VICKI HARDING,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS,	OF EDUCATION
Appellee.	Opinion No. 11-24

OPINION

The Appellant filed this appeal challenging the March 17, 2010 decision of the Baltimore City Board of School Commissioners (local board) to close Chinquapin Middle School, Diggs-Johnson Middle School, West Baltimore Middle School, Winston Middle School, and Doris M. Johnson High School.

We referred this case to the Office of Administrative Hearings (OAH) as required by COMAR 13A.01.05.07A(1). The local board filed a Motion to Dismiss maintaining that the Appellant lacked standing to appeal. Alternatively, the local board filed a Motion for Summary Affirmance maintaining that its decision was not arbitrary, unreasonable or illegal.

On December 6, 2010, the Administrative Law Judge (ALJ) issued a Proposed Decision and Order in the case. The factual background is set forth in the Proposed Decision, Findings of Fact, pp. 5 – 10.

In the body of the decision, the ALJ concludes that the Appellant lacks standing to bring the appeal because she failed to demonstrate that she has a "direct interest" or "injury in fact" as required by the State Board in numerous opinions. The ALJ recommended, therefore, that the case be dismissed because the Appellant lacks the requisite standing to appeal the matter to the State Board. (ALJ Proposed Decision, p.19). While this recommendation is set forth in the body of the Proposed Decision, it is not set forth in the Proposed Order. (ALJ Proposed Decision, pp. 21-22).

Despite the conclusion and recommendation regarding standing, the ALJ went on to issue a Proposed Order solely on the merits of the case. The order proposes that the State Board grant the local board's Motion for Summary Affirmance and affirm the local board's school closing decision. The ALJ found that the Appellant had failed to establish a dispute of fact material to determining whether the local board's decision was arbitrary, unreasonable or illegal. Instead, the ALJ found that the Appellant offered only her opinion, conjecture and speculation about the decision. He determined that the local board contemplated and addressed the required criteria for school closings, which resulted in a thorough and deliberative process and final decision. He also found that there was no evidence that any local board member was improperly serving on

the board or acting in an illegal fashion. (ALJ Proposed Decision, pp. 20-21).

The Appellant filed exceptions to the ALJ's Proposed Decision and Order.

STANDARD OF REVIEW

Decisions of a local board involving a local policy or a controversy or dispute regarding the rules and regulations of the local board shall be considered *prima facie* correct. The State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. *See* COMAR 13A.01.05.05A.

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. In reviewing the ALJ's Proposed Decision, the State Board must give deference to the ALJ's demeanor based witness credibility findings unless there are strong reasons present that support rejecting such assessments. *See Dept. of Health & Mental Hygiene v. Anderson*, 100 Md. App. 283, 302-303 (1994).

ANALYSIS

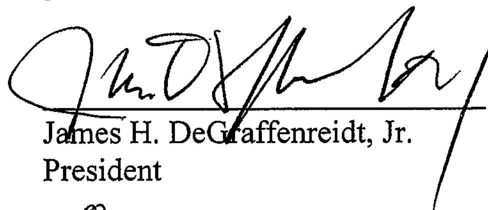
The ALJ concluded in the Proposed Decision that the Appellant lacked standing to appeal the local board's decision to close the schools. The Appellant contends that the ALJ erred in this conclusion, maintaining that she has standing to appeal based on her status as a citizen and taxpayer.

The State Board has established through a long line of cases that an Appellant before this Board must "show some direct interest or injury in fact, economic or otherwise." *See Schwalm v. Montgomery County Bd. of Educ.*, MSBE Op. No. 00-10 (2000); *Vera v. Board of Educ. of Montgomery County*, 7 Ops. MSBE 251 (1996); *Way v. Howard County Bd. of Educ.*, 7 Ops. MSBE 349 (1989). This showing of a direct interest or injury in fact requires that the individual be personally and specifically affected in a way different from the public generally and, thus, be aggrieved by the final decision of the administrative agency. *Clarksburg Civic Assoc. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 08-34 (2007). With regard to taxpayer standing, such a showing would require a demonstration that the action being challenged results in pecuniary loss or an increase in taxes to the individual. *See Citizens Planning and Housing Assn. v. County Executive of Baltimore County.*, 273 Md. 333, 339 (1974); *Stone v. Carroll County Bd. of Educ.*, MSBE OR09-04. Applying these principles, we find that the Appellant has failed to demonstrate she has standing to bring this appeal as she has not shown that she was affected differently than any other member of the public by the local board's decision to close the schools, or that she might suffer pecuniary loss or a tax increase as a result.

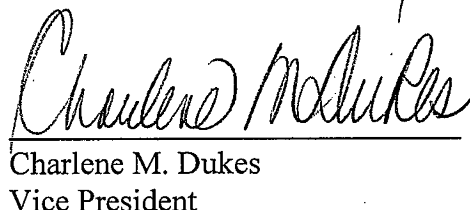
During oral argument before this Board the question arose whether Appellant, who has no personal standing in this matter, could establish her standing by raising claims on behalf of parents with children attending the affected schools. While there is a rule of standing that allows a party to assert the claims of others who are not parties, *see Turner v. State*, 299 Md. 565 (1984) and cases cited therein, that rule is not applicable to Appellant. That rule is based on the concept that it may be difficult, if not impossible, for the persons whose rights are asserted to have their claims heard. *See Barrows v. Jackson*, 346 U.S. 249, 257 (1953). Here, the local board's school closing decision was well publicized and well known in the community. There was an abundance of parents who could have easily appealed the decision to the State Board in order to have their claims heard.

CONCLUSION

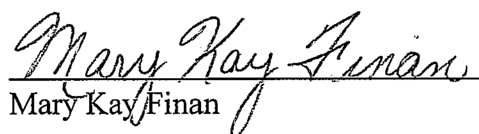
Because the Appellant lacks standing to appeal this matter to the State Board, we decline to rule on the other issues raised in the case. Accordingly, we adopt only those portions of the ALJ's Proposed Decision that pertain to the issue of standing and we dismiss the appeal.



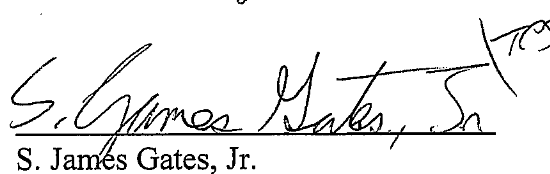
James H. DeGraffenreidt, Jr.
President



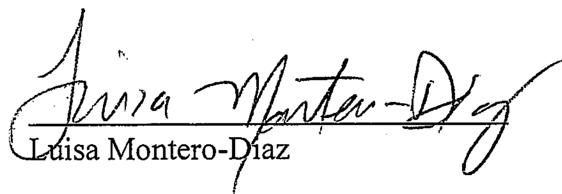
Charlene M. Dukes
Vice President



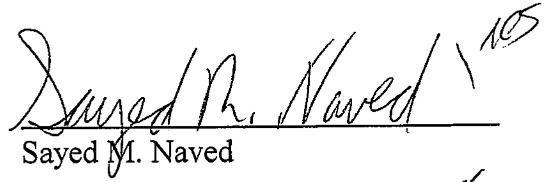
Mary Kay Finan

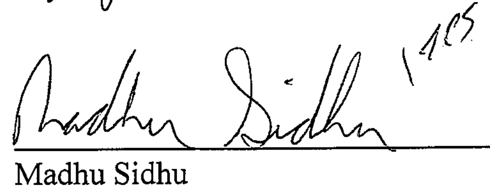


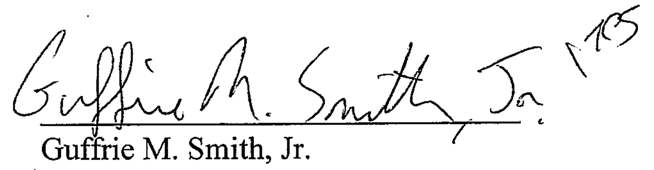
S. James Gates, Jr.

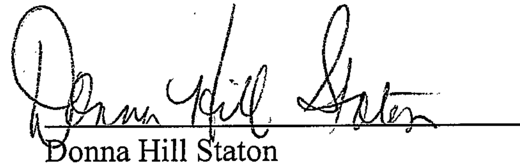


Luisa Montero-Diaz

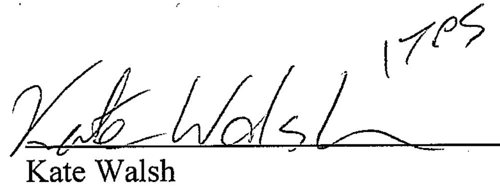

Sayed M. Naved


Madhu Sidhu


Guffrie M. Smith, Jr.


Donna Hill Staton

Ivan C.A. Walks


Kate Walsh

May 24, 2011

VICKI HARDING,	*	BEFORE JEROME WOODS, II,
APPELLANT	*	AN ADMINISTRATIVE LAW JUDGE
V.	*	OF THE MARYLAND OFFICE OF
BALTIMORE CITY BOARD OF	*	ADMINISTRATIVE HEARINGS
SCHOOL COMMISSIONERS	*	OAH CASE NO.: MSDE-BE-16-10-28497
	*	

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
ARGUMENT OF THE PARTIES
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

The Appellant filed an appeal of the Baltimore City Board of School Commissioners (Respondent) decision to close Chinquapin Middle School, Diggs-Johnson Middle School, West Baltimore Middle School, Winston Middle School and Doris M. Johnson High School (the Schools). The Baltimore City of School Commissioners (the Respondent) filed a Motion to Dismiss or, in the Alternative, Motion for Summary Affirmance (the Motion) of its decision, along with supporting documents. The Appellant filed an answer and the Respondent filed a response. Without taking any action on the Motion, the Maryland State Board of Education (State Board) forwarded the matter to the Office of Administrative Hearings (OAH) pursuant to the Code of Maryland Regulations (COMAR) 13A.01.05.07A(1) for a hearing before an

administrative law judge (ALJ). Any dispositive decision by the ALJ will be a proposed decision to the State Board.

At the Prehearing conference, Ethan D. Powell, Assistant Counsel, Baltimore City Public Schools, renewed the Respondent's Motion.

On October November 4, 2010, I conducted a hearing on the Motion at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland, pursuant to Code of Maryland Regulations (COMAR) 13A.01.05.07. The Appellant represented herself and Mr. Powell and Sally A. Robinson, Deputy Counsel, represented the Respondent.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010) and the Rules of Procedure of the OAH, and COMAR 28.02.01.

ISSUE

The issue is whether the Respondent's written Decision of March 17, 2010 should be affirmed without a hearing?

SUMMARY OF THE EVIDENCE

I have considered the following documents in reaching my decision on the Motion.

For the Respondent:

Respondent's Motion:

Reply To Appellant's Continuing Objection Response and attached exhibits:

Rsp 1 Portion of transcript from Respondent meeting held on January 26, 2010

Rsp 2 Affidavit of Kerry Whitacre Swarr with Initial recommendations

Rsp 3 Affidavit of Molly D. Rath with Notice of Public Hearings, letters and fliers

Rsp 4 Hearing Notices published in newspapers

Rsp 5 Affidavit of Michael Carter

Rsp 6 Affidavit of Lea J. Fereguson

Rsp 7 Board Rule 810

Rsp 8 Transcript from Public Hearing held on February 20, 2010

Rsp 9 Transcript from Public Hearing held on February 25, 2010

Rsp 10 Portion of transcript from Board Meeting held on March 9, 2010

Rsp 11 Respondent's written decision from March 17, 2010

Rsp 12 Letter from Maryland State Department of Education to Dr. Andres A. Alonso, Baltimore City Public Schools, Chief Executive Officer, dated March 11, 2010

Rsp 13 Summary Notice/flier advertised in the Baltimore Sun, dated March 25, 2010

Rsp 14 Affidavit of Lara Ohanian

For the Appellant:

Appellant's Continuing Objection Response and Opposition at Law To Respondent's Motion to Dismiss or in the Alternative Motion for Summary Affirmance;

Letter to Maryland State Department of Education, dated March 17, 2010;

Appeal Request, dated April 6, 2010;

Statement of Facts, dated April 8, 2010; and Exhibits admitted into evidence as follows:

App 1 Letter from Maryland Office of the Governor to Jerelle Francois, dated February 19, 2010

App 1b Letter from Ms. Robinson (no first name provided) to the Appellant, dated March 1, 2010

App 2 Letter from Maryland Office of the Governor to Lisa Akchin, dated February 19, 2010

App 3 Letter from Maryland Office of the Governor to Maxine Wood, dated February 19, 2010

App 4 Letter from Denise McCready, Circuit Court of Baltimore City to Ms. Stancil (no first name provided), dated February 24, 2010 with attached log

App 5 Baltimore City Board of School Commissioners appointment schedule

ARGUMENTS OF THE PARTIES

The Respondent

The Respondent contends that it is entitled to have the appeal dismissed or the Decision affirmed for essentially the following two reasons:

1. The Appellant lacks standing and;
2. There is no genuine dispute as to any material fact; the Appellants merely disagrees with the decision; and the Appellant did not present probative evidence to rebut the Respondent's evidence or generate a genuine dispute that the Decision violated COMAR, or any other law, rule or regulation or that its March 17, 2010 written decision was arbitrary, unreasonable or illegal as defined by State Board and court decisions.

In support of its position, the Respondent relied upon various documents, COMAR 13A.01.05.03D, State Board opinions, other case law and numerous documents relative to the Board's decision-making process. The Respondent by way of its Motion and exhibits, systematically addressed all issues pertinent to an appeal of this nature. The Respondent maintained that the complaint raised by the Appellant is a mere disagreement with the decision and that the Appellant did not show that there are any genuine issues of material fact in dispute that might demonstrate that the Respondent violated any of the requirements of COMAR 13A.01.05A, D and thus, did not show that the decision was arbitrary, unreasonable or illegal. The Respondent also maintained that the Appellant has not demonstrated any direct interest or injury in fact resulting from the Respondent's decision to close the schools.

The Appellant

In the response, as in her appeal, the Appellant claims that the Decision was improper

because the Decision was made by board members who were not lawfully entitled to sit on the Baltimore City Board of School Commissioners when the decision to close the schools was made and that the Respondent has an established pattern of wrong-doing. These alleged violations, in the Appellants' view, demonstrate that that the Decision to close the schools was arbitrary.

FINDINGS OF FACT

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

1. During the public business meeting of the Respondent on January 26, 2010, a discussion was held regarding the closure of the five schools.
2. The Appellant did not have children attending any of the closed schools nor was she enrolled in any of the closed schools.
3. The Appellant is the Vice-President of the Baltimore Black Think Tank, Inc. (BBTT), a non-stock corporation formed on January 14, 2010. BBTT is not a homeowners association, but a corporation formed for the purpose of engaging in all lawful, commercial, financial and general business ventures.
4. In the initial March 17, 2010 letter to the Maryland State Department of Education (MSDE) requesting an appeal of the Respondent's decision to close the schools, the Appellant did not file on behalf of the BBTT, but on behalf of herself.
5. In correspondence to MSDE, dated April 6, 2010, the Appellant requested a copy of the Respondent's March 9, 2010 decision regarding the closing of the schools. In this correspondence, the Appellant signed her name as Vice-President of the BBTT.
6. In the Statement of Facts filed by the Appellant on April 8, 2010, she filed on behalf of herself and not the BBTT. The Appellant stated that she was exercising "my constitutional and civil rights to bring forth the contested case."

7. After the meeting on January 26, 2010, Baltimore City Public Schools (BCPS) staff provided the Respondent with the initial report and recommendations titled, *Baltimore City Public Schools Expanding Great Options 2010-2011*. The initial recommendations were provided to the Mayor of Baltimore City, the Baltimore City Council and the members of the Baltimore City delegation in Annapolis, Maryland.

8. The initial recommendations were posted on the BCPS website with a link to the document provided on the BCPS homepage.

9. The Respondent advertised two public hearings to receive comment from the public regarding the proposed school closures. The hearing notices were placed in two newspapers, *The Baltimore Sun* (January 27, 2010) and the *Afro-American* (January 30, 2010).

10. The newspaper notices appeared more than two weeks prior to the hearings and included the procedures that the Respondent would follow in making its final decisions. The notices also included the required time limits for all oral and written testimony.

11. Direct notice was provided to parents and legal guardians of students enrolled in the five schools proposed for closure.

12. In February 2010, specifically, on February 2 (at Doris Johnson High School), February 3 (at Winston Middle School), February 4 (at Diggs-Johnson Middle School), February 8 (at West Baltimore Middle School) and February 19 (at Chinquapin Middle School) community meetings were held to discuss the proposed school closures. During these community meetings, BCPS staff was available to explain the various recommendations, answer questions and provide feedback regarding the proposed closures.

13. In February 2010, BCPS released the final Study to the Respondent, the affected schools and the public.

14. On February 20 and February 25, 2010, public hearings were conducted. At the meetings, the Respondent accepted comments on the Study recommendations. The hearings took place before the Respondent made its decisions regarding the proposed school closures.

15. The Chief Executive Officer (CEO) for BCPS made his final recommendation to the Respondent at the public business meeting on March 9, 2010.

16. The Respondent decided to close Chinquapin Middle School for the following reasons[1]:

    - Consistently low academic performance for several years;
    - Steadily declining enrollment;
    - During the 2009-2010 school year, the building utilization rate was 43%; and
    - Since 2005-2006, School enrollment has fallen over 50%.

    A new Transformation School would replace Chinquapin Middle School. At the time of the Respondent's decision on March 17, 2010, all of Chinquapin Middle School's students were given the option of staying and attending the new Transformation School.

17. The Respondent decided to close Diggs-Johnson Middle School for the following reasons:

    - Low academic performance for several years;
    - Declining enrollment and inability to be fiscally sustainable;
    - Utilization rate was only 60% despite sharing the space with another school; and
    - School has not attracted a sufficient number of students to attain fiscal sustainability.

[1] For a full review regarding the detailed data and reasons for closure for all the affected schools, see Respondent Exhibits two, six, ten and eleven.

In conjunction with closing the school, the Respondent decided to relocate a charter school that experienced academic achievement (Southwest Baltimore Charter School) to the Diggs-Johnson Middle School building in the fall of 2010. The charter school needed additional space in order to expand completely to serve the students in grades kindergarten through eight. The sixth and seventh grade students at Diggs-Johnson Middle School were given the option of staying and attending the charter school or choosing from options throughout the city.

18. The Respondent decided to close West Baltimore Middle School for the following reasons:
    - Low academic performance;
    - Decreasing enrollment (nine hundred thirty students in 2006-2007 school year to fewer than three hundred students for 2009-20010);
    - In the 2008-2009 school year, twenty nine percent of the school's students scored proficient or advanced on the Maryland School Assessment (MSA) in mathematics and fifty four percent were proficient or advanced in the MSA on reading;
    - Levels of student achievement were below the state goals of sixty four percent in mathematics and seventy six percent in reading;
    - Underutilized school building; and
    - Fiscally unsustainable.

The Respondent decided to replace the West Baltimore Middle School program with a new Transformation School (Green Street Academy). The sixth grade students at the school were given the option of staying and attending the new Transformation School, or like the seventh grade students, given the option of transferring elsewhere in the City. The school shared its building with KASA, an existing Transformation School, so students who did not

want to attend Green Street Academy but wanted to stay in the building could choose to attend KASA instead.

19. The Respondent decided to close Winston Middle School for the following reasons:

- Decreasing enrollment;
- Underutilized school building;
- Low academic performance;
- Fiscally unsustainable;
- In the 2008-2009 school year, forty one percent of the school's students scored proficient or advanced on the MSA in mathematics and fifty four percent were proficient or advanced in the MSA on reading; and
- Levels of student achievement were below the state goals of sixty four percent in mathematics and seventy six percent in reading.

The school had lost more than half of its enrollment in the last four years: from five hundred twenty eight students in the 2005-2006 school year to two hundred fifty four during the 2009-2010 school year. One hundred twenty nine sixth and seventh grade students enrolled in the 2009-2010 school year. Less than forty percent of the building is being utilized. Students from the school were given the option of attending other stand alone middle schools, Transformation Schools, or elementary schools with available seating.

20. The Respondent decided to close Doris Johnson High School for the following reasons:

- Poor academic performance;
- Declining enrollment (six hundred twenty two during the 2006-2007 school year to four hundred seventy one during the 2009-2010 school year; and

- In 2008-2009, less than fifty percent of the students scored proficient or advanced on the State's High School Assessment in both English and Algebra. The rates were nearly fifteen percentage points below state standards.

The school is located at the Lake Clifton campus, and shares the building with Heritage High School and REACH, a Transformation School. The decision to close the school allows for the expansion of REACH. Students who attended Doris Johnson High School were given the option of transferring to Heritage High School or REACH, permitting the students to stay at the same campus or transfer to other high schools or Transformation Schools throughout the City.

21. The Respondent issued its written decision which included notification of the right to appeal to the State Board.

22. The Respondent's written decision included the impact of the closures on the affected communities in terms of student enrollment trends, age or condition of school building, transportation, educational programs, racial composition of student body, financial considerations and student relocation.

DISCUSSION

Under certain circumstances, an appeal of a local board decision may be resolved without a hearing. COMAR 13A.01.05.03 provides:

D. Motion for Summary Affirmance.

(1) A motion for summary affirmance may be filed if there are no genuine issues of material fact and the respondent is entitled to affirmance as a matter of law.

(2) A memorandum in support of or in opposition to a motion for summary affirmance shall contain the following:

(a) A statement of the issues presented for review;

(b) A statement of the facts;

(c) An argument which includes reference to relevant legal principles and State Board decisions, if any;

(d) A short conclusion stating the relief sought; and

(e) Any supporting documents, exhibits, and affidavits.

Likewise, OAH's Rules of Procedure have similar provisions. COMAR 28.02.01.12 states, in pertinent part:

D. Motion for Summary Decision.

(1) Any party may file a motion for summary decision on all or part of an action, at any time, on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. Motions for summary decision shall be supported by affidavits.

(2) The response to a motion for summary decision shall identify the material facts that are disputed.

(3) An affidavit supporting or opposing a motion for summary decision shall be made upon personal knowledge, shall set forth the facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

(4) The judge may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

COMAR 28.02.01.12C parallels Md. Rule 2-322(b)(2) (failure to state a claim upon which relief can be granted) and, therefore, case law construing that rule applies equally to OAH Rule 12C. In a preliminary motion to dismiss, the moving party must establish that it is entitled to relief. *See Lubore v. RPM Assocs., Inc.* 109 Md. App. 312 (1996); *Rossaki v. NUS Corp.*, 116 Md. App. 11 (1997). Furthermore, when construing a motion of this nature, the ALJ is required to examine the evidence in the light most favorable to the non-moving party. Also, the non-moving party is entitled to all favorable inferences fairly construed from the evidence. *General Mtrs. Corp. v. Lahocki*, 286 Md. 714 (1980); *Sharrow v. State Farm Mutual Insurance*

Company, 306 Md. 754 (1986).

Under COMAR 28.02.01.01, in any case referred to the OAH, OAH's Rules of procedure apply. Md. State Code Ann., State Gov't § 10-206(a) (2009 & Supp. 2010). In any event, the Respondent's rules pertaining to the Motion and the OAH's Rules are substantively the same. Thus, I will refer only to the OAH's rules in my discussion.

A motion for summary decision (or affirmance) is the equivalent of a motion for summary judgment. As in a motion for summary decision, in a motion for summary affirmance the moving party must demonstrate that no genuine issues exist as to any material fact. COMAR 28.02.01.12(D). The moving party must also demonstrate that it is entitled to prevail as a matter of law. Because Md. Rule 2-501 and Federal Rule of Civil Procedure 56 set nearly identical standards for summary judgment, the requirements of those rules, as analyzed by appellate courts, are particularly instructive in analyzing the standards for summary decision or affirmance in administrative proceedings.

In *Washington Homes, Inc. v. Interstate Land Development Co.*, 281 Md. 712 (1978), the Court of Appeals summarized the standards for summary judgment set forth in numerous other Maryland cases:

> The summary judgment procedure is not a substitute for a trial, but a means by which the trial court may determine, summarily, whether a trial is necessary.... [I]f there is a genuine dispute as to any material fact, summary judgment would not properly be granted. *Brown v. Suburban Cadillac, Inc.*, 260 Md. 251, 255 (1971). "(E)ven where the underlying facts are undisputed, if those facts are susceptible of more than one permissible inference, the choice between those inferences should not be made as a matter of law, but should be submitted to the trier of fact." *Fenwick Motor Co. v. Fenwick*, 258 Md. 134, 138, 1970), and cases therein cited. The function of the trial judge is much the same as that which he performs at the close of all the evidence in a jury trial when motions for directed verdict or requests for peremptory instructions require him to determine whether an issue requires resolution by a jury or is to be decided by the court as a matter of law. *Lynx, Inc. v. Ordnance Products*, 273 Md. 1, 8 (1974); *Salisbury Beauty Schools v. St. Bd.*, 268 Md. 32, 41 (1973).

A court cannot rule summarily as a matter of law until the parties have supported their respective contentions by placing before the court facts which would be admissible in evidence. *Rooney v. Statewide Plumbing*, 265 Md. 559, 563-564 (1972); *Shatzer v. Kenilworth Warehouses*, 261 Md. 88, 95 (1971).

" '(W)hen the moving party has set forth sufficient grounds for summary judgment, the party opposing the motion must show with some precision that there is a genuine dispute as to a material fact.'" *Shatzer*, 261 Md. at 95, 274 A.2d at 44 (quoting *Brown,* 260 Md. at 255, 272 A.2d 42). "A bare allegation in a general way that there is a dispute as to material facts is never sufficient to defeat a motion for summary judgment. ... General allegations which do not show facts in detail and with precision are insufficient to prevent the entry of summary judgment." *Lynx, Inc.*, 273 Md. at 7-8, 327 A.2d at 509. A material fact is one "the resolution of which will somehow affect the outcome of the case." *Rooney*, 265 Md. at 564, 290 A.2d at 499.

Washington Homes, Inc, 281 Md. at 716-18 (1978). See also *Dietz v. Moore*, 277 Md. 1, 5 (1976); *King v. Bankerd*, 303 Md. 98, 111 (1985); *Hurl v. Howard County Board of Education*, 107 Md. App. 286,(1995) (involuntary transfer of a teacher).

Accordingly, to contest the truth of a fact attested to or documented in support of a motion for summary decision and render it disputed, the party against whom the motion is directed must respond with specific disputed facts, supported by attestation or documentation. The Respondent submitted detailed documentation in support of every aspect of the Motion. The Appellant offered no relevant documentary evidence, specific disputed facts and no controlling law in opposition to the Motion. The cases cited by the Appellant in the Statement of Facts are simply not relevant for this case as they deal with audits, insurance policies and other matters not relevant to this matter. In fact, it appears that Appellant merely disagrees with the Respondent's decision, questions the validity of some of the Respondent's board members to make decisions and disputes the analysis of the voluminous information that the Respondent considered in reaching its decision.

As pointed out by the Respondent the law that defines the scope of appeals of school

closing matters is codified at COMAR 13A.01.05.05A, B, C, D. The standard is whether the action taken was arbitrary, capricious or illegal.

> .05 Standard of Review.
>
> A. General. Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal.
>
> B. A decision may be arbitrary or unreasonable if it is one or more of 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.
>
> C. 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.
>
> D. The appellants shall have the burden of proof by a preponderance of the evidence.

COMAR 13A.02.09.01 enumerates the factors the Respondent must consider when determining school closings:

> A. Each local board of education shall establish procedures to be used in making decisions on school closings.
>
> B. The procedures shall ensure, at a minimum, that consideration is given to the impact of the proposed closing on the following factors:
>
> (1) Student enrollment trends;
>
> (2) Age or condition of school buildings;
>
> (3) Transportation;
>
> (4) Educational programs;

(5) Racial composition of student body;

(6) Financial considerations;

(7) Student relocation;

(8) Impact on community in geographic attendance area for school proposed to be closed and school, or schools, to which students will be relocating.

In the instant case, before I adress the merits of the case, I must determine whether the Appellant has standing to appeal the Respondent's decision to close the schools.

Numerous cases have addressed what is required before a party has standing. *Flast v. Cohen*, 392 U.S. 83, 99 (1968) addressed the concept of standing, in general. Acknowledging the amorphous or fluid nature of the jurisdictional concept, the Court explained that the

> fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *(citations omitted).*

Although constitutional questions are not at issue in this case, the explanation of standing in *Flast* is instructive. The key is whether the party has a sufficient personal stake in the outcome of a case to establish the right to be a party to the proceeding.

The Supreme Court clarified its position on standing before a federal court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In that case, the Court announced that standing requires a showing of three elements, including: (1) injury in fact;[2] (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood "that the injury will be 'redressed by a favorable decision.'" *Id.* at 560-561. The Court determined that environmental groups did not have standing to challenge a regulation of the Secretary of the Interior that

[2] This injury is defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual and imminent." *Id.* at 560 *(citations omitted).*

required other agencies to confer only with him regarding federally funded projects in the United States and on the high seas. In each of these cases, the issue was whether a party had standing to pursue an action in federal court.

The Maryland Court of Appeals addressed the issue of standing in administrative proceedings in *Sugarloaf Citizens' Ass'n, et al. v. Dept. of Environment*, 344 Md. 271, 686 A.2d 605 (1996). This case involved the issuance of construction permits by the Department of Environment for an incinerator that was to be located adjacent to property owned by association members. The Court explained that, unlike the requirements to establish standing for judicial review, the standard to establish standing in an administrative hearing is substantially lower. The Court:

> recognize[d] a distinction between standing to be a party to an administrative proceeding and standing to bring an action in court for judicial review of an administrative decision. Thus, a person may properly be a party at an agency hearing under Maryland's "relatively lenient standards" for administrative standing but may not have standing in court to challenge an adverse agency decision.

Id. at 285-86, 686 A.2d at 613. *See also, Handley v. Ocean Downs, LLC*, 151 Md.App. 615, 628, 827 A.2d 961, 969 (2003) (holding that "[m]ere presence at an administrative proceeding, without active participation, is sufficient to establish oneself as a party to the proceeding"); *Morris v. Howard Res. & Dev. Corp.*, 278 Md. 417, 423, 365 A.2d 34, 37 (1976); *Mid-Atlantic Power Supply Ass'n v. Public Service Com'n of Maryland*, 361 Md. 196, 213, 760 A.2d 1087, 1096 (2000). The Court in *Sugarloaf* continued,

> The requirements for administrative standing under Maryland law are not very strict. Absent a statute or a reasonable regulation specifying criteria for administrative standing, one may become a party to an administrative proceeding rather easily.

Id. at 286-287, 686 A.2d at 613 (internal citations omitted).

Similarly, in *Bryniarski v. Montgomery County Bd. of Appeals,* 247 Md. 137, 230 A.2d 289 (1967), the Court of Appeals found that appellants had standing to challenge the granting of a zoning ordinance exception because the property at issue was adjacent to the appellants' property and thus, they were "persons aggrieved" by the issuance of the permit. Consistent with reasoning of *Sugarloaf* and *Morris*, the Court relied on the State Zoning laws that required a person to be "aggrieved" to appeal both *to* the Board of Appeals and to appeal *from* a Board of Appeals decision to court.

The Court has established through these cases that, absent a statute or regulation requiring some additional basis for standing, an administrative hearing before an agency requires only the more lenient requirement that a person have participated in some fashion before the agency to establish that the person has standing to challenge an agency decision.

In the instant case, the statutes and regulations regarding a local board's decision to close schools places no restriction on who may appeal the local board's decision to the State Board. The Education statute provides, at Md. Code Ann., Educ. § 4-109(a) (2008 & Supp. 2010), as follows, with regard to establishment of public schools:

> (a) County board may establish schools.- Subject to approval by the State Superintendent and in accordance with the applicable bylaws, rules, and regulations of the State Board, a county board may establish a public school if, in its judgment, it is advisable.
>
> (c) With the advice of the county superintendent, the county board shall determine the geographical attendance area for each school established under this section.

COMAR 13A.02.09.03 addresses appeals of local board school closure decisions:

A. An appeal to the State Board of Education may be submitted in writing within 30 days after the decision of a local board of education.
B. The State Board of Education will uphold the decision of the local board of education to close and consolidate a school unless the facts presented indicate its decision was arbitrary and unreasonable or illegal.

COMAR 13A.01.05.01 addresses the definitions of "Appellant" and "Party." COMAR

13A.01.05.02 discusses the contents of an appeal. The standard of review in these cases, that the local board's decision was arbitrary, unreasonable, or illegal, is considered in COMAR 13A.01.05.05. That regulation also places the burden of proof on the appellant by a preponderance of the evidence. COMAR 13A.01.05.05D. The hearing procedures are addressed in COMAR 13A.01.05.07.

The applicable Education statute and regulations do not address the standing of a party to bring an administrative appeal of a local board's school closings decision. Unlike the zoning statute or regulations in *Bryniarski*, the Education statute and regulations do not require an appellant to be "aggrieved" to appeal the redistricting decision of a local board to the State Board of Education. Absent such a regulation, logic dictates that the rather lenient standard announced in *Sugarloaf* controls, and so long as the Appellants participated in some manner before the local board or asserted an interest in the outcome, they shall have standing to challenge the local board's decision at the administrative level.

The fact that there is no regulation or statute does not simply close the discussion on this issue. Notwithstanding the absence of statute or regulation regarding standing, the State Board has consistently held that an Appellant must assert a "direct interest" or "injury in fact" in order to have standing to challenge a decision of the local board.[3] Pursuant to section 10-214 of the State Government Article of the Annotated Code of Maryland, I am required to follow "any agency regulation, declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or would have been bound if it were hearing the case." Through its decisions, the Respondent has established a long-standing policy that an Appellant must assert

[3] *See, Marshall v. Baltimore City Board of School Commissioners,* MSBE Opinion No. 03-38 (2003); *Regan v. Washington County Board of Education*, MSBE Opinion No. 03-13 (2003); *Bellotte v. Anne Arundel County Board of Education*, MSBE Opinion No. 03-08 (2003); *Stratford Woods Homeowners' Association, Inc., v. Montgomery County Board of Education,* 6 Op. MSBE 238 (1992).

a "direct interest" or "injury in fact" in order to have standing to challenge a decision of the local board.

Based on the Appellant's Statement of Facts and her initial appeal, I find that she filed on behalf of herself as a private citizen and not as a representative of the BBTT. BBTT would lack standing to challenge the Respondent's decision as no evidence has been presented to establish that the corporation has demonstrated a direct interest or injury as a result of the Respondent's decision. Moreover, the law does not allow corporations to be represented by non-attorneys in administrative hearings, except for a limited number of circumstances, which are not applicable in this matter. See Md. Code Ann., State Gov't § 9-1607.1 (2009 & Supp. 2010).

Therefore, the question becomes whether the Appellant in this case has asserted a direct interest or injury in fact to bring this appeal. The Appellant in this case does not have a child who would attend or attended the closed schools. The Appellant asserts that as a resident of the community, she has a civil and Constitutional right to appeal the Respondent's decision. However, it is well established that "an individual's status as a resident of the community is insufficient to confer standing on that individual." (*Marshall v. Baltimore City Board of School Commissioners,* MSBE Opinion No. 03-38 (December 3, 2003). An Appellant does not have standing solely based on the fact that she is a citizen, taxpayer, and voter. *Schwalm v. Montgomery County Board of Education*, MSBE Opinion No. 00-10 (February 23, 2000).

Pursuant to the above stated criteria, the Appellant has failed to establish standing. A direct interest would be that the Appellant's child would attend the closed schools. For this reason, I recommend that the Appellant's appeal be dismissed because the Appellant has no standing. Nevertheless, I find that it would be prudent to issue a decision on the merits. For that reason, my decision on the merits follows.

As noted above, the Respondent's decision may be arbitrary or unreasonable if it is contrary to sound educational policy, or a reasoning mind could not have reasonably reached the conclusion the Respondent reached. When local boards make decisions concerning the closing of schools, such decisions by necessity impact a large number of communities and neighborhoods. No plan can satisfy everyone. In examining the plan accepted by the Respondent the analysis must be whether the Respondent's actions were contrary to sound educational policy or were unreasonable.

The Respondent adopted the final Study which sets forth the CEO's recommendations, and the detailed rationale for the closure recommendations. The Respondent's written decision from March 17, 2010, set forth the CEO's recommendations and the rationale for the Respondent's decision regarding each school.

It is clear from a review of the written record, including the Meeting Transcripts and Study data shared at the various meetings, that the Respondent's actions were consistent with sound educational policy and were reasonable when one considers that the Respondent contemplated the factors cited above and listed the specific data it gathered when making its decision regarding the factors assessed above.

A reasoning mind could have reasonably reached the same decision as the Respondent when assessing all of the data gathered and analyzed in this case. The record indicates that the Respondent followed its own procedures and addressed the required criteria in making its decision. The Respondent considered student enrollment trends, school building capacities, transportation, financial considerations, and academic achievement.

The Respondent considered cost in that it contemplated the feasibility of keeping schools opened considering the falling utilization ratios and declining enrollment which could impact future

school resources. This analysis further indicates the thoroughness of the Respondent's deliberative process and final decision.

In the appeal, and in her argument, the Appellants alleged that the Respondent's board members were serving improperly. Specifically, she questions the terms of certain board members. However, a thorough review of the record does not indicate that any board member was serving improperly on the board, or that any board member said or did anything in reaching its decision that was unconstitutional, exceeded their authority, misconstrued the law, abused its discretionary powers, or was affected by any other error of law.

I have thoroughly reviewed all of the information provided by the Appellant and she has simply failed to establish a disputed fact that is material to determining whether the Respondent's March 17, 2010 school closure decision was arbitrary, unreasonable or illegal. Simply offering opinion, conjecture and speculation regarding the numbers used, the terms of the Board members and the data gathered is not sufficient.

CONCLUSIONS OF LAW

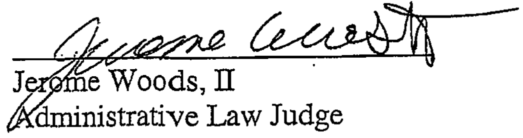
Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Respondent's Motion for Summary Affirmance must be granted because there is no genuine dispute as to any material fact and the Respondent is entitled to prevail as a matter of law. COMAR 28.02.01.12(D).

PROPOSED ORDER

I **PROPOSE** that the Motion for Summary Affirmance filed by the Baltimore City Board of School Commissioners be **GRANTED** by the Maryland State Department of Education, Maryland State Board of Education, and that the contested case hearing scheduled for December 14 and December15, 2010 be **CANCELLED**; and I further,

PROPOSE that the decision of the Baltimore City Board of School Commissioners dated March 17, 2010 be **UPHELD** by the Maryland State Department of Education.

December 6, 2010
Date Decision Mailed

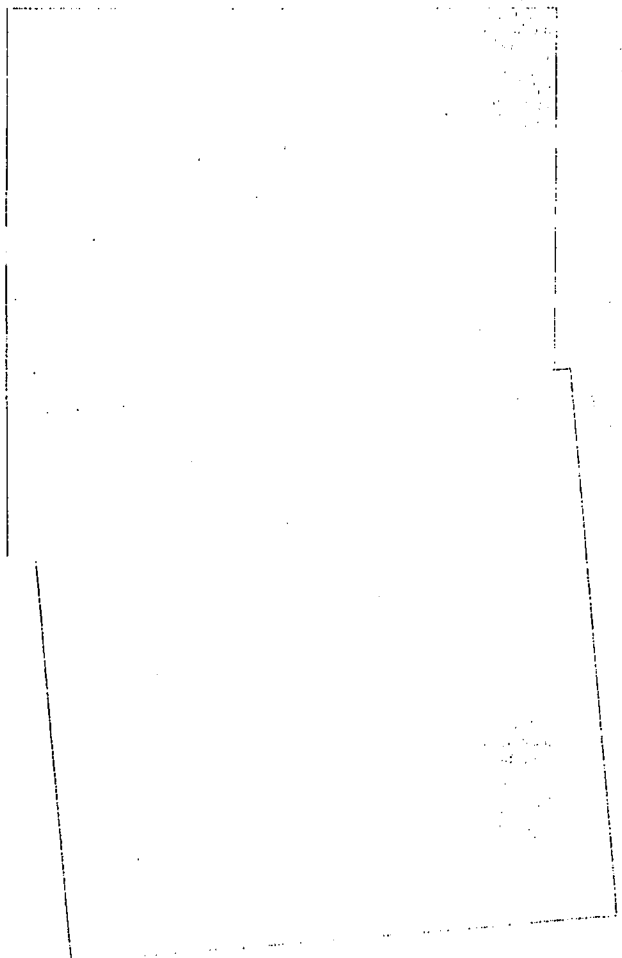


Jerome Woods, II
Administrative Law Judge

JW/rbs
#118526

NOTICE OF RIGHT TO FILE EXCEPTIONS

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



VICKI HARDING,	*	BEFORE JEROME WOODS, II,
APPELLANT	*	AN ADMINISTRATIVE LAW JUDGE
V.	*	OF THE MARYLAND OFFICE OF
BALTIMORE CITY BOARD OF	*	ADMINISTRATIVE HEARINGS
SCHOOL COMMISIONERS	*	OAH CASE NO.: MSDE-BE-16-10-28497
	*	

* * * * * * * * * * * * *

FILE EXHIBIT LIST

I have considered the following documents in reaching my decision on the Motion.

For the Respondent:

Respondent's Motion:

Reply To Appellant's Continuing Objection Response and attached exhibits:

Rsp 1 Portion of transcript from Respondent meeting held on January 26, 2010

Rsp 2 Affidavit of Kerry Whitacre Swarr with Initial recommendations

Rsp 3 Affidavit of Molly D. Rath with Notice of Public Hearings, letters and fliers

Rsp 4 Hearing Notices published in newspapers

Rsp 5 Affidavit of Michael Carter

Rsp 6 Affidavit of Lea J. Fereguson

Rsp 7 Board Rule 810

Rsp 8 Transcript from Public Hearing held on February 20, 2010

Rsp 9 Transcript from Public Hearing held on February 25, 2010

Rsp 10 Portion of transcript from Board Meeting held on March 9, 2010

Rsp 11 Respondent's written decision from March 17, 2010

Rsp 12 Letter from Maryland State Department of Education to Dr. Andres A. Alonso, Baltimore City Public Schools, Chief Executive Officer, dated March 11, 2010

Rsp 13 Summary Notice/flier advertised in the Baltimore Sun, dated March 25, 2010

Rsp 14 Affidavit of Lara Ohanian

For the Appellant:

Appellant's Continuing Objection Response and Opposition at Law To Respondent's

Motion to Dismiss or in the Alternative Motion for Summary Affirmance;

Letter to Maryland State Department of Education, dated March 17, 2010;

Appeal Request, dated April 6, 2010;

Statement of Facts, dated April 8, 2010; and Exhibits admitted into evidence as follows:

App 1 Letter from Maryland Office of the Governor to Jerelle Francois, dated February 19,

2010 App 1b Letter from Ms. Robinson (no first name provided) to the Appellant, dated March 1,

2010 App 2 Letter from Maryland Office of the Governor to Lisa Akchin, dated February 19,

2010 App 3 Letter from Maryland Office of the Governor to Maxine Wood, dated February 19,

2010 App 4 Letter from Denise McCready, Circuit Court of Baltimore City to Ms. Stancil (no first name provided), dated February 24, 2010 with attached log

App 5 Baltimore City Board of School Commissioners appointment schedule