

ABBE MILSTEIN, ET AL.,

Appellant

v.

MONTGOMERY COUNTY BOARD
OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 15-35

OPINION

INTRODUCTION

Abbe Milstein and 33 other individuals identifying themselves as TildenCares (Appellants) have appealed the decision of the Montgomery County Board of Education (local board) to collocate Rock Terrace School (“Rock Terrace”) with Tilden Middle School (“Tilden Middle”). The local board filed a motion to dismiss for lack of standing as to certain Appellants and a motion to dismiss for lack of jurisdiction. In the alternative, the local board filed a motion for summary affirmance. Appellants have responded to these motions¹ and the local board replied.

FACTUAL BACKGROUND

Tilden Middle, part of Montgomery County Public Schools (“MCPS”), was originally located at 6300 Tilden Lane in Rockville. Approximately 24 years ago, it moved to the site of Woodward High School (“Woodward High”) on Old Georgetown Road after that high school closed. The former Tilden Lane building became a holding center for students from middle schools around the county who were displaced from their regular schools while the schools were being renovated or expanded. Tilden Middle on Old Georgetown Road draws students from three local elementary schools and 798 students were enrolled there during the 2014-15 school year. Three special education programs operate out of Tilden Middle on Old Georgetown Road. (Motion, Ex. 4).

Rock Terrace is a stand-alone special education school. It serves students from ages 12 to 21 who have significant cognitive disabilities. Rock Terrace focuses on academic and school-to-work programs, tailored to students who may not be able to succeed in a large, general education school environment. Rock Terrace can serve up to 100 students, and 83 were enrolled in the 2014-15 school year. (Motion, Ex. 2).

On October 28, 2014, then-Superintendent of Schools Joshua Starr presented the local board with his recommended *Fiscal Year 2016 Capital Budget and Amendments to the FY 2015-2020 Capital Improvements Program*. As part of the plan, Tilden Middle would move from its

¹ Appellants argue that there are material facts in dispute that necessitate a hearing, but fail to identify any disputed facts in the record. Accordingly, we shall resolve this appeal based on the motions and the parties’ responses.

location in the Woodward High building on Old Georgetown Road back to its original location on Tilden Lane.² The Tilden Lane building would be renovated and expanded, with a target completion date of August 2019. In addition, MCPS recommended that Rock Terrace be considered for a collocation with Tilden Middle School at the Tilden Lane building. MCPS based its recommendation on the fact that the Rock Terrace building was in poor condition and state funding for stand-alone special education schools is difficult to obtain because of the lack of opportunities for students in stand-alone centers to receive instruction in a general education setting and otherwise interact with general education students. Five other sites were also considered for collocation with Rock Terrace, but were ruled out for various reasons. (Motion, Ex. 6; Ex. 20).

MCPS officials offered the following reasons for recommending that Rock Terrace be collocated with Tilden Middle at the Tilden Lane facility:

- The Tilden Lane building is centrally located with easy access to major highways
- Tilden Middle and its feeder high school serve students with similar disabilities
- The Tilden Lane site is 19.7 acres, large enough to accommodate both schools
- The Tilden Lane site is relatively flat and there is access from two streets
- The collocation with Tilden Middle would be one of the fastest ways in which to move Rock Terrace students to a more modern facility

(Motion, Ex. 6)

On November 17, 2014, the local board approved the creation of a roundtable discussion group to study the collocation of Tilden Middle and Rock Terrace at the Tilden Lane building. (Motion, Ex. 6). The roundtable group included MCPS staff, representatives from the special education committee of the Montgomery County Council of Parent Teacher Associations, and current parents and staff from Tilden Middle and Rock Terrace. (Motion, Exs. 5, 8). The roundtable group held meetings on December 18, 2014; January 5, 2015; January 20, 2015; January 26, 2015; February 4, 2015; February 12, 2015; and February 23, 2015. All of the meetings were held at Rock Terrace or Tilden Middle. (Motion, Exs. 9-16). At times, members of the community asked questions at the end of these roundtable group meetings. (Motion, Ex. 6, 12).

During the roundtable meetings, group members provided feedback concerning potential designs for the collocated facility and reviewed multiple concept plans developed by an architectural firm hired by MCPS. The roundtable group ultimately approved a draft report summarizing its findings. (Motion, Ex. 16).

In addition to public roundtable meetings, MCPS held two public information meetings on December 1, 2014 and March 4, 2015 about the potential collocation. During the March 4 public information meeting, the roundtable's work was reviewed along with the pros and cons of various collocation proposals and a timeline for local board action. (Motion, Ex. 17). A large

² The decision to move Tilden Middle back to its original location on Tilden Lane was first made in November 2009 as part of the *FY 2011-2016 Capital Improvements Program*.

group of parents of students from the surrounding community attended the meeting and voiced their opposition to the collocation, including concerns that MCPS did not spend enough time reviewing the feasibility of collocation; that the combined schools would result in a loss of green space and increased traffic problems; that combining the schools would lead to decreased services to students in both schools; and that it would be inappropriate for students up to 21 years old from Rock Terrace to be in the same building with younger students from Tilden Middle. (Motion, Ex. 18).

On March 23, 2015, Interim Superintendent of Schools Larry Bowers recommended that the local board collocate Rock Terrace with Tilden Middle at the Tilden Lane facility. (Motion, Ex. 20). The interim superintendent explained that the roundtable process was consistent with MCPS regulations, which require the participation of representatives from the two schools and MCPS staff members. Current representatives from the schools were selected because of their understanding of the programs offered by their respective schools. The interim superintendent argued that local board policy and federal and state law require students with disabilities to be educated in the least restrictive environment and to provide opportunities for inclusion to the maximum extent possible. Collocation would enable middle school-age students from Rock Terrace to interact with middle school students at Tilden Middle. The interim superintendent recommended creating one facility composed of two schools operating in separate parts of the Tilden Lane building, with shared common areas but separate principals and staff. As for neighborhood concerns about traffic, loss of green space, and utilities, the interim superintendent explained that these would be addressed as part of a future feasibility study.³ (Motion, Ex. 20).

The local board held a hearing on April 27, 2015. Approximately three dozen people testified against the proposed collocation, many of whom are a part of this current appeal. (Motion, Ex. 21).

On May 12, 2015, the local board adopted the interim superintendent's recommendation and approved the collocation. The resolution required that the collocation occur after the finished revitalization and expansion of the Tilden Lane facility; that two principals be maintained for the two schools; that the two schools be designed as one facility with classrooms, specialized rooms, labs, and support rooms for each school in separate parts of the building; and that the "unique needs" of students in the two schools be incorporated into the design and construction of the revitalized and expanded Tilden Lane building. (Motion, Ex. 1).

This appeal followed.

STANDARD OF REVIEW

Sections 4-205 and 2-205 of the Education Article establish the State Board's jurisdiction to hear and decide most cases. Section 4-205 establishes the State Board's authority to hear and

³ According to the local superintendent, the feasibility study is the next stage in the development process in which MCPS seeks the input of stakeholders, including nearby residents; explores building plans and projected costs; and performs a traffic study. MCPS will hold public community meetings as part of the feasibility study and design process for the school. (Motion, Ex. 6).

decide appeals from decisions of local superintendents which were appealed to and decided by the local board. This authority arose by statute in 1969.

Under §2-205, the State Board is given the power to determine the true intent and meaning of State education law and to decide all cases and controversies that arise under the State education statute and State Board rules and regulations. That authority has existed in statute since 1870. Section 2-205 was intended by the General Assembly as a grant of “original jurisdiction” to the State Board allowing an appellant a direct appeal without the need to exhaust lower administrative remedies. The Court of Appeals has observed that §2-205 grants the State Board the authority to hear cases that “deal primarily with statewide issues (i.e. statutes or bylaws applicable to all county boards of education).” *Board of Ed. of Garrett County v. Lendo*, 295 Md. 55, 65 (1982).

Because this appeal involves a direct challenge to a quasi-legislative decision of a local board, our jurisdiction to hear the appeal comes from §2-205 of the Education Article. Under §2-205, we apply a standard of review that focuses solely on whether the local board’s decision violates education law. See *Rock Creek Hills Association v. Montgomery County Bd. of Educ.*, MSBE Op. No. 12-49 (2012); *Stanmore Family Limited Partnership v. Montgomery County Bd. of Ed.*, MSBE Op. No. 12-41 (2012).

LEGAL ANALYSIS

Before reaching the merits of Appellants’ arguments, we must address several procedural questions raised by the parties concerning standing and jurisdiction to hear this appeal.

Lack of standing

Appellants identify themselves as TildenCares, a community group of 34 individuals who reside near the proposed collocated school on Tilden Lane or who have children who will attend Tilden Middle. The appeal is signed by Abbe Milstein as the “lead appellant” and undersigned by each of the remaining 33 members of the group. The local board argues that the State Board should dismiss seven of these individual Appellants because they lack standing to bring an appeal. The local board does not challenge the standing of TildenCares as an organization.

In order to have standing to bring an appeal, an individual “must show some direct interest or ‘injury in fact, economic or otherwise.’” *Nehemiah’s Vision, Inc. v. Bd. of Educ. of Prince George’s County*, MSBE Op. No. 14-30 (2014) (citation omitted). In other words, a person must “be personally and specifically affected in a way different from the public generally.” *Id.* An individual’s status as a resident of the community is insufficient to convey standing by itself. See *Marshall v. Baltimore City Bd. of School Commissioners*, MSBE Op. No. 03-38 (2003). The local board argues that seven of the Appellants live too far away from the site and have not shown that they have children who attend or might attend the collocated schools.

In the case of Appellants Milstein, Rachel Manchester, and Eric Manchester, Appellants point to evidence in the record that they have standing as parents. Ms. Milstein is the parent of children at Tilden Middle and Luxmanor, one of the elementary schools that feeds into Tilden

Middle. (Motion, Ex. 21). Appellants Rachel and Eric Manchester also have a child attending Luxmanor. (Motion, Ex. 21). For the remaining four Appellants, there are no affidavits from the challenged individuals or any other evidence in the record to support their standing. Accordingly, we grant the local board's motion and dismiss Nancy Delasos, Bethanne Bond, Nurti Coombe, and Lauren Schwartz from this appeal.

Lack of jurisdiction/Motion to amend appeal

Appellants raised eight questions in their original appeal, all dealing with whether MCPS or local board procedures were "fatally flawed." In response to the Appellants' appeal, the local board filed a motion to dismiss for lack of jurisdiction. The local board explained that its decision was a quasi-legislative one that could only be reviewed pursuant to Education Article §2-205 based on an allegation of a violation of State or federal law. The local board argued that Appellants were attempting to proceed under §4-205, which governs appeals of local board decisions stemming from the decision of a local superintendent. In response to the local board's motion, Appellants sought to amend their appeal, which the local board opposed.

The original appeal can be construed as raising a claim of a violation of state law in the form of a denial of due process. In the amended appeal, Appellants argue that the failure of MCPS to re-open roundtable discussions in the face of community opposition or to appoint community members and parents of children who will attend Tilden Middle to the roundtable group violated their due process rights. Additionally, Appellants raise an entirely new claim that the local board violated Education Article §4-116 by failing to consult with the Maryland-National Capital Parks and Planning Commission.

The State Board may allow a party to amend an appeal or other pleading. COMAR 13A.01.05.04A(2). In this case, Appellants' original appeal provided general notice to the local board about the due process claims Appellants wished to raise. Although the last argument, concerning an alleged violation of Education Article §4-116 is new, the local board has had the opportunity to fully respond to it. Accordingly, we shall accept the Appellants' amended appeal.⁴

Violation of due process

Appellants argue that once the local board became aware of community opposition to the proposed collocated school that it should have reopened roundtable discussions. Without citing any law, Appellants argue that the failure to reopen these discussions violated the community's rights to due process and the rights of parents whose children may attend the collocated school because they should have been represented as a part of the roundtable discussion group.

⁴ After all filings were submitted in this matter, one of the Appellants sent an email asking the State Board to take "administrative notice" of a document related to this appeal. The local board responded to the email and the Appellant replied. Because the document is already included in the record as an exhibit to the local board's motion to dismiss, we shall consider it as a part of this appeal. We decline, however, to consider the additional arguments offered by the Appellant and local board via email related to the document.

“The Fourteenth Amendment of the U.S. Constitution, as well as Article 24 of the Maryland Declaration of Rights . . . prohibits the deprivation of life, liberty, or property without due process of law.” *In re Ryan W.*, 434 Md. 577, 608-09 (2013) (quoting *Roberts v. Total Health Care, Inc.*, 349 Md. 499, 509 (1998)). Courts apply a two-part inquiry to determine whether there has been a due process violation, considering (1) whether State action has been used (2) to deprive a person of a substantial property interest. *Id.* at 609. In order to have a substantial property interest, “a person clearly must have more than an abstract need or desire for it.” *Evans v. Burruss*, 401 Md. 586, 593 (2007) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). A person must “have a legitimate claim of entitlement” to the property interest. *Id.*

Composition of the roundtable discussion group was guided by MCPS Regulation FAA-RA, *Long-range Educational Facilities Planning*. Regulation FAA-RA describes “parents, staff, and students” as the primary stakeholders in the planning process and states that representatives from the Montgomery County Council of Parent Teacher Associations, the local parent teacher association, or other parent or student representatives, along with MCPS staff, should be represented as part of any discussion group. (Motion, Ex. 25). Members of the surrounding community and parents who will have children attend the school in the future are not listed as required participants. In our view, membership on an advisory roundtable discussion group is not something to which Appellants were entitled as a matter of law. The MCPS regulations create a framework to ensure input from stakeholders, but they do not create a substantive property right.

Even without this substantive right, Appellants had both notice of the local board’s proposed action and an opportunity to be heard, the core components of due process. The record demonstrates that the community’s views were clearly expressed to the members of the roundtable group, the interim superintendent, and the local board. The failure of the interim superintendent and local board to agree with those views was not a violation of state law.

Appellants raise a related argument that failing to include parents of children who may attend the collocated school in the future as part of the roundtable group was a violation of Education Article §4-108(2). That provision requires that the local board “[m]aintain throughout its county a reasonably uniform system of public schools that is designed to provide quality education and equal educational opportunity for all children.” Appellants argue that future students at Tilden Middle “may well suffer a learning environment disadvantage” relative to their peers because of the “compressed physical and recreational facilities,” and that their parents should therefore have been a part of the roundtable. The State Board has consistently held that an Appellant must support allegations of illegality with factual evidence. *See King v. Baltimore Bd. of School Commissioners*, MSBE Op. No. 14-19 (2014). Speculating that future renovations to a facility could impact the learning environment does not meet this evidentiary threshold.

Violation of Education Article §4-116

Education Article §4-116(a) requires that if there is a commission or agency with responsibility for county planning for land use, the local board shall “consult with the commission or agency” and “ask its advice in choosing land for a school site.” The site must “conform as far as practicable to development plans for land use in the county.” Ed. Art. §4-

116(a)(2).

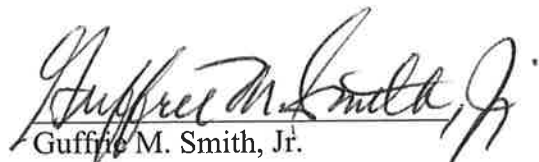
Appellants argue that MCPS violated state law by failing to consult with the Maryland-National Capital Park and Planning Commission before it choose to collocate the two schools together at Tilden Lane. In support, Appellants cite our decision in *Stanmore Family Limited Partnership v. Montgomery County Bd. of Educ.*, MSBE Op. No. 12-41 (2012), in which we discussed the requirements of §4-116. The local board's action here is distinctly different from that in *Stanmore*. In *Stanmore*, the local board consulted with the Maryland-National Capital Park and Planning Commission because it intended to swap land with the commission in order to build a new school on land adjacent to a former school site. Here, the local board is collocating two schools on an already-existing school holding site.


We conclude that the plain meaning of the phrase "choosing land for a school site" in the context of Ed. Art. §4-116(a) refers to new construction on that land, not renovating a building that has already been used as a school. This is made clear by the requirement in §4-116 that the site "conform as far as practicable to development plans for land use in the county." In our view, it would be unreasonable and contrary to the plain language of the statute to require the local board to follow the process outlined in §4-116 every time it choose to relocate one school to another already-existing school building.

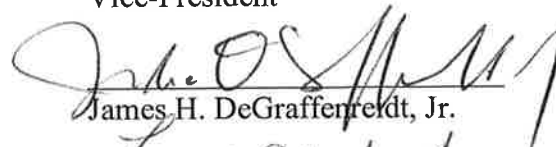

Appellants also argue that MCPS failed to follow its own regulations governing site selection criteria for schools. Because there is no violation of state law alleged, we need not address this argument.


CONCLUSION

For all of these reasons, we affirm the decision of the local board because there was no violation of state education law.


Guffie M. Smith, Jr.
President


S. James Gates, Jr.
Vice-President

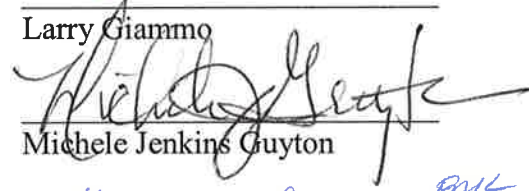

James H. DeGraffenreidt, Jr.

Linda Eberhart



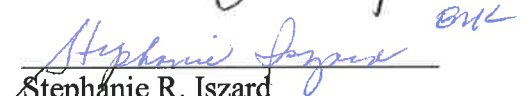
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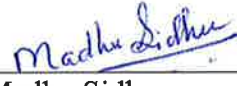
Larry Giammo




Michele Jenkins Guyton



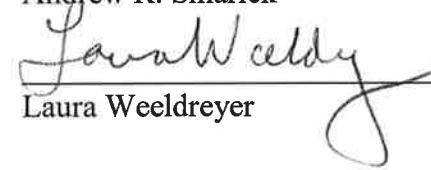
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October 27, 2015