

IN THE MATTER OF  
COMAR 13A.05.09.02B

BEFORE THE  
MARYLAND  
STATE BOARD  
OF EDUCATION  
Opinion No. 14-28

## OPINION

### INTRODUCTION

The Montgomery County Board of Education (local board) has filed a Petition for Declaratory Ruling requesting that the State Board explain the true intent and meaning of COMAR 13A.05.09.01, *et seq.* (Homeless Programs) and declare that the provisions do not apply to youth in the care of the Department of Juvenile Services who are placed at the Harriet Tubman facility (Tubman) in Montgomery County and, therefore, those youth do not require immediate registration in the regular instructional program at a comprehensive public high school. The Office of the Public Defender, the Department of Juvenile Services (DJS), Hearts & Homes for Youth, Inc. (Hearts & Homes), and the Public Justice Center have all responded to the Petition. The local board has replied and several Respondents have responded.

### FACTUAL BACKGROUND

This case concerns the State Board's regulations on homeless students, set forth in COMAR 13A.05.09.01 *et seq.* The State regulations were derived from the McKinney-Vento Homeless Assistance Act (McKinney-Vento), 42 USC §§11301 *et seq.*, the federal law that provides homeless students with various rights and protections. At the crux of this case is the definition of a homeless student under COMAR 13A.05.09.02B, and the requirement that a homeless student be allowed to attend either the student's school of origin during the period of homelessness or the public school serving the attendance area in which the homeless student is living.<sup>1</sup> COMAR 13A.05.09.04A.

In October 2012, Hearts & Homes re-opened the Harriet Tubman facility in Montgomery County.<sup>2</sup> Tubman temporarily houses students who are in the custody of DJS. (Petition, Ex.1). Tubman can serve up to 14 youth, ages 12-17, for a maximum of 60 days. Tubman is in the geographic attendance area for Rockville High School.

This petition arises because the local board maintains that it is not required to treat the youth at Tubman as homeless under COMAR 13A.05.09.02B and enroll them in a public school as set forth in COMAR 13A.05.09.04A. Rather, the local board maintains that it can educate the

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<sup>1</sup> The school system makes the decision regarding which school the homeless student will attend based on a determination of what is in the best interest of the student. COMAR 13A.05.09.04.

<sup>2</sup> Tubman had been closed for a period of years due to lack of funding. (Hearts & Homes Response to Petition at 7).

youth at Tubman by providing individualized instruction at the facility. To this end, MCPS had assigned a general and special education teacher to the facility to teach the youth there. It also installed and configured ten computers, including flat-panel monitors, keyboards, and mice, to be used for educational purposes. The computers can access MCPS programs, including access to Kurzweil;<sup>3</sup> MAP-M/MAP-r/MAP-4<sup>4</sup> programs as online assessments to identify skill level and guide instruction; and instructional programs in reading and mathematics that can be customized based on a student's skill level. The local board believed that it made legal, practical and educational sense to deliver instruction in this manner based on the fact that youth committed to Tubman stay at the facility for only a short time, and also based on conversations in October and November 2012 with a now retired Maryland State Department of Education (MSDE) Specialist for Homeless Education, Neglected/Delinquent Education who apparently conveyed to school system personnel that these youth were not considered homeless under the law. (Petition at 4-5; Petition, Exs.13 & 14, Affidavits of Adams and Neff).

On or about October 24, 2012, Tubman staff contacted Rockville High School seeking to enroll four students. Student A was a 12<sup>th</sup> grade special education student from Baltimore City who was placed at Tubman pursuant to a "Community Detention Program/Preliminary Consent Contract." (Petition, Ex.3). He was at Tubman from October 5, 2012 to December 4, 2012, at which time he was placed at the Liberty House shelter in Baltimore City. (Petition, Ex.9). Student B was an 11<sup>th</sup> grade special education student from Baltimore City who was placed at Tubman on October 17, 2012, under a "Shelter Authorization" that authorized taking the "child into detention [community detention or shelter care] until the next regular court day of the Juvenile Court for Baltimore City" following a complaint against Student B for malicious destruction. (Petition, Ex.4). He was at Tubman from October 17, 2012 to November 9, 2012, when he was returned to the care and custody of his mother in Baltimore City. (Petition, Ex.10). Student C was a 9<sup>th</sup> grade special education student from Frederick County who was placed at Tubman on October 25, 2012 for unknown circumstances. (Petition, p.2). Student D was a 10<sup>th</sup> grade student from Montgomery County placed at Tubman on October 23, 2012 for unknown circumstances. *Id.*

On or about November 2, 2012, the Office of the Public Defender filed a joint complaint with the MSDE Division of Special Education Services on behalf of Student A, Student B, and two other Tubman residents, Students E and F.<sup>5</sup> The joint complaint alleged that the school system had failed to deliver a free and appropriate public education (FAPE) to the students, who were entitled to receive special education services. It also alleged that the school system had violated COMAR 13A.05.09.03, governing homeless students, and COMAR 13A.08.07.03-1,

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<sup>3</sup> Kurzweil is a software assistive technology tool that enables those with dyslexia, dysgraphia, attention deficit disorder, and other reading disabilities and those who are blind or vision impaired to learn.

<sup>4</sup> Measures of Academic Progress-Mathematics and Measures of Academic Progress-Reading.

<sup>5</sup> Student E, from Montgomery County, was placed at Tubman on October 24, 2012, by court order. He remained at Tubman until November 7, 2012, at which point he returned to his mother's custody. After two weeks, he was hospitalized, placed into DJS custody, and placed at the Alfred D. Noyes Children's Center. (Petition at 3 & Ex.11). Student F, from Montgomery County, was placed at Tubman on October 11, 2012 by court order. He remained at Tubman until November 4, 2012, when he left without permission. The youth has since been placed by DJS at different facilities. (Petition, Ex.12).

governing placement of a child in State-supervised care by not enrolling the students in school. (Petition, Ex.5).

On November 16, 2012, MSDE advised that it would investigate. Based on its investigation, MSDE staff found that all of the youth at Tubman subject to the complaint qualified as homeless students under the definitions set forth in COMAR 13A.05.09.02B, and that MCPS had failed to comply with the requirements for homeless students which require enrollment in a public school in the youth's best interest, with the exception of Student F for whom MCPS had attempted to arrange transportation to the school of origin prior to his discharge.<sup>6</sup> (Petition, Exs.9, 10, 11, 12). Thereafter, MCPS began implementing the requirements of COMAR 13A.05.09 for homeless students for youth at Tubman.

Despite MSDE's clear indication to MCPS that the youth at Tubman fall within the homeless student definition and must be placed in an appropriate public school according to what is in the youth's best interest, MCPS is now seeking to have the State Board "declare that the true intent and meaning of the State Board's regulations requiring immediate registration of homeless students in the regular instructional program at a comprehensive public high school, COMAR 13.05.09.01, *et seq.*, does not encompass students awaiting a juvenile court hearing who are placed at Tubman. . . ."

#### STANDARD OF REVIEW

On the issue presented here, we exercise our independent judgment in interpreting education law. COMAR 13A.01.05.05E.

#### LEGAL ANALYSIS

##### *Initiation of Petition*

As a preliminary matter, Respondent Hearts and Homes argues that the local board lacks the authority to seek a declaratory ruling under the Administrative Procedure Act because local boards of education are considered State agencies which do not qualify as an "interested person" who may file a petition for declaratory ruling under Md. Code Ann., State Gov't §10-304. Respondent argues that §10-303 limits the local board's status as an interested party stating that "[a] political subdivision of the State or an instrumentality of a political subdivision is entitled, to the same extent as other legal entities, to be an interested person, party, or petitioner in a matter under this subtitle, including an appeal." Respondent relies on *Board of Educ. of Prince George's County v. Secretary of Personnel*, 317 Md. 34 (1989), in which the Court of Appeals questioned whether or not the local board had the authority to seek a declaratory ruling under this provision. The Court stated that "*In Bd. of Ex. of Land, Arch. v. McWilliams*, 270 Md. 383 (1973), this Court indicated that the quoted language was 'not . . . of sufficient scope' to give a State agency 'the status of an interested person, petitioner, or party, as the case may be. . . .'"

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<sup>6</sup> MSDE also found that MCPS had failed to provide each of the youths with FAPE. *Id.*

The State Board appeal procedures provide that “a party may file a petition for declaratory ruling by the State Board on the interpretation of a public school law or regulation of the State Board that is material to an existing case or controversy.” COMAR 13A.01.05.02D. A “party” means “either an appellant, respondent, or any person or entity allowed to intervene or participate as a party.” COMAR 13A.01.05.01B(8). Based on these two provisions, the State Board has always allowed local boards to seek declaratory rulings.

Whether or not the local board had the authority to initiate the Petition for Declaratory Ruling in the first place, §2-205(e) of the Education Article imbues this Board with the authority to explain the true intent and meaning of its own regulations. There is currently an existing case and controversy in Montgomery County involving whether or not the State Board regulations require MCPS to enroll youth placed in Tubman in public school. This Board has received filings on the Petition from numerous stakeholders, all of whom want to clarify the issue to resolve any further dispute concerning the education of these children. This is an issue of great importance. We decline to dismiss the Petition for Declaratory Ruling.

#### *Homeless Student/Child Awaiting Foster Case Placement Definitions*

The local board argues that youth at Tubman are not homeless students as defined in COMAR 13A.05.09.02B(4) because Tubman is a detention facility, not a shelter facility, and children placed in a detention facility are exempted from the homeless student definition. The local board maintains, therefore, that it is not required to enroll the children in their school of origin or in Rockville High School during their stay at Tubman. The Respondents argue that the local board’s position is incorrect and that Tubman is a shelter facility as a matter of law.

COMAR 13A.05.09.02B(4)(a) defines a “homeless student” as “a child or youth who lacks a fixed, regular, or adequate nighttime place of residence.” COMAR 13A.05.09.02B(4)(b)(v) includes a child awaiting foster care placement in that definition.<sup>7</sup> While both of these provisions are included in the McKinney-Vento Act, the federal law has left it to the states to further define what is meant by “child awaiting foster care placement.” COMAR 13A.05.09.02B(2) does just that and provides as follows:<sup>8</sup>

- (a) “Child awaiting foster care placement” means:
  - (i) A child placed out of the child’s home pursuant to a shelter care order by the Department of Social Services or the Department of Juvenile Services; or
  - (ii) A child placed out of the child’s home pursuant to a voluntary placement agreement documented by the Department of Social Services; or

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<sup>7</sup> It also sets forth four other categories of children or youth that are included in the definition. COMAR 13A.05.09.02B(4)(b)(i) – (iv).

<sup>8</sup> In October 2012, the State Board amended COMAR 13A.05.09.02B(2) to expand Maryland’s definition of a “child awaiting foster care placement” to include certain DJS youth. Prior to that time, no DJS youth were included in the definition and the provisions pertaining to homeless students did not apply to them.

- (iii) A child committed to or placed in the care and custody of the Department of Social Services or the Department of Juvenile Services, and who is placed into a temporary, short-term placement of not longer than 90 school days, such as in an emergency or shelter facility, a diagnostic center, a psychiatric respite facility, an emergency foster home, or another temporary, short-term placement not described in §B(2)(b) of this regulation.
- (b) **“Child awaiting foster care placement” does not include a child committed to or placed in the care and custody of the Department of Juvenile Services and who is placed into any of the following temporary, short-term placements:**
- (i) **A detention facility;**
  - (ii) A forestry camp;
  - (iii) A training school;
  - (iv) Any State owned and operated facility accommodating more than 25 youth; or
  - (v) Any other facility operated primarily for the purpose of detaining youth who are determined to be delinquent and require secure custody in a physically restrictive setting. (Emphasis added).

Tubman is not a detention facility. Tubman is a residential child care program for short term placement not to exceed 60 days, licensed by the DHR, the umbrella agency for the local departments of social services. DHR licenses the program pursuant to the residential child care regulations found in COMAR. Shelters are included in the definition of residential care programs, however, detention facilities are not. COMAR 14.31.07.02. DHR licensed facilities, like Tubman, are available to DJS for the placement of appropriate youth needing community, non-secure placement.

Maryland law differentiates between shelter care and detention. The youth at Tubman have been placed in “shelter care,” which is defined as “the temporary care of children in physically unrestricting facilities.” Md. Code Ann., Cts. & Jud. Proc. §3-8A-01(bb). Shelter care requires findings that continuation of the child in the child’s home is contrary to the welfare of the child, and that removal of the child from the home is reasonable under the circumstances due to an alleged emergency situation and/or in order to provide for the safety of the child. *Id.* at §3-8A-15(c). In contrast, “detention” is defined as “the temporary care of children who, pending court disposition, require secure custody for the protection of themselves or the community, in physically restricting facilities.” *Id.* at §3-8A-01(n). Placing a youth in detention requires findings that the action is required to protect the child or others, or the child is likely to leave the jurisdiction of the court. *Id.* at §3-8A-15(b).

Maryland law does not support an interpretation that Tubman is a detention facility. The elements of physical restriction, heightened security, and protection of the community that are all central to the concept of “detention” are absent. Tubman houses children who can be in a physically unrestricted facility. Tubman is not a locked facility and youth are permitted off-site on a regular basis.

The local board also argues that the State Board should consider Tubman to be a detention facility because youth placed there are in “community detention” or are placed based on having committed an offense that would be a crime for an adult or having violated probation. First, the basis for the youth’s DJS involvement is not relevant in determining whether or not Tubman is a detention facility. Second, “community detention” is not the same as “detention.” Rather, it is defined as a “program monitored by the Department of Juvenile Services in which a delinquent child or a child alleged to be delinquent is placed in the home of a parent, guardian, custodian, or other fit person, or in shelter care, as a condition of probation or as an alternative to detention.” *Id.* at §3-8A-01(h).

We note that Tubman qualifies as a child care institution under Title IV-E of the Social Security Act, which excludes detention facilities from its definition. 45 C.F.R. §1355.20. Title IV-E is a federal law that provides funds for specified administrative services to children requiring foster care services. 42 U.S.C. §672. Because Tubman is considered a child care institution and not a detention facility, DJS receives Title IV-E reimbursement for its youth there who are at risk for requiring foster care services through a Memorandum of Understanding between DHR and DJS. (*See* Attachment to DJS Response to Petition).

Youth placed at Tubman are not excluded from the definition of a “homeless student.” They qualify as children awaiting foster care placement under COMAR 13A.05.09.02B(2). They are considered homeless students who are entitled to the rights and protections under the law afforded to that category of students. That includes the right to attend either their school of origin or Rockville High School. *See* COMAR 13A.05.09.04A. It also includes the right not to be segregated in a separate school, or a separate program within a school, based on their status as homeless. 42 U.S.C. §11432(e)(3)(A); COMAR 13A.05.09.02C.

### *Educational Policy*

The local board argues that this case is not about the definitions of “detention” and “shelter care” that are contained in provisions other than the Education Article. Rather, it argues that, as a matter of sound educational policy, the State Board should find that for educational purposes, Tubman is a detention facility under COMAR 13A.05.09.02B and that the homeless student provisions are inapplicable to the youth there. Such an interpretation would allow MCPS to educate the youth in a room at the Tubman facility rather than enroll them in a comprehensive high school or transport them to their school of origin. The local board maintains that providing education services to the youth at Tubman, rather than at a school, will give the youth a better, more meaningful educational experience given that the youth at Tubman have an average length of stay of approximately 11 days and often are in need of individualized instruction. The local board further explains that the youth are in school for very few days because a determination

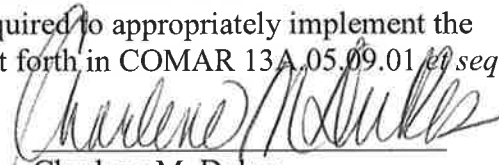
must first be made about what school they should attend and transportation arrangements must be made, all of which take time.

On the other hand, the Respondents argue that it is more educationally sound for the youth at Tubman to receive an education in a school setting rather than having MCPS provide instruction in a room in the basement of the facility that is outfitted with computer equipment. Respondents also argue that MCPS cannot meet the needs of special education students or the requirements of the special education laws by teaching them at the facility.<sup>9</sup> In addition, DJS maintains that youth at Tubman stay an average of 16.2 days, not the 11 days suggested by the local board. DJS further states that, if you eliminate from the count youth who stay at Tubman 3 days or less, the average length of stay becomes 20.9 days, which equates to about 3 weeks of school.

The parties can argue back and forth about which option is more educationally sound and give various examples of the circumstances of various DJS youth placed at Tubman. The fact remains, however, that the youth at Tubman qualify as homeless students under COMAR 13A.05.09.02B, and they are therefore entitled to be enrolled in public school. We note that at the time this Board approved the regulatory change expanding the definition of a “child awaiting foster care placement,” neither the local board nor MCPS opposed the change. In fact, no entity opposed the change in regulation. Given that this Board expanded the definition to include the category of child at issue in this matter, it is axiomatic that we believe it is more educationally sound to have the youth at Tubman enrolled in school rather than to be segregated from other students their age to receive instruction in the basement of a shelter facility. Further, it is entirely appropriate for this Board to take into consideration the existing relevant law in Maryland in its assessment of whether Tubman is a detention facility. If the local board seeks to have the regulation changed, a Petition for Declaratory Ruling is not the appropriate mechanism by which to do that.

## CONCLUSION

For all of the reasons set forth herein, we declare that the DJS youth placed at the Harriet Tubman facility are children awaiting foster care placement as defined in COMAR 13A.05.09.02B(2) and, therefore, satisfy the “homeless student” definition set forth in COMAR 13A.05.09.02B(4). As such, the local board is required to appropriately implement the regulations pertaining to homeless programs as set forth in COMAR 13A.05.09.01 *et seq.* with regard to these youth.

  
Charlene M. Dukes  
President

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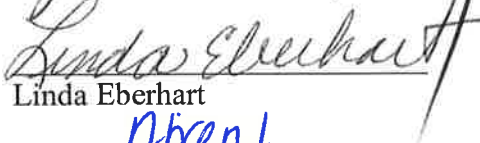
<sup>9</sup> Hearts and Homes also maintains that the local board’s argument about providing a more meaningful educational experience to the youth at Tubman is disingenuous because MCPS has a different reason for not wanting the youth to enroll at Rockville High School. Respondent states that when the Vice President of Therapeutic Services and two other Tubman employees met with the principal of Rockville High School in 2012 to enroll the first group of Tubman youth, the principal refused stating that she did not want to enroll them unless they were good football players because it would affect the school’s graduation rates. (Perez Affidavit).

Absent

Mary Kay Finan  
Vice President



James H. DeGraffenreidt, Jr.



Linda Eberhart

Absent

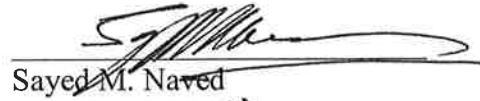
S. James Gates, Jr.

Absent

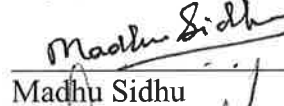
Larry Giammo



Luisa Montero-Diaz



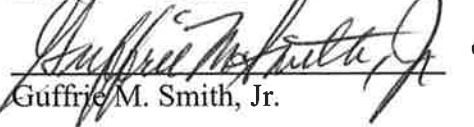
Sayed M. Naved



Madhu Sidhu



Donna Hill Staton



Guffrie M. Smith, Jr.

May 20, 2014