

MARTIN VASSILEV
DIMITROV (#27)

Appellant,

v.

HOWARD COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION

Opinion No. 21-23

OPINION

Appellant filed an appeal of the November 21, 2019 decision of the Howard County Board of Education (“local board”) approving the Attendance Area Adjustment Plan for School Year 2020-2021. Appellant made various arguments that the redistricting decision is arbitrary, unreasonable or illegal, including that the local board relied on inaccurate Free and Reduced-Price Meal (“FARM”) data in making its decision and the local board violated the Open Meetings Act (“OMA”).

On January 16, 2020, we transferred the case pursuant to COMAR 13A.01.05.07A(1) to the Office of Administrative Hearings for review by an Administrative Law Judge (“ALJ”). On June 23, 2020, the ALJ issued a Recommended Order to grant, in part, the local board’s motion for summary decision.

The ALJ conducted virtual hearings on July 23, 24, 29 and 30, 2020, and August 3, 11, and 20, 2020.

On October 14, 2020, the ALJ issued a Proposed Decision concluding that the Appellant failed to show, by a preponderance of the evidence, that the local board’s redistricting decision was arbitrary, unreasonable or illegal. The ALJ found that the Appellant failed to demonstrate that the local board’s decision resulted from reliance on incorrect or faulty data.¹ The ALJ further found that the Appellant failed to demonstrate that the OMA violation rendered the redistricting decision illegal. Although the Appellant initially made some other arguments in his appeal, the ALJ deemed them waived because the Appellant did not present any evidence to support the claims and failed to raise the claims during the hearings. The ALJ recommended that we dismiss the appeal.

Appellant did not file exceptions to the ALJ’s Recommended Order or Proposed Decision.

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

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

Signatures on File:

Clarence C. Crawford
President

Jean C. Halle
Vice-President

Gail H. Bates

Charles R. Dashiell, Jr.

Susan J. Getty

Vermelle Greene

Rose Maria Li

Rachel McCusker

Joan Mele-McCarthy

Lori Morrow

Warner I. Sumpter

Absent:

Holly C. Wilcox

Dissent of Shawn D. Bartley:

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

April 27, 2021

MARTIN VASSILEV DIMITROV,

APPELLANT

v.

HOWARD COUNTY

BOARD OF EDUCATION

* BEFORE JOY L. PHILLIPS,

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE OF

* ADMINISTRATIVE HEARINGS

* OAH No.: MSDE-BE-09-20-01684 (File #27)

* * * * *

PROPOSED DECISION

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

STATEMENT OF THE CASE

On November 21, 2019, the Howard County Board of Education (Local Board or Board) passed the Attendance Area Adjustment Plan for School Year 2020-2021 (Redistricting Plan). On December 20, 2019, the Appellant, who lives in Polygon 1132, filed an appeal challenging the Redistricting Plan on numerous grounds (Appeal).¹

By letter dated January 16, 2020, the Maryland State Board of Education (State Board or MSDE) transmitted the appeal to the Office of Administrative Hearings (OAH) for a contested case hearing and to issue a proposed decision containing findings of facts, conclusions of law, and recommendations.² Code of Maryland Regulations (COMAR) 13A.01.05.07A(1), E.

¹ A. This was one of thirty-six appeals challenging the Redistricting Plan. B. The term polygon is defined later in this Proposed Decision.
² The letter transmitting the appeals to the OAH requested the hearings be expedited, but the parties did not file any such motion, as was permitted pursuant to Code of Maryland Regulations 28.02.01.06. Nevertheless, I scheduled the matter as soon as practical, as per the regulation.

On February 20, 2020, I held an in-person prehearing conference on the Appeal at the OAH in Hunt Valley, Maryland. Claude de Vastey Jones, Esquire, and Judith S. Bresler, Esquire, represented the Local Board. Shavina Kumar Mukesh, Esquire, and Edward Tayter, Esquire, represented the Appellant.³ A motions schedule was agreed upon and later extended at the request of the parties.⁴

The Local Board filed motions to dismiss in twelve cases on or about February 29, 2020. My rulings were issued on March 20 and 25, 2020. On March 27, 2020, the Local Board filed a Response to Appeal, accompanied by twenty-five exhibits.⁵

On May 4, 2020, the Local Board filed a Motion for Summary Decision. On May 4, 2020, the Appellant filed a Motion for Summary Decision. On June 22, 2020, I convened a prehearing conference via videoconferencing.⁶ The prehearing conference was continued to July 6, 2020. On June 23, 2020, I issued a ruling on the Motions for Summary Decision.⁷ At the July 6, 2020 prehearing conference, the remaining issues were scheduled for hearing.

On July 23, 24, 29 and 30, 2020, and August 3, 11, and 20, 2020, I convened a contested case hearing via videoconferencing to address whether the decision regarding Polygon 1132 was arbitrary or unreasonable because it was based on inaccurate Free and Reduced Meals (FARM)

³ These representatives appeared for their clients at all proceedings.

⁴ I frequently extended deadlines for filing in the appeals due to the constraints imposed by the COVID-19 pandemic.

⁵ One copy of those exhibits will be forwarded to the State Board with the files for all appeals.

⁶ This matter was conducted remotely because of closures due to the COVID-19 pandemic.

⁷ I recommended the Appellant's Motion for Summary Decision be denied. I recommended the Local Board's Motion for Summary Decision be granted on the issues of whether race was a consideration in the boundary change of Polygon 1132, whether the Appellant had notice and an opportunity to be heard, and whether Chair Ellis abused her discretionary power.

data, and whether the Plan was illegal due to an Open Meetings Act violation on the Redistricting Plan.⁸ The Appeal was consolidated with other appeals for hearing on these issues.⁹

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

ISSUES

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

SUMMARY OF THE EVIDENCE

Exhibits

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

Testimony

The Appellants presented the testimony of the following witnesses:

- Renee Kamen, Howard County Public School System (HCPSS) Former Manager of School Planning,¹⁰ who was recognized as an expert in school planning

⁸ The Appellant raised two other issues in his Appeal that he failed to address at the hearing: He contended the Redistricting Plan did not constitute sound educational policy because "individual Board members routinely deviated from their stated goals," and because the Board "completely ignored the 'very real concern' that a severe bus driver shortage in Howard County would pose to safety, budget, and the health and well-being of students within the school system." (Appeal, p. 5). The Appellant raised neither of these issues during the hearing and produced no evidence in support of his assertions on either issue. Accordingly, I consider those issues to have been waived.

⁹ A. For certain issues, I consolidated the following appeals for hearing: Neidermyer (File #09), MSDE-BE-09-20-01502; Mummert (File #15), MSDE-BE-09-20-01599; Dimitrov (File #27), MSDE-BE-09-20-01684; Dewani (File #31), MSDE-BE-09-20-01773; MacCormack and Tayter (File #32), MSDE-BE-09-20-01781; Xue, et al., (File #33), MSDE-BE-09-20-01821; Tucker (File #34), MSDE-BE-09-20-01834; and Alacron (File #30), MSDE-BE-09-20-01769. B. At the consolidated hearing, I accepted on behalf of all of the Appellants all exhibits introduced by any of the Appellants and I considered on behalf of all of the Appellants all of the arguments and objections made by any of the Appellants.

¹⁰ At a hearing on September 3, 2020, Ms. Kamen announced that she had resigned from HCPSS.

- Timothy J. and Stephanie K. Mummert (File #15) (Appellants in MSDE-BE-09-20-01599)
- Jim and Archana Neidermyer (File #09) (Appellants in MSDE-BE-09-20-01502)
- Dr. Jill Tayter (File #32) (Appellant in MSDE-BE-09-20-01781)
- Local Board Members:
 - Kirsten Coombs
 - Christina Delmont-Small
 - Vicky Cutroneo
 - Mavis Ellis (Chair)
 - Jennifer S. Mallo

The Local Board presented the testimony of the following witness:

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

FINDINGS OF FACTS

I find the following facts by a preponderance of the evidence:

1. On January 24, 2019, the Local Board initiated a county-wide school boundary review that potentially impacted every school and neighborhood in Howard County, Maryland. The resulting school area adjustment would take effect during the 2020-2021 school year.
2. There are forty-two elementary schools, twenty middle schools, and twelve high schools in Howard County, for a total of seventy-four schools.
3. The impetus for the boundary review was the number of schools in Howard County that were or would soon be overcapacity. “Capacity” is the number of student seats in a school.

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

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

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

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

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

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

10. The Howard County Superintendent and the Local Board hired a consulting agency, Cooperative Strategies, Inc., to assist in compiling data and making recommendations for redistricting. The data they reported related primarily to capacity utilization, feeds, and

FARM rates. The consultants received data from the SIS office during Board work sessions to run “test scenarios” of the impact of proposed boundary changes.

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

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

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

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

15. The Office of School Planning also engages in an eighteen-month capital planning process, compiling projection data and reporting that data to the Local Board which in

¹¹ Because the official FARM participation numbers are calculated by the Food and Nutrition Services office and no one from that office testified at the hearing, none of the witnesses who did testify could confirm whether the October date used officially by Food and Nutrition Services is the 30th or the 31st. For simplicity, I have used the 30th. The difference has no impact on my decision.

turn reports, via the Adequate Public Facilities Ordinance, to the Howard County Council annually.

16. On August 22, 2019, the Superintendent presented the Superintendent's Plan to the Local Board. Under this plan, almost 7,400 students would be redistricted to a different school.¹²

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

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

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

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

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

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

¹² This might mean that a rising ninth grader would attend a different high school than they would have attended had no redistricting taken place, or a rising third grader would attend a different elementary school for fourth grade, for instance.

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

Data

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

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

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

27. During the work sessions, the Office of School Planning was not permitted to access FARM data at the polygon level. This resulted from an opinion of counsel for the Local

Board in September or October 2019 that privacy concerns should prevent that data being provided to the Office of School Planning. Instead, the SIS office maintained that data and provided it to the consultants and the Local Board in a redacted form.

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

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

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

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

Open Meetings Act

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

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

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

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

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

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

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

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

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

DISCUSSION

Standard of Review

The standard of review applicable to school redistricting is set forth in COMAR

13A.01.05.06A, as follows:

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

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

A decision may be arbitrary or unreasonable if it is one or more of the following:

- (1) It is contrary to sound educational policy; or
- (2) A reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached.

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

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

A redistricting decision is subject to a presumption of correctness. COMAR 13A.01.05.06A. To prevail, an appellant must show, by a preponderance of the evidence, that the challenged redistricting decision was arbitrary, unreasonable, or illegal. COMAR 13A.01.05.06A and D. To prove an assertion by a preponderance means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). As the Appellants acknowledged several times, they face an uphill battle to have the Redistricting Plan overturned.

Review of Redistricting Plans

County boards determine the geographical attendance area for each school. Md. Code Ann., Educ. § 4-109(c) (2018). In *Bernstein v. Board of Education of Prince George’s County*, 245 Md. 464 (1967), the court held that absent a claim of deprivation of equal educational opportunity or unconstitutional discrimination because of race or religion, there is no right or privilege to attend a particular school. *Id.* at 472. The courts of Maryland will not ordinarily substitute their judgment for the expertise of school boards acting within the limits of the discretion entrusted to them. *Id.* at 476. The court in *Bernstein* wrote:

The point is whether the move was reasonable and within the discretion of the Board. The test is not even that there may have been other plans that would have worked equally well, or may, in the opinion of some, have been better; the test is whether the action which was taken was arbitrary, capricious or illegal.

Id. at 479.

The Court further noted that it “is a thankless job that the Board of Education has when it finds it necessary to move students from one school to another,” but in “a rapidly growing county, however, that is sometimes necessary. The paramount consideration is the proper education of the students.” *Id.* In 1974, the State Board noted that it “is not enough for [the appellants] to show that their [p]lan is better, they must show that the Board’s Plan is so totally lacking in merit as to have been adopted without any rational basis.” *Concerned Parents of Overlea v. Bd. of Educ. of Baltimore Cty.*, MSBE Op. No. 74-13 (1974).

Local boards determine what constitutes sound educational policy for their county. It is defined by the public through their elected Board of Education members. They are elected specifically to formulate educational policy for the county using their own judgment. While many people may disagree with the resulting conclusions, decisions made through the proper process are the result of the community speaking through the democratic process. *Shah v. Howard Cty. Bd. of Educ.*, MSBE Op. No. 02-30 (2002). Promoting demographic diversity in a school setting has been approved as sound educational policy. *Jones, et al. v. Montgomery Cty. Bd. of Educ.*, MSBE Op. No. 06-38 (2006).

There is no right to a school attendance area remaining “as is.” In *Stishan v. Howard County Board of Education*, MSBE Op. No. 05-33 (2005), a family opposed the county board’s redistricting decision which resulted in the family’s children being reassigned to a different high school. The redistricting plan was upheld by the State Board, which found there is no liberty or property interest in a school in one’s district remaining “as is,” without changes resulting from closure or consolidation. The decision to close or consolidate schools is a quasi-legislative matter and the rights to be afforded to interested citizens are limited.

The reviewer of the Local Board’s decision may not substitute their judgment for that of the Local Board. If substantial evidence exists to support the decision, even if the reviewer

disagrees with it, the decision must be upheld. *Montgomery Cty. Educ. Assoc., Inc. v. Bd. of Educ. of Montgomery Cty.*, 311 Md. 303, 309-10 (1987).

The 2019 Redistricting Process and Policy 6010

Policy 6010 is the governing policy for redistricting actions taken by the Local Board.

(App. Ex. 6). It provides, in pertinent part:

IV.B. The Board, Superintendent/designee and the AAC will consider the impact of the following factors in the review or development of any school attendance area adjustment plan. While each of these factors will be considered, it may not be feasible to reconcile each and every school attendance area adjustment with each and every factor.

1. Facility Utilization. Where reasonable, school attendance area utilization should stay within the target utilization for as long a period of time as possible through the consideration of:
 - a. Efficient use of available space. For example, maintain a building's program capacity utilization between 90% and 100%.
 - b. Long-range enrollment, capital plans and capacity needs of school infrastructures (e.g., cafeterias, restrooms and other shared core facilities).
 - c. Fiscal responsibility by minimizing capital and operating costs.
 - d. The number of students that walk or receive bus service and the distance and time based students travel.
 - e. Location of regional programs, maintaining an equitable distribution of programs across the county.
2. Community Stability. Where reasonable, school attendance areas should promote a sense of community in both the geographic place (e.g., neighborhood or place in which a student lives) and the promotion of a student from each school level through the consideration of:
 - a. Feeds that encourage keeping students together from one school to the next. For example, avoiding feeds of less than 15% at the receiving school.
 - b. Areas that are made up of contiguous communities or neighborhoods.
 - c. Frequency with which any one student is reassigned, making every attempt to not move a student more than once at any school level or the same student more frequently than once every five years.
3. Demographic Characteristics of Student Population. Where reasonable, school attendance areas should promote the creation of a diverse and inclusive student body at both the sending and receiving schools through the consideration of:
 - a. The racial/ethnic composition of the student population.
 - b. The socioeconomic composition of the school population as measured by participation in the federal FARMS program.
 - c. Academic performance of students in both the sending and receiving schools as measured by current standardized testing results.
 - d. The level of English learners as measured by enrollment in the English for Speakers of Other Languages (ESOL) program.

- e. Number of students moved, taking into account the correlation between the number of students moved, the outcomes of other standards achieved in Section IV.B. and the length of time those results are expected to be maintained.
- f. Other reliable demographic and diversity indicators, where feasible.

Policy 6010 sets forth three main factors to be considered when developing an attendance area adjustment plan and notes that it “may not be feasible to reconcile each and every school attendance area with each and every factor.” *Id.* The factors are: Facility Utilization, Community Stability, and Demographic Characteristics of Student Population. *Id.* The factors apply to developing “attendance areas,” defined as the geographic area from which a school’s students are drawn. *Id.*, § III.R. Attendance areas are made up of contiguous communities or neighborhoods. *Id.*, § IV.B.2.b. Polygons, smaller units within an attendance area that are used only for redistricting purposes to quickly provide the numbers needed for the Local Board to assess the results of school reassignments, are not mentioned in Policy 6010.

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

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

precedence over the stability that comes from keeping a neighborhood assigned to a particular school.

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

Policy 6010 provides that the Board should encourage keeping students together as they move from level to level by avoiding feeds of less than 15%. (App. Ex. 6, § IV.B.2). Some Board members opined during the process that moving entire neighborhoods to a new school and creating a new feeder system promoted community stability by keeping friends together, albeit at different schools. Others did not want to change existing feeds, arguing it was more important to create larger, secure feeds that families could count on for future years. Some of the boundary changes made by the Local Board strengthened existing feeds and some weakened them. The Board was not successful in reaching the 15% goal for each school. Capacity utilization often took precedence over maintaining strong feeds. Nevertheless, the Board consistently considered feeds when reviewing potential boundary changes.

Other factors considered by Board members included allowing existing walkers to remain walkers, although they were not always successful in doing so. They looked at the costs of transportation. They discussed proposed housing development and where the greatest influx of new students would come from. They looked at the age of existing school buildings, the number of portable classrooms in use, and the frequency with which students from a given school would

be reassigned within a five-year period. (Policy 6010 sets the goal at not moving a student more than once at any school level. (App. Ex. 6, § IV.B.2.c)).

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

The Board began the process using the Superintendent's Plan, introduced on August 22, 2019, which contained alternative scenarios.¹³ Seven public hearings were held to permit the public to speak before the Board and public comment via email was solicited. From October 17, 2019 to November 18, 2019, the Board held nine public work sessions. The Board worked on the high schools and middle schools first. On November 14, 2019, the Board voted to use a plan submitted by Ms. Mallo as a base. (App. Ex. 23, Video at 1:41). Ms. Mallo's plan, called the Consolidated Plan by the Board, moved fewer students than the Superintendent's Plan, but more than a plan proposed by Dr. Wu. The final Redistricting Plan, adopted on November 21, 2019, moved approximately 5,400 students to different schools.

¹³ A timeline of the entire redistricting process is included in Renee Kamen's affidavit submitted with the Board's Response to Appeals as Board's Exhibit 2.

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

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

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

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

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

Data

The Appellants appealed the Redistricting Plan on the basis that the FARM data used by the Local Board in voting on various boundary changes was faulty or inaccurate. They based this argument on events of November 18, 2019, when the Local Board realized that some of the FARM rate percentages were different in the Consolidated Plan even in schools where no boundary change had occurred. For example, in Deep Run ES, the FARM rate changed from the base rate of 55% in the Feasibility Study to 54% under the final Plan; Wilde Lake High School (HS) changed from 46% to 41%.¹⁴ In both cases, there was no boundary change. The Local Board questioned the staff from the Office of School Planning why there would be a different percentage under the new Plan when there was no boundary change proposed. On November 18, 2019, one Board member requested a “written explanation from the Superintendent so we can completely understand the problems with the FARMs data.” (App. Ex. 18, Video at 9:58).

¹⁴ To determine which schools underwent no boundary change, the Appellants introduced Exhibit 16, which was the list of schools that did undergo a boundary change. From that list, the Appellants were able to name eighteen schools NOT mentioned, indicating they underwent no boundary change. I have noted those schools in the chart attached as Appendix II.

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

The Office of School Planning recalculated the FARM data to neutralize mobility and exclude Pre-K. This did not change the underlying data but affected the process by which the totals were derived. By adjusting these two factors, the methodology used to derive the data provided to the Board on November 21, 2019 was in line with the original methodology. This allowed for a more accurate comparison of FARM rates before and after boundary changes.

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

On November 21, 2019, revised rates used by the Office of School Planning were provided to the Local Board prior to the final vote. The members reviewed those rates, asked public questions of staff, recessed to privately review the numbers and privately question staff,

returned for more public questions and comments, and then proceeded to vote on the final Plan. The discussion of FARM numbers that evening spanned from 3:29 hours into the meeting to 4:06, when the voting began. (App. Ex. 9, Video). No Board member changed their vote as a result of receiving the revised numbers.

The Appellants called four Board members to testify in support of their appeal on this issue, announcing these witnesses would be able to show the data used by the Local Board were known to be inaccurate or, failing that, that the Local Board should have known they were inaccurate. Ms. Delmont-Small's recollections were hazy, but she recalled believing the data they had been given during the work sessions were not accurate. She was not able to explain why any data they used were inaccurate. She said she did not have enough time on November 21, 2019 to review the revised data.

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

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

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

The Local Board called Tim Rogers to testify as part of the school planning team. He said throughout the work sessions, the methodology in calculating the FARM rate was the same, but that after the November 18, 2019 session, they modified the methodology to be in line with

how his office calculated the rates originally; that is, using the static numbers from 2018 instead of the “live” numbers of where students lived and were moving in 2019. He recalled answering questions of Board members during a recess on November 21, 2019 in the main Board room. After the recess, the Board proceeded to vote on the final Plan. Like Ms. Kamen, he understood that what was meant by “accurate” data in the discussions was data which aligned with that used by the Superintendent and the Office of School Planning at the beginning of the process, making it consistent for comparison purposes.

Ms. Kamen and Mr. Rogers explained that some schools, such as Wilde Lake HS, have higher rates of mobility than other schools, where the student population is more stable. As a result of removing the mobility factor in the schools where students tend to be more mobile, the FARM rate went down. This explains why some schools that underwent no boundary change nevertheless showed a change in the FARM rate.

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

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

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

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

One complaint voiced by the Appellants is that the Board never defined what "success" in FARM rates would be. Two Board members raised the same question at the November 21, 2019 meeting. (App. Ex. 9, Video at 4:01). It is true there was no precise measurement used. Throughout the redistricting process, the Superintendent and Board members talked about equity for lower income students and addressing Title I schools that were overcapacity. To that end, throughout the work sessions, the Board attempted to bring FARM participation rates closer to

the countywide average of 22%, whether that meant increasing or decreasing the rates at a given school. The Board did not always succeed in making a big impact. Talbott Springs ES moved from a FARM participation rate of 50% to 49% under the Redistricting Plan. Cradlerock ES moved from 55% to 54%. Oakland Mills MS moved from 48% to 46%.

Board members frequently noted at the meetings that there would be no perfect Plan and that not all of the factors in Policy 6010 could be fulfilled in every school and by every boundary change. But throughout the process, overall, the Board kept focused on capacity utilization and socioeconomic equity. The changes in the numbers provided to the Board on November 21, 2019, before the final vote was taken, did not negatively impact the Board's goals. In fact, as I noted above, in only two schools did the FARM participation rate increase by more than 2% between the straw vote and the final vote.

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

The Appellants pointed to the fact that the revised data did not impact the final vote as proof that the Local Board was acting arbitrarily when it considered the data. They complained that the short recess to consider the data is proof its reliance on the data was arbitrary. A different conclusion could reasonably be drawn, however: that the differences in the data were so minor that the Board members did not deem them sufficient to change or delay their votes. As I noted above, the Board discussed and questioned the revised data from 3:29 hours into the meeting until 4:06, when the voting started. Only two Board members testified they were uneasy

with the change in the FARM numbers and those two would have voted in line with their straw votes anyway. Simply asserting that the entire Board did not adequately review the revised numbers fails to constitute proof the Board's actions were arbitrary.

The Feasibility Study (App. Ex. 21, p. 35) and the Superintendent's Plan (App. Ex. 20, p. 5) contain the following cautionary language: "These numbers are for planning purposes, and may not exactly match other reported numbers due to differences in timing and methodology." At the first work session on October 17, 2019 (App. Ex. 25), Mr. Rogers and Ms. Kamen explained to the Board that many factors entered into deriving projected enrollment numbers. The Board wanted official 2019 enrollment numbers, but those numbers were not ready to be released until November or December 2019. Throughout the work sessions, the staff from the Office of School Planning reminded the Board that if it wanted current numbers, they would be estimates. This frustrated Ms. Delmont-Small, who said it was "insane" to proceed in this way and called the process "discombobulated." (App. Ex. 25, Video at 6:07).

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

the staff provided a reasonable explanation for why they needed to continue using the same methodology.

The Appellants cited the Maryland State Board of Education *Shah* opinion in support of their assertion that where data relied upon by a Board of Education were known to be incorrect and substantial portions of it were relied upon in making boundary changes, those changes would be rendered arbitrary and unreasonable pursuant to COMAR 13A.01.05.06A. In *Shah*, there were at least two instances where data supplied to the board through the superintendent's office were flawed. Those flaws were pointed out by citizens before the final redistricting vote was taken. The data were shown to be dynamic and they were updated before the board made its decision. Thus, there was no error in the process and the appellants in *Shah* failed to show the decision was arbitrary or unreasonable. *Shah*, No. 02-30, at 17. This decision does not support the Appellants' arguments in the instant case.

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

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

The Local Board argued that the Maryland State Board of Education, in the *Jones* opinion, cited above, has addressed the issue of incorrect data being considered by a school board but corrected prior to the final vote. In that case, data were corrected about thirty days prior to the final vote. The Appellants responded that this is a far cry from the brief recess the Board took on November 21, 2019 to consider the revised data. Thus, they argued, the *Jones* decision gives the Board no support. I note, however, that the data used by the Local Board during the redistricting process were never shown to be incorrect, as it was in *Jones*. Instead, as I have already noted, the data simply included additional factors that were later removed. Furthermore, the Board had an opportunity to review the revised numbers, could have requested additional time had it needed it, and the members did not change their vote after reviewing the numbers. For all of these reasons, the *Jones* opinion does not change my decision.

In their opening statement, the Appellants said they would show the base rate used by the Office of School Planning was never correct and that the Board never had the correct data until the night of the final vote. The evidence does not support that assertion. Although the Board received figures during work sessions that included additional factors not used in the base rate, once those figures were adjusted to exclude Pre-K and neutralize mobility, the rates were comparable, allowing the Board to accurately compare the FARM participation rates in schools

after certain boundary changes were made. No vote was changed as a result of the revised data. The Appellants failed to show any of the data were “faulty,” but only that different processes were used to derive certain percentages during work sessions.¹⁵

Open Meetings Act

Background

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

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

¹⁵ The Appellants attempted to show that the data used by the Local Board had only a 7.2% accuracy rate because in thirteen of the eighteen schools in which the FARM rate was over 5% and which experienced no boundary change, there was a different FARM rate reported in the Feasibility Study from the number provided to the Board on November 21, 2019 before the final vote. This argument presumes the data used were inaccurate. As I have explained, that is not the case. Accordingly, this argument has no merit.

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

(b) Except for those actions authorized by subsection (c) of this section, all actions of the county board shall be taken at a public meeting and a record of the meeting and all actions shall be made public.

(c) The county board may take actions in closed session in accordance with § 3-305 of the General Provisions Article, including action to close a meeting.

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

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

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

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

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

The Appellants called Renee Kamen and Kirsten Coombs as witnesses.¹⁶ The Appellants Mummert, Neidermyer, and Tayter also testified. I admitted the written statements of three Board members: Vicky Cutroneo, Jennifer Mallo, and Kirsten Coombs. (Exs. 3, 7, and 8, respectively). Those statements documented what occurred during the recess from the perspective of the writer. I admitted a decision from the Open Meetings Act Compliance Board, issued on February 14, 2020. (App. Ex. 1).

The Appellants also raised the issue of two Board members texting each other during a meeting.¹⁷ (App. Ex. 4). I admitted a decision from the Open Meetings Compliance Board, issued on March 26, 2020, finding the issue to be one of first impression. (App. Ex. 5). Additional facts are discussed below.

¹⁶ The Appellants sought to present the testimony of four additional Local Board members on this issue: Vicky Cutroneo, Christina Delmont-Small, Mavis Ellis, and Jennifer Mallo. I granted the Local Board's motion to exclude the testimony of these four witnesses on the basis that they would not be capable of testifying to the motivations of the member who changed her vote following the recess that formed the basis of the Open Meetings Act violation, that is, Kirsten Coombs. The Appellants reserved the right to call those Board members in rebuttal to the Local Board's evidence. The Local Board put on no evidence in this portion of the hearing and, therefore, these witnesses did not testify on this issue. I denied the Appellants' motion to call them in rebuttal to Ms. Coombs' testimony.

¹⁷ I overruled the Board's objection to the admission of evidence regarding these texts because, even though it was not raised in any appeal, the Appellants Mummert disclosed the evidence in their prehearing conference statement filed February 14, 2020, explaining it only came to their attention after they filed their appeal. As the texts were addressed without objection in the motion for summary decision filed by the Board, I allowed evidence of them to be admitted at the hearing.

Testimony

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

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

¹⁸ This option was given to students with an Individualized Education Program or 504 Plan.

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

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

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

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

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

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

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

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

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

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

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

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

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

Written Statements

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

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

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

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

Video recordings of Board meeting

I watched the video recordings of the Board meetings on October 17, 2019, November 14, 2019, November 18, 2019, November 21, 2019, and December 17, 2019.¹⁹ At the first work session, on October 17, 2019, following numerous public sessions, Chair Ellis addressed the factors of Policy 6010, reminding the audience that each Board member could prioritize whatever factor they felt was important, but that overall, the Board was going to focus on capacity and equity. Ms. Coombs made a statement to the audience, chiding them about the ugly comments that had been made toward the Board and certain minority groups. She said capacity

¹⁹ October 17, 2019 (App. Ex. 25), November 14, 2019 (App. Ex. 23), November 18, 2019 (App. Ex. 18), November 21, 2019 (App. Ex. 9), and December 17, 2019 (App. Ex. 10).

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Violations of those mandates are not “technical” in nature; nor are they ever harmless. A violation may not cause specific demonstrable injury to individual members of the public, but it does necessarily clash with and detract from the public policy that the Legislature declared in § 3-102 is “essential to the maintenance of a democratic society,” that “ensures the accountability of government to the citizens of the State,” and that “enhances the effectiveness of the public in fulfilling its role in a democratic society.” Conduct that has that demeaning effect can be contagious and cannot be considered harmless. It strikes at the core of our democracy – the right and power of the citizens to control their government – even if its harm is not immediately perceptible.

That does not mean that an axe must fall upon every, or any particular, violation. The Legislature wisely provided a range of remedial and punitive options in §§ 3-401 and 3-402, established conditions on imposing the more serious of them, and, subject to those conditions, left the choice largely to the discretion of the court. It is within that discretionary framework that the sanction, if any, can be made to fit the offense, and that framework goes beyond the remedies set forth in those sections. Section 3-401(a)(3) expressly provides that the section does not affect or prevent the use of “any other available remedies.”

Most of the debate in this appeal centers on the meaning of “willful” or “willfully.” In that regard, it first is important to note that, of the various remedies listed in §§ 3-401 and 3-402, only two are conditioned on the violation being willful – voiding final actions by the public body and the imposition of civil penalties. The authority to void final actions is subject to the further condition that no other remedy is adequate. Issuance of an injunction, the assessment of counsel fees and litigation costs, the posting of a bond, and the granting of other appropriate relief do not require a finding of willfulness.

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

Texts

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

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

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

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

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

Appellants' Motion for Judgment

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

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

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

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

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

Furthermore, there was no “backroom deal.” There were backroom discussions that took place while a quorum of the Board was present, and the Board has admitted error in doing that.²⁰ The Appellants overdramatize what occurred by characterizing it as a backroom deal. It was a recess, like many other recesses the Local Board took, that became a closed meeting when a quorum appeared in the meeting room to hash out the previous vote. It should not have happened, and I do not defend it, but the fact that it happened does not automatically entitle the Appellants to judgment. I deny the Appellants’ Motion for Judgment on this issue.

In sum, although the Appellants made excellent arguments for why the Local Board should comply with the letter—and the spirit—of the Open Meetings Act, the evidence does not show that the violation of the Act impacted the redistricting process to the extent that the process was rendered illegal pursuant to COMAR 13A.01.05.06. As set forth above, the State Board may only substitute its judgment if the decision of a Local Board is arbitrary, illegal, or unreasonable. In this case, the decision is the Redistricting Plan. To be illegal under COMAR 13A.01.05.06C, the decision must satisfy one or more of the following six criteria:

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

²⁰ The Appellants argued that the Local Board should have provided an explanation and an admission that it violated the law, why it was violated, and why there was no impact. I understand why the Appellants seek an admission and explanation, but as evidenced from the Discussion here, the Board did admit error and explained the circumstances of the violation, and I have found there was no impact such as would render the process illegal.

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

CONCLUSIONS OF LAW


I conclude that the Appellant has failed to prove, by a preponderance of the evidence, that the Redistricting Plan adopted by the Howard County Board of Education on November 21, 2019, was arbitrary or unreasonable as a result of using incorrect or faulty data. *Bernstein v. Bd. of Educ. of Prince George's Cty.*, 245 Md. 464 (1967); *Montgomery Cty. Educ. Assoc., Inc. v. Bd. of Educ. of Montgomery Cty.*, 311 Md. 303, 309-10 (1987); *Shah v. Howard Cty. Bd. of Educ.*, MSBE Op. No. 02-30 (2002); *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002); COMAR 13A.01.05.06A and D; HCPSS Policy 6010.

I further conclude that the Appellant failed to prove, by a preponderance of the evidence, that the Redistricting Plan adopted by the Howard County Board of Education on November 21, 2019 was illegal as a result of a violation of the Open Meetings Act. *Bernstein v. Bd. of Educ. of Prince George's Cty.*, 245 Md. 464 (1967); *New Carrollton v. Rogers*, 287 Md. 56 (1980); *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002); Md. Code Ann., Gen. Provisions, Title 3 (2019); COMAR 13A.01.05.06A and D.

RECOMMENDED ORDER

I RECOMMEND that the Appeal filed December 20, 2019 by the Appellant be **DISMISSED**.

October 14, 2020 _____
Date Decision Issued



Joy E. Phillips
Administrative Law Judge

JLP/dlm
#187765

NOTICE OF RIGHT TO FILE EXCEPTIONS

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

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

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

MARTIN DIMITROV,

APPELLANT

v.

HOWARD COUNTY

BOARD OF EDUCATION

*** BEFORE JOY L. PHILLIPS,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE OF**

*** ADMINISTRATIVE HEARINGS**

*** OAH No.: MSDE-BE-09-20-01684 (File #27)**

* * * * *

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

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
UNDISPUTED FACTS
DISCUSSION
CONCLUSIONS OF LAW
ORDER
RECOMMENDED ORDER

STATEMENT OF THE CASE

On or about November 21, 2019, the Howard County Board of Education (Local Board) passed the Attendance Area Adjustment Plan for School Year 2020-2021 (Redistricting Plan). On December 20, 2019, the Appellant, along with numerous other parents and concerned citizens, filed an appeal (Appeal) to challenge the Redistricting Plan.

By letter dated January 16, 2020, the Maryland State Board of Education (State Board) transmitted the appeals to the Office of Administrative Hearings (OAH) for a contested case hearing and to issue a proposed decision containing findings of facts, conclusions of law, and recommendations. Code of Maryland Regulations (COMAR) 13A.01.05.07A(1), E.

On February 20, 2020, I held an in-person prehearing conference on the appeals at the OAH in Hunt Valley, Maryland. Claude de Vastey Jones, Esquire, and Judith S. Bresler, Esquire, represented the Local Board. Shavina Kumar Mukesh, Esquire, and Edward Tayter,

Esquire, represented the Appellant. A motions schedule was agreed upon and later modified at the request of the Local Board and some of the appellants.

On May 4, 2020, the Local Board filed a Motion and Memorandum in Support of County Board's Motion for Summary Decision (Board's Motion) with twenty-five exhibits. On the same day, the Appellant filed a Motion for Summary Decision (Appellant's Motion) with three exhibits. On May 20, 2020, the Appellant filed a Response to the Motion (Appellant's Response). On May 22, 2020, the Local Board responded to the Appellant's Motion with three exhibits. On June 1, 2020, the Local Board filed a Reply to the Appellant's Response (Reply) with two exhibits. On June 4, 2020, the Local Board filed an Amended Reply to the Appellant's Response.¹ No one requested oral argument.

ISSUES

Should either the Appellant's or the Board's Motion be granted because there is no genuine dispute as to any material fact and they are entitled to judgment as a matter of law?

SUMMARY OF THE EVIDENCE

Exhibits

In support of its Motion and Response, the Local Board relied upon affidavits, links to archived video footage, and documentary exhibits. In support of its Motion, the Appellant attached an affidavit² and exhibits. A complete list of exhibits is attached to this Ruling as an Appendix.

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

² The affidavit was inadvertently omitted from the original filing on May 4, 2020, but it was emailed on May 26, 2020. I consider it to have been timely filed.

UNDISPUTED FACTS

The following facts are undisputed:

1. Local Board Policy 6010 defines the conditions and processes by which school attendance area adjustments will be developed and adopted in Howard County. (Board's Motion, Ex. 1).
2. On January 24, 2019, the Local Board initiated a system wide school boundary review.
3. As part of her duties in the Office of School Planning and the boundary review and redistricting planning process, Renee Kamen, Manager of School Planning for the Local Board, produced a Feasibility Study with other school system staff. (Board's Motion, Ex. 3).
4. The Feasibility Study was presented to the Local Board on June 13, 2019. The Attendance Area Committee reviewed the Feasibility Study and provided feedback to the superintendent through a series of meetings held on June 18, 2019, June 25, 2019, July 2, 2019, and July 9, 2019. (Board's Motion, Ex. 2).
5. Four community meetings were conducted in July 2019 and input was solicited via an online form and survey collected between June 14 and August 1, 2019. (Board's Motion, Ex. 2).
6. The superintendent's recommended plan was presented at a public board meeting on August 22, 2019. (Board's Motion, Exs. 2 and 4).
7. Seven regional public hearings and nine public work sessions were held to consider the proposed boundary adjustments between September 17, 2019 and November 21, 2019, when the final vote was taken. (Board's Motion, Ex. 2).
8. Prior to the final vote on November 21, 2019, the Local Board developed its own Redistricting Plan. (Board's Motion, Ex. 22).

9. The Appellant resides in Polygon 1132.³

10. At least as early as November 12, 2019, the Local Board suggested changing the boundaries of Polygon 1132.

11. During the vote affecting Polygon 1132 on November 21, 2019, the Local Board violated the Open Meetings Act.⁴

DISCUSSION

Legal Framework

Motion for Summary Decision

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

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

Maryland appellate cases on motions for summary judgment under the Maryland Rules are instructive regarding similar motions under the procedural regulations of the OAH. In a

³ In his appeal, the Appellant refers to both 1132 and 132 as his Polygon, but based on the context of what he wrote, I have concluded he lives in Polygon 1132.

⁴ Md. Code Ann., Gen. Provisions, Title 3 (2019).

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

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

When a party has demonstrated grounds for summary disposition, the opposing party may defeat the motion by producing affidavits, or other admissible documents or evidence, which establish that material facts are in dispute. *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737-38 (1993). In such an effort, an opposing party is aided by the principle that all inferences that can be drawn from the pleadings, affidavits, and admissions, on the question of whether there is a dispute as to a material fact, must be resolved against the moving party. *Honacker v. W.C. & A.N. Miller Dev. Co.*, 285 Md. 216, 231 (1979).

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

[T]he trial court must determine that no genuine dispute exists as to any material fact, and that one party is entitled to judgment as matter of law. In its review of the motion, the court must consider the facts in the light most favorable to the non-moving party. It must also construe all inferences reasonably drawn from those facts in favor of the non-movant.

To defeat a motion for summary judgment, the non-moving party must establish that a genuine dispute exists as to a material fact. A material fact is one that will somehow affect the outcome of the case. If a dispute exists as to a fact that is not material to the outcome of the case, the entry of summary judgment is not foreclosed.

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

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

Standard of Review

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

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

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

A decision may be arbitrary or unreasonable if it is one or more of the following:

- (1) It is contrary to sound educational policy; or
- (2) A reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached.

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

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

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

Review of Redistricting Plans

County boards determine the geographical attendance area for each school. Md. Code Ann., Educ. § 4-109(c)(2018). In *Bernstein v. Board of Education of Prince George’s County*, 245 Md. 464 (1967), the court held that absent a claim of deprivation of equal educational opportunity or unconstitutional discrimination because of race or religion, there is no right or privilege to attend a particular school. *Id.* at 472. The courts of Maryland will not ordinarily

substitute their judgment for the expertise of school boards acting within the limits of the discretion entrusted to them. *Id.* at 476. The court in *Bernstein* wrote,

The point is whether the move was reasonable and within the discretion of the Board. The test is not even that there may have been other plans that would have worked equally well, or may, in the opinion of some, have been better; the test is whether the action which was taken was arbitrary, capricious or illegal.

Id. at 479.

The Court further noted that it “is a thankless job that the Board of Education has when it finds it necessary to move students from one school to another,” but in “a rapidly growing county, however, that is sometimes necessary. The paramount consideration is the proper education of the students.” *Id.* at 479. In 1974, the State Board noted that it “is not enough for [the appellants] to show that their [p]lan is better, they must show that the Board’s Plan is so totally lacking in merit as to have been adopted without any rational basis.” *Concerned Parents of Overlea v. Bd. of Educ. of Baltimore Cty.*, MSBE Op. No. 74-13 (1974).

Local boards determine what sound educational policy is for their county. It is defined by the public through their elected Board of Education members. They are elected specifically to formulate educational policy for the county using their own judgment. While many people may disagree with the resulting conclusions, decisions made through the proper process are the result of the community speaking through the democratic process. *Shah v. Howard Cty. Bd. of Educ.*, MSBE Op. No. 02-30 (2002). Promoting demographic diversity in a school setting has been approved as sound educational policy. *Jones, et al. v. Montgomery Cty. Bd. of Educ.*, MSBE Op. No. 06-38 (2006).

There is no right to a school attendance area remaining “as is.” In *Stishan v. Howard County Board of Education*, MSBE Op. No. 05-33 (2005), a family opposed the county board’s redistricting decision which resulted in the family’s children being reassigned to a different high school. The redistricting plan was upheld by the State Board, which found there is no liberty or

property interest in a school in one's district remaining "as is," without changes resulting from closure or consolidation. The decision to close or consolidate schools is a quasi-legislative matter and the rights to be afforded to interested citizens are limited.

The reviewer of a local board's decision may not substitute their judgment for that of the local board. If substantial evidence exists to support the decision, even if the reviewer disagrees with it, the decision must be upheld. *Montgomery Cty. Educ. Assoc., Inc. v. Bd. of Educ. of Montgomery Cty.*, 311 Md. 303, 309-10 (1987).

The Local Board moved for summary decision on each of the issues raised by the Appellant. The Appellant moved for summary decision on the basis that the Local Board violated the Open Meetings Act. Md. Code Ann., Gen. Provisions, Title 3 (2019).

Cross Motions for Summary Decision

Open Meetings Act

The Appellant moved for summary decision on one basis: That the Local Board has conceded it violated the Open Meetings Act on November 21, 2019. It argued that "[t]his unlawful procedure makes the board's redistricting illegal and entitles the Appellant to judgement as a matter of law." (Appellant's Motion, p. 7).

The Local Board also moved for summary decision on this issue, arguing that the violation of the Open Meetings Act does not prove the Board acted illegally in making the attendance area adjustments. The Local Board denied it acted illegally on November 21, 2019, when it went into closed session to consider a failed vote regarding certain polygons. Alternatively, it argued that if its action was illegal, "[i]t is not within this body's power to legislate the decision made by the Board while acting in a quasi-legislative capacity. That would necessitate a violation of the separation of powers." (Board's Motion, p. 13). It further argued that if its action was illegal, it did not invalidate the entire Redistricting Plan because the vote

was ratified at a hearing on December 17, 2019. Finally, it said that if its action were illegal, it did not “ipso facto amount to an illegal proceeding.” (Board’s Motion, p. 14).

The Appellant is of the opinion that proof of a violation such as a violation of the Open Meetings Act automatically entitles him to judgment as a matter of law, with the result that the Redistricting Plan be rendered void. As I have set forth above, however, consideration of a motion for summary decision is a two-part process. In addition to showing there is no genuine dispute of material fact, the proponent must show he is entitled to judgment as a matter of law.

That the Local Board violated the Open Meetings Act during the vote on one piece of the large Redistricting Plan puzzle does not necessarily mean the Appellant is entitled to judgment in his favor as to the entire Plan. The evidence reveals the Local Board returned to the public meeting after an approximately four-minute recess and reconsidered its vote, with one Board member changing her vote and stating her reasons for doing so on the record. There are many arguments that might be made and evidence that might be produced at hearing regarding the effect or import of that vote. The inferences to be drawn from the facts are disputed and thus, their legal significance is not a matter of law for summary determination. *Beatty*, 330 Md. at 737-38, and *Ferwick Motor Co.*, 258 Md. at 139. Accordingly, both Motions for Summary Decision on the issue of the impact of the Open Meetings Act on the Redistricting Plan will be denied.⁵

Local Board’s Motion for Summary Decision

The Local Board challenged the Appellant’s appeal on these additional grounds:

1. The Appellant alleged that the Redistricting Plan is arbitrary and unreasonable because it is contrary to sound educational policy. In moving for summary decision, the Local Board asserted the Redistricting Plan accords with sound educational policy and was reasonable

⁵ Regarding the Local Board’s other arguments that this is not the proper forum in which to allege a violation of the Open Meetings Act, I have already ruled that I will permit the parties to proceed on this issue despite the State Board of Education’s history of declining to review such violations.

as it followed Policy 6010 and considered many factors in making the moves. As “a reasoning mind could have reached the Board’s decision based on the considerations and factors and data used,” it should be upheld despite the Appellant’s dissatisfaction with it. (Board’s Motion, p. 11).

2. Regarding the Appellant’s allegation that some of the school moves were based on race, the Local Board moved for summary decision because the Appellant provided no evidentiary support for that assertion. Instead, it noted the Local Board used numerous considerations, including facility utilization and Free and Reduced Meals (FARM) percentages, in developing the new attendance areas. (Board’s Motion, p. 12).

3. As to the Appellant’s claim that he did not receive sufficient notice regarding the redistricting, the Local Board moved for summary decision by pointing to numerous community announcements on the Board’s website and in emails and in the news. It also noted the number of public hearings that were televised, streamed, and made available to the public. (Board’s Motion, pp. 12-13).

4. The Appellant asserted Chair Ellis abused her discretionary powers in voting to change the boundaries of schools affecting her polygon by illegally participating in the vote regarding the polygon in which she lives because it resulted in a potential increase to the value of her home. The Local Board moved for summary decision on this issue, arguing he provided no evidence that home values were a consideration in making the decisions. (Board’s Motion, p. 14).

Analysis

Arbitrary or Unreasonable

The Appellant contended the decision regarding his Polygon, 1132, was made using inaccurate FARM data, that some Local Board members did not apply their stated redistricting goals uniformly, and that it ignored bus transportation safety issues. He referred to statements made by some Board members during deliberations in support of his arguments. The Local

Board moved for summary decision by highlighting deliberations conducted on the Redistricting Plan as a whole, concluding the overall Plan constitutes sound educational policy and should be upheld despite the Appellant's dissatisfaction with it.

I have reviewed the evidence submitted by the parties, including the recorded meetings held by the Local Board.⁶ Motions were made to extend the time for deliberation due to the extensive changes required, but those motions did not pass. There were numerous discussions during the final meetings regarding the accuracy of the FARM data, the impact the revised data might have on the boundary changes, and bus transportation safety and costs. Two Board members mentioned the deliberations were rushed and based on incomplete or faulty information. The question of how the changing, updated data impacted the final votes remains unresolved.

As to the issue of bus transportation and whether the Local Board ignored the "very real concern" that a severe bus driver shortage would result and impact safety, budget, and the health and well-being of students (Appeal, p. 5), the Local Board submitted an affidavit from David Ramsey, Director of Transportation for the school system. (Reply, Ex. 26). He wrote that he has "determined that the new non-transported areas and bus routes meet a reasonable level of safety pursuant to HCPSS⁷ Policy 5200 and COMAR." Policy 5200 was attached to his affidavit. (Reply, Ex. 26A). He also noted that he has submitted a revised budget "which reflects the consolidation of bus routes impacted by redistricting and the repurposing of bus routes to communities no longer eligible for transportation services. Additionally, bus routes throughout the entire system have been designed and will support the transportation requirements of eligible students." (Reply, Ex. 26). However, one issue raised by the Appellant in his appeal was directed at balancing the costs of bus transportation against the benefits of a boundary change

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

⁷ Howard County Public School System

affecting his polygon that resulted in only a 4% change in the FARM participation rate and whether the change constituted sound educational policy. This is a different and much narrower issue from that addressed by the affidavit.

Construing all inferences in the Appellant's favor, I find there exist genuine disputes of material fact on whether the vote regarding the Appellant's polygon was arbitrary or unreasonable. As to this issue, the Board is not entitled to judgment. *Beatty*, 330 Md. at 737-38.

Race as a Factor

In the Appellant's appeal, he asserted the Local Board illegally used race as a basis for some of the boundary changes. The Local Board moved for summary decision on this issue, arguing there is no evidence supporting that assertion. In its Motion, it wrote, "The Board was quite clear in utilizing the data that reflected on the capacity utilization at the individual schools and the FARM participation rate to help balance both factors. Nothing in the Board's deliberations supports the Appellant's allegations." (Board's Motion, p. 12).

In his Response to the Motion, the Appellant did not refute this argument or offer evidence to support his allegation that race played a role in the Local Board's decision; nor, in my review of the evidence, did I find any such evidence. Construing all inferences in the Appellant's favor, I find the Board is entitled to prevail as a matter of law on the issue of whether the Local Board impermissibly considered race as a factor in approving the Redistricting Plan. *Beatty*, 330 Md. at 737-38. Accordingly, as to this issue, the Local Board's Motion will be granted.

Notice and Opportunity to be Heard

In his appeal, the Appellant argued that there was no mention of moving Polygon 1132 to another school until forty hours prior to the final vote. (Appellant's Response, p. 3). The Local Board produced evidence showing extensive public announcements and coverage about the boundary review as a whole and the numerous opportunities families had to submit written and

oral comment. It also noted the number of public hearings that were televised, streamed, and made available to the public. The Appellant responded that any chance of him submitting “written testimony in such a short notice was marginal.” (Appellant’s Response, p. 3).

The recordings of the final work sessions reveal the Board considering input from families in Polygon 1132. Chair Ellis told the audience at every work session that written statements were being given the same weight as oral testimony. Furthermore, the lengthy comment period was open to all families at all times and there was never any guarantee that one polygon might not be moved. The Appellant has submitted no evidence to show the process violated the law. I find no genuine dispute of material fact relating to the Appellant’s opportunity to be heard by the Local Board before it made its final decision. Construing all inferences in the Appellant’s favor, I find the Board is entitled to prevail as a matter of law. *Beatty*, 330 Md. at 737-38. The Motion will be granted as to this issue.

Chairman Ellis abused her discretionary powers

The Appellant has alleged Chair Ellis voted to move certain polygons to increase the value of her home. (Appeal, p. 12). The Local Board responded he provided no evidence that Chair Ellis abused her powers by considering home values. The Appellant’s appeal referred to a study commissioned by the Local Board in 2016 showing a correlation between test scores and property values. From this, the Appellant questioned Chair Ellis’ motives and projected that her vote on his polygon would result in an increase in her home’s value by approximately \$23,600.00. His conclusion is speculative, at best. He failed to raise any genuine dispute of material fact on this issue. Throughout the hearings and public sessions, I heard nothing that would lead me to conclude Chair Ellis took her home value into consideration in making school boundary changes. Construing all inferences in the Appellant’s favor, I find the Board is entitled

to prevail as a matter of law. *Beatty*, 330 Md. at 737-38. As to this issue, the Local Board's Motion will be granted.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Appellant's Motion for Summary Decision on the issue of the Open Meetings Act violation should be denied because he has not shown that he is entitled to prevail as a matter of law. COMAR 28.02.02.12D(5); COMAR 13A.01.05.06.

I conclude as a matter of law that the Local Board's Motion for Summary Decision as to the issues of the Open Meetings Act violation and whether the boundary change for Polygon 1132 was arbitrary and unreasonable should be denied because there exist genuine disputes as to a material fact and it has not shown that it is entitled to prevail as a matter of law. COMAR 28.02.02.12D(5); COMAR 13A.01.05.06.

I conclude as a matter of law that the Local Board's Motion for Summary Decision as to the issues of whether race was a consideration in the boundary change of Polygon 1132, whether the Appellant had notice and an opportunity to be heard, and whether Chair Ellis abused her discretionary power should be granted because there is no genuine dispute as to any material fact and the Local Board has shown that it is entitled to prevail as a matter of law. COMAR 28.02.02.12D(5); COMAR 13A.01.05.06.

ORDER

I **ORDER** that the Appellant's Motion for Summary Decision is **DENIED**.

I **FURTHER ORDER** that the Howard County Board of Education's Motion for Summary Decision is **DENIED** as to the issues of a violation of the Open Meetings Act and whether the boundary change of Polygon 1132 was arbitrary and unreasonable.

RECOMMENDED ORDER

I **RECOMMEND** that the Howard County Board of Education's Motion for Summary Decision be **GRANTED** on the issues of whether race was a consideration in the boundary change of Polygon 1132, whether the Appellant had notice and an opportunity to be heard, and whether Chair Ellis abused her discretionary power.⁸

June 23, 2020
Date Decision Issued


Joy L. Phillips
Administrative Law Judge

JLP/cmjg
#186023

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⁸ This Recommended Ruling will be transmitted to the State Board when I issue a Recommended Decision after a hearing on the merits. The parties retain their rights to file exceptions at that time. Those rights are:

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