it is reasonable to read this error as a simple mix-up of dates, which does not change the uncontroverted fact that Ms. Dixon had a private conversation with Ms. Smondrowski.

Motion for Summary Decision. Accordingly, the Respondent did not violate the Open Meetings Act.

D. The MCBOE Did Not Adopt an Unconstitutional Boundary Reassignment

One of the four factors in Policy FAA section G(2) that may be considered in boundary recommendations is the demographic characteristics of students, which may be assessed through data on the "racial/ethnic composition of the student population, the socioeconomic composition of the student population, the level of English language learners, and other reliable demographic indicators and participation in specific educational programs." (Bd. Ex. 2.) Statistics were compiled for each high school and middle school in the boundary study for the 2018 to 2019 school year that included the percentage of Black or African American students, Asian students, Hispanic/Latino students, White students, students of Two or More Races, students in FARMS, and students in the ESOL program. Based upon the 2018 to 2019 school year statistics, each boundary option included the change that would result in the affected high school and middle school in race/ethnic composition, FARMS, and ESOL.

The U.S. Department of Education recognizes that diversity among the student population has educational value. (Bd. Ex. I.) Though implemented in October 2019 after the boundary study, the MSDE has established as a matter of policy that "[e]ach Maryland public school will provide every student equitable access to the educational rigor, resources, and supports that are designed to maximize the student's academic success and social/emotional well-being." COMAR 13A.01.06.01A. The policy is "designed to create and maintain environments that are equitable, fair, safe, diverse, and inclusive." COMAR 13A.01.06.04; *see also* Bd. Ex. F.

School systems do not need to put blinders on with respect to race. To be conscious of or consider racial composition in decision making, as opposed to using race as a determinative

factor, is not a presumptively unconstitutional racial classification. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-89 (2007) (finding racial classifications in student assignment plan unconstitutional) ("In the administration of the public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. . . . These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race . . . ." (Kennedy, J., concurring)); *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (stating that "we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination" and finding "race-conscious admissions policy" furthered a compelling governmental interest in student body diversity); *Eisenberg v. Montgomery Cty. Pub. Sch.*, 197 F.3d 123, 129, 131, 134 (4th Cir. 1999) (finding transfer policy that considers race as the "sole determining factor" unconstitutional racial balancing but stating "[w]e have not decided that diversity . . . either is or is not a compelling governmental interest").

The Appellants argue, pointing to the revised Policy FAA and the FARMS rate, that the MCBOE unconstitutionally reassigned students based on their race. During discussions on the drafting of language in Policy FAA, the student member mentioned African American history, including *Brown v. Board of Education* and integration in Montgomery County, and there were suggestions among committee members to make demographics a priority factor. The Appellants have tied these isolated facts, which do not point to any clear or uniform intent among the MCBOE, to an adverb ("especially") in order to elevate the constitutional implications of

language that was adopted in Policy FAA.[10] Thus, in the tentatively revised Policy FAA, under student demographics, Policy FAA instructed: "Options *should strive* to promote the creation of a diverse student body in each of the affected schools." (App. Ex. 7.) In the approved Policy FAA, Policy FAA instructed: "Options should *especially* strive to create a diverse student body in each of the affected schools *in alignment with Board Policy ACD, Quality Integrated Education.*" (Bd. Ex. 2.) The adopted policy added an adverb to language that by a plain reading is aspirational. Both "strive to promote" and "especially strive to create" is aspirational, rather than mandatory, language.[11]

The adopted policy FAA exhorts the MCBOE to "especially strive" to create a diverse student body. Diversity is under the demographics factor and is not synonymous with racial composition. Diversity also includes "socioeconomic composition of the student population, the level of English language learners, and other reliable demographic indicators and participation in specific educational programs." Demographics is one factor among four, and the adopted language in Policy FAA does not make racial diversity the sole and driving factor. Policy FAA section E(2) provides that "[s]taff developed options put forward for community input will reflect a range of approaches to advance each of the factors set forth in section G below and provide a rationale that demonstrates the extent to which any option advances each of those factors." (Bd. Ex. 2.) It directs consideration of all four factors.

Nor was racial diversity the overriding factor in the actual reassignment among the boundary options under Policy FAA. Under Option 11a, the Superintendent recognized that the

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[10] MCBOE member Jill Ortman-Fouse wrote on her Facebook page that "[s]tudents were strongly in support of the measure to help create more diverse schools as our schools have become more segregate[d] by race and income, following national trends. I would like to recommend that change again." (App. Ex. 17.)

[11] The language suggested by the MCBOE prior to the tentatively adopted policy is of a mandatory nature: "Where reasonable, options *should promote* the creation of a diverse student body in each of the affected schools." (App. Ex. 5) (emphasis added). The adopted language is weaker than the language originally proposed.

"three high schools are racially and ethnically diverse" and reduced the FARMS disparity, as well as maximized walkers and provided for contiguous boundaries for the three high schools. (Bd. Ex. 17.) The option that would have reduced the FARMS disparity the most among the three high schools was not chosen because it would decrease the number of walkers and increase transportation needs. (*Id.*)

The Appellants further argue that the inclusion of Policy ACD, *Quality Integrated Education*, in section G(2)(a) makes the entire Policy FAA unconstitutional and, therefore, illegal. (App. Ex. 8.) In support of its argument, the Appellants reference the case of *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123 (4th Cir. 1999). The Appellants correctly point out that *Eisenberg* involved the transfer of a student. The use of diversity profiles with the race of the student as a basis to approve or deny a transfer is what was determined to be unconstitutional. The court stated that the transfer policy was "administered with an end toward maintaining [a specific] percentage of racial balance in each school. This, by definition, is racial balancing." *Id.* at 131.

It is not unconstitutional to analyze the composition of school population over time, the rate of change in racial/ethnic groups, and prioritize need based on them. The court did not rule on the constitutionality of Policy ACD but on the transfer policy, which referenced a Quality Integrated Transfer Policy formed in 1975.[12] Regulation FAA-RA explains that the adopted language in Policy FAA, referencing Policy ACD, "means that a key consideration is significant disparity in the demographic characteristics between schools in the affected geographic areas that

[12] The court stated that the "transfer policy reflects the Quality Integrated Education policy goals of "avoiding racial isolation and promoting diverse enrollments." *Id.* at 130. The current Policy ACD, *Quality Integrated Education*, amended in 1993, states that "a major purpose of this policy is to provide a framework for actions designed to promote diversity so that the isolation of racial, ethnic, and socioeconomic groups is avoided and the full benefits of integration are achieved."

cannot be justified by any other factor." (Bd. Ex. 13.) Regulation FAA-RA and Policy FAA consider demographic characteristics but do not direct that demographics, especially racial diversity, be the decisive factor in making redistricting decisions. The adopted language in Policy FAA, both on its face and as applied, is not unconstitutional.

In order to bolster the weight of the racial/ethnic data factor, the Appellants argue that FARMS is a proxy for two racial groups, Hispanic/Latino and African American. FARMS is a distinct category, separate from racial and ethnic composition, included in the demographic characteristics of the proposed boundary options. Under Option 11a, among Neelsville and Rocky Hill middle schools, the greatest proposed change was among the FARMS population. The FARMS population decreased 12.8% at Neelsville and increased 17.6% at Rocky Hill. (Bd. Ex. 17.) This reassignment also avoided creating a split articulation for Rocky Hill. (Szyfer Affidavit.) The Appellants relate this effect, however, to cause; that is, because the FARMS redistribution has an effect on racial composition, the FARMS redistribution was undertaken to achieve specific racial compositions. This "cause" is not supported by the undisputed, material facts.

In conjunction with Policy FAA's mandate to consider demographic factors, the MCBOE chose FARMS as a measure of poverty to reflect the socioeconomic composition of the student population. FARMS data reported to the State Department of Education is a snapshot in time. (Karamihas Affidavit.) The Appellants rely upon a December 3, 2019 report from the Montgomery County Office of Legislative Oversight that 55% of students participating in the FARMS program were Hispanic/Latino and 32% were Black/African American. This report was issued after the boundary line decision. (App. Ex. 19.) This standalone statistic does not support

that FARMS is a reliable or valid measure for any particular racial group. Nor does tying this statistic with a handful of incidents support that the FARMS factor is a racial balancing measure.

The Appellants repeatedly highlight, among much outreach and discussion during the boundary reassignment process, certain MCBOE's members discussion of African American history, as well as the MCPS' Chief Operating Officer's invitation to the NAACP Parents' Council and Identity, Inc. to attend a focus group co-sponsored by these community organizations. The purpose of the NAACP Parents' Council is to "provide a forum through which interested citizens may offer assistance, guidance, and support to African American parents and students," and Identity, Inc. "creates opportunities for Latino and other historically underserved youth to realize their highest potential and thrive." *See supra* note 2. These two groups were invited by the MCPS' Chief Operating Officer to include, and gain feedback from, "communities that . . . may not have participated to the same extent as others." (Zuckerman Affidavit.)

The Appellants also generally reference the inclusion of the Seneca Valley PTA, which submitted a reassignment proposal that was included in a supplement to the Boundary Study Report, in the boundary reassignment process. (Karamihas Affidavit.) The Appellants seem to imply that the Seneca Valley PTA speaks for a particular demographic group but do not provide any foundation for its vague references. These isolated dots of communication, which acknowledge shameful racial history and reach out to "community groups that have traditionally been less active in accessing information through the usual channels," (Zuckerman Affidavit), do not connect to a conclusion that FARMS is a proxy for race and is so interchangeable with race as to constitute impermissible racial balancing.

E. The MCBOE's Boundary Reassignment Was Not Arbitrary or Unreasonable

The MCBOE first authorized a boundary study to explore secondary school reassignments in the Clarksburg, Northwest, and Seneca Valley high school clusters. Initially, there were three middle schools involved in the evaluation, but that was expanded by the MCBOE to include all middle schools in these clusters to evaluate enrollments and split articulations among the middle schools. It has previously been discussed how two of the high schools were projected to be significantly overcapacity by the 2025-2026 school year and that one of the high schools, Seneca Valley, would be significantly underutilized. To develop options for the Superintendent and the MCBOE to consider, the planning and evaluation process would be done in accordance with Policy FAA, including the four factors, knowing that it may not be feasible to reconcile every recommendation with every factor.

The four factors include demography, geography, stability, and facility utilization. The stability factor, the factor that is used to consider the stability of the school assignment over time, was considered; however, since the only school that had recently undergone a new reassignment was Hallie Wells Middle School in 2016, there was no need to further delve into the stability factor since none of the other schools had any recent reassignments. Therefore, after determining that the stability factor was not necessary for further analysis, the Superintendent recommended to the MCBOE an option that included a rationale for the remaining three factors, which were extensively considered and reviewed by the MCPS staff and the public before a recommendation was finally made.

There was extensive stakeholder input in the option development process. There were twelve community-wide meetings, frequently asked questions were prepared, flyers were sent to schools, and webcasts, along with targeted focus groups, were held. Initially, there were eight boundary options under consideration, which was later expanded to fourteen options after

receiving input from stakeholders. MCPS conducted surveys, with several thousand individuals responding to each survey, and held meetings where several hundred attended.

The guiding parameters in developing the fourteen options, having previously addressed the stability factor, were the remaining three factors: demography, geography, and facility utilization. The Superintendent, in recommending his preferred option to the MCBOE, also wanted to avoid triple articulations at the middle school level and maintain walkers at middle and high schools, knowing that none of the options would provide full capacity relief at Clarksburg and Northwest High Schools. The construction of the new Crown High School would provide capacity relief to Northwest High School once it was built. Based on the input from stakeholders and a review of the fourteen options, the Superintendent recommended, and the MCBOE adopted, Option 11a as modified on November 26, 2019.

By selecting this option, the overutilization rate at Clarksburg High School would be reduced from 146 percent overcapacity to 118 percent. Northwest High School would be reduced from 118 percent to 113 percent, and Seneca Valley High School's under capacity would change from 49 percent to 99 percent in the last year of the six-year planning period. (Bd. Ex. 17.) Modified option 11a provides for contiguous boundaries for the three high schools and ensures current and future walkers are not reassigned to a high school requiring bus transportation. By reducing the number of buses and maximizing the number of walkers, the fiscal impact on MCPS is minimized. A slight increase in travel time is negligible. The geographic factor would finally address the split articulation that has existed for Great Seneca Creek Elementary School, causing its students to now articulate to Kingsview Middle School.

The Superintendent's goal for the demographic factor was to reduce the disparity of the FARMS percentage at the three high schools. The proposed modified 11a option would reduce

the FARMS disparity at the three high schools from 16.5 percent to 12.9 percent. (*Id.*) The FARMS disparity could have been reduced even further if another option (Option 4) was considered, but that option would only decrease the number of walkers and increase transportation needs, thus contradicting one of the Superintendent's stated goals.

Finally, the FARMS disparity between Rocky Hill Middle School and Neelsville Middle School would be reduced from 44.2 percent to 15.9 percent. The change would have little impact on the utilization rates at these schools. (*Id.*)

The Superintendent reviewed the options and presented his recommendations to the MCBOE on October 16, 2019. He concluded, "Addressing the space needs for middle and high schools while creating diverse student body populations and ensuring that students attend schools close to their home is a complex goal." (*Id.*) It is not an easy decision to make, and it is practically a given that certain stakeholders will disagree with whatever option is ultimately selected and approved. However, the analysis is not whether one agrees or disagrees with the selection, but rather whether it is contrary to sound educational policy, or a reasoning mind could not have reasonably reached the conclusion the local board or the Superintendent reached. COMAR 13A.01.05.06B.

As noted in *Bernstein v. Board of Education of Prince George's County*, 245 Md. 464 (1967), a challenge that there "may have been other plans that would have worked equally well, or may, in the opinion of some, have been better" is not sufficient to establish that "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 [Appellants] to show that their plan 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 Balt. Cty.*, MSBE No. 74-13 (1974). The MCBOE's decision was not arbitrary or capricious. It was made only after careful and thoughtful examination of many options and the impact each one of them had on how it can achieve the stated goals.

The redistricting plan selected by the MCBOE on November 26, 2019 represents sound education policy. First, it has already been established that Policy FAA was not illegal. The MCBOE adopted the policy and the MCPS staff used that policy to develop options for the Superintendent and the MCBOE to consider. The MCBOE are elected officials who represent the constituents that voted them into office. They are charged, in this case, to develop and adopt a plan of redistricting that include the factors outlined in Policy FAA. With input from many stakeholders over a long period of time, and after holding numerous meetings with input from thousands of community members, the elected officials adopted a plan of redistricting that took into consideration each of the factors listed in Policy FAA. The undisputed facts indicate that the MCBOE sought to reduce the disparity of the FARMS populations among schools; address the facility utilization at the schools, while maximizing walkers; and reduce negative transportation impacts on families, resources, and the environment. This is consistent with sound educational policy. COMAR 13A.01.05.06B(1). The staff of the MCPS and the MCBOE should be commended for its diligence and work in developing various options, providing ample opportunity for the public to provide input, and ultimately selecting an option that they deem best achieves the stated goals.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent's Motion for Summary Decision should be granted because, based upon the undisputed facts, there is no genuine dispute as to any material fact and it has shown that it is entitled to prevail as a matter of law. COMAR 28.02.02.12D(4).

I further conclude as a matter of law that the Appellants' Motion for Summary Decision is denied because there is no genuine dispute as to any material fact and the Appellants are not entitled to prevail as a matter of law. COMAR 28.02.02.12D(4).

I further conclude based upon the undisputed facts and as a matter of law, that the Respondent's decision of November 26, 2019 to a redistricting plan that reassigned the public school boundaries for the Clarksburg, Northwest, and Seneca Valley clusters was based on sound educational policy and was not arbitrary, unreasonable, or illegal. COMAR 13A.01.05.06B, C.

RECOMMENDED ORDER

I RECOMMEND that the Motion for Summary Decision filed by the Montgomery County Board of Education be **GRANTED**.

I **RECOMMEND** that the Motion for Summary Decision filed by the Appellants be **DENIED**.

I FURTHER RECOMMEND that the Montgomery County Board of Education's redistricting plan that reassigned the public school boundaries for the Clarksburg, Northwest, and Seneca Valley clusters be **AFFIRMED**.

As a result of these Recommended Orders, the hearing scheduled to begin on July 22, 2020 is hereby cancelled.

June 26, 2020
Date Decision Issued

S. Breslow
Stuart G. Breslow
Administrative Law Judge

SGB/cj
#186173

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 receipt of the decision; parties may file written responses to the exceptions within fifteen days of receipt of the exceptions. Both the exceptions and the responses shall be filed with the Maryland State Department of Education, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, with a copy to the other party or parties. COMAR 13A.01.05.07F. The Office of Administrative Hearings is not a party to any review process.

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MELISSA VAN HERKSEN, ET AL.,	*	**BEFORE STUART G. BRESLOW,**
APPELLANTS	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE OF**
BOARD OF EDUCATION OF	*	**ADMINISTRATIVE HEARINGS**
MONTGOMERY COUNTY	*	**OAH CASE No.: MSDE-BE-09-20-01453**

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APPENDIX – FILE EXHIBT LIST

The following documents were attached to the Respondent's Motion:

Affidavit of Derek G. Turner, May 18, 2020

Affidavit of Deborah Szyfer, May 18, 2020, with attached Option 11A

Bd. Ex. 1	Local Board Policy BFA, *Policysetting*, amended July 27, 2005
Bd. Ex. 2	Local Board Policy FAA, *Educational Facilities Planning*, amended September 24, 2018
Bd. Ex. 3	Memorandum from Patricia B. O'Neill to Local Board re: "Tentative Action, Policy FAA, Long-range Educational Facilities Planning," April 12, 2018
Bd. Ex. 4	Local Board Informational Summary, April 12, 2018
Bd. Ex. 5	Email from Melissa van Herksen to John Garza, December 11, 2019
Bd. Ex. 6	Email string between Allison Cullinane and Jeanette Dixon, November 20, 2019
Bd. Ex. 7	Local Board's Revised Facilities and Boundaries Work Session, November 19, 2019
Bd. Ex. 8	Affidavit of Jeanette E. Dixon, May 15, 2020
Bd. Ex. 9	Letter from Jack R. Smith, Superintendent of Schools, to Michael Durso and Local Board, October 23, 2017
Bd. Ex. 10	Memorandum from Jack R. Smith to Local Board re: "Exploring the Reassignment of Clarksburg and Northwest High School Students to Seneca Valley High School," November 27, 2017

Bd. Ex. 11 Letter from Jack R. Smith to Michael Durso and Local Board, October 29, 2018

Bd. Ex. 12 Local Board Policy FAA, *Educational Facilities Planning*, amended September 24, 2018 (same as Ex. 2)

Bd. Ex. 13 Local Board Regulation FAA-RA, *Educational Facilities Planning*, revised May 2, 2019

Bd. Ex. 14 Memorandum from Jack R. Smith to Local Board re: "Clarksburg, Northwest, and Seneca Valley High Schools Boundary Study," November 27, 2018

Bd. Ex. 15 Clarksburg, Northwest, and Seneca Valley Clusters Boundary Study Report, Executive Study, September 2019

Bd. Ex. 16 Supplement to the Clarksburg, Northwest, and Seneca Valley Clusters Boundary Study Report, October 2019

Bd. Ex. 17 Superintendent's Recommendation on the Boundary Study for the Clarksburg, Northwest, and Seneca Valley Clusters, October 16, 2019, with Attachments A & B

Bd. Ex. 18 Agenda Item Details, October 28, 2019 & November 4, 2019

Bd. Ex. 19 Memorandum from Jack R. Smith to Local Board re: "Supplement A—Superintendent's Recommendation for the Clarksburg, Northwest, and Seneca Valley Clusters Boundary Study," November 26, 2019

Bd. Ex. 20 Local Board Facilities and Boundaries Decisions Informational Summery, November 26, 2019

Bd. Ex. 21 Memorandum from Jack R. Smith to Local Board re: "Supplement A—Superintendent's Recommendation for the Clarksburg, Northwest, and Seneca Valley Clusters Boundary Study," November 26, 2019

Bd. Ex. 22 Current Boundary Articulations

Bd. Ex. 23 Proposed Middle School Boundary Reassignments

Bd. Ex. 24 Policy Management Committee Meeting Informational Summary, September 13, 2018

The following documents were attached to the Appellants' Cross-Motion:

App. Ex. 1 Memorandum from Jack R. Smith to Local Board re: "Supplement A—Superintendent's Recommendation for the Clarksburg, Northwest, and Seneca Valley Clusters Boundary Study," November 26, 2019

App. Ex. 2 Expert Report of Sheila Weiss, Ph.D.

App. Ex. 3 Memorandum from Jack R. Smith to Local Board re: "Exploring the Reassignment of Clarksburg and Northwest High School Students to Seneca Valley High School," November 27, 2017

App. Ex. 4 Memorandum from Jack R. Smith to Local Board re: "Clarksburg, Northwest, and Seneca Valley High Schools Boundary Study," November 27, 2018

App. Ex. 5 Draft 2 of Local Board Policy FAA, March 13, 2018

App. Ex. 6 Draft 3 of Local Board Policy FAA, September 6, 2018

App. Ex. 7 Memorandum from Patricia B. O'Neill to Local Board re: "Tentative Action, Policy FAA, Long-range Educational Facilities Planning," April 12, 2018, with Attachment A, Committee Recommended Draft of Local Policy FAA, April 12, 2018 and Attachment B, Local Board Policy FKB, *Sustaining and Modernizing Montgomery County Public Schools (MCPS) Facilities*, amended December 7, 2010

App. Ex. 8 Local Board Policy ACD, *Quality Integrated Education*, amended May 17, 1993

App. Ex. 9 Memorandum from Patricia B. O'Neill to Local Board re: "Final Action, Policy FAA, Long-range Educational Facilities Planning," September 24, 2018, with Attachment A, Committee Recommended Draft of Local Policy FAA, September 24, 2018

App. Ex. 10 Clarksburg, Northwest, and Seneca Valley Clusters Boundary Study, Public Information Meeting Division of Capital Planning, January 23 & 24, 2019

App. Ex. 11 Local Board Policy FAA, *Educational Facilities Planning*, amended September 24, 2018

App. Ex. 12 Local Board Regulation FAA-RA, *Educational Facilities Planning*, revised May 2, 2019

(App. Ex.)[1] Duplicate of Ex. 12

App. Ex. 14 Superintendent's Recommendation on the Boundary Study for the Clarksburg, Northwest, and Seneca Valley Clusters, October 16, 2019, with Attachments A & B

App. Ex. 15 Superintendent's Recommendation Clarksburg, Northwest, and Seneca Valley Clusters Boundary Study, updated October 21, 2019

[1] Unmarked

App. Ex. 16 Local Board Policy BFA, *Policysetting*, amended July 27, 2005

App. Ex. 19 MCPS Performance and Opportunity Gaps, December 3, 2019

The following documents were attached to the Appellants' Corrected Cross-Motion:

App. Ex. 2 Affidavit of Sheila Weiss

App. Ex. 17 Affidavit of Louella Matarazzo; Facebook Excerpts of Jill Ortman-Fouse, September 11, 2018 & September 28, 2018

App. Ex. 18 FAQs for Clarksburg, Northwest, and Seneca Valley High Schools Boundary Study, February 1, 2019

The following documents were attached to the Respondent's Response to the Appellants' Cross-Motion:

Affidavit of Andrew Zuckerman

Affidavit of Adrienne Karamihas

Bd. Ex. A FY 2021 Capital Budget, Montgomery County Public Schools

Bd. Ex. B Seneca Valley HS – Current Revitalizations/Expansions

Bd. Ex. C Memorandum from Patricia B. O'Neill to Local Board re: "Final Action, Policy FAA, Long-range Educational Facilities Planning," September 24, 2018

Bd. Ex. D Local Board Policy ACD, *Quality Integrated Education*, amended May 17, 1993

Bd. Ex. E Memorandum from Karen B. Salmon to Local Board re: "COMAR 13A.04.05 *Education That is Multicultural* REPEAL COMAR 13A.01.06 *Educational Equity* (NEW) ADOPTION, with attached regulation and MCPS Comments

Bd. Ex. F MSDE, *Equity and Excellence*

Bd. Ex. G Jennifer Ayscue, Erica Frankenberg, & Genevieve Siegel-Hawley, *The Complementary Benefits of Racial and Socioeconomic Diversity in Schools*, The National Coalition on School Diversity, March 2017

Bd. Ex. H The Century Foundation, *The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms*, April 29, 2019

Bd. Ex. I List of Policy Guidance documents on Supporting Racial Diversity, September 30, 2016

Bd. Ex. J U.S. Department of Justice & U.S. Department of Education, *Questions and Answers About Fisher v. University of Texas at Austin II*, September 30, 2016; U.S. Department of Justice and U.S. Department of Education, *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*

Bd. Ex. K FAQs for Clarksburg, Northwest, and Seneca Valley High Schools Boundary Study, February 1, 2019

The following documents were attached to the Appellants' Response to the Respondent's Motion:

App. Ex. 20 Memorandum from Patricia B. O'Neill to Local Board re: "Final Action, Policy FAA, Long-range Educational Facilities Planning," September 24, 2018

App. Ex. 21 MCPS Bulletin, Comment Sought on Two Board of Education Policies, April 25, 2018

App. Ex. 22 Page 1 of Local Board Regulation FAA-RA, *Long-range Educational Facilities Planning*; Error Message

App. Ex. 23 Public Comment Sought on Amendments to Policy JEE

App. Ex. 24 Page 1 of Local Board Regulation FAA-RA, *Educational Facilities Planning*; Error Message

App. Ex. 25 No Exhibit Attached

App. Ex. 26 Superintendent's Recommendation on the Boundary Study for the Clarksburg, Northwest, and Seneca Valley Clusters, October 16, 2019, with Attachments A & B

App. Ex. 27 Timeline for the Development of Board Policy FAA, *Educational Facilities Planning*, and MCPS Regulation FAA-RA, *Educational Facilities Planning*

App. Ex. 28 Local Board Regulation CHA-RA, Developing and Publishing Regulations, revised January 27, 2016

App. Ex. 29 Memorandum from Patricia B. O'Neill to Local Board re: "Recommended Action, Policy JEE, *Student Transfers*," January 9, 2020

App. Ex. 30 Montgomery County Public Schools Policies and Regulations: Start to Finish

The following documents were attached to the Appellants' Reply to the Respondent's Response[2]:

App. Ex. 25 MCBOE Handbook, revised June 2015

App. Ex. 31 Draft for Public Comment of Local Board Policy BFA, November 13, 2018

App. Ex. 32 Memorandum from Judith R. Docca, Chair, Board of Education Policy Management Committee, to Local Board re: "Final Action, Policy BFA, Policysetting," April 9, 2019, with Attachments A & B

App. Ex. 33 No Exhibit Attached

App. Ex. 34 Local Board Policy ABA, *Community Involvement*, amended June 13, 2013

App. Ex. 35 Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws,"* Texas Law Review, August 1985

[2] Although I did not accept the Appellants' Reply, I am listing the attached exhibits for completeness.

MELISSA VAN HERKSEN, ET AL.,	*	**BEFORE GERALDINE A. KLAUBER,**
APPELLANTS	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE OF**
BOARD OF EDUCATION OF	*	**ADMINISTRATIVE HEARINGS**
MONTGOMERY COUNTY	*	**OAH CASE NO.: MSDE-BE-09-20-01453**

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

RULING ON APPELLANTS' MOTION FOR DEFAULT JUDGMENT, OR IN THE ALTERNATIVE, TO PROCEED WITHOUT THE MONTGOMERY COUNTY BOARD OF EDUCATION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
DISCUSSION
CONCLUSION OF LAW
PROPOSED ORDER

On or about November 26, 2019, the Board of Education of Montgomery County (Respondent or Local Board) approved a school redistricting plan that reassigned the public school boundaries for the Clarksburg, Northwest, and Seneca Valley clusters. On December 27, 2019, the Appellants filed this appeal challenging the redistricting plan approved by the Respondent. The nine Appellants are parents of children who attend Pre-K, Clarksburg Elementary School, Rocky Hill Middle School, and Clarksburg High School. By letter dated January 15, 2020, the Maryland State Board of Education (State Board) transmitted this matter to the Office of Administrative Hearings (OAH) to hold a contested case hearing and issue a proposed decision. Code of Maryland Regulations (COMAR) 13A.01.05.07A(1), E.

On February 18, 2020, the Respondent filed a Motion to Dismiss in Part (Motion to Dismiss) the Appellants' appeal for lack of jurisdiction. On March 2, 2020, the Appellants filed a Motion to Strike the Respondent's Motion to Dismiss based on untimeliness. On March 9, 2020, the Respondent filed an Opposition to the Appellants' Motion to Strike; on March 19,

2020, the Appellants filed a Reply to the Respondent's Opposition to the Motion to Strike; and on March 24, 2020, the Respondent filed a Response to the Appellants' Reply to the Respondent's Opposition to the Motion to Strike. Contemporaneously with this order, I have issued an order denying the Appellants' the Motion to Strike the Respondent's Motion to Dismiss in Part.

On March 3, 2020, the Appellants filed a Motion for Default Judgment, or in the Alternative, to Proceed without the Montgomery County Board of Education (Motion for Default). On March 19, 2020, the Respondent filed an Opposition to the Motion. On March 30, 2020, the Appellants filed a Reply to the Respondent's Opposition to the Motion.

ISSUE

Is the Appellant entitled to a default judgment in its favor?

SUMMARY OF THE EVIDENCE

The following exhibit was attached to Appellants' Motion:

Ex. 1 - Memorandum from the State Board Assistant Attorney General Jackie La Fiandra to Dr. Jack Smith and Judith Bresler, Esquire, January 15, 2020; Letter from State Board Assistant Attorney General Jackie La Fiandra to OAH, January 15, 2020.

The following exhibits were attached to the Respondent's Opposition to the Appellants' Motion:

Ex. 1 - Revised Memorandum from State Board Assistant Attorney General Jackie La Fiandra to Dr. Jack Smith and Judy Bresler, Esquire, January 15, 2020;

Ex. 2 - Board of Education Opposition to Appellant's Motion to Strike; and

Ex 3 -Letter from Jackie LaFiandra to the OAH, January 15, 2020.

DISCUSSION

Appeals from actions of local boards are regulated by COMAR 13A.01.05. The Appellants filed an appeal of the Local Board's final decision on a school redistricting plan.

Once an appeal has been filed, a local board may file either a memorandum in response to an appeal or a motion to dismiss the appeal. COMAR 13A.01.05.03 B and C. The State Board, for "good cause shown," may shorten or extend time limitations. COMAR 13A.01.05.04B(1).

Appeals must be filed no later than thirty days after the date of the decision of the local board or other individual or entity which issued the decision on appeal. COMAR 13A.01.05.02B. The rules provide that within twenty days after the State Board sends a copy of the appeal to the local superintendent, "the respondent shall file a memorandum in response to the appeal or a motion to dismiss, whichever is appropriate." COMAR 13A.01.05.03A. The Appellants complain that the Respondent's only submission subsequent to their appeal was its February 18, 2020 Motion to Dismiss, which was not filed with the State Board and not filed within twenty days from the State Board's forwarding the appeal to the superintendent. Moreover, the Respondent did not apply for an extension of time for good cause under COMAR 13A.01.05.04B(1). The Appellants contend, based on the Respondent's failure to timely file a response to the appeal with the State Board, that the Respondent must be found in default and request that I void the redistricting adjustments adopted by the Respondent or, in the alternative, that I exclude the Respondent from participating in the hearing.

In support of the Motion for Default, the Appellants refer to the filing timeline of the appeal. The appeal was filed with the State Board on December 26, 2019. By memorandum dated January 15, 2020, the Assistant Attorney General for the Maryland State Board notified the

Respondent of the appeal and that a response to the appeal was due to be filed by February 7, 2020. The Appellants rely upon COMAR 13A.01.05.03A, B and C, which state:

A. Time for Response. Within 20 days after the State Board sends a copy of the appeal to the local superintendent, the respondent shall file a memorandum in response to the appeal or a motion to dismiss, whichever is appropriate.

B. Motion to Dismiss.

(1) A motion to dismiss shall specifically state the facts and reasons upon which the motion is based that may include, but are not limited to, the following:

(a) The local board has not made a final decision;

(b) The appeal has become moot;

(c) The appellant lacks standing to bring the appeal;

(d) The State Board has no jurisdiction over the appeal; or

(e) The appeal has not been filed within the time prescribed by Regulation .02B of this chapter.

(2) The State Board may, on its own motion, or on motion filed by any party, dismiss an appeal for one or more of the reasons listed in §B(1) of this regulation.

C. Memorandum in Response to the Appeal.

(1) The respondent may file a memorandum in response to the appeal.

(2) The memorandum shall contain the following:

(a) A concise statement of the questions presented for review;

(b) A statement of the facts material to those questions;

(c) An argument on each question, including citations of authority, reference to relevant legal principles, and reference to pages of the record and exhibits relied on, if any;

(d) A short conclusion stating the relief sought; and

(e) Any supporting documents, exhibits, and affidavits.

(3) The appellant may file a response to the memorandum, and the local board may file a reply to the response.

Under COMAR 13A.01.05.03C(4), the "State Board may decide the appeal on the merits based on the filings." *See also* COMAR 13A.01.05.07A(2) (stating that "if a motion to dismiss is filed, the State Board may rule on the motion without first transferring the appeal to the [OAH]").

The State Board declined to rule on any motions or decide the appeal. Instead, on January 15, 2020, the same day that the State Board notified the local superintendent of the appeal and prior to the expiration of the twenty-day response period, the State Board transferred the matter to OAH for a hearing. (Respondent's Ex. 3). Subsequent to the transfer of the matter to OAH, the State Board revised the January 15, 2020 notice of appeal and informed the parties that the appeal had been forwarded to the OAH. (Respondent Exs. 1and 3). In the revised notice, the State Board specifically deleted the statements regarding the Respondent's required response and timeframes. (Respondent's Ex. 1). The State Board delegated its authority to decide the appeal to the OAH. *See* Delegation Letter from Md. State Dep't of Educ. to Md. Office of Admin. Hearings (Dec. 14, 2016). COMAR 28.02.01.04A(1).

COMAR 13A.01.05.03 does not set forth a penalty for failing to comply with the twenty-day time period for responding to an appeal *before the State Board.* Even if a filing before the State Board is late, the appropriate remedy is not a default judgment. *See, e.g.*, *Michael D. v. Anne Arundel Cty. Bd. of Educ.*, MSBE Op. No. 20-07 (2020) (holding that it would consider the appeal and the record but not the Local Board's late response). Any sanction must be within the administrative agency's statutory or regulatory authority. *See Berkshire Life Ins. Co. v. Md. Ins. Admin.*, 142 Md. App. 628, 672 (2002); *Neutron Products, Inc. v. Dep't of the Env't*, 166 Md. App. 549, 584, 592 (2006).

Contemporaneously with this Order, I issued an Order denying the Appellant's Motion to Strike the Respondent's Motion to Dismiss in part, which was filed on February 18, 2020. I found that after the State Board transferred the appeal to the OAH, the Motion to Dismiss was properly filed before the OAH for my consideration. And even if I were to find that the Motion to Dismiss was filed late with the OAH, which I do not, the remedy would not be to find the Respondent in default and void the redistricting adjustments adopted by the Respondent or exclude the Respondent from participating in the hearing. The OAH rules do not support that conclusion. That rule, found at COMAR 28.02.01, provides as follows:

> .23 *Failure to Attend or Participate in a Hearing, Conference, or Other Proceeding; Default.*
> A. If, after receiving proper notice, a party fails to attend or participate in a prehearing conference, hearing, or other stage of a proceeding, the judge may proceed in that party's absence or may, in accordance with the hearing authority delegated by the agency, issue a final or proposed default order against the defaulting party.

The Respondent did not fail to participate in any stage of a proceeding after the matter was transmitted to OAH for a hearing.

CONCLUSION OF LAW

I conclude, as a matter of law, the Appellant's Motion for Default, Or in The Alternative, to Proceed Without the Montgomery County Board of Education, has no merit. Md. Code Ann., State Gov't § 10-205 (2014); COMAR 13A.01.05.07; COMAR 13A.01.05.08; COMAR 28.02.01.01, 28.02.01.02, 28.02.01.11.

PROPOSED ORDER

I order that the Appellants' Motion for Default Judgment, Or in The Alternative, to Proceed Without the Montgomery County Board of Education, is **DENIED**.

April 7, 2020
Date Order Mailed

Geraldine A Klauber/mp
Geraldine A. Klauber
Administrative Law Judge

GAK/emh
#185243

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