

IN THE MATTER OF
BARRY LEBOWITZ

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION

Opinion No. 21-47

OPINION

INTRODUCTION

Barry Lebowitz (“Petitioner”), a parent of a Montgomery County Public Schools’ (“MCPS”) student, filed a Petition for Declaratory Ruling challenging the process used to adopt a school system policy concerning educational facilities. The Montgomery County Board of Education (“local board”) responded. Petitioner replied and the local board filed a response. Thereafter, Petitioner filed a Sur-Reply to which the local board objected.

FACTUAL BACKGROUND

In this case, Petitioner asks us to address the interplay between two policies of the local board. One policy is substantive (Policy FAA–Educational Facilities Planning), the other procedural (Policy BFA-Policysetting).

Policy FAA addresses Educational Facilities Planning. It was adopted in 1992. According to Petitioner, the local board amended that policy in 2018. He argues that that amendment process, which followed, in part, the requirements of Policy BFA, violated State law and regulations because COMAR 13A.02.01.01 states that a “motion or resolution may not be declared adopted without a concurrence of the majority of the board.” As Petitioner sees it, the way the local board amended Policy FAA in September 2018 illustrates the questions he raises in his Petition. Specifically, the full board tentatively amended Policy FAA on April 12, 2018 and it went out for public comment until September 10th. On September 6, 2018, MCPS staff then proposed some revisions. On September 13, 2018, the Policy Committee adopted three revisions. The Policy Committee consists of four members of the board. Five votes constitutes a majority of the whole board.

At final action on September 24, 2018, the full board voted not to remove revisions to the tentatively amended policy. Petitioner contends that, because a majority of the board voted *not* to remove the revisions, rather than *affirmatively* voting to accept the revisions, they violated COMAR 13A.02.01.01.

The local board raised several arguments advocating that the Petition for Declaratory Ruling be dismissed.

STANDARD OF REVIEW

The State Board may dismiss a case in which there is no legal basis on which to proceed. COMAR 13A.01.05.03(B).

LEGAL ANALYSIS

There are several legal barriers to hearing this Petition for Declaratory Ruling.

Timeliness

It has been two years since the September 2018 amendment of Policy FAA utilizing the procedures established, in part, under Policy BFA that the Petitioner believes violated COMAR. While there is no specific statute of limitations applicable to declaratory judgment actions, we decided the timeliness issue in *Van Herksen v. Montgomery County Bd. of Educ.*, MSBE Op. No. 20-45 (2020). That case, filed in December 2019, challenged the validity of the process used to amend Policy FAA. Because the appeal was not filed within 30 days of the local board's actions, we declined to decide the appeal. We said "we will not consider an [untimely] appeal ...that passage of Policy FAA was procedurally defective." *Id.* at 4-5. Likewise, we will not allow a petition for declaratory ruling to be used as a means to re-argue the time-barred issue of whether Policy FAA was amended legally.

Case or Controversy

In addition, we will not allow a petition for declaratory ruling filed by a private citizen to circumvent the requirements that a case or controversy exists between the parties.

COMAR 13A.01.05.05A states that "[a] party may file a petition for declaratory ruling by the State Board in the interpretation of a public school law or regulation of the State Board that is material to an existing case or controversy." A case or controversy exists when at least two parties are in a dispute about a matter. Petitioner admits that there is no existing case or controversy. *See* Petition at 2 ("...this matter does not involve a dispute between two parties....").

Petitioner attempts to overcome the absence of this necessary predicate. He cites *In the Matter of COMAR 13A.02.01.01 and Education Article §3-2B-09*, MSBE Op. No. 20-08 (2020). He argues that the State Board issued an advisory opinion in that case even in the absence of a case or controversy and should do so here. (Petition at 3). Opinion 20-28, however, reinforced our previous decisions that stated that we will not consider a petition for declaratory ruling unless there is an existing case or controversy. Opinion 20-28 cited *In the Matter of Education Article §4-201*, MSBE Op. No. 18-41 (2018), which explained the only basis for considering the legal issues presented when there was not an existing case or controversy:

There is no case or controversy. We cannot, therefore, exercise jurisdiction within the declaratory ruling context.

Yet, we recognize that the law directs the State Board "to explain the true intent and meaning" of the education laws and regulations even when there is no case or controversy pending. Educ. Art. §2-

205(e). Procedurally, when there is no case or controversy an Advisory Opinion is the appropriate form for such a decision. An Advisory Opinion is an opinion by a court or administrative body upon a question raised by a public official in the absence of a case or controversy. It is an opinion that states the legal rule on a particular matter. It adjudicates nothing.

Id. at 2. (Emphasis supplied). Petitioner is a private citizen, not a public official. Therefore, as we set forth in Opinions 18-41 and 20-28, we will not exercise the narrow exception to the necessary existence of a case or controversy in order to issue an Advisory Opinion for a private citizen.

Other Issues

The local board raises other legal issues that bar this Petition, but the issues of timeliness and lack of a case or controversy are immutable barriers to hearing this Petition. Thus, we need not consider the additional legal arguments the local board presented.

CONCLUSION

For these reasons, we decline to address the merits of the Petition and, therefore, the Petition for Declaratory Ruling is dismissed.

Signatures on File:

Clarence C. Crawford
President

Shawn D. Bartley

Gail H. Bates

Chuen-Chin Bianca Chang

Charles R. Dashiell, Jr.

Susan J. Getty

Vermelle Greene

Jean C. Halle

Rachel McCusker

Joan Mele-McCarthy

Lori Morrow

Warner I. Sumpter

Holly C. Wilcox

September 28, 2021