

COLIN MURPHY, ET AL.,

Appellant

v.

ANNE ARUNDEL COUNTY BOARD
OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 15-36

OPINION

INTRODUCTION

Appellants challenge the decision of the Anne Arundel County Board of Education (local board) to enter into an agreement to lease school property to a private entity for the purpose of constructing cell towers. The Appellants argue that the agreement is inconsistent with the local board's obligation under §4-114(a)(1) of the Education Article to hold school property "in trust for the benefit of the school or school system."

We transferred the case pursuant to COMAR 13A.01.05.07 to the Office of Administrative Hearings (OAH) for a hearing before an Administrative Law Judge (ALJ) to resolve any genuine disputes of material fact. The ALJ convened a hearing on the matter on March 9, 2015. On April 21, 2015, the ALJ issued a proposed decision concluding, in part, that the local board's agreement violated §4-114(a)(1). (ALJ Proposed Decision at 28). The ALJ also opined on an Open Meetings Act issue and a jurisdictional issue.

Both the Appellants and the local board filed exceptions to the ALJ's proposed decision. Oral argument on the exceptions was held before the State Board on September 22, 2015.

FACTUAL BACKGROUND

On January 4, 2012, at its regularly scheduled meeting, the local board reviewed as an agenda item the local superintendent's recommendation to award a contract for a Tower Leasing Program to Milestone Communications. The contract was expected to generate approximately \$5 million in revenue for Anne Arundel County Public Schools (AACPS) over a 10 year period. (Agenda Item, 1/4/12). The matter was not scheduled for approval at the meeting. Rather, it was scheduled as an agenda item for review only, allowing for the local board to question or object to the award recommendation but not to vote to approve or disapprove. (ALJ Proposed Decision at 6).

On January 24, 2012, the local board held a public workshop on the AACPS budget. This was an informational briefing at which Aleksy L. Szachnowicz, Chief Operating Officer for AACPS (COO), did a PowerPoint presentation on the budget. The local board did not consider any agenda items or vote on any public business at the workshop. (ALJ Proposed Decision at 6).

On June 20, 2012, at its regularly scheduled meeting, the local board voted to approve a Telecommunications Leasing Master Agreement (Master Agreement) between the Anne Arundel County Public Schools (AACPS) and Milestone Communications. The agreement gave Milestone Communications the right to lease a portion of AACPS properties for the purpose of constructing cell phone towers (telecommunications monopoles) and an equipment facility at each approved site in locations deemed acceptable to the local board, and to sublease the towers and equipment facilities to telecommunication service providers. (Master Agreement at 1). The Master Agreement provided that each individual cell tower site proposal would be submitted to the local board for review. *Id.* The Master Agreement also provided that the local board would designate a School Board Project manager who could review site proposals and approve the final site plan for each proposed cell tower and the equipment facility. *Id.* at 3. It also authorized the parties to enter into 10 year site agreements, renewable by the parties. Pursuant to the Master Agreement, Milestone Communications is exclusively responsible for the construction, maintenance, and operation of the cell towers and the equipment facility at any proposed AACPS site. *Id.* Eight of the nine local board members voted to approve the Master Agreement. The one board member who did not vote was not present at the meeting. The vote was recorded and placed in the meeting minutes. (ALJ Proposed Decision at 7).

The Master Agreement was executed on July 23, 2012. By its terms, the Master Agreement lasts for five years, until July 23, 2017, and allows either party to seek renewal of the Agreement from the other party. (Master Agreement at 1-2). It requires Milestone Communications to pay to the local board a site fee of \$25,000 per site and 40% of the gross revenues derived from the use, leasing or occupancy of the towers and facilities. *Id.* at 4- 5.

On July 9, 2014, at a regularly scheduled meeting, the local board reviewed a site proposal from Milestone Communications for the construction of a cell tower and equipment facility to be built at the Magothy/Severn River Middle School property. The site proposal was listed as a meeting agenda item. The Agenda Item read as follows, in pertinent part, “As stated in the [Master Agreement], each individual site proposal is to be submitted to the [local board] for conceptual review.” (ALJ Proposed Decision at 8). This was merely a conceptual review of the proposal and there was no board vote. (T.210-216). As explained at the OAH hearing, after all required permits and approvals are received and there are assurances from board counsel that everything is in order, the local board president administratively signs the lease on behalf of the board.¹ (T.211-213).

On July 31, 2014, nineteen appeals were filed with the State Board maintaining that the local board’s agreement to lease school property for the purpose of constructing a cell tower violates the local board’s obligation to hold the property in trust for the benefit of the school system as set forth in §4-114(a)(1) of the Education Article. We transferred the case to OAH for a hearing before an ALJ to resolve genuine disputes of material fact. The ALJ convened a hearing on the matter in March 2015.

At the time of the OAH hearing there was no executed site lease for the Magothy/Severn River Middle School property and construction at the site had not yet begun. (T.210-211). Since

¹ The site lease for the construction of the cell tower at Magothy/Severn River Middle Schools is not in the record.

that time, construction began for the installation of the cell tower. It is our understanding that construction is now complete.

On April 21, 2015, the ALJ issued a proposed decision concluding that the local board's Master Agreement violated §4-114(a)(1). The ALJ also opined on this Board's jurisdiction and authority. He also ruled on an Open Meetings Act issue. The Appellants and the local board filed exceptions to the ALJ's proposed decision. Oral argument on the exceptions was heard on September 22, 2015.

STANDARD OF REVIEW

When the State Board explains the true intent and meaning of the State education law and State Board rules and regulations, we exercise our independent judgment on the law's meaning and effect. COMAR 13A.01.05.05(E). This case, however, involves a mixed question of law and fact. In such cases, we give deference to the local board's application of the facts to the law. *See Charles County Bd. of Educ. v. Vann*, 382 Md. 286, 296 (2004).

The State Board referred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify, or remand the ALJ's proposed decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications, or amendments to the proposed decision. *See Md. Code Ann., State Gov't §10-216(b)*.

ANALYSIS

At issue in this case is whether the local board's decision to lease property for the construction of cell towers and facilities under the Master Agreement with Milestone Communications is consistent with its trust obligation under §4-114(a)(1). The ALJ found that the local board breached this obligation and the local board filed exceptions to that finding.

Trust Obligation - §4-114(a)(1) of the Education Article

Section 4-114(a)(1) states that “[a]ll property granted, conveyed, devised, or bequeathed for the use of a particular public school or school system . . . shall be held in trust for the benefit of the school or school system by the appropriate county board. . . .” This statute imposes a “trust obligation” on the local board with regard to school property. Although a local board has broad authority in the management of school property, when a local board decides to lease that property to a third party, the lease must be consistent with the trust obligation.

A review of this case requires an explanation of §4-114(a)(1). As stated above, in expressing the true intent and meaning of the law, we exercise our independent judgment. COMAR 13A.01.05.05(E). In the context of holding school property in trust pursuant to §4-114(a)(1), there are no court decisions in Maryland that elaborate on a local board's trust obligation. The Maryland Attorney General, however, has issued three opinions addressing this obligation.² The State Board has issued one.

² Although the Attorney General Opinions are not binding precedent, they serve as important guidance. *See Mitchell v. Register of Wills*, 227 Md. 305, 310 (1962).

We start with the proposition that leasing school property is consistent with the trust obligation if “the lease is reasonable, considering among other factors, ‘the purposes of the trust’ and the ‘nature of the property and the uses to which it may be advantageously put.’” *Restatement (Second) of Trusts*, §189, comment b (1959); *see also* 76 Op. Att’y. Gen. 190, 92 (1991). The assessment of these factors is for the local board. *Id.* Consistent with this proposition, in *Kurth v. Montgomery County Bd. of Educ.*, MSBE Op. No. 12-23 (2012), this Board held that in ascertaining if the local board’s decision to lease property to the County for construction of soccer fields violated §4-114(a)(1), the issue was “whether the decision to lease the property held in trust is reasonable.”

The Attorney General opinions on the issue provide some pertinent factors to consider in determining if a lease is reasonable and thus consistent with §4-114(a)(1). Because the lease may not be tantamount to a complete disposition of the public school property, the first factor is the duration of the lease. 76 Op. Att’y. Gen. 190 (1991). A lease that extends for a long period of time can be viewed as a transfer of use that impedes the school system’s ability to use the property for the benefit of the schools. This factor played a large role in the Attorney General’s determination that a 99 year lease of school property to a private corporation for commercial use would not be consistent with the local board’s trust obligation under §4-114. *See* 91 Md. Att’y. Gen. 33 (2006).

Second, the lease will comply with the trust obligation if it provides a “benefit” to the school system. 76 Md. Att’y. Gen. 190 (1991). In analyzing this factor, the local board must identify the benefit delivered by the lease transaction and support its analysis by facts. There should be some nexus between the benefit the lease will provide and the local board’s educational responsibilities. *Id.* In some cases, there must be a strong nexus, such that the benefit is a “direct benefit” to the school system. For example, the Attorney General opined that a direct benefit was necessary to support approval of a long-term lease of school property to a non-public, non-profit educational institution for the construction and operation of a non-public school building on the school system’s property to serve special education students. The direct benefit to the school system was the ability to have some of its students access the facility and programs at the non-public school. *Id.* A strong nexus was required because the lease was long-term and it involved the building of a permanent structure on the property, thus limiting the local board’s ability to retrieve the property, if that ever became necessary.

In some cases, however, the nexus between the benefit and the educational responsibilities of the local board need not be so strong. For example, in *Kurth v. Montgomery County Bd. of Educ.*, MSBE Op. No. 12-23 (2012), this Board concluded that a “direct” benefit was not necessary. In that case, the Montgomery County government rented land from the local school board to build artificial turf soccer fields. This Board found the annual rental income of \$1500.00 and the lessening of wear and tear on the school system’s playing fields to be of sufficient benefit to sustain a short-term lease to the Montgomery County government for the creation and operation of playing fields to be used by the community.³

³ This Board reached that conclusion despite the appellants’ arguments that the arrangement was essentially a lease to a private entity given that the County planned to enter into a partnership with a private entity to construct and operate the ball fields. We indicated that such a use does not violate the trust obligation because the local board

Third, the Attorney General has opined that the lease should be terminable any time that the entity's use of the school property becomes incompatible with the needs of the school system. 76 Md. Att'y. Gen at 192. This requirement is based on the trust obligation that the lease must benefit the school system. If the use of the leasehold no longer benefits the school system, because it is an incompatible use, the lease should be terminable.

Fourth, it is our strong view that an important factor to consider is the type of use of the property. Uses that involve the placement of temporary structures on school property, such as cell towers, are less likely to impede the school system's ability to use the property in the future because they are easier to deconstruct than permanent structures and are unlikely to create disruption of school activities. While we do not want to impede the flexibility of school systems to use their property in the context of the trust obligation, we emphasize that not all commercial uses are appropriate on school property. A cell tower is far more innocuous than a use involving the operation of a business with employees and customers who are present on school property during school hours.

Furthermore, as with all leases of school property the local board should be mindful of its responsibility to safeguard the property for the benefit of the school system. Part of that responsibility is to ensure that any use takes into consideration the fair market value of the use of the property.

Ascertaining if a lease is reasonable under §4-114(a)(1) requires a balancing of all of these factors, taking into account the specific facts and circumstances of the particular case. No one factor is determinative of the result.⁴

Local Board Decision

We now turn to the case at hand to determine if the local board's decision to enter into the Master Agreement should be upheld. In doing so we give deference to the local board's application of the law to the facts in this case.

Duration of Agreement

We must first ascertain the duration of the agreement at issue. The ALJ found that the 5 year Master Agreement was long-term based on the purpose and continuing nature of the agreement. In particular, the ALJ referred to the agreement's extension provision allowing either party to request an extension of the contract term. (ALJ's Proposed Decision at 18; Master Agreement, ¶2.1). In addition, the Master Agreement authorizes the execution of 10 year site

would still hold the land in trust for the school system, thereby preserving it for school use if the need arose. (*Id.* at 11).

⁴ In March 2014, the local board established Policy FB-RA – Telecommunication Transmission Facilities to “facilitate access to [school property] for the location of telecommunication transmission facilities to permit appropriate coverage for the safety and security of Anne Arundel County citizens, to advance instructional technology in schools and to obtain revenue for the benefit of Anne Arundel County Public Schools (AACPS).” Other school systems across the State have similar policies and have leased school property to private entities to construct cell towers. The fact that policies and leases already exist between local boards of education and private entities suggests that local boards have already been contemplating the reasonableness of entering into such leases.

leases between the local board and Milestone Communications for the construction of cell towers and facilities.

While we recognize that the Master Agreement has the potential to be of continuing nature, we disagree with the ALJ's assessment that the Master Agreement is a long-term contract. The contract duration is 5 years. Although either party can request an extension, the other party need not agree. Thus, after five years, the local board is free to discontinue the agreement. As for the individual site leases, the leases are for 10 years, with extension provisions. There is no evidence to suggest that the local board will be bound beyond the 10 year duration of any site lease. In addition, the Master Agreement provides for the removal of any cell towers and facilities at a site by Milestone Communications within 60 days after the end of the site lease, should the local board select that option. (Master Agreement, ¶8). In our view, the lease duration itself is not an impediment to the local board fulfilling its trust obligation.

Benefits to School System

The ALJ also concluded that the Master Agreement is inconsistent with the local board's trust obligation under §4-114(a)(1), finding that it does not result in direct benefits to the school system. The local board takes exception to this finding arguing that the Master Agreement results in direct benefits in three ways. At the OAH hearing, local board witnesses explained the benefits. The first was enhancement to the safety and security of AACPS schools by supporting cell phone service which is critical in emergency situations when land line service is not accessible. The local board explained that it is essential for administrators and others to have cell phone service in schools to contact first responders, the AACPS communications office, and others in times of emergency. The second benefit was support and delivery of instruction by providing wireless connectivity for the use of instructional technology. Such technology includes smart boards, tablets, laptops and other devices that support the delivery of instruction in schools. The third benefit was the revenue stream produced by the contract payments from Milestone Communications to the local board which can be allocated for school system expenses. The school system projects the Master Agreement to produce approximately \$5 million in revenue over a period of ten years.

In analyzing the proposed benefits, the ALJ found that there was no persuasive evidence that the Master Agreement helped to fill a coverage gap at Magothy/Severn River Middle Schools or any other Anne Arundel County Public School. We agree. While the local board presented testimony about the how cellular and wireless access benefits schools generally, the local board failed to present any evidence connecting those benefits to a need for improved cellular access at any Anne Arundel County Public School.⁵ We point out that witnesses for the school system had no information about whether a wireless coverage gap existed at

⁵ In its Response to Appellants' Exceptions, the local board argues that Appellant Haneberg, perhaps inadvertently, submitted as attachments to her exceptions evidence of the gap in cellular coverage at the schools. The attachments are a February 20, 2014 document from Milestone Communications stating that "Verizon is addressing a gap in wireless coverage and capacity in the community around Magothy River and Severn River Middle School" and a postcard from Verizon stating that the "area surrounding the school was identified by Verizon as needing additional wireless coverage. Wireless coverage and antenna placement is driven by consumer usage." Even if the State Board were to consider this as additional evidence at this late date, it is not evidence of an actual gap in coverage at any AACPS school. Rather, the attachments refer to a gap in the surrounding area.

Magothy/Severn River Middle Schools. (T.153-155). Nor did they speak directly to the point. Instead, the testimony of the Chief Operating Officer merely presumed a coverage gap. He stated that due to the expense, “if there was no coverage gap there, no wireless provider would want to spend the money to construct towers and infrastructures.” (T. 192). Neither of the local board’s witnesses could testify that there was an actual gap in coverage. As the ALJ stated, “if there is no existing gap in wireless coverage at the Severn River and Magothy River Middle Schools or some other identified AACPS school, there appears to be no merit to the assertion that the benefits of the cell tower(s) lease would include enhancement of safety and security at school facilities or aid in the support and delivery of instruction through the use of instructional technology.”⁶ (ALJ’s Proposed Decision at 21).

The remaining benefit is the anticipated \$5 million in revenue over a 10 year period. The ALJ stated that “[a]n expected stream of revenue payments is not a ‘direct benefit’ in the conduct of the Local Board’s educational responsibilities as contemplated by the Attorney General’s analysis in the three cited opinions.” (ALJ Proposed Decision at 22). We do not agree with this conclusion. The 2006 Attorney General opinion suggests otherwise with a specific mention of a monetary amount to be received by the school system. 91 Op. Md. Att’y. Gen. 33. That Opinion includes the legal analysis submitted by counsel to the local board. The Attorney General agreed with that legal analysis. That analysis states as follows:

Under the terms of the proposed ninety-nine year lease at issue here, the Board would receive, among other things, a 3.86 ± acre site (worth over \$1,000,000.00 unimproved in 2002) improved for parking for school buses and other vehicles. Further, the Board would receive the cash amount of \$500,000.00 to be dedicated and used for school construction. The receipt of such substantial consideration would be ample basis for the Board to reasonably determine that the lease would result in direct benefits to the Board in the conduct of its educational responsibilities.

91 Op. Md. Att’y. Gen. at 41 (determining that the 99 year lease for commercial use would violate the trust obligation). This clearly contemplates the possibility that substantial monetary consideration could be viewed as a direct benefit sufficient to satisfy the trust obligation.

Here, the local board has identified the projected \$5 million in revenue over a 10 year period as a significant benefit to the local board in the performance of its educational functions. (T.197-198). The revenue produced by the contract will be used to support the local board’s core mission of educating the children in Anne Arundel County Public Schools. *Id.* We do not find such a determination unreasonable. It is not necessary that the benefit go directly to the school where the cell tower is placed.

⁶ We note that the ALJ further found that even if the local board had proven that enhanced school safety and security or support for delivery of instruction through the use of instructional technology resulted from the Master Agreement, he would not have viewed these as direct benefits to the board in the conduct of its educational responsibilities. We find no need to reach this issue given that the local board failed to demonstrate that these were direct benefits of the Master Agreement.

Ability to Terminate the Lease at any Time

The final factor to consider is that the lease should be terminable at any time that the entity's use of the school property ceases to be compatible with the needs of the school system. *See* 76 Op. Att'y. Gen 190 (1991)(involving long-term lease to non-public, non-profit educational institution). Based on our review of the Master Agreement, it does not appear to include a termination for incompatible use clause. The Master Agreement here is short term and expires on July 23, 2017, less than two years from the date of this decision. Due to the short amount of time remaining on the agreement, in this particular case we find that the absence of such a clause does not render the Master Agreement illegal. We find, however, that future agreements shall include a termination for incompatible use clause.

Therefore, balancing all of the factors above, we find that the local board's decision to enter into the Master Agreement for the lease of school property for the construction of cellular towers and facilities is consistent with the local board's trust obligation under §4-114(a)(1).

Open Meetings Act

Appellants argued during the OAH hearing that the local board violated the Maryland Open Meetings Act, Md. Code Ann., Gen. Provisions, Title 3. No exceptions were filed on this issue. We note that the State Board has consistently declined to address issues related to the Open Meetings Act, holding that the State Board is not the appropriate forum for redress of such claims. *See Kurth v. Montgomery County Bd. of Educ.*, MSBE Op. No. 12-23 (2012); *Harper v. Frederick County Bd. of Educ.*, MSBE Op. No. 02-15 (2002). The avenue for redress of Open Meetings Act violations is to file a complaint with the Open Meetings Compliance Board (OMCB) or to file a petition for enforcement with the circuit court. *See* Md. Code Ann., Gen. Provisions §3-205 & §3-401. Thus, we make no findings regarding the Open Meetings Act claim and do not adopt those aspects of the ALJ's proposed decision.

Authority of this Board

The ALJ opined that, even if the lease violated the trust obligation, the State Board lacked the authority to find the Master Agreement null and void and to halt the construction of the cell tower at Magothy/Severn River Middle Schools site. The Appellants have filed exceptions to this part of the decision. We find it unnecessary to reach this issue because it is our view that the local board's decision to enter into the Master Agreement is consistent with §4-114(a)(1) and should be upheld.

Proposed Default Order

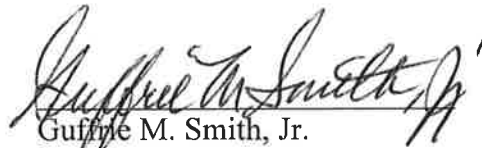
The ALJ has also issued a Proposed Default Order dismissing several of the Appellants from the case for failure to appear at the OAH pre-hearing conference and hearing. The OAH Rules of Procedure authorize an ALJ to issue a proposed default order against a defaulting party if the party fails to attend or participate in a pre-hearing conference, hearing, or other stage of a proceeding after receiving proper notice. COMAR 28.02.01.23. OAH mailed letters to all Appellants notifying them of the January 13, 2015 pre-hearing conference and the March 9, 2015 hearing. None of the notices were returned. Several of the Appellants failed to appear for either proceeding. Thereafter, the ALJ issued a proposed order finding those who failed to appear to be


in default and terminating them from any further case proceedings. None of the Appellants found to be in default filed exceptions requesting that the order be modified or vacated. Accordingly, we adopt the ALJ's Proposed Default Order and dismiss from the case the Appellants who failed to appear at the OAH proceedings.

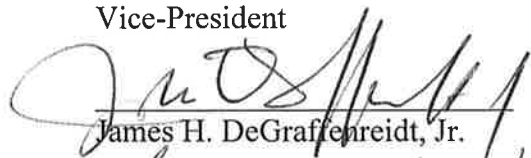
CONCLUSION

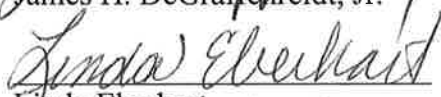
For the reasons stated above, we find that the local board's decision to enter into the Master Agreement to lease school property for the construction of cell phone towers and facilities is consistent with the local board's obligation to hold school property in trust for the benefit of the school system as set forth in §4-114(a)(1). In this decision we have set forth the factors we will consider in determining whether the use of school property meets the trust obligation.

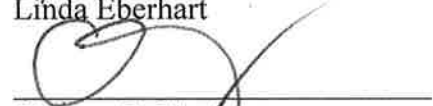
We adopt only the Findings of Fact set forth in the ALJ's Proposed Decision and reject the remainder of the proposed decision. With regard to the ALJ's Proposed Default Order, we adopt the order and dismiss from the case the Appellants who failed to appear at the OAH proceedings.

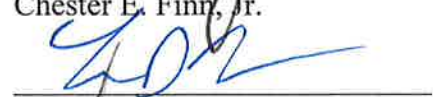

Guffie M. Smith, Jr.
President

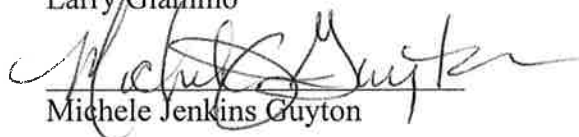

S. James Gates, Jr.
Vice-President



James H. DeGraffenreidt, Jr.


Linda Eberhart


Chester E. Finn, Jr.


Larry Gianmo


Michele Jenkins Guyton


Stephanie R. Iszard

absent
Andrew R. Smarick

Laura Weeldreyer *Ente*
Laura Weeldreyer

Dissent:

Madhu Sidhu
Madhu Sidhu

October 27, 2015

COLIN MURPHY ET AL.,

APPELLANTS

v.

ANNE ARUNDEL COUNTY BOARD
OF EDUCATION

* BEFORE STEPHEN J. NICHOLS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-BE-19-14-42812

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER
NOTICE OF RIGHT TO FILE EXCEPTIONS

STATEMENT OF THE CASE

On or about July 31, 2014, nineteen appeals were filed with the Maryland State Board of Education (MSBE or State Board) regarding a final decision made by the Anne Arundel County Board of Education (Local Board). The written appeals are almost identical except for the names of the individuals listed as the author(s) of the appeals.¹ The MSBE regulations provide that “[t]he State Board shall transfer an appeal to the Office of Administrative Hearings for review by an administrative law judge under . . . circumstances . . . in which the State Board finds that there exists a genuine dispute of material fact.” Code of Maryland Regulations (COMAR) 13A.01.05.07A(3). On December 3, 2014, in order to resolve genuine disputes of material fact,

¹ Some of the appeals listed multiple names; in all, there were twenty-three individuals listed on the nineteen appeals.

the State Board transferred the nineteen appeals to the Office of Administrative Hearings (OAH) as one consolidated case for an administrative adjudication.

On December 10, 2014, the OAH mailed notice to the Local Board and to each of the individuals listed on the nineteen appeals scheduling a pre-hearing conference for January 13, 2015. The U.S. Postal Service did not return any mailed copies of the notice to the OAH. On January 13, 2015, I conducted a pre-hearing conference at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. Colin Murphy and Vanessa Haneberg, two of the twenty-three individuals listed on the nineteen appeals, appeared at the pre-hearing conference. The Local Board was represented by counsel of record. The pre-hearing conference took place as scheduled with those who were present.²

On January 14, 2015, I issued a Pre-Hearing Conference Report and Scheduling Order which, among other things, defined the issues in this case. The OAH mailed a copy of the Pre-Hearing Conference Report and Scheduling Order to each of the individuals listed on the nineteen appeals. The U.S. Postal Service did not return any of the mailed copies to the OAH.

On January 15, 2015, the OAH mailed notice to the Local Board and to each of the individuals listed on the nineteen appeals scheduling a two-day hearing in this matter commencing Monday, March 2, 2015, at 9:30 a.m., and continuing on Monday, March 9, 2015, at 9:30 a.m., at the OAH in Hunt Valley, Maryland. The U.S. Postal Service did not return any copies of the hearing notice to the OAH, and no requests for postponement were received prior to the dates of the hearing.

² "If, after receiving proper notice, a party fails to attend or participate in a prehearing conference, hearing, or other state of a proceeding, the judge may proceed in that party's absence or may, in accordance with the hearing authority delegated by the agency, issue a final or proposed default order against the defaulting party." COMAR 28.02.01.23A.

On March 2, 2015, due to the effects of inclement weather, the Governor of the State declared liberal leave for State employees from the start of normal business hours until 12:00 p.m. (noon). The OAH Inclement Weather Policy Directive provides that when liberal leave is declared for part of a day, cases scheduled to begin prior to the end of liberal leave for that day will be postponed to a future date. On March 2, 2015, the OAH mailed a letter to the Local Board and to each of the individuals listed on the nineteen appeals that the hearing had been postponed and would commence on Monday, March 9, 2015, at 9:30 a.m. The U.S. Postal Service did not return any of the mailed copies of the letter to the OAH.

On March 9, 2015, I convened the hearing as scheduled at the OAH in Hunt Valley, Maryland. COMAR 13A.01.05.07A(3). Colin Murphy, Vanessa Haneberg, Alan Stott, Carol Stott, Claudia R. Haneberg, Mary A. Shank, and Julie Obringer (collectively, the Appellants) were present and were ready to proceed.³ None of the Appellants are represented by legal counsel. Each of the Appellants, as a separate party to this matter, represented themselves. P. Tyson Bennett, Esquire, of Carney, Kelehan, Bresler, Bennett & Scherr, LLP, represented the Local Board.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act (APA), the MSBE's hearing regulations, and the OAH's Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.01.05; COMAR 28.02.01.

³ Kathryn L. Hamilton, Samuel R. Shank, Patrick Albornoz, Lourdes Albornoz, Ryan Obringer, Olav R. Haneberg, Eric Haneberg, Lene Rikke Nielsen-Paton, Melissa Paton, Randall C. Paton, John Hall, Pati Hall, and Alex Hall, who are among the individuals listed on the nineteen appeals, failed to appear. On March 12, 2015, I issued a Proposed Default Order against the individuals who had failed to appear. After the Pre-Hearing Conference Report and Scheduling Order was issued in this case, Laura D. Burke, Fernando S. Lagunes, and Laurie Moynihan, three of the individuals listed on the nineteen appeals, filed with the OAH a written withdrawal from the administrative adjudication of their appeal. Only seven of the twenty-three individuals who had filed appeals participated in the March 9, 2015 hearing.

ISSUES

(1) Whether the Local Board's action(s) at a January 24, 2012 meeting on a proposal from Milestone Communications Management III, Inc. (Milestone Communications) to lease school grounds for the purpose of constructing a cell tower (or cell towers) was in violation of the Open Meetings Act.

(2) Whether the Local Board's agreement to lease school property for the purpose of constructing a cell tower (or cell towers) was in violation of section 4-114 of the Education Article.

(3) If the answer to either issue is affirmative, whether the State Board should rule the action taken by the Local Board to lease school grounds for the purpose of constructing a cell tower (or cell towers) to be null and void.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Appellants:

App. Ex. 1 - Local Board Agenda Item Details for June 20, 2012 Meeting

App. Ex. 2 - Local Board Votes on Fiscal Year 2012 Action Items

App. Ex. 3 - Anne Arundel County Public Schools (AACPS) January 4, 2012 Agenda Item for the Local Board

App. Ex. 4 - AACPS July 9, 2014 Agenda Item for the Local Board

App. Ex. 5 - AACPS News Release, December 16, 2011

App. Ex. 6 - Local Board PowerPoint Slide Printout - Superintendent's Recommended FY2013 Operating & Capital Budgets, January 24, 2012

App. Ex. 7 - Telecommunications Leasing Master Agreement between Local Board and Milestone Communications, July 23, 2012

I admitted the following exhibits on behalf of the Local Board:

- Bd. Ex. 1 - AACPS News Release, December 16, 2011
- Bd. Ex. 2 - AACPS News Release, December 21, 2011
- Bd. Ex. 3 - Local Board Meetings, Hearings and Workshops – 2011-2012

Testimony

Colin Murphy and Vanessa Haneberg testified on behalf of the Appellants.

The Local Board presented the following witnesses: Molly Connolly, Executive Assistant to the Local Board; Robert J. Mosier, Chief Communications Officer, AACPS; and Aleksy L. Szachnowicz, Chief Operating Officer, AACPS.

Stipulation

On the record, the parties stipulated to the following fact: The Local Board is a governmental body subject to and required to comply with the Open Meetings Act.

FINDINGS OF FACT

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

1. On December 21, 2011, the AACPS Superintendent presented his recommended FY2013 Operating & Capital Budgets (the budgets) at a scheduled regular meeting of the Local Board. The budgets charted the course for the AACPS for the fiscal year that began July 1, 2012. The general session of the meeting, open to the public, took place at 7:00 p.m.⁴ The Local Board had provided timely notice and the agenda for that meeting to the community by written news releases and on the AACPS website.
2. Minutes of the December 21, 2011 meeting were kept and were approved by the Local Board at its next scheduled meeting that occurred on January 4, 2012.

⁴ A closed session, not open to the public, to discuss confidential matters was scheduled to commence at 5:30 p.m.

3. On January 4, 2012, at the scheduled regular meeting, the Local Board reviewed, as an agenda item, the AACPS Superintendent's recommendation for the proposed award of a contract for a cell tower leasing program to Milestone Communications.

4. As an agenda item for review, a Local Board member(s) has the opportunity to question or object to the recommendation from the AACPS Superintendent. However, as an item for review, the matter is not scheduled for an approval/disapproval vote. The Local Board did not vote on the Superintendent's recommendation for the proposed award of a contract to Milestone Communications during the January 4, 2012 meeting.

5. Minutes of the January 4, 2012 meeting were kept and were approved by the Local Board at its next scheduled meeting that occurred on January 18, 2012.

6. On January 12, 2012, a scheduled public hearing on the budgets took place at Old Mill High School. The Local Board had provided timely notice of that hearing to the community by written news releases and on the AACPS website.

7. On January 14, 2012, a second scheduled public hearing on the budgets took place at the Parham Building, located at 2644 Riva Road, Annapolis, Maryland (Board Room). The Local Board had provided timely notice of that hearing to members of the community by written news releases and on the AACPS website.

8. On January 24, 2012, a public workshop on the budgets took place at the Board Room. At this public workshop, Aleksy L. Szachnowicz, Chief Operating Officer, AACPS, presented a PowerPoint presentation on the budgets to the Local Board and members of the Anne Arundel County community, who attended the workshop, as an information briefing.

9. At the January 24, 2012 public workshop, the Local Board did not consider any agenda items, vote, or take any other action as a public body. No public business agenda items

14. The AACPS Superintendent, pursuant to the Master Agreement, appointed Greg Stewart of the Plan, Design, and Construction Department, AACPS, as the School Board Project Manager. The School Board Project Manager is responsible for day-to-day interaction with Milestone Communications as to any cell tower site proposal under the Master Agreement.

15. On July 9, 2014, at a scheduled regular meeting, the Local Board reviewed, as an agenda item, a site proposal from Milestone Communications for the construction of a cell tower and equipment facility to be built at the Severn River and Magothy River Middle Schools. In pertinent part, the meeting agenda item regarding this proposal reads, "As stated in the [Master Agreement], each individual site proposal is to be submitted to the [Local Board] for conceptual review." (App. Ex. 4)

16. Pursuant to the Master Agreement, Milestone Communications is exclusively responsible for obtaining any regulatory permits or approvals that may be necessary for the construction, maintenance, and operation of a cell tower and equipment facility at any proposed AACPS site.

17. Milestone Communications has requested approval of its proposal to build the cell tower and equipment facility at the Severn River and Magothy River Middle Schools site from the Maryland Critical Area Commission for the Chesapeake and Atlantic Coastal Bays; at the time of the hearing, approval of that request is pending.⁶ Once the staffing process is finished, if the request is approved, the Chief County Building Officer will issue a construction permit for the proposed site.

⁶ The Commission was created by the Critical Area Act of 1984 (now codified at sections 8-1801 through 8-1817 of the Natural Resources Article of the Maryland Annotated Code) to oversee the development and implementation of local land-use programs in critical areas for Chesapeake and Atlantic Coastal Bays. The Critical Area Act identifies the critical area as all land within 1,000 feet of Maryland's tidal waters and tidal wetlands.

had been prepared for the workshop. No testimony was received from members of the community who attended that workshop. No minutes were kept of this public workshop.

10. On June 20, 2012, at a scheduled regular meeting, the Local Board voted to approve a Telecommunications Leasing Master Agreement (Master Agreement) between the AACPS and Milestone Communications. This agreement gives Milestone Communications the right to lease a portion of AACPS properties for the purpose of constructing a cell tower (or cell towers) and equipment facility on an approved site(s) in a location(s) deemed acceptable to the Local Board. The Master Agreement provides that each individual cell tower site proposal will be submitted to the Local Board for review. The Master Agreement also provides that the Local Board would designate a School Board Project Manager who would review site proposals and may approve the final site plan for each proposed cell tower and equipment facility.

11. The Local Board's vote on approval of the Master Agreement was recorded and placed in the minutes of the June 20, 2012 meeting. Eight of the nine members of the Local Board voted in favor of approval of the Master Agreement; the only member who did not vote in favor was not present for this meeting.

12. The benefit the Local Board seeks to obtain from the Master Agreement is an on-going revenue generating resource to use in the conduct of its educational responsibilities.

13. On July 23, 2012, the Master Agreement with Milestone Communications was executed by the parties. The President of the Local Board signed the Master Agreement, and the AACPS Superintendent signed in approval of the Master Agreement.⁵ By its terms, the Master Agreement lasts for five years until July 23, 2017.

⁵ The Local Board's President and the AACPS Superintendent signed on July 19, 2012.

18. Once a construction permit is issued, a pre-construction meeting will take place with AACPS and Milestone Communications representatives. If the final site plan is approved at the pre-construction meeting, a lease agreement for the proposed cell tower and equipment facility at the Severn River and Magothy River Middle Schools will be prepared and executed. The practice intended is that the President of the Local Board and the AACPS Superintendent will sign the lease agreement on behalf of the AACPS for the cell tower and equipment facility site.

19. At the time of the hearing, the lease by Milestone Communications of school property for the proposed cell tower and equipment facility at the Severn River and Magothy River Middle Schools had not been approved by the School Board Project Manager or the Local Board.⁷

DISCUSSION

“Subject to the provisions of Subtitle 4 of this title, educational matters that affect the counties shall be under the control of a county board of education in each county.” Md. Code Ann., Educ. § 4-101(a) (2014). The Local Board’s decisions are considered prima facie correct. COMAR 13A.01.05.05A. The Appellants must prove by a preponderance of the evidence that the Local Board’s decisions were arbitrary, unreasonable, or illegal as to: 1) the Local Board’s actions at a January 24, 2012 meeting on a proposal from Milestone Communications to lease school property for the purpose of constructing a cell tower (or cell towers) or 2) the Local Board’s lease of school property for the purpose of constructing a cell tower (or cell towers). COMAR 13A.01.05.05B-D. “A decision may be arbitrary or unreasonable if it is one or more of

⁷ Mr. Szachnowicz testified that after the Local Board voted in favor of the Master Agreement it will “not” vote “yes or no” in terms of reviewing each proposed lease for a cell tower and equipment facility. (Tr. 216:15-16)

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.01.05.05B. “A decision may be illegal if it is one or more of the following: (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.” COMAR 13A.01.05.05C. If the Appellants prove that the Local Board violated either the Open Meetings Act by its actions on January 24, 2012, or the Education Article by leasing school grounds for the purpose of constructing a cell tower (or cell towers), then I will propose to the State Board, which shall issue the final decision, that the Local Board’s decision or decisions were arbitrary, unreasonable, or illegal. COMAR 13A.01.05.07A(3); COMAR 13A.01.05.09A.

1. Open Meetings Act

The Appellants argue that on January 24, 2012, the Local Board convened a meeting and awarded a contract for a cell tower leasing program to Milestone Communications in violation of the Open Meetings Act (the Act). The Appellants contend that one of the Local Board’s internal documents points to a contract awarded on January 24, 2012. In light of this document, the Appellants argue that the Local Board “took action” on a contract without recording a vote by its elected officials by written minutes or providing some other type of public record. The Appellants emphasize that pursuant to the Act governing bodies are required to be transparent; otherwise, without any record of its actions, the Local Board cannot be held accountable by the public for its decisions.

The Local Board maintains that the document – upon which the Appellants rely – contains a typographical error that created confusion. The Local Board contends that it did not

meet to consider or transact business on January 24, 2012, and therefore did not take any votes, as the January 24th event was simply a workshop that consisted of a PowerPoint presentation. Moreover, correction of this typographical error clears up this confusion and the alleged violation of the Act should be rejected as totally without merit.

Under the Act, the State has codified its policy that to increase faith in, and ensure accountability of, government to its citizens, public business should be conducted openly and publicly:

(a) *In general.*—It is essential to the maintenance of a democratic society that, except in special and appropriate circumstances:

(1) public business be conducted openly and publicly; and

(2) the public be allowed to observe:

(i) the performance of public officials; and

(ii) the deliberations and decisions that the making of public policy involves.

(b) *Accountability; faith in government; effectiveness of public involvement.*—

(1) The ability of the public, its representatives, and the media to attend, report on, and broadcast meetings of public bodies and to witness the phases of the deliberation, policy formation, and decision making of public bodies ensures the accountability of government to the citizens of the State.

(2) The conduct of public business in open meetings increases the faith of the public in government and enhances the effectiveness of the public in fulfilling its role in a democratic society.

Md. Code Ann., Gen. Provisions § 3-102(a), (b) (2014). The Act requires that “a public body shall meet in open session” unless expressly provided otherwise. *Id.* § 3-301.

Under the Act, “[m]eet” means to convene a quorum of a public body to consider or transact public business.” *Id.* § 3-101(g). A public body engages in a “quasi-legislative function” when it “approv[es], disapprov[es], or amend[s] a contract.” *Id.* § 3-101(j).

Subject to certain exceptions under subtitle 3 of the Act, “as soon as practicable after a public body meets, it shall have written minutes of its session prepared.” *Id.* § 3-306(b)(1). The content of the “written minutes shall reflect: (i) each item that the public body considered; (ii) the action that the public body took on each item; and (iii) each vote that was recorded.” *Id.* § 3-306(c)(1). The Act also provides, “(1) it is presumed that the public body did not violate any provision of this title; and (2) the complainant has the burden of proving the violation.” *Id.* § 3-401(c).

An excerpt from the Local Board Agenda Item Details for its June 20, 2012 meeting states as follows: “On January 24, 2012, the [AACPS] Board of Education awarded Contract 11SC-219 for the Tower Leasing Program, to Milestone Communications to market designated properties for telecommunication tower sites.” (App. Ex. 1) This excerpt is the key evidence in the record that supports the Appellants’ argument that the Local Board conducted public business and awarded a contract for a cell tower leasing program to Milestone Communications in violation of the Act. There were no written minutes produced after the Local Board’s January 24, 2012 workshop. If the Local Board had considered any agenda items, voted, or took any other action as a public body on January 24, 2012 without producing written minutes of that action, then that omission would be at odds with the requirements of section 3-306(c)(1) of the Act.

Molly Connolly, Executive Assistant to the Local Board; Robert J. Mosier, Chief Communications Officer, AACPS; and Aleksy L. Szachnowicz, Chief Operating Officer, AACPS, testified on behalf of the Local Board. In their testimony, each indicated that the “January 24, 2012” date from the excerpt quoted above is a typographical error. Each of the Local Board’s witnesses indicated that the date listed in the excerpt quoted should have been

January 4, 2012. On January 4, 2012, the Local Board had reviewed a recommendation from the AACPS Superintendent selecting Milestone Communications from among two contenders for the proposed award of a cell tower leasing contract.

Mr. Szachnowicz testified that he presented a PowerPoint presentation on the budgets to the Local Board as a tutorial or information briefing at the January 24, 2012 public workshop; there were no agenda items considered by the Local Board during that workshop. Ms. Connolly and Mr. Mosier supported Mr. Szachnowicz's testimony that the Local Board did not consider or vote on any public business during the January 24, 2012 workshop. Mr. Szachnowicz acknowledged that at scheduled meetings he reads from Agenda Item Details when he presents matters to the Local Board. Mr. Szachnowicz, in all likelihood, erred when he spoke to the Local Board during its June 20, 2012 meeting and used the January 24, 2012 date for the agenda item, as he "would have read it exactly the way that it was written." (Tr. 161:16-17)

Colin Murphy and Vanessa Haneberg testified on behalf of the Appellants. When questioned, both acknowledged that they had not attended the January 24, 2012 workshop or any of the meetings held by the Local Board during 2012. In addition to the internal document upon which they rely, the Appellants only suggest that Mr. Szachnowicz used the "January 24, 2012" date when speaking to the Local Board during its June 20, 2012 meeting. The Appellants further contend that the Local Board's failure to correct the January 24, 2012 date as a typographical error until the OAH hearing lends support to their argument.

The Appellants have no personal knowledge as to what took place on January 24, 2012, and their evidence fails to meet their burden of proof. There is no persuasive reason to discount the testimony from the Local Board's witnesses on the fact in dispute. I am satisfied that the "January 24, 2012" date quoted from the Local Board Agenda Item Details document for its June

20, 2012 meeting is a typographical error. As reflected in the findings of fact, any other determination would be against the weight of the credible evidence.

At closing argument, the Appellants also argued that the Local Board's consideration of the AACPS Superintendent's recommendation during its January 4, 2012 meeting, as an agenda item for review, was also a violation of the Act as no vote was taken by the Local Board on the recommendation selecting Milestone Communications from among two contenders for the proposed award of a cell tower leasing contract. None of the appeals filed with the State Board included any mention of the Local Board's January 4, 2012 meeting as the basis for an alleged violation of the Act. The State Board transmitted this matter to the OAH for a hearing on the allegations as contained in the consolidated appeals. As this additional issue was not part of the appeals filed with the State Board, this allegation is beyond the scope of the instant hearing.

2. Education Article

The Appellants contend that a lease of AACPS school property for the purpose of constructing a cell tower (or cell towers) is a commercial use at odds with the Local Board's obligation to hold school property in trust for the benefit of the public school system. In pertinent part, section 4-114 of the Education Article provides:

(a) All property granted, conveyed, devised, or bequeathed for the use of a particular public school or school system:

(1) Except as provided in subsection (c) of this section, **shall be held in trust for the benefit of the school or school system by the appropriate county board** or, for real property in Baltimore City, by the Mayor and City Council of Baltimore; and

(2) Is exempt from all State and local taxes.

....

(c) (1) A private entity may hold title to property used for a particular public school or local school system if the private entity is contractually obligated to transfer title to the appropriate county board on a specified date.

(2) The conveyance of title of school property to a private entity for a specified term under this subsection may not be construed to prohibit the allocation of construction funds to an approved school construction project under the Public School Construction Program.

(3) A county or county board may convey or dispose of surplus land under the jurisdiction of the county or county board in exchange for public school construction or development services.

Md. Code Ann., Educ. § 4-114 (2014) (emphasis added).

The parties have not brought attention to any court decision as a controlling precedent that explains or illuminates the Local Board's obligation to hold school property in trust under section 4-114 of the Education Article. However, the Maryland Attorney General has issued three opinions concerning a local board's trust obligations under section 4-114. Maryland courts have noted that "Attorney General opinions are entitled to consideration, but . . . they are not binding . . ." *Balt. Dev. Corp. v. Carmel Realty Assocs.*, 395 Md. 299, 327 (2006) (citing *Dodds v. Shamer*, 339 Md. 540, 556 (1995)). Yet, Attorney General opinions are "entitled to careful consideration and serve as important guides to those charged with the administration of the law" in Maryland. *Mitchell v. Register of Wills*, 227 Md. 305, 310 (1962).

In 1991, the Attorney General, considering the application of section 4-114(a) of the Education Article, offered the following opinion concerning the authority of a local board to lease school property to a nonpublic educational institution for the purpose of constructing a school building that would serve special education students:⁸

⁸ The opinion also considered the application of section (c)(1) of the Education Article that allowed a local board to "dispose of real property only if it 'no longer is needed for school purposes.'" 76 Md. Op. Att'y Gen. 190, 191 (1991).

In summary, it is our opinion that a local board of education may enter into a lease of school property to a private non-profit educational institution serving handicapped students, **if the local board reasonably determines that the lease would result in direct benefits to the board in the conduct of its educational responsibilities.** Authorization for the lease, however, would exist only so long as the private institution's use of the school property is consistent with the local board's obligation as trustee to hold the property for the benefit of the public school system.

76 Md. Op. Att'y Gen. 190, 193 (1991) (footnote omitted) (emphasis added). “[The Attorney General’s] conclusion [was] limited to these circumstances. We intimate no view whether factors not present in this case – if, for example, the educational institution were operated for profit, or if two or more private institutions in a county offered competing programs – might change the analysis in any respect.” *Id.* at 193 n.4. In the opinion, the Attorney General noted that “[i]n general, a trustee may lease trust property if the lease is reasonable, considering, among other factors, ‘the purposes of the trust’ and ‘the nature of the property and the uses to which it may advantageously be put.’” *Id.* at 192 (quoting *Restatement (Second) of Trusts* § 189 cmt. b (1959)).

In 1991, the Maryland Attorney General, considering the application of section 4-114(a) and other provisions of the Education Article, also offered the following opinion concerning whether a local board of education had the authority to permit the construction and use of a building by a private corporation, in that case a day care provider, on public school property:

In summary, it is our opinion that the authority of a local board of education to permit a day care provider or other private corporation to construct a building for its own use on public school property is doubtful. We recommend that the General Assembly consider an express authorization for such agreements.⁹

76 Md. Op. Att'y Gen. 147, 152 (1991).

⁹ In Chapter 26 (House Bill 1188) of the Laws of Maryland 1991, the General Assembly authorized the lease of public school property for day care centers. *See* Md. Code Ann., Educ. § 7-109(a)(3) (2014).

In a later opinion, the Maryland Attorney General was asked to consider whether a local board of education had the authority to lease real property owned by the board to a private corporation for a 99-year term in return for a \$500,000.00 cash payment and other real property. The proposed lease concerned a parcel of property owned by the local board for the parking of school buses and employee vehicles, which bordered on another lot of land that was zoned for commercial development. The commercial developer of the bordering lot sought to lease the school parcel for the construction of a building of sufficient size to house a planned commercial operation. In pertinent part, the opinion reads:

In an opinion dated November 22, 2005, the General Counsel for the [Board of Education of Harford County (Board)] (“Board Counsel”) concluded that the Board does not have such authority. A copy of that opinion, which describes the proposed transaction in greater detail, is attached. We have reviewed Board Counsel’s opinion and agree with his analysis and conclusion.

In reaching the conclusion that the Board lacks authority to enter into the proposed lease, Board Counsel relied on Annotated Code of Maryland, Education Article (“ED”), §4-114, which states that a local board holds school property in trust for the benefit of the school system, and ED §4-115, which requires that surplus school property be transferred to the County government for disposition. In light of those statutes, Board Counsel reasoned, “the legality of the use of Board property for ninety-nine years by a for profit commercial entity is doubtful.” Board Counsel further concluded that the 99-year lease would not constitute an alternative financing mechanism authorized by ED §4-126.

....

We agree with Board Counsel that the proposed transaction does not appear to be consistent with the Board’s obligation to hold the property in trust for the benefit of the school system. If the Board believes that it would be advantageous to the school system to swap real estate with a private corporation, it may be able to arrange such a transaction with the cooperation of the State Superintendent and the County government.

91 Md. Op. Att’y Gen. 33, 35 (2006) (footnote omitted).

This most recent opinion from the Attorney General indicates that a local board is without authority to lease school property on a long-term basis for a commercial use despite,

apparently, it being financially advantageous for the school system to do so. By its terms, the Master Agreement lasts for five years until July 23, 2017. However, given the purpose of the agreement between the Local Board and Milestone Communications, it is obvious that the parties are contemplating a leasing arrangement that will be of a continuing nature.¹⁰ Given that circumstance, the fact that the Master Agreement on its face is not a long-term lease is not a significant distinction. The lease of school property for the purpose of constructing a cell tower (or cell towers) is a lease for a commercial use. The lease of school property to a private corporation for a commercial use, thereby creating an on-going source of revenue for the AACPS, “does not appear to be consistent with the Board’s obligation to hold the property in trust for the benefit of the school system.” *Id.*

“A trustee, in deciding whether and how to exercise the powers of the trusteeship, is subject to and must act in accordance with . . . fiduciary duties . . .” *Restatement (Third) of Trusts* § 86 (2007). “In exercising the power to lease trust property, the trustee has a duty to act with prudence and in a manner that is reasonable in light of the terms and purposes of the trust and its probable duration and other circumstances.” *Id.* § 86 cmt. c(1). The Local Board’s educational responsibilities stretch far into the future. A lease of school property might be prudent and reasonable in light of the terms and purposes of section 4-114 if, as the Attorney General has pointed out, the lease would result in “direct benefits” to a local board in the conduct of its “educational responsibilities.” 76 Md. Op. Att’y Gen. at 193. As a fiduciary that holds

¹⁰ The Master Agreement (App. Ex. 7, at 1-2, ¶ 2.1), in pertinent part, provides:

If either party wishes to so extend the Term, it shall provide written notice to other party thereof and the other party shall respond in writing within fourteen (14) days whether it elects to so extend the Term or allow the Agreement to terminate at the end of the current Term. In the event that the parties agree to extend the term of this Agreement, an amendment to this Agreement confirming the extension of the Term shall be executed and delivered.

property in trust for the benefit of the school system, the lease of school property for the purpose of constructing a cell tower (or cell towers) would be at odds with trust obligations under section 4-114 unless the lease would result in a direct benefit to the Local Board in the conduct of its educational responsibilities.

It is argued that the lease of school property for the purpose of constructing a cell tower (or cell towers) is consistent with the Local Board's fiduciary duties under section 4-114 because the lease would result in direct benefits in the conduct of its educational responsibilities. When questioned along these lines, Mr. Szachnowicz, on behalf of the Local Board, stated:

[MR. BENNETT]

Q. Mr. Szachnowicz, to what extent, if any, does or would the construction of a cellular tower on the Magothy Middle, Severn River property be advantageous to school students in that facility?

[WITNESS]

A. Really three – three main ways. The first one would be enhancement to the safety and security aspects of the facility. Secondly, it would aide in the support and delivery of instruction through the use of instructional technology. And, finally, it would provide revenue to the school district so the school district can hire teachers, and buy text books, and pay its utility bills and everything else that the school system requires to – to operate properly.

(Tr. 170-71)

Mr. Szachnowicz continued in his direct testimony to elaborate in detail on the three advantages afforded by leasing school property for the purpose of constructing a cell tower (or cell towers). However, during his cross-examination, the following exchange took place:

[MS. HANEBERG]

Q. Okay. Changing gears to address the Maryland Education Section 4-114, you specified that there were three benefits to the school system. The first of which was enhancement to security or safety. The second was support and delivery of instruction.

For those two benefits to the school, is there a current gap in coverage at Magothy and Severn Middle Schools?

[WITNESS]

A. There – if there was not a coverage gap there, no wireless provider would want to spend the money to construct towers and infrastructures. They're very expensive

to construct. I suspect that it would be doubtful that a provider would expend those monies if it was adequately covered. I'm not in that business, so I'm not speaking for the telecommunication industry. But, again, my opinion, Your Honor and madam, is that there must be an identified gap there, otherwise they would not spend the moneys to – out of their pocket to correct that deficiency.

Q. Have the – that – those two schools, have they expressed a need for cell coverage, or are you aware of a lack of coverage for those two schools? Is there any gap in coverage there?

A. There – one of the – if you go on the website for the project, there is a map that shows the coverage gap in that area.

Q. Right. So, there is, according to that map, there is no gap in coverage at the middle schools, so, therefore, that negates the first two of your three benefits to the school system; is that correct?

A. Again, I'm – I don't have that map in front of me, so I can't speak directly to that.

(Tr. 192-93)

Mr. Szachnowicz's testimony quoted above creates more questions than answers. Mr. Szachnowicz did not testify that constructing a cell tower on school property covers an existing gap in wireless coverage at the Severn River and Magothy River Middle Schools or, for that matter, at any AACPS school. He indicates that, given the expensive nature of the project, constructing a cell tower on school property must be for the purpose of covering a wireless gap that exists in the area (perhaps on or nearby school property). Mr. Szachnowicz's lay opinion on this point seems a reasoned inference to fairly draw. Mr. Szachnowicz, as the Chief Operating Officer, oversees the business (the non-instructional) operations of the AACPS. If there was a gap in existing wireless coverage at any particular AACPS school, should not Mr. Szachnowicz be aware that such a gap existed? Mr. Szachnowicz's answers on cross-examination seem to suggest there is no existing wireless coverage gap at the Severn River and Magothy River Middle Schools or, for that matter, at any AACPS school.

In his testimony, Mr. Mosier, Chief Communications Officer, AACPS, also stated that it is "critically important for the school to be able to communicate" in terms of safety and that "wireless devices" serve "technology-infused instruction." (Tr. 152:16, 22-23) However, during

record that might shed light as to what the Local Board determined would be its benefit from the lease of school property for the purpose of constructing a cell tower (or cell towers). In pertinent part, the meeting agenda item regarding this recommendation reads, “The objective was to create a revenue generating resource from which [AACPS] could benefit for many years to come.” (App. Ex. 3, at 1) The meeting agenda item also read that “Milestone Communications has projected that [AACPS] has the potential to earn approximately \$5 Million over the next ten years.” (*Id.* at 2)

Clearly, an on-going stream of revenue for the AACPS would be the benefit from the lease of school property for constructing a cell tower (or cell towers). As there is no evidence of an existing wireless coverage gap at the Severn River and Magothy River Middle Schools or, for that matter, at any identified AACPS school, advantages other than revenue as suggested in testimony from the Local Board’s witnesses are questionable and appear to be in the nature of invented rationales rather than potential benefits contemplated by the Local Board in entering into the Master Agreement. On this record, it is more likely than not that the only benefit the Local Board seeks to obtain and will obtain from the Master Agreement is an on-going, revenue-generating resource. (Finding of Fact #12)

An expected stream of revenue payments is not a direct benefit in the conduct of the Local Board’s educational responsibilities as contemplated by the Attorney General’s analysis in the three cited opinions. Although not controlling precedent, I find the analysis reflected in the Attorney General’s opinions persuasive. Under section 4-114 of the Education Article, the Local Board’s authority to lease school property is limited to those prudent and reasonable uses that are in keeping with its educational responsibilities that stretch far into the future. The Master Agreement – as it provides for a lease(s) of school property to a private corporation for the

cross-examination, Mr. Mosier admitted that cell towers do not have to be on school property in order to provide wireless coverage at AACPS facilities. Mr. Mosier also admitted that he had no information whether a wireless coverage gap existed at the school grounds of the Severn River and Magothy River Middle Schools.

Intuitively, and as Mr. Mosier admitted, cell towers do not have to be on school property in order to provide wireless coverage at AACPS facilities. Further, if there is no existing gap in wireless coverage at the Severn River and Magothy River Middle Schools or some other identified AACPS school, there appears to be no merit to the assertion that the benefits of the cell tower(s) lease would include enhancement of safety and security at school facilities or aide in the support and delivery of instruction through the use of instructional technology.

The Local Board's witnesses suggest that a lease of school property for the purpose of constructing a cell tower (or cell towers) would enhance the safety and security at school facilities and would aide in the support and delivery of instruction through the use of instructional technology. In their testimony, however, the Local Board's witnesses did not indicate that the Local Board had discussed or considered these advantages (other than revenue) as potential benefits when it contemplated entering into the Master Agreement.

If safety and security at school facilities or support and delivery of instruction through the use of wireless instructional technology had been considered to be benefits sought from the leasing arrangement, it would be expected those claimed advantages would be reflected in contemporaneous documentation when the matter was considered by the Local Board. Yet, the AACPS Superintendent's recommendation for the cell tower lease(s) as a review agenda item for the January 4, 2012 meeting of the Local Board does not mention these advantages. The AACPS Superintendent's recommendation is the only somewhat contemporaneous document in the

purpose of constructing a cell tower (or cell towers) in return for an expected stream of revenue payments – is not consistent with the Local Board’s obligation to hold the property in trust for the benefit of the school system as required by section 4-114 of the Education Article.

Even if I had been persuaded that safety and security at school facilities or support and delivery of instruction through the use of instructional technology had been potential benefits that the Local Board had contemplated or might obtain in entering into the Master Agreement, the analysis would change somewhat, but the outcome would not.

In the first Attorney General’s opinion discussed above, a nonprofit, nonpublic educational institution leased public school property to construct a nonpublic school building in order to provide special education to students, some of whom were students that the local board was responsible for educating. The Attorney General noted that the contemplated “arrangement potentially offers significant benefits to both [the public and non-public] school populations through the sharing of facilities and cooperative programs.” 76 Md. Op. Att’y Gen. at 191. The Attorney General also noted that local school boards have a “special obligation to provide a free educational program” to each child with a disability in need of special education in their school districts. *Id.* at 192. Under those circumstances, the lease of school property was viewed as “consistent with the local board’s trust obligations” because the lease arrangement provided direct benefits to the local board in the conduct of its educational responsibilities. *Id.*

Milestone Communications is in the business of providing wireless communication and is not in the business of addressing safety and security requirements at school facilities, or any other type of facilities, and not in the business of providing instructional technology. The advantages other than revenue as suggested in testimony from the Local Board’s witnesses would not be provided by Milestone Communications. Even if a lease(s) of school property for

the purpose of constructing a cell tower (or cell towers) would cover a gap in wireless coverage or enhance wireless coverage at an AACPS facility that would, at best, indirectly benefit the Local Board in the conduct of its educational responsibilities and, therefore, would not be “consistent with the local board’s trust obligations” under section 4-114 of the Education Article. *Id.*

3. Relief Requested

The Appellants request that I recommend that the State Board order the Master Agreement to be null and void and immediately halt construction of the proposed cell tower at the Severn River and Magothy River Middle Schools because the Local Board’s actions violate its fiduciary duty under section 4-114. Article 8 of the Maryland Declaration of Rights indicates that “the Legislative, Executive and Judicial Powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.” Md. Const. Decl. of Rights art. 8.

The State Board is an arm of the executive branch of government, and in this hearing I should only propose that the State Board take such action within the boundaries that the applicable enabling statute delegates to it. *See, e.g., Adamson v. Corr. Med. Servs., Inc.*, 359 Md. 238, 250 (2000).

A court of law in the judicial branch of government has authority to find a contract unenforceable as a matter of public policy and, in turn, void the agreement. *See, e.g., Md.-Nat’l Park & Planning Comm’n v. Wash. Nat’l Arena*, 282 Md. 588, 607 (1978) (“[I]t is the function of a court to balance the public and private interests in securing enforcement of the disputed promise against those policies which would be advanced were the contractual term held invalid.”); *Balt. & Ohio R.R. Co. v. Glenn*, 28 Md. 287, 322 (1868) (stating that an agreement is

legal “unless it violates good morals or is repugnant to some law or policy of this State”). Nevertheless, courts are reluctant to nullify voluntary contractual arrangements on “elusive” public policy grounds and prefer that parties maintain broad powers to make legally enforceable promises. *See, e.g., Md.-Nat’l Park & Planning Comm’n*, 282 Md. at 606; *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 790 (1993); *Seigneur v. Nat’l Fitness Inst., Inc.*, 132 Md. App. 271, 281 (2000) (reiterating that Maryland courts expressed over a hundred years ago the legal principle that “it must be a very plain case to justify a court in holding a contract to be against public policy”).

A court’s power to void a contract as a matter of public policy may be found in a statute’s express terms or implied in its provisions. For instance, the Open Meetings Act expressly authorizes “any person” to file a “petition that asks the court” to “void the action of the public body” if it fails to comply with certain sections of the Act. Md. Code Ann., Gen. Provisions § 3-401(b)(1) (2014). The “public policy embraced in [a] statute” does not need to be in its express terms; however, the “lesser the relationship” between the statute and a contract, “the greater is the reluctance of [the] Court” to invalidate the contract. *Finci v. Am. Cas. Co.*, 323 Md. 358, 378 (1991).

Assuming the violation of fiduciary duty under section 4-114 of the Education Article is clear and plain enough to justify holding the Master Agreement to be against public policy, the question to be decided is whether the State Board has the power to take the action requested by the Appellants and, thereby, impose a sanction on the Local Board and on Milestone Communications, a third party that is not part of this administrative adjudication. *See, e.g., Thanner Enters., LLC v. Baltimore County*, 414 Md. 265, 269 (2010); *Adamson*, 359 Md. at 250.

The State Board has power and authority enumerated in the Education Article to make, for example, an ultimate decision whether to suspend or dismiss a professional employee. *See* Md. Code Ann., Educ. § 6-202(a)(4) (Supp. 2014); *Bd. of Sch. Comm'rs of Balt. City v. James*, 96 Md. App. 401, 418 (1993). The State Board's authority enumerated in the Education Article also includes the following:

(1) determining the primary and secondary educational policies of the State, (2) explaining the true intent and meaning, causing to be carried out, and deciding all controversies and disputes arising under the provisions of the Education Article that are within its jurisdiction, (3) adopting by-laws, having the force of law, for the administration of the public schools, (4) through the State Superintendent of Schools, exercising general control and supervision over the public schools and educational interests of the State, (5) preparing the annual State public school budget, including appropriations for State aid to the counties for current expenses, student transportation, and public school construction, and (6) specifying the information each county board is required to record and the form in which it is to be recorded.

Chesapeake Charter, Inc. v. Anne Arundel Cnty. Bd. of Educ., 358 Md. 129, 138 (2000) (footnote omitted); *see also* Md. Code Ann., Educ. § 2-205 (Supp. 2014).

Overall, the State Board is “vested with the last word on matters of educational policy and administration of public education in Maryland.” *James*, 96 Md. App. at 417. The State Board's “comprehensive” power was expressed in an opinion nearly a century and a half old:

This is a visitatorial power of the most comprehensive character If every dispute or contention among those entrusted with the administration of the system, or between the functionaries and the patrons or pupils of the schools, offered an occasion for a resort to the Courts for settlement, the working of the system would not only be greatly embarrassed and obstructed, but such contentions before the Courts would necessarily be attended with great costs and delay, and likely generate such intestine heats and divisions as would, in a great degree, counteract the beneficent purposes of the law.

Wiley v. Bd. of Cnty. Sch. Comm'rs of Allegany Cnty., 51 Md. 401, 406 (1879).

Undoubtedly, the State Board exercises “adjudicatory” functions and has “broad latitude in fashioning sanctions within legislatively designated limits.” *See Neutron Products, Inc. v.*

Dep't of the Env't, 166 Md. App. 549, 584, 592 (2006); *see also Lussier v. Md. Racing Comm'n*, 343 Md. 681, 706 (1996) (Bell, J., dissenting) (“Our cases recognize that there is a certain amount of acceptable overlap between the branches of government. They also recognize, however, that this constitutional ‘elasticity’ cannot be stretched to a point where, in effect there no longer exists a separation of governmental power” (internal quotations and citation omitted)).

The State Board has broad and longstanding authority over a number of educational issues. However, the type of action requested by the Appellants is for an order declaring the Master Agreement to be null and void and halting construction of the proposed cell tower at the Severn River and Magothy River Middle Schools. In part, the Appellants are seeking injunctive relief. The Appellants have provided no citation of authority for the notion that the State Board may exercise this type of power that is constitutionally vested in the courts of law in this State and traditionally considered to be within judicial authority.

Title 5, subtitle 1 of the Education Article, which concerns budget and reporting requirements for elementary and secondary education contracts for school buildings, improvements or supplies, provides that “[a] contract entered into or purchase made in violation of this section is void.” Md. Code Ann., Educ. § 5-112(h) (2014). Unlike Title 5, however, there is no express authority in section 4-114 of the Education Article to impose the sanction that the Appellants seek. Even assuming, without deciding, that the State Board has power to order certain contracts to be null and void, the Education Article’s lack of specificity in Title 4 with regard to sanctions is too attenuated from the Board’s broad authority under section 2-205 to tie an implied authority to order the Master Agreement to be declared null and void and to order a halt to the construction of the proposed cell tower. While the State Board can take some action

regarding the Local Board's noncompliance with section 4-114, the ultimate sanction of declaring an executed contract with a private party to be null and void and imposing an injunction is too extreme and drastic to order without some clear statutory authority and guidelines.

The APA allows an agency to issue a declaratory ruling: "An interested person may submit to a unit a petition for a declaratory ruling with respect to the manner in which the unit would apply a regulation or order of the unit or a statute that the unit enforces to a person or property on the facts set forth in the petition." Md. Code Ann., State Gov't § 10-305 (2014). In the absence of clear statutory authority and guidelines in support of the relief requested, I will recommend that the State Board's action on the appeals be limited to issuing a declaratory ruling on the violation of section 4-114.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Local Board's activities at a January 24, 2012 workshop did not include any consideration of a proposal from Milestone Communications to lease school grounds for the purpose of cell tower(s) construction, was not a meeting to consider or transact public business, did not require the production of written minutes, and, therefore, was not a violation of the Open Meetings Act. Md. Code Ann., Gen. Provisions §§ 3-101(g), 3-102(b)(2), 3-306(b)(1) (2014).

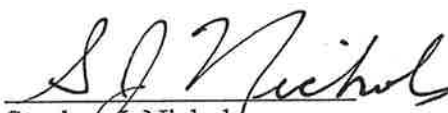
Based on the foregoing Findings of Fact and Discussion, I also conclude as a matter of law that the Local Board's agreement to lease school property for the purpose of constructing a cell tower (or cell towers) was not consistent with its trust obligations under section 4-114 of the Education Article. Md. Code Ann., Educ. § 4-114(a)(1) (2014).

Based on the foregoing Findings of Fact and Discussion, I further conclude as a matter of law that the State Board is without power to declare the Master Agreement to be null and void and to order construction of the proposed cell tower at the Severn River and Magothy River Middle Schools to be halted. Md. Const. Decl. of Rights art. 8.

PROPOSED ORDER

IT IS PROPOSED that the State Board order that the Local Board's agreement to lease school property for the purpose of constructing a cell tower (or cell towers) as memorialized in the Master Agreement is not consistent with its trust obligations under section 4-114(a)(1) of the Education Article.

April 21, 2015
Date Decision Issued


Stephen J. Nichols
Administrative Law Judge

SJN/AJ/da
#155176v1

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this Proposed Decision has the right to file written exceptions within fifteen (15) days of receipt of the decision; parties may file written responses to the exceptions within fifteen (15) 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.

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COLIN MURPHY, <i>ET AL.</i>	*	BEFORE STEPHEN J. NICHOLS,
v.	*	AN ADMINISTRATIVE LAW JUDGE
ANNE ARUNDEL COUNTY	*	OF THE MARYLAND OFFICE OF
BOARD OF EDUCATION	*	ADMINISTRATIVE HEARINGS
	*	OAH CASE NO.: MSDE-BE-19-14-42812
* * * * *	*	* * * * *

PROPOSED DEFAULT ORDER

On or about July 31, 2014, nineteen appeals were filed with the State Board of Education (State Board) regarding a final decision made by the Anne Arundel County Board of Education (Local Board). The written appeals are almost identical except for the names of the appellants.¹ “The State Board shall transfer an appeal to the Office of Administrative Hearings for review by an administrative law judge under the following circumstances . . . [a]n appeal upon review in which the State Board finds that there exists a genuine dispute of material fact.” Code of Maryland Regulations (COMAR) 13A.01.05.07A(3). On December 3, 2014, the State Board transferred the nineteen appeals to the Office of Administrative Hearings (OAH) as one consolidated case for an administrative adjudication.

On December 10, 2014, the OAH mailed notice to each of the appellants listed on the nineteen appeals scheduling a pre-hearing conference for January 13, 2015. The U.S. Postal Service did not return any mailed copies of the notice to the OAH. The pre-hearing conference convened as scheduled. The Local Board was represented by counsel of record. Only Colin Murphy and Vanessa Haneberg, two of the appellants, appeared at the January 13, 2015 pre-

¹ Some of the appeals listed multiple names; in all, there are twenty-three appellants.

hearing conference. The pre-hearing conference took place as scheduled with those who were present.²

On January 14, 2015, the undersigned Administrative Law Judge issued a Pre-Hearing Conference Report and Scheduling Order in this case. The OAH mailed a copy of the Pre-Hearing Conference Report and Scheduling Order to each of the appellants listed on the nineteen appeals. The U.S. Postal Service did not return any of the mailed copies to the OAH.

On January 15, 2015, the OAH mailed notice to each of the appellants listed on the nineteen appeals scheduling a two-day hearing in this matter commencing Monday, March 2, 2015, at 9:30 a.m., and continuing on Monday, March 9, 2015, at 9:30 a.m., at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. These notices included the following warning: "FAILURE TO APPEAR MAY RESULT IN DISMISSAL OF YOUR CASE OR A DECISION AGAINST YOU." (Emphasis in original.) The U.S. Postal Service did not return any copies of the hearing notice to the OAH and no requests for postponement were received prior to the dates of the hearing.

On Monday, March 2, 2015, due to the effects of inclement weather, the Governor of the State declared liberal leave for State employees from the start of normal business hours until 12:00 p.m. (noon). The OAH Inclement Weather Policy Directive provides that when liberal leave is declared for part of a day, cases scheduled to begin prior to the end of liberal leave for that day will be postponed to a future date. The hearing in this case was postponed. On March 2, 2015, the OAH mailed a letter to each of the appellants listed on the nineteen appeals that the

² "If, after receiving proper notice, a party fails to attend or participate in a prehearing conference, hearing, or other state of a proceeding, the judge may proceed in that party's absence or may, in accordance with the hearing authority delegated by the agency, issue a final or proposed default order against the defaulting party." COMAR 28.02.01.23A.

hearing had been postponed and would commence on Monday, March 9, 2015, at 9:30 a.m. The U.S. Postal Service did not return any of the mailed copies of the letter to the OAH.

On Monday, March 9, 2015, at 9:30 a.m., the hearing convened as scheduled. P. Tyson Bennett, Esq., representing the Local Board, was present with three witnesses, and ready to proceed. Colin Murphy, Vanessa Haneberg, Alan Stott, Carol Stott, Claudia R. Haneberg, Mary A. Shank, and Julie Obringer (seven of the appellants), were present and were ready to proceed. Each of the appellants listed on the nineteen appeals is a separate party to this matter. None of the appellants are represented by legal counsel. Kathryn L. Hamilton, Samuel R. Shank, Patrick Albornoz, Lourdes Albornoz, Ryan Obringer, Olav R. Haneberg, Eric Haneberg, Lene Rikke Nielsen-Paton, Melissa Paton, Randall C. Paton, John Hall, Pati Hall, and Alex Hall (collectively, the Appellants), who are among the appellants listed on the nineteen appeals, failed to appear. Proceeding with the hearing was delayed until 9:45 a.m. At that point, the Local Board's representative requested a default order be issued regarding the Appellants who had failed to appear.

No requests for postponement had been received at the OAH from any of the Appellants prior to the March 9, 2015 hearing.³ The failure to appear at a scheduled hearing demonstrates that the Appellants have essentially abandoned their appeal.

The OAH Rules of Procedure provide, in pertinent part:

.23 Failure to Attend or Participate in a Hearing, Conference, or Other Proceeding; Default.

A. If, after receiving proper notice, a party fails to attend or participate in a prehearing conference, hearing, or other stage of a proceeding, the judge may proceed in that party's absence or may, in accordance with the hearing authority delegated by the agency, issue a final or proposed default order against the defaulting party.

³ However, three of the appellants listed on the nineteen appeals, other than those named herein, had filed with the OAH a written withdrawal from the administrative adjudication of their appeal.

C. Proposed Default Orders. A proposed default order is reviewable in accordance with the delegating agency's regulations governing review of proposed decisions.

COMAR 28.02.01.23.

In this type of case, the OAH has been delegated the authority to render a proposed decision. Pursuant to COMAR 13A.01.05.07F, a party may file exceptions to a proposed decision in this case within fifteen days after that party receives the proposed decision.

THEREFORE, it is **PROPOSED** as follows:

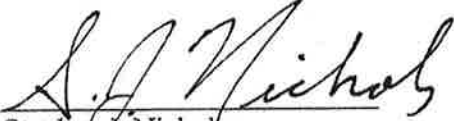
1. Kathryn L. Hamilton, Samuel R. Shank, Patrick Albornoz, Lourdes Albornoz, Ryan Obringer, Olav R. Haneberg, Eric Haneberg, Lene Rikke Nielsen-Paton, Melissa Paton, Randall C. Paton, John Hall, Pati Hall, and Alex Hall be, and hereby are, found in **DEFAULT**; and

2. All further proceedings in the above-captioned matter with respect to these individually-identified Appellants only be, and hereby are, **TERMINATED**, and

3. Accordingly, each of the Appellants identified in paragraph one or his or her representative may file written exceptions to this Default Order with the State Board of Education within fifteen days of the date of this order. Any such exceptions must state the grounds for the request to modify or vacate the Default Order. COMAR 13A.01.05.07F; 28.02.01.23.

4. Any written exceptions to the Default Order must include a certificate of service indicating a copy of the written exception was mailed, postage prepaid, to P. Tyson Bennett, Esq., Carney, Kelehan, Bresler, Bennett & Scherr, LLP, 888 Bestgate Road, Suite 316, Annapolis, MD 21401.

March 12, 2015
Date Order Mailed
#154968v1


Stephen J. Nichols
Administrative Law Judge

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