

K.B.,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 24-11

OPINION

INTRODUCTION

Appellant challenges the decision of the Montgomery County Board of Education (“local board”) issued on September 21, 2023, affirming the Superintendent’s Designee’s decision denying the Appellant’s request to pause construction work on the tarring of the Poolesville High School (“PHS”) roof during times that the school is occupied. After the initial State Board appeal briefing process was complete, on January 23, 2024, the State Board issued Order No. OR24-01 dismissing, in part, all claims raised by the Appellant except for those maintaining that Montgomery County Public Schools (“MCPS”) failed to follow local board Policy FAA and the Indoor Air Quality Management Plan (“IAQ Plan”). Thereafter, the parties briefed the merits of these remaining claims. The matter is now back before the State Board for review on these two remaining issues only.

FACTUAL BACKGROUND

On May 19, 2023, Appellant filed a *Complaint from the Public* (“Complaint”) with MCPS alleging that her two children who attend PHS have had “severe acute symptoms and possible long-term effects of being exposed to tar fumes and other hazardous chemicals” associated with the tarring of the school roof at PHS. The Appellant sought to have the tarring process and use of the materials discontinued while the school was occupied. She also sought to have MCPS follow the filtration procedures in its IAQ Plan whenever hazardous chemicals are used on campus, and to turn off the school’s HVAC system to prevent air intakes from drawing in contamination. (Local Bd. 11/26/23 Reply, Complaint).

Hearing Officer, Dr. Natasha White Jones, investigated the matter and recommended denial of the Complaint. (*Id.*, Jones Report). On August 4, 2023, Dana E. Edwards, Chief of District Operations, acting as the Superintendent’s Designee, adopted Dr. Jones’ recommendation. (*Id.*, Edwards letter). The local board thereafter denied the Appellant’s Complaint, incorporating Dr. Jones report and the Superintendent’s memorandum in response to the appeal into its decision. (*Id.*, Local Bd. Decision).

As set forth in OR24-01, the relevant facts are as follows:

On February 14, 2023, the tarring work on the PHS roof resulted in a strong odor that caused some individuals in the school to feel nauseous and/or experience headaches. After the school officials identified the source of the odor, the construction team ceased work and MCPS closed school early. MCPS thereafter paused tarring of the roof from March through mid-April 2023. When tarring resumed, MCPS took measures to address the issue including: relocation of the tar truck; additional filtration on the mechanical equipment responsible for heating and cooling the school; evaluation of weather conditions, including wind direction; the use of odor neutralizing materials; redirection of ingress and egress to the school; temporary seals around doors and windows facing the construction zone; creation of a negative air zone; and delay of tarring until after student dismissal.

MCPS hired a third-party vendor to monitor air quality on the potential exposure to fumes related to the roofing work. Air quality sampling reports were generated and posted each week between April 13, 2023, and June 9, 2023. The reports indicated that despite the smell of tar being present, asphalt fumes and hydrogen sulfide gas levels were either not present, or they were at concentrations below the detectable range on the gas meter, and that oxygen levels were as expected. The vendor also monitored the Total Volatile Organic Compounds (“TVOC”) and posted those reports weekly from April 26, 2023, through June 5, 2023. The reports indicated that during roofing activities there were nondetectable to low TVOC concentrations throughout the exterior of the school and nondetectable to considerably low TVOC concentrations inside the school.

During this time, PHS sent letters to the community to keep them apprised of the construction project, responded to numerous communications from parents, convened two parent meetings to answer questions and communicate steps taken to address concerns about the project, and provided written answers to questions arising from the meetings. MCPS explained that the school system and its contractors strictly follow guidelines and procedures established by the National Institute for Occupational Safety and Health and the Federal and Maryland State Occupational Safety and Health Administrations. In addition, MCPS reported that it could not turn off the HVAC system while the school was occupied without violating legal requirements.

Dr. Jones’ report, adopted by the Superintendent’s Designee and the local board, noted that this major capital improvement project at PHS aligned with the requirements of local board Policy FAA and Regulation FAA-RA on *Educational Facilities Planning* for capital projects. The report also explained that the roofing work fell outside of the governing principles of the IAQ Plan, but that the construction work followed the industry’s best practices to prevent infiltration into the school, which included the protection and filtration principles detailed in the IAQ Plan. The HVAC equipment used, however, prevented application of the flushing principles in the IAQ Plan.

MCPS completed the roof tarring at PHS before the start of the 2023-2024 school year.

The Appellant filed this appeal raising a variety of issues related to the roof work. As stated above, the State Board dismissed all claims except for those alleging violation of local

board Policy FAA and the IAQ Plan.¹ The parties submitted additional briefing on the remaining issues as requested by the State Board.

STANDARD OF REVIEW

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.01.05.06A. A decision may be arbitrary or unreasonable if it is contrary to sound educational policy, or if a reasoning mind could not have reasonably reached the conclusion of the local board. COMAR 13A.01.05.06B. The Appellant has the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.06D.

LEGAL ANALYSIS

As a preliminary matter, we find that the Appellant’s February 28, 2024, submission raises a variety of issues that have either already been dismissed by OR24-01 or extend beyond the scope of the briefing required by the order. We decline to address those matters and limit our decision only to the specific claims regarding Policy FAA and the IAQ Plan.

Policy FAA Claims

The Appellant maintains that the actions of MCPS do not align with certain specified provisions of Policy FAA because they do not provide a “healthy and safe” environment for children. Policy FAA - *Educational Facilities Planning* - guides the MCPS educational facilities planning process to respond to changes in student enrollment, educational programming, and physical plant infrastructure. (FAA at B). The facility planning process requires an analysis of various criteria including student enrollment projections, educational program requirements; facility utilization rates; school site size; capacity calculations; the impact of county planning as well as trends in development, land use, transportation, and housing patterns, and Key Facilities Indicators. (FAA at D).

The Appellant argues that MCPS violated the section on Key Facilities Indicators. Key Facilities Indicators are facility characteristics that influence the learning and working experience. Examples of these characteristics are safety, security, and accessibility requirements; indoor environment conditions; program and space relationships; building quality; infrastructure and asset data, and other relevant characteristics. (FAA at D.1.c). The Key Facilities Indicators approach is used to identify and provide a basis for prioritizing options responsive to the school system’s changing facility needs. (FAA at D.1.d). An analysis of the various criteria using the Key Facilities Indicators approach is used to develop a schedule of county-wide systemic replacement and major capital projects. Major capital projects include facility-specific projects such as construction of new or additions to existing facilities. *Id.* The Appellant has not presented any evidence demonstrating improper application of the Key Facilities Indicators

¹ The IAQ Plan at issue here is the PHS IAQ Plan which was included in the initial appeal documents, and again with the additional briefing. While Order OR24-01 inadvertently referred to the MCPS IAQ Plan, this was inconsequential as the parties addressed the PHS IAQ Plan in their additional briefings.

approach by the local board in the prioritization and development of the school system's county-wide project schedule.

The Appellant also highlights a provision concerning local board changes to the Superintendent's recommendation regarding the capital improvements program and the facility planning activities. Pursuant to the policy, the local board may approve a different and/or condensed process and time schedule from the recommendation if the local board determines that unusual circumstances exist. (FAA at F). Again, we find a failure of evidence to support a claim of a violation of Policy FAA in this regard.

Additionally, the Appellant argues violation of a provision regarding facility design, devoting a great deal of time to the "healthy" and "safe" reference therein. The provision states that "[e]ducational facility designs shall consider community input and provide for a healthy, safe, and secure environment, in alignment with principles of environmental stewardship, and consistent with current educational program needs as well as anticipated future program needs." Regulation FAA-RA defines "facility design" as the planning and design processes that lead up to construction of a school facility. This provision is not relevant to the issues in this case as the roof work is beyond the "facility design" stage. We do not find that the Appellant has met her burden of demonstrating a violation of Policy FAA.

PHS IAQ Plan Claims

The Appellant also alleges that MCPS violated the PHS IAQ Plan. Specifically, the Appellant maintains that MCPS failed to follow the requirement that construction activities "be planned to provide time to allow flush out of the building prior to occupancy." (IAQ at 5). The Appellant also maintains that MCPS failed to follow the requirements of the 2012 International Green Construction Code ("IgCC") as required by the IAQ Plan by failing to shut down the school HVAC system while doing the roof work. *Id.* at 2.

The MCPS documentation explained that the roofing work fell outside IAQ Plan. Accordingly, we do not subscribe to the Appellant's view that the IAQ Plan governs here simply because MCPS utilized some of the methods mentioned in the Plan to improve air quality at PHS and such methods were discussed by school system officials. The IAQ Plan is the plan developed by MCPS through a consulting service specifically applicable to PHS. (*See* IAQ Plan). While the IAQ Plan is silent on its application to interior versus exterior work, MCPS has consistently maintained that the IAQ Plan was not intended to apply to the roof-related work at issue in this case. The MCPS Office of Facilities Management, Division of Design and Construction, stated that the IAQ Plan governs construction practices inside of the new building and, as applicable, to any work within the structure of the existing building while the roofing work, as part of the exterior envelope construction, falls outside of the governing principles of the IAQ Plan. (PHS Q&A Document). The view of the school system design and construction experts was reiterated by Hearing Officer Jones' in her Report Findings and Recommendations (8/4/23 Report), by the Superintendent's Designee, and by the local board. In the circumstances here, we defer to the local board in adopting the view of the Division of Design and Construction as to application of its own IAQ Plan. *See Marzullo v. Kahl*, 366 Md. 158 (2001) (deference to administrative agency's interpretation of statutes it administers); *Kenneth F. v. Baltimore Cnty. Bd. of Educ.*, MSBE Op. No. 10-23 (2010)(deference to administrative agency's interpretation of its own

regulations). We will not second guess the opinion of the school system experts in this arena when it comes to the interpretation of its own procedures.²

CONCLUSION

For the foregoing reasons, we find that the local board did not violate Policy FAA and that the IAQ Plan did not apply to the exterior roof work. We affirm the local board’s decision because it is not arbitrary, unreasonable, or illegal.

Signatures on File:

Joshua L. Michael
Vice-President

Shawn D. Bartley

Chuen-Chin Bianca Chang

Susan J. Getty

Monica Goldson

Nick Greer

Rachel McCusker

Joan Mele-McCarthy

Absent:

Clarence C. Crawford, President

Irma Johnson

Samir Paul

Holly Wilcox

² We recommend, however, that the local board amend the IAQ Plan to clarify its application to interior and exterior work.

May 21, 2024