

NATHAN A. BLAZEJAK, ET AL.,

Appellant

v.

KENT COUNTY BOARD  
OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 10-41

### OPINION

The Appellants filed this appeal challenging the April 15, 2010 redistricting decision of the Kent County Board of Education (local board). The redistricting decision closed some public schools, and consolidated and reconfigured the attendance boundaries of other public schools in Kent County, effective for the 2010-2011 school year.

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 for Summary Affirmance. The Appellants opposed the Motion and filed a Counter Motion for Summary Reversal.

On August 9, 2010, the Administrative Law Judge issued a Recommended Order proposing that the State Board grant the local board's Motion for Summary Affirmance and affirm the local board's redistricting decision. The Appellants did not file any exceptions to the ALJ's Recommended Order.

### FACTUAL BACKGROUND

The factual background in this case is set forth in the Administrative Law Judge's Proposed Order, Findings of Fact, pp.8 – 26.

### STANDARD OF REVIEW

This appeal involves a redistricting decision of a local board of education. 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.

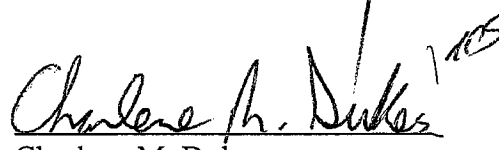
The State Board referred this case to OAH for proposed findings of fact and conclusions of law by an ALJ. In such cases, the State Board may affirm, reverse, modify, or remand the ALJ's Proposed Decision. The State Board's final decision, however, must identify and state reasons for any changes, modifications; or amendments to the Proposed Decision. See Md. Code

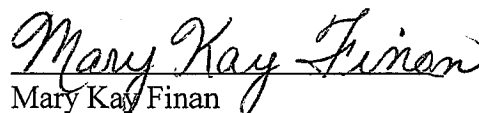
Ann., State Gov't § 10-216. In reviewing the ALJ's Proposed Decision, the State Board must give deference to the ALJ's demeanor based witness credibility findings unless there are strong reasons present that support rejecting such assessments. *See Dept. of Health & Mental Hygiene v. Anderson*, 100 Md. App. 283, 302-303 (1994).

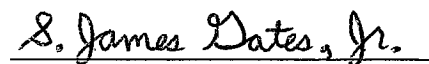
CONCLUSION

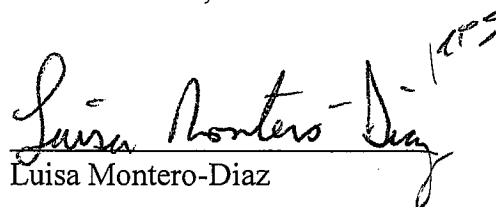
Based on our review of the record, we concur with the ALJ that the local board's decision is not arbitrary, unreasonable or illegal. Accordingly, we adopt the ALJ's Proposed Order and affirm the local board's redistricting decision.

  
James H. DeGraffenreidt, Jr.  
President

  
Charlene M. Dukes  
Vice President

  
Mary Kay Finan

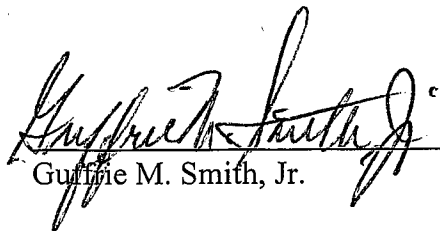
  
S. James Gates, Jr.

  
Luisa Montero-Diaz

  
Sayed M. Naved

ABSTAINED

Madhu Sidhu



Guffie M. Smith, Jr.



Donna Hill Staton

ABSENT

Ivan C.A. Walks



Kate Walsh

October 26, 2010

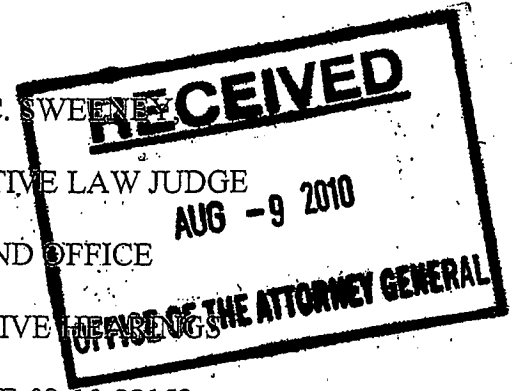
NATHAN A. BLAZEJAK, *ET AL.*,

APPELLANTS

v.

KENT COUNTY BOARD OF  
EDUCATION

\* BEFORE EILEEN C. SWEENEY  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH NO.: MSDE-BE-09-10-22152



\* \* \* \* \*

**PROPOSED RULING ON KCBOE'S MOTION FOR SUMMARY AFFIRMANCE**

**AND**

**APPELLANTS' COUNTER MOTION FOR SUMMARY REVERSAL**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
UNDISPUTED FACTS  
DISCUSSION  
CONCLUSIONS OF LAW  
PROPOSED ORDER

**STATEMENT OF THE CASE**

On April 15, 2010, the Kent County Board of Education (KCBOE) decided to close, consolidate, and redistrict the attendance zone of certain public schools in the Kent County Public School (KCPS),<sup>1</sup> effective the school year commencing in August 2010. On May 11, 2010, Nathan A. Blazejak, Summer H. Blazejak, Eleanor T. Collyer, R. Eric Cornelius, Angela C. Cornelius, Joseph M. Graney, Jr., Dawn M. Graney, Robert T. Moxley, Elisia G. Moxley, Whitmel F. Sanderson, Jr., Peggy S. Sanderson, Jeffrey A. Usilton and Kimberly Chance Usilton (Appellants) filed a Notice of Appeal with the Maryland State Board of Education (MSBE). On or about June 23,

<sup>1</sup> For purposes of this decision, I will refer to those actions collectively as the "Consolidation."

2010,<sup>2</sup> the MSBE transmitted the appeal to the Office of Administrative Hearings (OAH) to conduct a contested case hearing. COMAR 13A.01.05.07A(1).

On June 16, 2010, the KCBOE filed a Motion for Summary Affirmance (Motion). On June 30, 2010, the Appellants filed a Response to the Motion (Appellants' Response) and a Counter Motion for Summary Reversal (Counter Motion). On July 8, 2010, the KCBOE filed a reply to the Appellants' Response and Counter Motion (KCBOE's Response).

I held a telephonic Prehearing Conference on July 6, 2010 and issued a Prehearing Conference Order on July 9, 2010.

Philip W. Hoon, Esquire, represents the Appellants in this matter. Charles D. MacLeod, Esquire, Patrick W. Thomas, Esquire, and Jefferson L. Blomquist, Esquire, represent the KCBOE.

The contested case provisions of the Administrative Procedure Act, the procedural regulations for the MSDE, and the Rules of Procedure of the OAH govern procedure in this matter. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); COMAR 13A.01.05; COMAR 28.02.01.

### ISSUES

- (1) Does the Appellants' appeal raise genuine issues of material fact?
- (2) Is the KCBOE entitled to summary affirmance as a matter of law?
- (3) Are the Appellants entitled to summary decision as a matter of law?

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<sup>2</sup> The letter enclosing the Transmittal is dated June 21, 2010; however, the letter and the Transmittal are date-stamped as received on June 23, 2010.

## SUMMARY OF THE EVIDENCE

### Exhibits

The KCBOE submitted the following Affidavits in support of its Motion: June 15, 2010 Affidavit of Michael P. Harvey, Ph.D. (Dr. Harvey) and June 15, 2010 Affidavit of A. Barbara Wheeler, Ed.D. (Dr. Wheeler or Superintendent).<sup>3</sup>

The KCBOE submitted the following exhibits in support of its Motion:

- |                        |                                                                                                                                                           |
|------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------|
| KCBOE Motion Ex. 1:    | KCBOE Resolution No. 2010-01 (April 15, 2010, effective August 2010)                                                                                      |
| KCBOE Motion Ex. 1(A): | Resolution Ex. A: KCPS Policy NSBA Code FL (Procedures to Govern School Closings and/or Consolidation) (adopted February 11, 1982; revised March 6, 2000) |
| KCBOE Motion Ex. 1(B): | Resolution Ex. B: Becker Morgan Group, Inc. Architectural Feasibility Study for KCPS (May 29, 2002)                                                       |
| KCBOE Motion Ex. 1(C): | Resolution Ex. C: "Nimble Nine" Power Point Presentation by Board President Dr. Harvey                                                                    |
| KCBOE Motion Ex. 1(D): | Resolution Exhibit D: MSDE Middle School Steering Committee Report, "The Critical Middle: A Reason for Hope" (June 2008)                                  |
| KCBOE Motion Ex. 1(E): | Resolution Ex. E: Administration Proposal No. 1                                                                                                           |
| KCBOE Motion Ex. 1(F): | Resolution Ex. F: Administration Proposal No. 2                                                                                                           |
| KCBOE Motion Ex. 1(G): | Resolution Ex. G: Administration Proposal No. 3                                                                                                           |
| KCBOE Motion Ex. 1(H): | Resolution Ex. H: Administration Proposal No. 4                                                                                                           |
| KCBOE Motion Ex. 1(I): | Resolution Ex. I: Minutes from Galena Middle School public hearing (January 26, 2010)                                                                     |
| KCBOE Motion Ex. 1(J): | Resolution Ex. J: Minutes from Rock Hall Middle School public hearing (January 27, 2010)                                                                  |
| KCBOE Motion Ex. 1(K): | Resolution Ex. K: Minutes from Chestertown Middle School public hearing (January 28, 2010)                                                                |

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<sup>3</sup> Throughout this decision, these affidavits are referred to as Harvey AV and Wheeler AV.

- KCBOE Motion Ex. 1(L): Resolution Ex. L: Minutes from Millington Elementary School public hearing (February 22, 2010)
- KCBOE Motion Ex. 1(M): Resolution Ex. M: Petition, Power Point Presentation, "And Now We Have.....The Rest of the Story," and correspondence received by KCBOE members and KCPS staff
- KCBOE Motion Ex. 1(N): Resolution Ex. N: Summary of Questions and Answers prepared by KCPS Administration (per February 25, 2010 meeting with Two River Charter School group)
- KCBOE Motion Ex. 1(O): Resolution Ex. O: Minutes from public KCBOE meeting (March 1, 2010)
- KCBOE Motion Ex. 1(P): Resolution Ex. P: School Closing and Consolidation Plan Power Point Presentation from the April 8, 2010 public hearing
- KCBOE Motion Ex. 1(Q): Resolution Ex. Q: Minutes from Kent County High School public hearing (April 8, 2010)
- KCBOE Motion Ex. 1(R): Resolution Ex. R: KCPS Master Plan (November 2, 2009)
- KCBOE Motion Ex. 1(S): Resolution Ex. S: KCPS FY 2011 Capital Improvement Plan (CIP) (October 5, 2009)
- KCBOE Motion Ex. 1(T): Resolution Ex. T: MSDE Fact Book (2008 – 2009)
- KCBOE Motion Ex. 1(U): Resolution Ex. U: Template for Notification Letter to parents, guardians, and students
- KCBOE Motion Ex. 2: Transcript of the April 8, 2010 public hearing
- KCBOE Motion Ex. 3: Media Notices Regarding School Consolidation
- KCBOE Motion Ex. 3(A): "Consolidation of School Meetings," posted online at <http://gms.kent.k12.md.us> on December 28, 2009
- KCBOE Motion Ex. 3(B): "School Consolidation Hearing Coming," posted online at <http://gms.kent.k12.md.us> on January 5, 2010
- KCBOE Motion Ex. 3(C): "School closing scenarios considered," published in Kent County News on January 21, 2010
- KCBOE Motion Ex. 3(D): "Kent school bd. weighs school closing scenarios," posted online at <http://www.stardem.com> on January 25, 2010

- KCBOE Motion Ex. 3(E): "Decision on school closing expected February 16," published in Kent County News on January 28, 2010
- KCBOE Motion Ex. 3(F): "Decision on Kent County School closing expected Feb. 16," posted online at <http://www.chestertownspy.com> on February 1, 2010
- KCBOE Motion Ex. 3(G): "School Closure Possible in Galena, Millington, Rock Hall or Chestertown," posted online at <http://www.chestertownspy.com> on February 1, 2010
- KCBOE Motion Ex. 3(H): "Town Council Enters School Fight," posted online at <http://www.chestertownspy.com> on February 2, 2010
- KCBOE Motion Ex. 3(I): "Board asked to delay school closing," published in Kent County News on February 4, 2010
- KCBOE Motion Ex. 3(J): "Meetings," published in Kent County News on February 4, 2010
- KCBOE Motion Ex. 3(K): "Pisapia reports on school meetings," published in Kent County News on February 4, 2010
- KCBOE Motion Ex. 3(L): "Storms play havoc with school schedules," published in Kent County News on February 11, 2010
- KCBOE Motion Ex. 3(M): "Storms play havoc with Kent County school schedules," posted online at <http://www.stardem.com> on February 15, 2010
- KCBOE Motion Ex. 3(N): "Parents ask Kent Co. BOE to delay school closing," posted online at <http://www.stardem.com> on February 15, 2010
- KCBOE Motion Ex. 3(O): "Consolidation Hearing Rescheduled for 2/22/2010," posted online at <http://mes.kent.k12.md.us> on February 16, 2010
- KCBOE Motion Ex. 3(P): "Schools are back in session after storms," published in Kent County News on February 18, 2010
- KCBOE Motion Ex. 3(Q): "Kent schools are back in session after two storms," posted online at <http://www.stardem.com> on February 19, 2010
- KCBOE Motion Ex. 3(R): "Final school closing forum is held," published in Kent County News on February 25, 2010
- KCBOE Motion Ex. 3(S): "Meetings," published in Kent County News on February 25, 2010



- KCBOE Motion Ex. 3(T): "News from School," posted online at <http://cms.kent.k12.md.us> on February 27, 2010
- KCBOE Motion Ex. 3(U): "Final school closing forum is held," posted online at <http://www.stardem.com> on March 1, 2010
- KCBOE Motion Ex. 3(V): "Rock Hall Middle School to Close," posted online at <http://www.chestertownspy.com> on March 2, 2010
- KCBOE Motion Ex. 3(W): "BOE Consolidation Decision 3/1/10," posted online at <http://gms.kent.k12.md.us> on March 2, 2010
- KCBOE Motion Ex.3(X): "Board Vote: Consolidate Middle Schools," published in Kent County News on March 4, 2010
- KCBOE Motion Ex. 3(Y): "Approved School Consolidation," posted online at <http://gms.kent.k12.md.us> on March 4, 2010
- KCBOE Motion Ex. 3(Z): "Reorganization process ongoing for Kent Schools," published in Kent County News on March 11, 2010
- KCBOE Motion Ex. 3(AA): "Parents Protest School Consolidation in Kent County, MD," posted online at [www.wboc.com](http://www.wboc.com) on March 15, 2010
- KCBOE Motion Ex. 3(BB): "Citizens Force New School Hearing," posted online at <http://kentcomd.com> on March 18, 2010
- KCBOE Motion Ex.3 (CC): "School closing vote delayed," published in Kent County News on March 18, 2010
- KCBOE Motion Ex. 3(DD): "School closing vote delayed until April," posted online at <http://www.stardem.com> on March 21, 2010
- KCBOE Motion Ex. 3(EE): "Final school closing vote to be cast on April 15," published in Kent County News on March 25, 2010
- KCBOE Motion Ex. 3(FF): "Notice of Public Hearing," published in Kent County News on March 25, 2010
- KCBOE Motion Ex.3 (GG): "Notice of Public Hearing," posted online at [www.publicnoticeads.com](http://www.publicnoticeads.com) on March 25, 2010
- KCBOE Motion Ex. 3(HH): "Meetings," published in Kent County News on April 1, 2010

- KCBOE Motion Ex. 3(II): "Notice of Public Hearing," published in Kent County News on April 1, 2010
- KCBOE Motion Ex. 3(JJ): "Notice of Public Hearing," posted online at [www.publicnoticeads.com](http://www.publicnoticeads.com) on April 1, 2010
- KCBOE Motion Ex. 3(KK): "Final school closing hearing held tonight," published in Kent County News on April 8, 2010
- KCBOE Motion Ex. 3(LL): "Libraries, school changes discussed," published in Kent County News on April 8, 2010
- KCBOE Motion Ex. 3(MM): "Meetings," published in Kent County News on April 8, 2010
- KCBOE Motion Ex. 3(NN): "Libraries, school changes discussed," posted online at <http://www.stardem.com> on April 12, 2010
- KCBOE Motion Ex. 4: Minutes from KCBOE's April 15, 2010 meeting
- KCBOE Motion Ex. 5: Letter from Superintendent Wheeler to parents/guardians of KCPS students (May 4, 2010)

The Appellants submitted the following Affidavits in support of their Response and Counter Motion: June 30, 2010 Affidavits of Appellant Dawn M. Graney (D. Graney); and June 30, 2010 Affidavits of Appellant Eleanor T. Collyer (E. Collyer).<sup>4</sup>

The Appellants attached the following exhibits to their Notice of Appeal:

- Notice of App. Ex. 1: KCBOE Resolution (April 15, 2010, effective August 2010)
- Notice of App. Ex. 2: KCBOE March 1, 2010 Meeting Minutes
- Notice of App. Ex. 3: KCBOE Member Sarah Brown's comments from March 8, 2010 KCBOE meeting
- Notice of App. Ex. 4: Board of Education Advisory Committee Report (June 5, 2006)
- Notice of App. Ex. 5: Letter from Hoon & Associates, LLC to KCBOE and Kent County Commissioners (April 28, 2010)
- Notice of App. Ex. 6: Statement of Appellant Eleanor T. Collyer (May 7, 2010)

<sup>4</sup> Throughout this decision, these Affidavits are referred to as D. Graney AV #1, D. Graney AV #2, E. Collyer AV #1, and E. Collyer AV #2.

**UNDISPUTED FACTS**

Based upon the information of record, I find the following to be material facts about which there is no genuine issue:

1. During the 2009-2010 school year, the KCPS operated four elementary schools, each of which provided services to children from pre-kindergarten through fourth grade: the Millington Elementary School (MES), the Garnett Elementary School (Garnett ES), the Rock Hall Elementary School (RHES), and the Worton Elementary (WES).
2. During the 2009-2010 school year, the KCPS operated three middle schools, each of which provided services to children from fifth grade through eighth grade: the Galena Middle School (GMS), the Rock Hall Middle School (RHMS), and the Chestertown Middle School (CMS).
3. Appellant D. Graney has two children who attended MES during the 2009-2010 school year.
4. Appellant E. Collyer has two children who attended RHMS during the 2009-2010 school year.<sup>5</sup>
5. KCBOE Policy NSBA Code: FL (Policy) proposes the following procedures and timelines for consideration of recommended school closings and/or consolidations:

II. Proposed Policy

A. Consideration shall be given to the impact of the proposed school closing on the following factors:

- (1) Student enrollment trends;
- (2) Age or condition of school buildings;
- (3) Transportation;
- (4) Educational programs;

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<sup>5</sup> The other Appellants did not submit Affidavits including information about which schools their children attend.

- (5) Ethnic and racial composition of student body;
- (6) Financial impacts;
- (7) Student relocation;
- (8) Impact on community in geographic attendance area for school proposed to be closed and school(s) to which students will be relocating.

...  
C. The process for closing or consolidating a school shall, at a minimum, include the following procedures:

(1) An advertised public hearing to permit concerned citizens an opportunity to submit their views orally or to submit written testimony or data on a proposed school closing.

(a) The public hearing shall take place before any final decision by the [KCBOE] to close a school; and

(b) Time limits on the submission of oral and written testimony and data shall be clearly defined in the notification of the public hearing.

(2) Adequate notice to parents and guardians of students in attendance at all schools that are being considered for closure by the [KCBOE].

(a) In addition to any regular means of notification used by the local school system (including Internet postings), written notification of all schools that are under consideration for closing shall be advertised in at least two (2) newspapers having general circulation in the geographic attendance area for the school(s) proposed to be closed, and the school(s) to which students will be relocating.

(b) The newspaper notification shall include the procedures and timeline that will be followed by the [KCBOE] in making its final decision.

(c) The newspaper notification shall appear at least two (2) weeks in advance of any public hearing(s) held by the [KCBOE] on a proposed school closing.

D. The final decision of the [KCBOE] to close a school shall be announced at a public session and shall be in writing.

(1) The final decision shall include the rationale for the school closing and address the impact of the proposed closing on the factors set forth in Part A above;

(2) There shall be notification of the final decision of the [KCBOE] to the community in the geographic attendance area of the school proposed to be closed and school(s) to which students will be relocating;

(3) The final written decision shall include notification of the right to appeal the decision of the [KCBOE] to the State Board of Education, as forth below in Section IV.

### III. Date of Decision.

The date of the final decision to close a school, except in emergency situations, shall be announced at least ninety (90) days before the date the school is scheduled to be closed, **but not later than April 30 of any school year**. An emergency circumstance is one where the decision to close a school because of unforeseen circumstances cannot be announced at least ninety (90) days before the date a school is scheduled to close or before April 30 of any school year.

### IV. Appeal to State Board of Education.

A. An appeal to the State Board of Education may be submitted in writing within thirty (30) days after the final decision of the [KCBOE].

B. The State Board of Education will uphold the decision of the [KCBOE] to close and/or consolidate a school unless the facts presented indicate the decision was arbitrary and unreasonable or illegal.

(KCBOE Motion Ex. 1A.)

6. In December 2005, the KCBOE charged a KCBOE Advisory Committee with examining the grade configuration of the KCPS, including having fifth graders in the elementary schools and ninth graders in the middle schools, consolidating the middle schools, and having a kindergarten through eighth grade (K-8) school.
7. The Advisory Committee considered the advantages and disadvantages of the above configurations, and determined consolidation held no advantages. In its June 5, 2006 report, it identified the following disadvantages:
  - Consolidated problems similar to those already seen at the high school
  - Loss of more students to private schools
  - Loss of community focus

- Too long bus rides
- School too big for middle school students
- Probable larger class size
- Less services to IEP<sup>6</sup> students
- Less personal staff attention to individual students
- Three very different, very diverse communities

8. The Advisory Committee reported the following advantages to having fifth grade in the elementary schools:

- [Keeping] them little
- Both elementary & middle will test three grades (even for both)<sup>7</sup>

(Notice of App. Ex. 4.)

9. The Advisory Committee reported the following disadvantages to having fifth grade in the elementary schools:

- Not enough room at elementary
- Too few kids left at middle school
- Lunch shifts at elementary will have to start too early

(Notice of App. Ex. 4.)

10. The Advisory Committee concluded that “because of recent events in the county, budget constraints, and foreseeable population changes; (sic) now is not the time to take action to change the grade configuration of the elementary and middle schools.” (Notice of App. Ex. 4.)

11. In September 2006, the MSBE established a Middle School Steering Committee (MSSC) with the goal of improving teaching and learning in Maryland’s middle school grades.

12. In June 2008, the MSSC published the Critical Middle Report, which set forth the goal that all middle school students have a rigorous and relevant core academic program that engages them

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<sup>6</sup> IEP stands for Individualized Education Program, which describes special education and related services for eligible special education students.

<sup>7</sup> Neither party explained this conclusion.

in learning, develops critical literacy skills, and prepares them for high school success, post-secondary enrollment, and twenty-first century careers. The Critical Middle Report identified several core programs important to middle school students' cognitive, social and emotional development, such as English/Language Arts, Mathematics, Science, Social Studies, World Languages, Fine Arts, Health, and Physical Education.

13. On November 2, 2009, the KCBOE charged the KCPS Administration with assessing the impact of middle school consolidation on the ability of the KCPS to provide the core programs important to middle school students' cognitive, social and emotional development, such as world languages, fine arts and technology education, as well as the impact of consolidation on local communities and the KCPS budget.
14. On December 7, 2009, during the KCBOE's monthly meeting, the Administration publicly shared an analysis of the impact of consolidating the middle schools on the KCPS' ability to provide middle school students with the core programs identified in the Critical Middle Report, including, but not limited to:
  - (1) student enrollment trends;
  - (2) age or condition of school buildings;
  - (3) transportation;
  - (4) educational programs;
  - (5) ethnic and racial composition of student body;
  - (6) financial impacts;
  - (7) student relocation; and
  - (8) impact on community in geographic attendance area for school proposed to be closed and school(s) to which students will be relocating.

15. During its December 7, 2009 monthly public meeting, the KCBOE directed the Administration to schedule “public hearings”<sup>8</sup> in Rock Hall, Galena and Chestertown on options for closing, consolidating and redistricting the public schools. (KCBOE Motion Ex. 1.)
16. Per the KCBOE’s direction, the following public hearings were held:
- (1) GMS, January 26, 2010 – 7:00 p.m.;
  - (2) [RHMS], January 27, 2010 – 7:00 p.m.;
  - (3) CMS, January 28, 2010 – 7:00 p.m.; and
  - (4) [MES], February 22, 2010 – 7:00 p.m.<sup>9</sup>
17. Notice of the GMS public hearing appeared on the GMS website on December 28, 2009 and January 5, 2010. Notice of the RHMS public hearing appeared on the MES website on January 5, 2010 and in The Kent County News on February 4, 2010. Notice of the CMS public hearing appeared on the MES website on January 5, 2010. Notice of the MES public hearing appeared on the MES website on February 16, 2010.<sup>10</sup>
18. At each of the public hearings, the attendees were presented with four proposals (Proposals ## 1 - 4) and were permitted an opportunity to submit their views.<sup>11</sup>
19. Proposal #2 provided, in pertinent part, for grades PreK-5 in the elementary schools,<sup>12</sup> the relocation of RHES to the current RHMS building; the creation of Galena Elementary School (GES) to be housed in the current GMS building; the closure of RHMS, CMS and GMS and the creation of one middle school to be located at the current CMS; naming the new consolidated

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<sup>8</sup> Although I refer to these meetings as “public hearings” in my findings of Undisputed Facts, as discussed below, I have distinguished them from a later April 8, 2010 public hearing for purposes of this Proposed Order.

<sup>9</sup> In addition, the Superintendent attended a February 25, 2010 public community forum hosted by the Two River Charter School group.

<sup>10</sup> The KCBOE also asserted in its Response that notice of the RHMS and CMS public hearings appeared in The Star Democrat on January 25, 2010 and that notice of the MES public hearing appeared in The Kent County News on February 11 and 18, 2010 and online at The Star Democrat website on February 15 and 19, 2010. A review of the referenced exhibits attached to the KCBOE’s Motion indicates, however, that the “notices” referred to by the KCBOE were actually articles that appeared in those publications about the upcoming meetings.

<sup>11</sup> Hereinafter, I will refer to Proposals ## 1, 3 and 4, collectively, as the “Other Proposals.”

<sup>12</sup> The elementary schools are currently PreK-4.



middle school Kent County Middle School (KCMS); the relocation of the KCPS Central Office to the current RHES building; and the relocation of the Intensive Behavior and Academic Learning Center (Alternative School) to the current RHES building.

20. Each Proposal contained the current and projected enrollments after redistricting and the capacities of the schools, advantages and disadvantages of the Proposal and impacts on class size, FARM<sup>13</sup> diversity, minority percentages, number of students transferred, surplus teachers, surplus staff, renovation costs, transportation costs, building closure savings, and curricular impact.
21. Prior to presenting a proposed plan and making a recommendation to the KCBOE, the Superintendent considered all four proposals as well as some other proposals suggested by interested persons.
22. On March 1, 2010, the KCBOE held a Special Board Meeting at which the Superintendent presented to the KCBOE a summary of the questions posed by the public at each of the four public hearings and at the community forum, and responses to those questions. During the meeting, the Superintendent proposed Consolidation according to Proposal #2. Proposal #2 included the following list of the advantages and disadvantages of Consolidation:

Advantages:

- Provides increased opportunity for [elementary school] students to walk to school and remain in community schools
- Increases the opportunities for parental support
- Meets the Critical Middle Report programmatic requirements
- Provides world language, health education, media specialists, increased fine arts, and a technology integrationist per the Critical Middle Report
- Eliminates the need for the current central office building
- Provides STEM (Science, Technology, Engineering, and Math) program for all students without leaving the home school

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<sup>13</sup> Free and Reduced Meal.

- Expands alternative program services
- Facilitates the delivery of ESOL (English Speakers of Other Languages) services
- Increases the availability of technical support
- Makes the high speed network available to all middle and high school students to use new technology
- Develops a sense of community earlier and facilitates transition to the high school
- Eliminates the need to purchase new buses
- Allows the traditional PreK to 5 elementary configuration
- Provides long term redistricting solution
- Continues to be eligible for Title I<sup>14</sup> services

Disdvantages

- Requires renovation of [GMS] and [RHMS] to accommodate early childhood programs
- Requires renovation of [RHES] to accommodate the central office and the alternative program
- Requires relocation of larger number of students and teachers
- Requires movement of the playground to RHMS and creation of a new playground at GES

23. The March 1, 2010 meeting focused only on Proposal #2; the KCBOE members did not discuss the Other Proposals at that meeting.

24. No one seconded a KCBOE member's motion to approve Proposal #2, and the motion died for lack of vote.

25. After lengthy discussion by KCBOE members, the Superintendent amended Proposal #2 to exclude any action with respect to the relocation of the Central Office and the Alternative School and recommended amended Proposal #2 to the KCBOE for approval.

26. The KCBOE voted 3-2 to approve amended Proposal #2.

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<sup>14</sup> *Elementary and Secondary Education Act of 1965*, as amended, Title 1, Part A; 20 U.S.C. 6301-6339, 6571-6578 (also known as: Education for the Disadvantaged—Grants to Local Education Agencies, Improving the Academic Achievement of the Disadvantaged, Title I ESEA, Title I LEA Grants).

27. Sometime after the March 1, 2010 meeting, the KCBOE received Petitions signed by hundreds of citizens requesting that the KCBOE take the following actions:

- rescind the March 1, 2010 vote on School Consolidation and take ten months to research consolidation options more thoroughly and revisit a vote in 2011
- take a minimum of ten months to review or implement studies concerning the impact of consolidation on a rural community
- research alternative solutions for additional funding opportunities including grants and state money obtainable for the school system
- evaluate and compare current proposals equally and their financial impact
- take time to analyze or implement county economic impact studies
- allow board of advisory involvement
- allow more accurate figures and communication with the public
- allow time for a transition plan to be put into place for affected students and families

28. On March 8, 2010, the KCBOE held a regularly scheduled meeting, which the Appellants D. Graney and E. Collyer attended. At that meeting, members of the KCBOE stated that they were moving forward with Proposal #2. Charles MacLeod, Esquire, legal counsel for the KCBOE, advised the KCBOE members that COMAR required that the decision on the Consolidation approval be in writing; the KCBOE must articulate the rationale for the decision; and a written notice of the decision must be forwarded to all parents of children affected by the consolidation.

29. The KCBOE made a decision that a special session would be held on March 15, 2010 and that a public hearing would be held on April 8, 2010. Mr. MacLeod advised the KCBOE that a notice of the public hearing should be sent home to all the parents.

30. In her written comments submitted at the March 8, 2010 meeting, KCBOE member, Sarah Brown, implored the KCBOE to consider the impact on the community of the proposed Consolidation, including undertaking a fiscal review of the impact, consideration of submitted written comments. Referring to the KCBOE's "blatant disregard to the discerning and thought-based questions presented by [the] community" and "the haste and lack of consideration of . . . key issues," she asked that the KCBOE reconsider the Consolidation question and postpone its

decision for ninety days to allow for study of the financial, community, and Critical Middle Report impacts of Proposal #2. (Notice of App. Ex. 3.)

31. At the March 15, 2010 KCBOE meeting, Mr. MacLeod informed the KCBOE members and the participating public that the Other Proposals would not be discussed and that Proposal #2 had been adopted in principle.
32. Written notification of all schools under consideration for closing was advertised in The Star Democrat on March 24, 2010 and in The Kent County News on March 25, 2010, newspapers having general circulation in the relevant geographic attendance area.
33. The notices in the newspapers stated, in pertinent part, as follows:

The following [KCPS] closure and consolidation plan is proposed for the school year commencing August 2010:

- A. Closing of [RHMS, GMS and CMS];
- B. Establishing a new [KCMS] at the former [CMS];
- C. Establishing a new [GES] at the former [GMS] and relocating [RHES] to the former [RHMS];
- D. Creating five community elementary schools . . . comprised of students in Pre-Kindergarten through 5<sup>th</sup> Grade

**A public hearing will be held:**

**Date: Thursday, April 8, 2010**

**Time: 7:00 p.m.**

**Place: Kent County High School Auditorium**

[The KCBOE] will, at a minimum, consider the following factors before rendering a final decision: (1) student enrollment trends; (2) age or condition of school buildings; (3) transportation; (4) educational programs; (5) ethnic and racial composition of the student body; (6) financial impact; (7) student relocation[,] and (8) impact on the community. The final decision will include contemplation of these factors and public input, and will set forth the rationale for closing and consolidating schools. The final decision will be made in writing and announced no later than April 30, 2010. A Special [KCBOE] meeting has been scheduled on Thursday, April 15, 2010 at 6:30 p.m. to consider final action. For additional information, visit the [KCPS] website [www.kent.k12.md.us](http://www.kent.k12.md.us) or visit the Central Office at 215 Washington Avenue, Chestertown.

(KCBOE Motion Ex. 3(FF).)

34. The above written notification was again advertised in The Star Democrat on March 31, 2010, and in The Kent County News on April 1, 2010.
35. The KCBOE failed to include in the notifications the time limits on the submission of oral or written testimony and data.
36. On April 8, 2010, the KCBOE held a public hearing at the Kent County High School (KCHS) auditorium on the proposed school Consolidation, during which Dr. Wheeler and other members of the Administration presented a Power Point presentation, entitled "School Closing & Consolidation Plan."
37. The Power Point presentation addressed student enrollment trends, the age or condition of school buildings, transportation, educational programs, the ethnic and racial composition of the student body, financial impacts, student relocation, and impact on the community in the geographic attendance area of schools proposed to be closed and in the geographic attendance area of schools to which students would be relocating.
38. Attendees were invited to sign up to speak and to make comments or ask questions. Dr. Harvey asked attendees, except for Appellant E. Collyer, who presented a Power Point presentation in opposition to Proposal #2, to limit their oral comments to three minutes.
39. In addition to Appellants D. Graney and E. Collyer, seventeen other attendees spoke at the public hearing, including Appellants Whitmel F. Sanderson, Jr. (W. Sanderson), Elisia Moxley (E. Moxley), Robert Moxley (R. Moxley), Joseph Graney (J. Graney), and Summer Blazejak (S. Blazejak).
40. The public hearing lasted at least three hours.

41. All attendees were provided an opportunity to submit their views in the form of written and oral testimony or data during and after the April 8, 2010 public hearing.
42. At the April 8, 2010 meeting, Dr. Harvey announced that the next regularly scheduled meeting of the KCBOE would be April 12, 2010 and that the Board would take a final vote on the proposal on April 15, 2010.
43. The KCBOE did not discuss the Other Proposals at the April 8, 2010 public hearing.
44. Following public comment during the April 15, 2010 meeting, including comments from Appellants D. Graney, E. Collyer, E. Moxley, and S. Blazejak, the KCBOE voted four to one to adopt the amended Proposal #2 (hereinafter Resolution). The KCBOE did not discuss the Other Proposals at that meeting.
45. After the adoption of the Resolution, Dr. Wheeler also recommended to the KCBOE that the Central Office be relocated to RHES as soon as feasible after July 1, 2010, and the KCBOE voted to approve that relocation
46. The Resolution provided as follows:

SECTION 1:

[IT] IS HEREBY RESOLVED BY THE [KCBOE] that the KCPS 2010 Consolidation Plan for the school year commencing in August 2010 is approved, as follows:

- (1) Close [CMS], [RKMS] and [GMS].
- (2) Establish one (1) middle school comprised of students in 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> grades, located at the current [CMS].
- (3) The new consolidated middle school will be named [KCMS].
- (4) [RHMS] and {GMS} students in 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> grades will be relocated to [KCMS].
- (5) There will be five (5) community elementary schools comprised of students in Pre-K through 5<sup>th</sup> grade:
  - a. Garnett Elementary School – existing;
  - b. [WES] – existing;
  - c. [MES] – existing;

- d. [GES] – new; to be located in the current [GMS] building; and
- e. [RHES] – existing; to be relocated at the current [RHMS] building.

SECTION II:

[BE] IT FURTHER RESOLVED BY THE [KCBOE] that due to the approved school closing and consolidation plan for the school year commencing in August 2010, certain KCPS school names shall be changed as follows:

- 1. [GMS] changed to [GES]
- 2. [RHMS] changed to [RHES]
- 3. [CMS] changed to [KCMS]

....  
SECTION V:

[BE] IT FURTHER RESOLVED BY THE [KCBOE] that the Administration undertake a comprehensive evaluation of KCPS transportation policies, procedures and routes in an effort to reduce bus ride times for all students, to encourage walking where safe and practicable and to maximize operational efficiencies.

(Notice of App. Ex. 1.)

- 47. In the Resolution, the KCBOE scheduled the school closures/Consolidation for the school year commencing August 2010.
- 48. In deciding to adopt the Resolution, the KCBOE considered and relied upon the following eight factors and supporting reasons:

1) STUDENT ENROLLMENT TRENDS: Kent County has experienced a 13.5 percent decline in enrollment in student population between 2002 and 2009. From 2002 to the present, the elementary school enrollment has decreased overall, but it increased slightly overall in 2009. Middle school enrollment has increased overall since 2009 and is projected to increase slightly to 2019. The projected effect of the Consolidation on student enrollment is as follows:

<u>Schools</u>	<u>Current Enrollment</u>	<u>Proposed Enrollment</u>	<u>Capacity</u>
CMS	282	472 (KCMS)	678
Garnett ES	213	205	323
GES housed in GMS	216 (GMS)	219 <sup>15</sup>	468
MES	246	206	249
RHES housed in RHMS	204	236	340
WES	241	246	302

2) AGE AND CONDITION OF BUILDINGS: Consolidation will not result in the overcrowding of the elementary schools and student enrollment at the new KCMS will be substantially less than the building's 678-student rated capacity. The current CMS building is adequate for its intended educational program as the new KCMS and the Consolidation will fully utilize the existing KCPS buildings. The KCPS will incur approximately \$233,956.00 in non-recurring expenditures to convert the RHMS and GMS buildings into elementary schools and to convert CMS into KCMS, including expenditures for playgrounds, restrooms, furniture/fixtures, instructional materials, media center start-up costs, signage, keyless entry, and moving expenses. The estimated savings relating to the Consolidation are \$263,000.00 in personnel savings and \$51,000.00 in facility costs, realizing a net savings of approximately \$80,000.00.

3) TRANSPORTATION: Consolidation will result in the average transportation time for elementary students being shorter, *albeit* longer for the middle school students. Specifically, Consolidation will reduce the average bus rides for elementary students by twelve minutes in the morning and by four minutes in the afternoon; it will increase the average duration of bus

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<sup>15</sup> The new GES received its population by redistricting the other elementary schools.



rides for middle school students by nine minutes in the morning and by eight minutes in the afternoon. The current longest morning bus ride for middle school students is ninety minutes; the projected morning ride after Consolidation is seventy-five minutes. The current longest afternoon bus ride is seventy-five minutes; the projected afternoon ride is ninety minutes. This may change after a dry run is conducted. A workgroup was formed to review transportation policies to reduce ride times. In addition, the KCBOE directed in the Resolution that the Administration undertake a comprehensive evaluation of transportation policies, procedures and routes in an effort to reduce bus ride times, encourage walking where safe and practicable and maximize operational efficiencies.

4) EDUCATIONAL PROGRAMS: Consolidation will enable the KCPS to provide all middle school students with the programmatic requirements set forth in the Critical Middle Report, such as World Languages, Fine Arts and Technology and Information Literacy. Additional benefits with regard to the educational programs will be the facilitation of grade level team professional development, assignment of teachers to areas in which they are most proficient, and greater planning flexibility for teachers and opportunities for group and cross-curriculum teaching. Consolidation will also facilitate the delivery of ESOL (English Speakers of Other Languages) services; provide a STEM (Science, Technology, Engineering, and Math) program for all middle school students without leaving the home school; and allow the traditional PreK to 5 elementary configuration. Fifth graders will have one more year in the nurturing and more structured environment of the elementary school. Consolidation will improve IEP services, allowing for six special education teachers in the middle school to be a permanent part of a team and for the assignment of special education teachers to the sixth-eighth grade English and Math teams. The special education teachers will be able to specialize in one

subject and to work exclusively with one set of students. The Consolidation plan also provides for a certified media specialist to teach media literacy and two World Language teachers, which will allow every sixth-eighth grade student to learn Spanish and earn high school credit. Middle school students will be able to have physical education every other day and to participate in the fine arts components. A technology integration teacher will be available to provide ongoing professional development and to help integrate technology into instruction. Other benefits will be an increase in advisory time for students and a decrease in the disruption of instructional time for transitions.<sup>16</sup>

The estimated average class size at KCMS after Consolidation is twenty-three.<sup>17</sup>

5) ETHNIC AND RACIAL COMPOSITION: A single county-wide middle school will eliminate ethnic and racial differences among the three middle schools. Consolidation will provide all KCPS middle school students with equal access to the same middle school programs and having a single, county-based middle school will eliminate regional discrimination because every KCPS middle school student will have equal access to the full complement of programs. The percentage of minority students enrolled in the new KCMS will be well balanced and representative of the demographics of the KCPS, which is thirty percent minority.<sup>18</sup> The projected student population under the Consolidation will have approximately the same percentage of minority students as the KCHS student body and even with the new GES, the

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<sup>16</sup> Work groups are to be formed to study enrollment and redistricting data and determine the appropriate staffing for each of the schools, subject to teachers' requests and early-semester adjustments.

<sup>17</sup> According to Proposal #2, the estimated class sizes after Consolidation are eighteen at Garnett ES, seventeen at MES, twenty at RHEM (housed at RHMS), nineteen at WMS, and seventeen at GES.

<sup>18</sup> The projected minority enrollment at KCMS is thirty-one percent.

percentage of minority students in the elementary schools will not change significantly.<sup>19</sup>

6) FINANCIAL IMPACTS: Consolidation of the middle schools will allow the KCPS to enhance the middle school program in a manner that would not be physically possible in the current configuration because by consolidating the schools the KCPS will be able to maximize its resources, at an estimated net savings of approximately \$80,000.00. The percentage of students receiving FARM in the elementary and middle schools will not change significantly.<sup>20</sup> KCPS would incur approximately \$233,956.00 in non-recurring expenditures to convert the RHMS and GMS buildings into elementary schools and to convert CMS into KCMS, including expenditures for playgrounds, restrooms, furniture/fixtures, instructional materials, media center start-up costs, signage, keyless entry, and moving expenses. After Consolidation, schools will continue to be eligible for Title I services. Furthermore, no additional buses will be needed.

7) STUDENT RELOCATION: The most significant relocations resulting from the Consolidation will be the relocation of the RHMS and GMS students to the new KCMS and the relocation of the elementary students who will attend the new GES.<sup>21</sup> Student enrollment at the new KCMS and GES is estimated to be substantially less than the buildings' student rated capacities. Furthermore, elementary school students will be able to attend community-based elementary schools for PreK to fifth grade.

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<sup>19</sup> The current minority enrollment is sixty-one percent at Garnett ES, thirty-three percent at MES, thirty-one percent at RHES; and twenty percent at WES. The projected minority enrollment is forty-eight percent at Garnett ES, thirty-two percent at MES, twenty-six percent at RHES, and thirty-four percent at WES. The projected minority enrollment at GES is nineteen percent. The current minority enrollment is forty-four percent at CMS, thirteen percent at GMS, and twenty-four percent at RHMS. The projected minority enrollment at KCMS is thirty-one percent.

<sup>20</sup> The percentage of FARM-eligible student will decrease from sixty-one percent to fifty-nine percent at Garnett ES; increase from forty-nine percent to fifty percent at MES; increase from forty-eight percent to fifty-three percent at RHES; and increase from forty-one percent to forty-seven percent at WES. Twenty-six percent of students at GES will be FARM-eligible. The current percentage of FARM-eligible students is fifty percent at CMS; thirty-five percent at GMS; and fifty-five percent at RHMS. The projected percentage of FARM-eligible students at KCMS is forty-six percent.

<sup>21</sup> Proposal #2 indicates that an estimated 585 students will be relocated.

8) COMMUNITY IMPACT: As a result of Consolidation, elementary students will remain in their communities so that parents will have quicker access to the young learner and greater volunteer opportunities. Consolidation will provide increased opportunities for elementary school students to walk to school and remain in community schools and develop a sense of community earlier.

49. On May 4, 2010, the Superintendent provided written notification of the KCBOE's final decision to the parents/guardians of students in the geographic attendance areas of the schools to be closed and/or consolidated, including a copy of the Resolution, and posted the exhibits thereto on the KCPS website. The letter also advised the parents/guardians of their right to appeal the decision to the MSBE on the grounds that it was arbitrary and unreasonable or illegal.

50. As of June 30, 2010, the following had taken place:

- bathrooms at GMS had been altered to accommodate elementary school students
- the GMS Principal had been reassigned to CMS
- the Principal of GES mailed letters to parents of students affected by the consolidation confirming that GES had been relocated to GMS
- the 2001-2011 school year calendar contained new addresses and the names of each school affected by the Consolidation
- correspondence from the PTA confirmed the decision to transfer funds from MES to the new GES
- there had been no middle school students or teachers on GMS property since June 15, 2010
- there was no summer program for students at GMS; summer school was being held at CMS
- Appellant D. Graney received a welcome letter from the Principal of GES showing the former GMS address
- an Open House was held on June 8, 2010 for GES in the former GMS building; there were packed and labeled boxes of GMS materials in the hall of the library
- the "Official School Calendar" gave the opening date for new GES teachers as August 16, 2010 and for students as August 23, 2010
- the GMS telephone number was listed as the GES telephone number on the school calendar
- excavation of an elementary-age playground had begun at the former GMS building
- many GMS teachers had been reassigned to KCMS

- the GMS principal had been reassigned
- Appellant D. Graney received a redistricting link to confirm that her children, who previously attended MES, would be attending GES
- the RHMS sign was removed from the current RHMS building
- sinks and toilets in the bathrooms at RHMS had been lowered to accommodate elementary school age students
- when a call was received by Appellant E. Collyer from what was RHMS, the caller ID read RHES
- classroom materials from RHMS had been boxed and labeled for delivery to KCMS
- the last day for teachers at RHMS was June 15, 2010
- student tables and chairs had been removed from classrooms and labs at RHES;
- elementary school furniture was scheduled to be delivered at RHMS the week of July 6, 2010
- the new principal of RHES had begun to set up his office in the current RHMS building
- a ceremony and dedication of a plaque commemorating the closing of RHMS was held on June 11, 2010.<sup>22</sup>

### DISCUSSION

Preliminarily, I note that the Appellant's Notice of Appeal specifies that "[t]his matter involves the consolidation of the middle schools in Kent County. . . . In essence, the Resolution ordered the closure of [RHMS] and [GMS], and that all students who would otherwise attend those middle schools will in the future attend [CMS]."<sup>23</sup> Therefore, although the Resolution also resulted in the addition, relocation and grade reconfiguration of elementary schools,<sup>24</sup> I will consider the KCBOE's action with regard to elementary schools only as it relates to the KCBOE's decision to consolidate the middle schools.

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<sup>22</sup> I note that in her Affidavit setting forth some of these matters, the Appellant D. Graney did not explain what she meant in her Affidavit by "Calendars and staff confirmed last day of school to parents for students and teachers via printed school calendar." (D. Graney AV #2.) She referred to a Memorandum from Tracey Rodney but did not state that individual's connection to the KCPS.

<sup>23</sup> See also the agreed-upon general issue set forth in my July 9, 2010 Prehearing Conference Order.

<sup>24</sup> The Resolution further provided for grades PreK-5 in the elementary schools, the addition of a fifth elementary school, GES, which will be located in the former GMS building, and the relocation of RHES from the current building in which it is located to the building formerly occupied by the RHMS.

As indicated in their Notice of Appeal, the Appellants appealed the Consolidation, contending that it was arbitrary, unreasonable or illegal based on the following allegations, some of which overlap.<sup>25</sup>

- 1) the KCBOE failed to give proper and legally sufficient public notice of the consolidation of the middle schools in Kent County;
- 2) the KCBOE failed to conduct proper and legally sufficient public hearings relating to the Consolidation;
- 3) the KCBOE did not follow the required procedures for its enactment of the Resolution and for Consolidation;
- 4) the KCBOE failed to conduct a proper and legally sufficient consideration of other proposals related to the Consolidation;
- 5) the KCBOE failed to timely adopt the Resolution; the Consolidation cannot be implemented for the 2010-2011 school year because the KCBOE did not enact the Resolution at least ninety days prior to the close of GMS and RHMS as required by COMAR 13A.02.09.02; and
- 6) In adopting the Resolution, the KCBOE violated the Appellants' due process rights and made legally sufficient significant procedural and substantive errors.<sup>26</sup>

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<sup>25</sup> As discussed below, in my July 9, 2010 Prehearing Conference Order, I found these allegations to be somewhat vague and directed the Appellants to clarify in their Prehearing Conference Statement the factual and legal issues asserted by them. They provided some clarification in their July 13, 2010 Prehearing Conference Statement.

<sup>26</sup> In their July 13, 2010 Prehearing Conference Statement, the Appellants withdrew their allegation that the Resolution was not approved by the requisite majority because one or more of the KCBOE members voting in favor of the Resolution may have had a conflict of interest or be otherwise disqualified to vote.

Legal Standard

Pursuant to section 4-108 of the Education Article of the Annotated Code of Maryland, the KCBOE is charged, in pertinent part, as follows:

**4-108. Function of board**

Each county board shall:

- (1) To the best of its ability carry out the applicable provisions of this article and the bylaws, rules, regulations, and policies of the State Board;
- (2) Maintain throughout its county a reasonably uniform system of public schools that is designed to provide quality education and equal educational opportunity for all children;

Section 4-109 of the Education Article provides:

**§ 4-109. Public schools and attendance areas**

- (a) 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.
- (b) On approval by the State Superintendent, any school established under this section becomes a part of the State program of public education.
- (c) With the advice of the county superintendent, the county board shall determine the geographical attendance area for each school established under this section.

Section 4-120 provides:

**§ 4-120. Consolidating schools**

- (a) *Consolidation of schools.* -- If a county board considers it practicable, it shall consolidate schools.
- (b) *Transportation of pupils.* -- Each county board shall arrange for the transportation of students to and from consolidated schools.

The decision of a local board to close and consolidate schools is the exclusive province of the local board and may be reversed only if arbitrary and unreasonable or illegal. COMAR 13A.02.09.03A; COMAR 13A.01.05.05A; KCBOE Policy NSBA FL IV.B (Proposed Procedures

to Govern School Closings and/or Consolidation) (adopted February 11, 1982, revised March 1, 1982, October 9, 2009 and March 6, 2000), KCBOE Motion Ex. 1A) (Policy). *See also Coleman v. Howard Co. Bd. of Educ.*, MSBE Op. No. 05-32 (Sept. 27, 2005) (challenge of board decision to reassign ninth and tenth grade students from one high school to another as part of overall redesign of school boundaries); *Slider v. Allegany Co. Bd. Of Educ.*, MSBE Op. No. 00-35 (July 31, 2000) (challenge of board decision to close, consolidate, and reconfigure various public schools).

COMAR 13A.01.05.05 provides in pertinent part as follows:

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 unlawful procedure;
- (5) Is an abuse of discretionary powers; or
- (6) Is affected by any other error of law.

The burden of proof is on the Appellants to prove their case by a preponderance of the evidence. COMAR 13A.01.05.05D. The Appellants contend that with regard to the alleged procedural violations, the burden shifted to the KCBOE when the Appellants raised those issues. I find no merit in that position; the Appellants cited no authority for it and it is contrary to COMAR 13A.01.05.05D.

The Court of Appeals has recognized that, in general, courts will not attempt to substitute their judgment for the expertise of local school boards, acting within their discretion. *Bernstein v. Board of Education of Prince George's County*, 245 Md. 464 (1967) (parents sought to restrain



school board from transferring children from one elementary school to another). Thus, I will give due deference to KCBOE's decision.

**Summary Affirmance**

The KCBOE contends that there are no genuine issues of material fact and that it is entitled to affirmance of its decision to adopt the Resolution as a matter of law because its decision was not arbitrary and unreasonable or illegal. COMAR 13A.01.05.03D. The Appellants contend that there are genuine issues of material fact, or in the alternative, that the Appellants are entitled to prevail as a matter of law. COMAR 13A.01.05.03D; COMAR 28.02.01.12D.

COMAR 13A.01.05.03 governs a local board's response to appeals. That regulation provides in pertinent part as follows:

**.03 Response to Appeals.**

**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<sup>27</sup> 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.

As the above regulation applies to a motion for summary affirmance filed by a local board,

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<sup>27</sup> COMAR 13A.01.05.01B(9) defines "Respondent" as "the local board or other individual or entity which issued the decision that is on appeal."

and does not refer to a motion for summary affirmance filed by appellants in a contested case, I find that the OAH Rules of Procedure govern the Appellant's Counter Motion and their Response to the KCBOE's Motion.

The OAH's Rules of Procedure have a similar standard for a motion for summary decision as that set out by the MSBE in its regulations governing motions for summary affirmance.

COMAR 28.02.01.12D provides:

- (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.
- (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.

The OAH's rule regarding summary decision is largely based upon Maryland Rule 2-501, which governs motions for summary judgment in circuit court; namely, if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law, the motion must be granted. Because of the similarities between these three rules, I have relied upon appellate decisions interpreting Maryland Rule 2-501 for guidance in applying the MSBE's rule governing summary affirmance and the OAH's rule governing summary decision.

The Court of Special Appeals has discussed what constitutes a "material fact," the method of proving such facts, and the weight a judge ruling upon such a motion should give the information presented:

“A material fact is a fact the resolution of which will somehow affect the outcome of the case.” . . . “A dispute as to a fact ‘relating to grounds upon which the decision is not rested is not a dispute with respect to a *material* fact and such dispute does not prevent the entry of summary judgment.’” . . . We have further opined that in order for there to be disputed facts sufficient to render summary judgment inappropriate “there must be evidence on which the jury could reasonably find for the plaintiff.”

...

[T]he trial court, in accordance with Maryland Rule 2-501(e) shall render summary judgment forthwith if the motion and response show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. The purpose of the summary judgment procedure is not to try the case or to decide factual disputes, but to decide whether there is an issue of fact that is sufficiently material to be tried. . . . Thus, once the moving party has provided the court with sufficient grounds for summary judgment,

[I]t is . . . incumbent upon the other party to demonstrate that there is indeed a genuine dispute as to a material fact. He does this *by producing factual assertions, under oath*, based on the personal knowledge of the one swearing out an affidavit. . . . “Bald, unsupported statements or conclusions of law are insufficient.”

*Tri-Towns Shopping Ctr., Inc., v. First Fed. Sav. Bank of W. Md.*, 114 Md. App. 63, 65-66 (1997) (citations omitted) (emphasis in original).

Moreover, when a motion for summary judgment is supported by an affidavit and exhibits and no opposing affidavit is filed, the non-moving party is considered to have admitted, for the purposes of summary judgment, all statements of fact in the moving party’s affidavit.

*Alamo Trailer Sales, Inc. v. Howard County Metropolitan Comm’n*, 243 Md. 666, 668 (1966) (property owners’ allegation that public hearings relating to classification and taxation of land as commercial property were not held according to law was insufficient to preclude summary judgment in the absence of an affidavit supporting the allegation). A mere general denial of facts set forth in the moving party’s affidavit is not enough to show that there is a genuine dispute as to a material fact. *Id.*

For the reasons that follow, KCBOE's Motion is granted and the Appellant's Counter Motion is denied.

### KCBOE'S MOTION FOR SUMMARY AFFIRMANCE

#### Illegality

In their Notice of Appeal, as clarified by their Prehearing Conference Statement, the Appellants allege that the KCBOE failed to give legally sufficient notice of **all** of its public hearings relating to the Consolidation; failed to conduct proper and legally sufficient public hearings related to the Consolidation; violated the Appellants' due process rights; failed to provide proper notification of the Consolidation decision; and failed to enact the Resolution at least ninety days prior to the closure of schools. See COMAR 13A.01.05.05C(1) and (4).

COMAR 13A.02.09.01A provides that each local board shall establish procedures to be used in making decisions on school closings. COMAR 13A.02.09.01B-D sets forth the following guidelines for those procedures:

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.<sup>28</sup>

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<sup>28</sup> I will refer to the factors, collectively, as "eight factors."

C. The procedures shall provide, at a minimum, for the following requirements:

(1) A public hearing to permit concerned citizens an opportunity to submit their views orally or to submit written testimony or data **on a proposed school closing**. This includes the following:

(a) **The** public hearing shall take place before any final decision by a local board of education to close a school;

(b) Time limits on the submission of oral or written testimony and data shall be clearly defined in the notification of **the** public meeting.

(2) Adequate notice to parents and guardians of students in attendance at all schools that are being considered for closure by the local board of education. The following apply:

(a) In addition to any regular means of notification used by a local school system, written notification of all schools that are under consideration for closing shall be advertised in at least two newspapers having general circulation in the geographic attendance area for the school or schools proposed to be closed, and the school or schools to which students will be relocating;

(b) The newspaper notification shall include the procedures that will be followed by the local board of education in making its final decision;

(c) The newspaper notification shall appear at least 2 weeks in advance of **any** public hearings held by the local school system on a proposed school closing.

D. The final decision of a local board of education to close a school shall be announced at a public session and shall be in writing. The following apply:

(1) The final decision shall include the rationale for the school closing and address the impact of the proposed closing on the factors set forth in Regulation .01B;

(2) There shall be notification of the final decision of the local board of education to the community in the geographic attendance area of the school proposed to be closed and school or schools to which students will be relocating;

(3) The final decision shall include notification of the right to appeal to the State Board of Education as set forth in Regulation .03.

(Emphasis added). The procedures established by KCBOE Policy substantially mirror those set

forth in COMAR 13A.02.09.01.<sup>29</sup>

### Notice of Public Hearing

With regard to their allegation that the KCBOE failed to follow the proper procedure for the enactment of the Resolution and for Consolidation, the Appellants clarified in their July 13, 2010 Prehearing Conference Statement that they are contending that the KCBOE was required but failed to give legally sufficient notice of all of its meetings relating to the consolidation. Thus, a threshold issue is which of the meetings held by the KCBOE were “public hearings” subject to the procedural requirements set forth in COMAR 13A.02.09.

### *Public Hearing*

In its Motion, the KCBOE does not dispute that meetings were held on January 26, 27, and 28, 2010 and on February 22, 2010, during which it produced information and heard input on four Proposals the Superintendent was considering in making her recommendations on Consolidation to the KCBOE. The KCBOE contends, however, that it was required by COMAR 13A.02.09B and KCBOE Policy to advertise and hold only one formal “public hearing” on the plan actually proposed and recommended by the Superintendent to the KCBOE (in this case, Proposal #2, which was ultimately enacted in its amended form as the Resolution). In its Motion, the KCBOE refers to the January and February 2010 meetings as “public informational meetings” and takes the position that, with regard to the alleged procedural issues raised by the Appellants, only the April 8, 2010

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<sup>29</sup> Section II.A of the Policy differs from subsection B(5) of the regulation by providing for the consideration of the impact on “ethnic” and racial composition of the student body. (KCBOE Motion Ex. 1A.). Section II.B sets forth examples of information and data that may be used in the evaluation of the eight factors. Similar to subsection C of the regulation, section II.C(1)(a) and (b) of the Policy refers to “[a]n” advertised public hearing and “the” public hearing. Section C(2)(c) also refers to newspaper notification of “any” public hearing on a proposed school closing. (KCBOE Motion Ex. 1A.). Section C(2) of the Policy differs from COMAR 13A.02.09.01C(2) in that subsection (a) specifies Internet postings as one type of regular means of notification used by the local school system and subsection (b) states that the newspaper notification shall include the procedures “and the timeline” that will be followed by the KCBOE in making its final decision. (KCBOE Motion Ex. 1A.)

public hearing is relevant.

In their Response, the Appellants contend that in addition to providing notice of the public hearing conducted by the KCBOE on April 8, 2010 relating to Proposal #2, the KCBOE was required to provide notices pursuant to COMAR 13A.02.09 of the meetings it held on January 26, 27, and 28, 2010, and on February 22, 2010, as they, also were "public hearings."<sup>30</sup> For the following reasons, I find that the only relevant "public hearing" for purposes of my decision is the April 8, 2010 public hearing.

The Resolution attached to the Notice of Appeal and to the KCBOE's Motion indicates that on November 2, 2009, the KCBOE charged the KCPS Administration with assessing the impact consolidating the middle schools would have on KCPS's ability to provide middle school students with the core programs identified in the Critical Middle Report. During the KCBOE's monthly meeting on December 7, 2009, after the Superintendent and the Administration shared an analysis of that impact, the KCBOE directed the Administration to schedule "public hearings" in Rock Hall, Galena and Chestertown on options for Consolidation of the public schools. (KCBOE Motion Ex. 1.)

The Resolution further states:

[P]er the [KCBOE's] direction, the following advertised<sup>31</sup> public hearings were held:

<sup>30</sup> Appellants D. Graney's and E. Collyer's Affidavits also refer to regularly scheduled and special board meetings on March 1, 8, and 15, 2010, and on April 15, 2010. The Appellants did not clearly aver in their pleadings that the procedure for those meetings was governed by COMAR 13A.02.09 or by the KCBOE Policy relating to Consolidation, nor do I believe them to be so governed.

<sup>31</sup> According to the Resolution, advance notice of "said public hearings" was published in The Kent County News, posted at the KCPS Central Office and on the KCPS Internet website, and aired on local radio. (KCBOE Motion Ex. 1.) The exhibits referred to by the KCBOE in their Motion indicate that Notice of the GMS public hearing appeared on the GMS website on December 28, 2009 and on January 5, 2010; notice of the RHMS public hearing appeared on the MES website on January 5, 2010 and in The Kent County News on February 4, 2010; notice of the CMS public hearing appeared on the MES website on January 5, 2010; notice of the MES public hearing appeared on the MES website on February 16, 2010. The KCBOE also asserted in its Response that other notices appeared in local newspapers; however, a review of the referenced exhibits attached to the KCBOE's Motion indicates that those "notices" were actually articles that appeared in those publications.

- (1) GMS, January 26, 2010 – 7:00 p.m.;
- (2) [RHMS], January 27, 2010 – 7:00 p.m.;
- (3) CMS, January 28, 2010 – 7:00 p.m.; and
- (4) [MES], February 22, 2010 – 7:00 p.m.<sup>32</sup>

(KCBOE Motion Ex. 1.) I note that throughout the Resolution, those four meetings were referred to as “public hearings” or the “public hearing phase.” (KCBOE Motion Ex. 1).

The Resolution and the minutes of the KCBOE’s March 1, 2010 meeting indicate that it was not until that meeting that the Superintendent presented a proposed plan and made a recommendation to the KCBOE regarding a proposed school closing. Specifically, the Superintendent recommended that the KCBOE adopt Proposal #2. After the Superintendent revised her recommendation, the KCBOE voted to approve the amended Proposal #2. The Resolution indicates that the Superintendent recommended Proposal #2 “in principle” and that the KCBOE voted to approve it “in principle,” but the minutes from that meeting do not reflect that qualifying language.

Although neither party submitted copies of the minutes, Appellants D. Graney’s and E. Collyer’s Affidavits indicate that the KCBOE reconsidered its action at the next regularly scheduled KCBOE meeting on March 8, 2010. The Affidavits state that the KCBOE’s attorney advised the KCBOE that COMAR required a decision on Consolidation to be in writing, articulating the rationale for the decision. He further advised the KCBOE that a written notice of the decision must be forwarded to the parents of children affected by the Consolidation. (D. Graney AV #1 and E. Collyer AV #1.) According to Appellant E. Collyer’s Affidavit, at that meeting, the KCBOE’s attorney advised the KCBOE that a notice of the meeting should be sent home to all of the parents;

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<sup>32</sup> In addition, the Resolution refers to a February 25, 2010 public community forum hosted by the Two River Charter School group in which representatives from the Administration participated.



thereafter, the KCBOE scheduled a special session of the KCBOE for March 15, 2010 and scheduled a public hearing for April 8, 2010. (E. Collyer AV #2).

I find that the aforementioned sequence of events supports the KCBOE's position that the January and February 2010 "public hearings" were part of the evaluation and planning process conducted by the Superintendent before making a recommendation to the KCBOE. COMAR 13A.02.09.01C(1) requires a public hearing "**on a proposed school closing**" before a final decision is made by a local board of education. (Emphasis added.) Likewise, KCBOE Policy II.C requires "[a]n advertised public hearing to permit concerned citizens an opportunity to submit their views orally or to submit written testimony or data **on a proposed school closing.**" (KCBOE Motion Ex. 1A.) (Emphasis added.) Regardless of the nomenclature used by the parties with regard to the January and February 2010 gatherings, a review of the exhibits submitted in support of the KCBOE's Motion shows that prior to the March 1, 2010 KCBOE meeting, the Superintendent had not yet proposed school closing to the KCBOE. Had the KCBOE failed to take action with regard to notice and public input subsequent to that meeting, it would have been in violation of COMAR and the KCBOE Policy. Indeed, an "Illustrative Timeline for Closing a School" contained in the KCBOE Policy sets forth the following pertinent steps: (1) the Administration gathers and analyzes data; (2) the KCBOE charges the Superintendent with complete evaluation and planning; (3) the Superintendent presents a proposed plan and recommendation to the KCBOE; (4) the KCBOE provides written notice to the public and conducts a public hearing(s) including an invitation for oral or written testimony or data from the public; (5) the KCBOE reviews and considers all testimony and data and the Superintendent presents to the KCBOE the final school closing plan and reassignment of students; (6) the KCBOE reaches a final decision to be announced by April 30 in a

non-emergency situation. The KCBOE acted in compliance with the Policy and its "Illustrative Timeline" by scheduling a public hearing for April 8, 2010.

Thus, I find that the notice of public hearing requirements set forth in COMAR 13A.02.09.01C and in KCBOE Policy are not applicable to the earlier meetings because only one "public hearing" is required and that a public hearing is required to be held only after closure has been proposed. Accordingly, I will proceed to address the procedural issues raised by the Appellants only with regard to the April 8, 2010 public hearing.

*Notice*

For the following reasons, I find that there is no genuine issue of material fact with regard to the KCBOE's notice of the April 8, 2010 public hearing.

Dr. Harvey's and Dr. Wheeler's Affidavits and the attachments to the KCBOE's Motion establish that the KCBOE advertised the public hearing in two newspapers having general circulation in the geographic attendance areas for both the schools proposed to be closed and the schools to which students will be relocating, namely, in The Star Democrat on March 24, 2010 and March 31, 2010 and The Kent County News on March 25, 2010 and April 1, 2010. The Appellants presented no evidence to establish a genuine issue as to whether those notices appeared. In her Affidavit, Appellant D. Graney said that she read a public notice in The Kent County News on April 1, 2010, then baldly claimed that no other public notice appeared in any other newspaper covering Kent County. She provided no foundation for that assertion, e.g., she did not state that she looked for such notices in those newspapers and found none.<sup>33</sup> Furthermore, contrary to Appellant D.

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<sup>33</sup>I note also that in their Prehearing Conference Statement, the Appellants state that they believe the following fact is undisputed: "The advertising for the school closure hearings, other than the Apr. 8<sup>th</sup> hearing, did not comply with the notice requirements of COMAR that the advertising run for two weeks in two newspapers." (Emphasis added.)

Graney's statements, Appellant E. Collyer stated in her Affidavit that "[o]n March 25, 2010 there was the first public notice of a special meeting of the [KCBOE] about the consolidation plan" and "[o]n April 1, 2010 there was a second notice in The Kent County News of the special meeting of the [KCBOE] about the consolidation plan."<sup>34</sup> (E. Collyer AV #1.)

The Appellants did not clearly assert in their Notice of Appeal, or even in the text of their Prehearing Conference Statement, that there were any deficiencies in the content of the notice of public hearing. The Prehearing Conference Statement refers to the Affidavits of Appellants D. Graney and E. Collyer, however, with regard to the issue of whether proper notice was given of time restrictions on public speaking at the April 8, 2010 meeting. Appellant D. Graney stated in her Affidavit that (1) at the April 8, 2010 hearing, a three-minute time limit was given to each parent wishing to ask questions or discuss Proposal #2; (2) she was not aware until the meeting that there would be such a time limit; and (3) other speakers were interrupted by KCBOE members and then not permitted to have an extended speaking time. Thus, I will address the alleged failure of the KCBOE to clearly define in the notice of the public hearing the time limits on the submission of oral or written testimony and data pursuant to COMAR 13A.02.09.01C(1)(b).

A review of the advertisements does show that the KCBOE failed to include the time limits on the submission of oral or written testimony and data.<sup>35</sup> For the following reasons, I find that the Appellants did not raise a genuine issue of material fact and that the KCBOE is entitled to summary affirmance on this issue.

COMAR 13A.01.05.05C provides that a decision resulting from an unlawful procedure

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<sup>34</sup> Appellant E. Collyer's Affidavit also lacks an assertion that she looked for but did not find other notices of the April 8, 2010 public hearing.

<sup>35</sup> The Appellants presented no legal authority requiring the KCBOE to entertain comments longer than three minutes in duration.

“may” be illegal. In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954), the Supreme Court held that federal administrative agencies must follow their own rules, and if they do not, the resulting agency action is invalid; no showing of prejudice by the complaining party is necessary (the *Accardi* doctrine.) Maryland, like many states, has adopted the *Accardi* doctrine in some modified form and has applied it to the actions taken by state and local agencies. Maryland courts generally take a pragmatic approach in applying the *Accardi* doctrine.

The Court of Appeals has held:

Consistent with our own [Administrative Procedure Act] in respect to the agencies to which it applies, we adopt for other administrative agencies, the *Accardi* doctrine as we modify it and hold that an agency of the government generally must observe rules, regulations or procedures which it has established and under certain circumstances when it fails to do so, its actions will be vacated and the matter remanded. This adoption is consistent with Maryland’s body of administrative law, which generally holds that an agency should not violate its own rules and regulations.

In so holding we nonetheless note that not every violation of internal procedural policy adopted by an agency will invoke the *Accardi* doctrine. Whether the *Accardi* doctrine applies in a given case is a question of law that, as the Court of Special Appeals has opined, requires the courts to scrutinize the agency rule or regulation at issue to determine if it implicates *Accardi* because it “affects individual rights and obligations” or whether it confers “important procedural benefits” or, conversely, whether *Accardi* is not implicated because the rule or regulation falls within the ambit of the exception which does not require strict agency compliance with internal “procedural rules adopted for the orderly transaction of agency business,” *i.e.*, not triggering the *Accardi* doctrine.

Additionally, we adopt the exception to the *Accardi* doctrine which provides that the doctrine does not apply to an agency’s departure from purely procedural rules that do not invade fundamental constitutional rights or are not mandated by statute, but are adopted primarily for the orderly transaction of agency business.

To this extent we adopt the application and rationale of the Court of Special Appeals in its previous applications of the *Accardi*. We reject, however, the Court of Special Appeals’ holdings where that court has indicated that there can be a *per se* violation of the doctrine in situations where it may be applicable,

regardless of whether the complainant involved was prejudiced by the failure of the agency to follow its procedures or regulations.

Where the *Accardi* doctrine is applicable, we are in accord with the line of cases arising from the Supreme Court and other jurisdictions which have held that prejudice to the complainant is necessary before the courts vacate agency action. In the instances where an agency violates a rule or regulation subject to the *Accardi* doctrine, *i.e.*, even a rule or regulation that “affects individual rights and obligations” or affords “important procedural benefits upon individuals,” the complainant nevertheless must still show that prejudice to him or her (or it) resulted from the violation in order for the agency decision to be struck down. In other instances where an exception to *Accardi* applies and where an agency fails to follow its “internal administrative procedures,” if the complainant can nonetheless show prejudice to a substantial right due to the violation of the rule or regulation by the agency, then the agency decision may be invalidated pursuant to the Maryland Administrative Procedure Act. **In either case, prejudice must be shown.**

*Pollock v. Patuxent Institution Bd. of Review*, 374 Md. 463, 503-04 (2003) (emphasis added).<sup>36</sup>

Under *Pollack's* direction, I first find that the *Accardi* doctrine is inapplicable to the alleged procedural violations in this case. The Court of Appeals of Maryland has held that there is no right or privilege to attend a particular school under State law absent a claim of deprivation of equal opportunity or unconstitutional discrimination because of race or religion. *Bernstein*, 245 Md. at 472. *Accord, Elprin v. Howard Co. Bd. of Educ.*, 57 Md. App. 458, 464-65 (1984) (appeal by concerned citizens of closure of two schools and assignment of pupils). In *Welch v. Board of Educ. of Baltimore County*, 477 F. Supp. 959 (1979), residents of eight county school districts sought to prevent the Board of Education from closing certain schools in the district. The Court held:

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<sup>36</sup> I note that the decision cited by the KCBOE (*Marsh v. Allegany Co. Bd. of Educ.*, MSBE Op. 03-25) in support of its contention that the MSBE has held that a local board's failure to strictly adhere to its procedures is not necessarily grounds for reversal of its action, was reversed and remanded to the OAH for further proceedings. A hearing on the merits was subsequently held and a decision issued. (OAH No.: MSDE-BE-09-04-3124, Dec. 3, 2004).

Plaintiffs seemingly claim . . . that before any school is closed or converted, they have a constitutional procedural due process right to have the members of the State and County Boards of Education hear in person from all "interested citizens," who wish to speak before or with them. The resolution of plaintiffs' said contention initially depends upon whether a resident of a school district possesses a liberty or property interest in a school in his district remaining "as is." . . . Obviously, plaintiffs possess no such liberty interest. Nor do they have such a property interest unless it is granted to them under state law.

*Welch*, 477 F. Supp. at 966.

Second, no statute mandates the procedures set forth in COMAR and in the KCBOE Policy relating to public hearings on proposed Consolidation.

Third, even if the *Accardi* doctrine were applicable, the Appellants have asserted no facts showing prejudice. In her Affidavit, Appellant D. Graney stated that she was not aware of the three-minute time limit until the meeting "and had to quickly edit the speech I prepared to the [KCBOE] members." (D. Graney AV #1.) She further stated that she observed that other speakers were interrupted by the KCBOE members and were then not permitted to have an extended speaking time to make their position known. *Id.*

A review of the transcript of the April 8, 2010 public hearing shows that Dr. Harvey assured the attendees that speakers would not be cut off at three minutes and would be allowed to finish speaking and that Appellant E. Collyer would be permitted to present a power point presentation on behalf of a group opposed to the Consolidation, well in excess of three minutes. Attendees were invited to sign up and make comments or ask questions. The transcript also shows, however, that Dr. Harvey stated that each speaker would be limited to three minutes and that the KCBOE kept track of the time by holding up a yellow card when one minute was left, and a red card when fifteen

seconds were left. At one point, Dr. Harvey cautioned Appellant W. Sanderson, “[Y]our three minutes are – you have a minute to go.”<sup>37</sup>

I find, however, that the Appellants failed to show that they suffered any prejudice from the failure to set forth the three-minute time limit in the advertisements. According to Dr. Harvey’s and Dr. Wheeler’s Affidavits, all attendees were provided an opportunity to submit their views in the form of written and oral testimony or data during and after the April 8, 2010 public hearing.

Furthermore, the transcript indicates that the KCBOE solicited follow up comments. At 9:50 p.m., Dr. Harvey noted the time and that the comments would have to stop after three more speakers but that a regular board meeting was coming up the next week and a decision meeting in a week. Dr. Harvey stated, “Just because this meeting ends does not mean that you are not contributing - continuing to share and if you have ideas direct them to us as many people have via e-mail, telephone, regular mail.” (KCBOE Motion Ex. 2.)

A review of the transcript shows that in addition to W. Sanderson and E. Collyer, Appellants E. Moxley, R. Moxley, J. Graney, D. Graney and S. Blazejak made comments at the hearing. None of those Appellants, including D. Graney and E. Collyer, indicated what comments they would have made if given more time or that they were prevented from submitting written comments on or after the April 8, 2010 public hearing.

The KCBOE has established that it is entitled to summary affirmance on this issue. Appellant failed to show a genuine dispute of material fact with regard to this issue and the KCBOE is entitled to summary affirmance as a matter of law.

#### Failure to Conduct Proper and Legally Sufficient Public Hearings

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<sup>37</sup> He also told George Boyd that he had “gone a bit past [his] time” and advised Robin Fithian when her time was up and asked her to finish up quickly. (KCBOE Motion, Ex. 2.) (Those individuals are not parties to this proceeding).

I have found that the KCBOE did conduct a public hearing on April 8, 2010, which was before the final April 15, 2010 decision of the KCBOE to close any schools. The Appellants did not specify in their Notice of Appeal or Prehearing Conference Statement how they allege that hearing was improper or not legally sufficient.

Indeed, although the Appellants disagree with the KCBOE's conclusions, as discussed in greater detail below, a review of the transcript of the April 8, 2010 public hearing and Dr. Harvey's and Dr. Wheeler's Affidavits shows that the KCBOE gave due consideration to the impact of the proposed closing by utilizing the eight factors set forth in COMAR 13A.02.09.01B and KCBOE Policy. In addition, as discussed above, a review of the transcript of the April 8, 2010 public hearing indicates that the KCBOE permitted concerned citizens an opportunity to submit their views orally or to submit written testimony or data on Proposal #2 at and subsequent to that public hearing. COMAR 13A.02.09.01C(1).

The Appellants complain that the KCBOE did not consider the Other Proposals; however, as discussed above, the only Consolidation plan proposed by the Superintendent to the KCBOE was Proposal #2. Thus, procedurally, the KCBOE was not obligated to consider the Other Proposals at the April 8, 2010 public hearing. I have, however, further considered the Appellants' contention in my analysis below of whether the KCBOE's decision was arbitrary and unreasonable.

#### Due Process

The Appellants contend in their Notice of Appeal that "in its approval of Amended Proposal #2, the KCBOE denied interested parties' due process of law."

In its Motion, the KCBOE contends that it did not violate due process of law because there is no right or privilege to attend a particular school under Maryland law and the Appellants did not



assert facts showing a deprivation of equal educational opportunities or unconstitutional discrimination.

I concur with the KCBOE. As discussed above, the Court of Appeals of Maryland has held that there is no right or privilege to attend a particular school under State law absent a claim of deprivation of equal opportunity or unconstitutional discrimination because of race or religion. *Bernstein*, 245 Md. at 472. *Accord, Elprin*, 57 Md. App. at 464-65. *See also Welch*, 477 F. Supp. at 966. Thus, I find that the Appellants have presented no genuine issue of material fact and the KCBOE is entitled to summary affirmance with regard to this issue.

### Notice of the Consolidation

In their Notice of Appeal, the Appellants contend that the KCBOE failed to properly notify parents of affected public school students of the consolidation decision in violation of COMAR 13A.02.09.01D.<sup>38</sup>

In their Prehearing Conference Statement, the Appellants contend that a May 4, 2010 letter from Dr. Wheeler about the decision placed in each student's backpack, which failed to contain a direction that parents sign and return a notice of receipt, did not constitute legally sufficient notice to all of the parents affected school children. They argue that this method of notice did not comply with the KCBOE's standard procedure for the delivery of important notices to public school students and parents, in violation of the *Accardi* doctrine. The Appellants allege in their Prehearing Conference Statement that the KCBOE has a standard procedure with regard to report cards that is also applicable to notice of school closure: report cards are sent home with students in their backpacks and each parent is required to acknowledge receipt of the report card by signing and returning a certification on the envelope.

The KCBOE argues that it complied with the regulation by announcing the KCBOE's decision to close schools at an open and public session meeting held on April 15, 2010; by including the rationale for the school closings in the Resolution; and by addressing the impact of the closing using the eight factors set forth above. In its Motion, the KCBOE states that the Resolution was mailed to all parents and guardians of KCPS students on May 4, 2010 and that

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<sup>38</sup> I note that COMAR 13A.02.09.01D(2) requires notification of the final decision "to the **community** in the geographic attendance area of the school proposed to be closed and school or schools to which students will be relocating." (Emphasis supplied.) That subsection of the regulation does not limit notification to parents of affected school children. Arguably, there may be circumstances when members of the community who do not have affected students in their families may have a legitimate interest in the closure or consolidation of schools (e.g., nearby residents or businesses). Nonetheless, the Appellants clearly based their appeal on the KCBOE's alleged failure to properly notify only the parents of affected school children. Thus, I have limited my decision with regard to notice of the Consolidation to the issue of whether the KCBOE gave the required notice of the school closures to parents of the affected students.

the Resolution clearly included information about the right to appeal to the MSBE. In addition, the Resolution was posted on the KCBOE's website on April 19, 2010.

For the following reasons, I find that there are no genuine issues of material fact and that the KCBOE is entitled to summary affirmance with regard to this issue.

Initially, I note that the Appellants did not contend that the KCBOE failed to announce its final decision at the April 15, 2010 public session. COMAR 13A.02.09.01D. Their dispute lies with the required written notification of the decision.

Although the KCBOE states in its Motion that the Resolution was **mailed** to all parents and guardians of KCPS students on May 4, 2010, the exhibits attached to the Motion and to the Appellants' Response do not establish that method of notification. Without providing further detail, Dr. Wheeler's Affidavit states, "On May 4, 2010, I sent a letter to the parent and legal guardian of each KCPS student. . . . A copy of the Resolution as adopted by KCBOE was attached to each letter." (Wheeler AV.) In addition, the Resolution indicates that the Exhibits to the Resolution were posted on the KCBOE's website on April 19, 2010.<sup>39</sup>

Regardless, COMAR 13A.02.09.01D, does not specify the method by which the KCBOE is to provide notification of its final decision. Furthermore, the Appellants did not present any evidence of a policy requiring a signed receipt with regard to notices of consolidation or even with regard to report cards. Nor do they cite any statute, regulation or policy requiring a certain method of delivery, *e.g.*, by regular or certified mail. Finally, they presented no evidence that they did not receive the notice or were prejudiced in any way by the notification method used. They were able to file a timely appeal. *See Pollock, supra.*

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<sup>39</sup> It is not clear from the exhibits attached to the KCBOE's Motion whether the Resolution itself was posted.

Ninety Days

In their Notice of Appeal, the Appellants contend that the Consolidation of the middle schools cannot be implemented because the KCBOE did not enact the Resolution at least ninety days prior to the closure of RHMS and GMS as required by COMAR 13A.02.09.02.

The KCBOE argued in its Motion that it did announce its decision to close and consolidate schools in a timely manner, in compliance with COMAR 13A.02.09.02 and KCBOE Policy.

COMAR 13A.02.09.02 provides:

**.02 Date of Decision.**

Except in emergency circumstances, the decision to close a school shall be announced at least 90 days before the date the school **is scheduled to be closed** but not later than April 30 of any school year. An emergency circumstance is one where the decision to close a school because of unforeseen circumstances cannot be announced at least 90 days before the date a school is scheduled to close or before April 30 of any school year. (Emphasis supplied).

KCBOE Policy contains identical language.

A review of the Minutes of the April 15, 2010 Special Board Meeting indicates that the KCBOE's final decision was announced at that meeting, prior to April 30, 2010, and the Appellants presented no evidence to the contrary. Thus, the remaining issue is whether the announcement took place at least ninety days before the dates the schools were scheduled to close.

In support of its contention that schools were not scheduled to be closed until August 2010, the KCBOE relies upon the introductory language in the Resolution stating that it concerned "the closing, consolidation and redistricting of certain public schools in the [KCPS] system, to be effective the school year **commencing in August 2010.**" (KCBOE Motion Ex. 1.) (Emphasis supplied.) The Resolution later states in Section I, "BE IT HEREBY RESOLVED BY THE [KCBOE] that the KCPS 2010 Consolidation Plan **for the school year commencing in August 2010** is approved," and Section II refers to the renaming of schools due to "the approved school

closing and consolidation plan **for the school year commencing in August 2010.**" (KCBOE Motion Ex. 1.) (Emphasis supplied.)

Based on Affidavits from Appellants D. Graney and E. Collyer, including photographs, it is clear that the KCPS began to prepare for the Consolidation in June 2010. The Appellants contend that those actions showed that the school closed at least as of June 30, 2010, less than ninety days from the enactment of the Resolution. The KCBOE argues, however, that the date the schools were "scheduled to be closed" is set forth in the Resolution and that, regardless, a common sense interpretation of that phrase is that it means the date that students are scheduled to move into a different physical facility.

First, I note that the regulations do not define the word "closed" and neither party has indicated that another section of the KCBOE Policy defines that word. Furthermore, the words "scheduled to be" are critical to my analysis.

It is a fundamental principle of statutory construction that when the language of a statute is "clear and unambiguous, the words must be held to mean what they express." *Sibert v. State*, 301 Md. 141, 153 (1984) (citations omitted). Furthermore, "if reasonably possible, no word, clause, sentence, or phrase should be rendered surplusage, superfluous, meaningless or nugatory." *Id.* (citations omitted). *Compare Williams v. McCardell*, 198 Md. 320 (1951) (in an accidental disability case, Court of Appeals hesitated to hold that the words "at some definite time and place" had no meaning at all and no effect in limiting the scope of the word "accident.")

The Appellants presented no evidence that any of the schools in their revised states (relocated, created, consolidated, or renamed) were "scheduled to be closed" prior to August 2010. The KCBOE has presented evidence that the KCBOE intended that the closure go into effect in August 2010. Even if the KCPS began to prepare in June for the closings of GMS and

RHMS, those actions did not change the scheduled effective date of the closures as set forth in the Resolution (August 11, 2010). Interestingly, the “Illustrative Timeline for Closing a School” set forth in the KCBOE Policy describes a process which ends in “August – September” when “[s]chools open under a new plan.” (KCBOE Motion Ex. 1A.)

Finally, I find that even if I were to interpret the aforementioned phrase differently, the Appellants presented no sworn testimony setting forth facts indicating that they were prejudiced by the alleged untimely announcement. *See Pollock, supra*, discussed above.

**Arbitrary and Unreasonable**

In addition to the above alleged procedural errors, the Appellants contend in their Notice of Appeal that the KCBOE decision to Consolidate middle schools was arbitrary and unreasonable. A review of the Notice of Appeal indicates that the Appellants base that contention on the following assertions:

1) the KCBOE never addressed, considered or debated the possible enactment of the Other Proposals at any public meeting;

2) In June 2006, a KCBOE Advisory Committee<sup>40</sup> found no advantages to Consolidation of the middle schools and advised against it based on the following negatives:

- a) Consolidated problems similar to those already seen at the high school;
- b) Loss of more students to private schools;
- c) Loss of community focus;
- d) Too long bus rides;
- e) School too big for middle school students;
- f) Probable larger class size;
- g) Less services to IEP students;
- h) Less personal staff attention to individual students;
- g) Three very different, very diverse communities.

3) Many more middle school students will have to be transported to and from school by bus;

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<sup>40</sup> See Md. Code Ann., Educ. § 4-112 (2008).

4) It is anticipated that some middle school students will have to travel one and a half to two hours to and from school;

5) The elementary school population, and therefore the middle school population in the Galena area are increasing; therefore the enactment of the Resolution predicated on an assumed decrease in the population of middle school students is *prima facie* arbitrary and unreasonable;<sup>41</sup>

6) The consolidation was opposed by more than 850 other citizens of Kent County.

The Appellants otherwise failed to describe, with particularity, any other facts set forth in the KCBOE's Motion or in any supporting documents, exhibits, or Affidavits that are in genuine dispute.<sup>42</sup>

The KCBOE argued that its decision to Consolidate was in accordance with sound educational policy and that it was reasonable because the KCBOE followed the precepts of COMAR 13A.02.09.01B and KCBOE Policy by addressing the required eight factors in making its decision. The KCBOE argued that its decision must be upheld because a reasoning mind could have reached the KCBOE's decision based on a consideration of those eight factors.

#### Educational Policy; Reasoning Mind

In ruling upon the KBOE's Motion, I must determine if there are material facts that would establish that the KCBOE's decision was either (1) contrary to sound educational policy or (2) could not have been reasonably reached by a reasoning mind. COMAR 13A.01.05.05B.

Section 2-205 of the Educational Article gives the MSBE the power and duty to determine the elementary and secondary educational policies of this State. Section 4-108(3) provides that each county board shall "[s]ubject to this article and to the applicable bylaws, rules,

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<sup>41</sup> The Appellants incorrectly used the work "capricious" rather than unreasonable.

<sup>42</sup> As discussed below, in its response to the KCBOE's Motion, the Appellants raised for the first time, the issue of whether the KCBOE improperly relied on a projected decrease of middle school students in the Galena area in deciding to close the GMS.

and regulations of the State Board, determine, with the advice of the county superintendent, the educational policies of the county school system.” Neither the courts nor the MSBE, the agency which has delegated to me its authority to issue this Proposed Order, and whose policy I am obligated to follow,<sup>43</sup> has specifically defined the term “sound educational policy.”

Nevertheless, in considering how to apply this standard, the MSDE upheld a prior administrative decision, in which Administrative Law Judge James T. Murray wrote:

The State Board has never defined the term “sound educational policy”. Nor do I believe that it could. Sound educational policy is a value laden, amorphous concept that is impacted by many competing considerations as is reflected by Policy 1675-R. In Howard County, sound educational policy is determined through the representative democracy process. Members of the [Board of Education] are elected by the public: they are chosen by the electorate to formulate educational policy for the county. By the exercise of their independent judgment and in considering the factors delineated in Policy 1675-R, they apply educational policy to the county as a whole. It [is] up to the [Board of Education] to establish sound educational policy. In this case I find that the [Board of Education] plan, while not perfect, represents sound educational policy.

*Shah v. Howard County Bd. of Educ.*, MSBE Op. No. 02-30 (July 10, 2002).

The “reasoning mind” standard set forth in COMAR 13A.01.05.05B(2) is a broad standard giving great deference to the decisions made by local boards of education in determining school boundaries and student assignments. *Bernstein, supra*.

For the following reasons, I find that the Appellants have not presented genuine issues of material fact and that the KCBOE is entitled to summary affirmance with regard to the issue of whether the KCBOE’s decision to Consolidate was arbitrary and unreasonable.

#### *Critical Middle Report and Eight Factors*

Clearly, the MSBE has set forth in its Critical Middle Report its educational policy that all middle school students have a rigorous and relevant core academic program that engages them in

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<sup>43</sup> See Md. Code Ann., State Gov’t § 10-214(b) (2009).



learning, develops critical literacy skills, and prepares them for high school success, postsecondary enrollment, and twenty-first Century careers. The Critical Middle Report identified several core programs important to middle school students' cognitive, social and emotional development, such as English/Language Arts, Mathematics, Science, Social Studies, World Languages, Fine Arts, Health, and Physical Education. The interrelation between the goals set forth in the Critical Middle Report and the KCBOE's action is evidenced by the KCBOE's charge to the KCPS Administration on November 2, 2009 to assess the impact of middle school consolidation on the ability of KCPS to provide the core programs important to middle school students' cognitive, social and emotional development, such as world languages, fine arts and technology education, as well as the impact of consolidation on local communities and the KCPS budget. The Appellants have not disputed the soundness of the educational policy set forth in the Critical Middle Report. Nor have the Appellants asserted that the KCBOE was unreasonable in relying upon the directives of the MSBE set forth in the Critical Middle Report, which was the underlying primary reason for the KCBOE's decision to Consolidate the middle schools. Indeed, under section 4-108 of the Education Article, the KCBOE is required to carry out the MSBE's policies to the best of its ability and to maintain throughout the county a reasonably uniform system of public schools that is designed to provide quality education and equal educational opportunity for all children.

There is no dispute that Drs. Harvey and Wheeler have personal knowledge of the facts in their Affidavits and that they have the professional capacity to assert those facts based on their respective positions as President of the KCBOE and Superintendent of the KCPS. A review of their Affidavits, Power Point presentations referred to in those Affidavits, Proposal #2, the Resolution, the transcript and minutes of the April 8, 2010 public hearing and the April 15, 2010 special session establish that the KCBOE followed the precepts of COMAR 13A.02.09.01B and KCBOE Policy by

addressing the required eight factors in reaching its decision to Consolidate. In contrast, the Appellants did not present reliable evidence from anyone who has been shown to be qualified in the field of educational policy to create a genuine issue of material fact and has presented no facts to create a genuine issue as to the reasonableness of the KCBOE's decision to Consolidate.

*Consideration of Other Proposals*

The Appellants contend that the KCBOE's decision to consolidate was unreasonable because the KCBOE did not consider the Other Proposals.

Preliminarily, I note that the Appellants argue that the KCBOE's Motion did not address the Appellant's allegation of failure to consider the Other Proposals and therefore, the allegation must stand; however, as discussed above, the KCBOE did address the issue in its response to the Appellants' allegations regarding notice of public hearing. Furthermore, the KCBOE argued in its Motion that it considered all of the required minimum eight factors in reaching its decision regarding Proposal #2, which was enacted as the Resolution. Their assertion necessarily implies that they were not required to consider Other Proposals. Thus, I find that the alleged failure to consider the Other Proposals was the subject of the KCBOE's Motion and I will proceed to address it.

According to the Court of Appeals of Maryland, a challenge that "[t]here may have been other plans that would have worked equally well, or may, in the opinion of some, have been better" is not sufficient to establish that "the action which was taken was arbitrary, capricious or illegal." *Bernstein*, 245 Md. at 479.

For the following reasons, I find that there is no genuine issue of material fact and that the KCBOE is entitled to summary affirmance with regard to this issue.

A review of the transcript shows that the Other Proposals were not considered by the KCBOE at the April 8, 2101 public hearing. I have already found, however, that the KCBOE was not required under COMAR to hold public hearings or give notice of the January and February meetings at which the Other Proposals were discussed because only Proposal #2 was actually proposed by the Superintendent to the KCBOE. It necessarily follows that the KCBOE was not required to otherwise consider the Other Proposals before enacting the Resolution. Additionally, under *Bernstein, supra*, the existence of those Other Proposals is not sufficient to establish that the action taken was arbitrary and unreasonable.

Regardless, the exhibits attached to the KCBOE's Motion show that the Superintendent did consider the Other Proposals before making her recommendation. The minutes from the four community-based public informational meetings show that at each meeting, the KCPS Administration presented the four Proposals and solicited comments from the attendees.

*Advisory Committee Report*

I found no merit in the Appellants' reliance upon the recommendations made in June 2006 by an Advisory Committee charged with examining the issue of grade reconfiguration in the KCPS schools. The Advisory Committee determined that growth in housing made a decision regarding grade reconfiguration ill advised at that time and that funding and the cost of change needed to be examined carefully. The report states, "[W]e have concluded that because of recent events in the county, budget constraints, and foreseeable population changes, now is not the time to take action to change the grade configuration of the elementary and middle schools." (Notice of Appeal Ex. 4.) The Advisory Committee also determined that there were no advantages to Consolidation of the middle schools and listed the aforementioned disadvantages. That report was issued almost four years prior to the KCBOE's enactment of the Resolution, however, and prior to the issuance of the

MSBE's Critical Middle Report. The KCBOE has since done a thorough study of the eight factors, including financial impact, and determined that Consolidation was in accordance with sound educational policy.

Furthermore, the Appellants presented no competent evidence outside of the Advisory Committee report to support the alleged cited disadvantages. They did not produce factual assertions, under oath, based on the personal knowledge of the affiant, with regard to the factors set forth in the Advisory Committee Report. They presented no competent evidence explaining the alleged Consolidation problems experienced by the KCHS or what is meant by "three very different very diverse communities." (Notice of App. Ex. 4.) They provided no valid basis for their assertions that the Consolidation will result in loss of students to private schools, and a "[s]chool too big for middle school students." (Notice of App. Ex. 4.) The Appellants also presented no evidence that the projected class size of twenty-three is "too large." (Notice of App. Ex. 4.) Nor did the Appellants provide any valid basis for a conclusion that Consolidation would result in loss of community focus, less services to IEP students, and less personal staff attention to individual students; indeed, the KCBOE made contrary determinations based on a thorough current analysis.

The Appellants presented no evidence with a proper foundation that Consolidation would result in the increased duration of bus rides for middle school students to such an extent as to materially affect the KCBOE's decision to consolidate and render it arbitrary or unreasonable. As discussed below, the KCBOE presented competent evidence to the contrary. Thus, the Appellants have presented no material facts that would affect the outcome of this case.

*Increased Necessity to Travel by Bus*

The Appellants also presented no evidence with a proper foundation that Consolidation would result in the increased necessity for middle school students to travel by bus as a result of the Consolidation. Even if I were to infer that fact as a logical consequence of the closing of two neighborhood schools, the Appellants have not shown that this is a material fact, in light of the numerous other reasonable reasons discussed above that the Board relied upon in reaching its decision to Consolidate, particularly its obligation to comply with the MSBE's educational policy with regard to middle school students as set forth in the Critical Middle Report.

*Increased Travel Time*

The Appellants presented no competent evidence that any student, including their own children, will have to travel two hours to and from school as a result of the Consolidation. The KCBOE did not dispute that after Consolidation some middle school students will have to travel ninety minutes one way and seventy-five minutes the other way, but a chart included in the April 8, 2010 Power Point presentation shows students already had this lengthy a commute during the 2009-2010 school year. The current longest morning ride is ninety minutes; the current longest afternoon ride is seventy-five minutes. The projected current longest morning ride after Consolidation is seventy-five minutes; the projected longest afternoon ride is ninety minutes (the flip side of the current situation). Furthermore, in the portion of the Power Point presentation presented by Ms. Kalmanowicz, KCPS Supervisor of Transportation and Food Services, the Administration showed that Consolidation will result in the average transportation time for elementary students being reduced. The Consolidation is projected to increase the

average bus ride for middle school students by nine minutes in the morning and by eight minutes in the afternoon.

Even if the Appellants had been able to establish such ride duration, the Appellants have not shown that this is a material fact, in light of the numerous other reasonable reasons discussed above, particularly the obligation to follow the recommendations in the Critical Middle Report.

*Middle School Population in Galena*

In their Response to the KCBOE's Motion, the Appellants emphasize the KCBOE's statement in its Motion that "[t]he addition of a fifth elementary school in Galena will provide a community based (i.e. more proximity) elementary school for children living in northern Kent County where there has been an influx of new housing and a base of students sufficient to warrant a new elementary school."<sup>44</sup> The Appellants assert that a common sense extrapolation of the KCBOE's determination that the elementary school population in Galena is expanding is that there will soon be an increase in the number of middle school students in the Galena area as well, nullifying the KCBOE's justification for closing the GMS. They argue that a "reasoning mind" could not have reached a conclusion to close a middle school in the same area where an elementary school population is expanding.<sup>45</sup>

The Appellants presented no evidence, expert or otherwise, to support their bald contention that there will be an increase of middle school students in the Galena area similar to the increase in elementary school students. As the KCBOE noted in its Response, an increase in

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<sup>44</sup> I note that the referenced statement in the KCBOE's Motion was contained in the argument portion of the KCBOE's Motion.

<sup>45</sup> In their Prehearing Conference Statement, the Appellants gave the following as an example of an alleged question of fact relating to the arbitrary and capricious nature of the KCBOE's decision: "[W]as the KCBOE's decision to simultaneously close the [GMS] and open a new [GES] arbitrary and capricious based on its finding that there is an expanding population of elementary school students."

elementary school population does not necessarily equate to a future increase in the middle school population in Galena. Furthermore, even if the Appellants had been able to establish that the middle school population is likely to increase in the Galena area, the Appellants have not shown that this is a material fact, in light of the numerous other reasonable reasons given by the KCBOE for the enactment of the Resolution, in particular, meeting the goals set forth in the Critical Middle Report.

*Petitions*

The Appellants contend that the KCBOE failed to consider petitions signed by 850 citizens before making a decision regarding Consolidation.

First, I note that only the Appellants and not the other citizens who signed the Petitions submitted to the KCBOE are parties to this proceeding. Regardless, the fact that numerous citizens, including the Appellants, disagree with Proposal #2 does not make the KCBOE's decision arbitrary and unreasonable. Section 4-120 of the Education Article gives a local board the authority to consolidate schools if it considers it practicable and that decision may be reversed only if arbitrary and unreasonable or illegal. Md. Code Ann., Educ. § 4-120; COMAR 13A.02.09.03A; COMAR 13A.01.05.05A; KCBOE Policy. *See also Coleman, supra; Slider, supra.* Furthermore, the KCBOE's decision to Consolidate is quasi-legislative in nature and not judicial or quasi-judicial. A resident of a school district possesses no liberty or property interest in a school in his district remaining "as is," without changes resulting from closure or consolidation. *Elprin*, 57 Md. App. at 465. Therefore, the rights to be afforded to interested citizens are limited with regard to the KCBOE's quasi-legislative decision to Consolidate. That certain citizens simply disagree with the KCBOE's decision is not sufficient to render it arbitrary and unreasonable.

Thus, I find that there is no genuine issue of material fact and that the KCBOE is entitled to summary affirmance with regard to this issue.

Accordingly, the Appellants, have not established or shown that they could establish at the hearing, sufficient proof to carry their burden to prove that the KCBOE Plan was arbitrary and unreasonable. The Appellants failed to present any evidence that the KCBOE's decision was contrary to educational policy. The KCBOE established that it acted in compliance with the educational policy set forth in the Critical Middle Report. Furthermore, the undisputed material facts demonstrate that the KCBOE's decision *was* reasonable under the standards set forth at COMAR 13A.01.05.05B and the Appellants failed to show any genuine dispute of material fact in that regard. Thus, the KCBOE is entitled to summary affirmance.

***APPELLANT'S COUNTER MOTION FOR SUMMARY REVERSAL***

In their Counter Motion, the Appellants state vaguely, "While Appellants believe that there are a number of unresolved questions of fact, and mixed questions of fact and law, Appellants also assert that there are a sufficient number of undisputed facts that Appellants are entitle (sic) to a summary reversal of the Resolution." They request that they be granted "summary reversal" of the Resolution and the Consolidation based on the following:

- A. The elementary school population, and therefore, the middle school population, in the Galena area are increasing; therefore, the enactment of the Resolution predicated on an assumed decrease in the population of middle school students is *prima facie*, arbitrary and capricious;
- B. The KCBOE failed to properly advertise and consider the Other Proposals as required and, therefore, the enactment of the Resolution is illegal; and
- C. [RHMS] and [GMS] have already been closed in violation of the 90 Day Rule and, therefore, the enactment of the Resolution is illegal.

For the reasons set forth above in my decision relating to the KCBOE's Motion,



I find that the Appellants have presented no genuine dispute as to any material fact and that they are not entitled to judgment as a matter of law. COMAR 28.02.01.12D.

### CONCLUSIONS OF LAW

I conclude that the Appellants' appeal does not raise genuine issues of material fact and that the KCBOE is entitled to summary affirmance as a matter of law. *Welch v. Board of Educ. of Baltimore County*, 477 F. Supp. 959 (1979); *Sibert v. State*, 301 Md. 141 (1984); *Bernstein v. Board of Educ. of Prince George's County*, 245 Md. 464 (1967); *Elprin v. Howard Co. Bd. of Educ.*, 57 Md. App. 458 (1984); Md. Code Ann., Educ. § 4-120 (2008); COMAR 28.02.01.12D; COMAR 13A.01.05.03D; COMAR 13A.01.05.05A-E; COMAR 13A.02.09.01B-D; COMAR 13A.02.09.02; COMAR 13A.02.09.03A; KCBOE Policy NSBA FL IV.B (Proposed Procedures to Govern School Closings and/or Consolidation) (adopted February 11, 1982, revised March 1, 1982, October 9, 2009 and March 6, 2000). *See also Coleman v. Howard Co. Bd. of Educ.*, MSBE Op. No. 05-32 (Sept. 27, 2005); *Slider v. Allegany Co. Bd. of Educ.*, MSBE Op. No. 00-35 (July 31, 2000).

I further conclude that the Appellants are not entitled to summary judgment as a matter of law: *Welch v. Board of Educ. of Baltimore County*, 477 F. Supp. 959 (1979); *Sibert v. State*, 301 Md. 141 (1984); *Bernstein v. Board of Educ. of Prince George's County*, 245 Md. 464 (1967); *Elprin v. Howard Co. Bd. of Educ.*, 57 Md. App. 458 (1984); Md. Code Ann., Educ. § 4-120 (2008); COMAR 28.02.01.12D; COMAR 13A.01.05.05A-E; COMAR 13A.02.09.01B-D; COMAR 13A.02.09.02; COMAR 13A.02.09.03A; KCBOE Policy NSBA FL IV.B (Proposed Procedures to Govern School Closings and/or Consolidation) (adopted February 11, 1982, revised March 1, 1982, October 9, 2009 and March 6, 2000). *See also Coleman v. Howard Co. Bd. of*

*Educ.*, MSBE Op. No. 05-32 (Sept. 27, 2005); *Slider v. Allegany Co. Bd. of Educ.*, MSBE Op. No. 00-35 (July 31, 2000).

**RECOMMENDED ORDER**

I **RECOMMEND** that the Motion for Summary Affirmance filed by the Kent County Board of Education be **GRANTED** by the Maryland State Department of Education, and that the contested case hearing scheduled for August 31, 2010 and September 1, 2010 be **CANCELLED**; and I further,

**RECOMMEND** that the Motion for Summary Decision filed by the Appellants be **DENIED** by the Maryland State Department of Education; and I further,

**RECOMMEND** that Resolution No. 2010-01 enacted by the Kent County Board of Education on April 15, 2010, effective August 2010, be **UPHELD** by the Maryland State Department of Education

August 9, 2010  
Date Decision Mailed

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Eileen C. Sweeney  
Administrative Law Judge

ECS/ecs  
#115201

**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.

**Redacted**

NATHAN A. BLAZEJAK, *ET AL.*,

APPELLANTS

v.

KENT COUNTY BOARD OF

EDUCATION

\* BEFORE EILEEN C. SWEENEY,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH NO.: MSDE-BE-09-10-22152

\* \* \* \* \*

**FILE EXHIBIT LIST**

The KCBOE submitted the following Affidavits in support of its Motion: June 15, 2010 Affidavit of Michael P. Harvey, Ph.D. (Dr. Harvey) and June 15, 2010 Affidavit of A. Barbara Wheeler, Ed.D. (Dr. Wheeler or Superintendent).

The KCBOE submitted the following exhibits in support of its Motion:

- KCBOE Motion Ex. 1: KCBOE Resolution No. 2010-01 (April 15, 2010, effective August 2010)
- KCBOE Motion Ex. 1(A): Resolution Ex. A: KCPS Policy NSBA Code FL (Procedures to Govern School Closings and/or Consolidation) (adopted February 11, 1982; revised March 6, 2000)
- KCBOE Motion Ex. 1(B): Resolution Ex. B: Becker Morgan Group, Inc. Architectural Feasibility Study for KCPS (May 29, 2002)
- KCBOE Motion Ex. 1(C): Resolution Ex. C: "Nimble Nine" Power Point Presentation by Board President Dr. Harvey
- KCBOE Motion Ex. 1(D): Resolution Exhibit D: MSDE Middle School Steering Committee Report, "The Critical Middle: A Reason for Hope" (June 2008)
- KCBOE Motion Ex. 1(E): Resolution Ex. E: Administration Proposal No. 1
- KCBOE Motion Ex. 1(F): Resolution Ex. F: Administration Proposal No. 2

- KCBOE Motion Ex. 1(G): Resolution Ex. G: Administration Proposal No. 3
- KCBOE Motion Ex. 1(H): Resolution Ex. H: Administration Proposal No. 4
- KCBOE Motion Ex. 1(I): Resolution Ex. I: Minutes from Galena Middle School public hearing (January 26, 2010)
- KCBOE Motion Ex. 1(J): Resolution Ex. J: Minutes from Rock Hall Middle School public hearing (January 27, 2010)
- KCBOE Motion Ex. 1(K): Resolution Ex. K: Minutes from Chestertown Middle School public hearing (January 28, 2010)
- KCBOE Motion Ex. 1(L): Resolution Ex. L: Minutes from Millington Elementary School public hearing (February 22, 2010)
- KCBOE Motion Ex. 1(M): Resolution Ex. M: Petition, Power Point Presentation, "And Now We Have.....The Rest of the Story," and correspondence received by KCBOE members and KCPS staff
- KCBOE Motion Ex. 1(N): Resolution Ex. N: Summary of Questions and Answers prepared by KCPS Administration (per February 25, 2010 meeting with Two River Charter School group)
- KCBOE Motion Ex. 1(O): Resolution Ex. O: Minutes from public KCBOE meeting (March 1, 2010)
- KCBOE Motion Ex. 1(P): Resolution Ex. P: School Closing and Consolidation Plan Power Point Presentation from the April 8, 2010 public hearing
- KCBOE Motion Ex. 1(Q): Resolution Ex. Q: Minutes from Kent County High School public hearing (April 8, 2010)
- KCBOE Motion Ex. 1(R): Resolution Ex. R: KCPS Master Plan (November 2, 2009)
- KCBOE Motion Ex. 1(S): Resolution Ex. S: KCPS FY 2011 Capital Improvement Plan (CIP) (October 5, 2009)
- KCBOE Motion Ex. 1(T): Resolution Ex. T: MSDE Fact Book (2008 – 2009)
- KCBOE Motion Ex. 1(U): Resolution Ex. U: Template for Notification Letter to parents, guardians, and students
- KCBOE Motion Ex. 2: Transcript of the April 8, 2010 public hearing
- KCBOE Motion Ex. 3: Media Notices Regarding School Consolidation

- KCBOE Motion Ex. 3(A): "Consolidation of School Meetings," posted online at <http://gms.kent.k12.md.us> on December 28, 2009
- KCBOE Motion Ex. 3(B): "School Consolidation Hearing Coming," posted online at <http://gms.kent.k12.md.us> on January 5, 2010
- KCBOE Motion Ex. 3(C): "School closing scenarios considered," published in Kent County News on January 21, 2010
- KCBOE Motion Ex. 3(D): "Kent school bd. weighs school closing scenarios," posted online at <http://www.stardem.com> on January 25, 2010
- KCBOE Motion Ex. 3(E): "Decision on school closing expected February 16," published in Kent County News on January 28, 2010
- KCBOE Motion Ex. 3(F): "Decision on Kent County School closing expected Feb. 16," posted online at <http://www.chestertownspy.com> on February 1, 2010
- KCBOE Motion Ex. 3(G): "School Closure Possible in Galena, Millington, Rock Hall or Chestertown," posted online at <http://www.chestertownspy.com> on February 1, 2010
- KCBOE Motion Ex. 3(H): "Town Council Enters School Fight," posted online at <http://www.chestertownspy.com> on February 2, 2010
- KCBOE Motion Ex. 3(I): "Board asked to delay school closing," published in Kent County News on February 4, 2010
- KCBOE Motion Ex. 3(J): "Meetings," published in Kent County News on February 4, 2010
- KCBOE Motion Ex. 3(K): "Pisapia reports on school meetings," published in Kent County News on February 4, 2010
- KCBOE Motion Ex. 3(L): "Storms play havoc with school schedules," published in Kent County News on February 11, 2010
- KCBOE Motion Ex. 3(M): "Storms play havoc with Kent County school schedules," posted online at <http://www.stardem.com> on February 15, 2010
- KCBOE Motion Ex. 3(N): "Parents ask Kent Co. BOE to delay school closing," posted online at <http://www.stardem.com> on February 15, 2010
- KCBOE Motion Ex. 3(O): "Consolidation Hearing Rescheduled for 2/22/2010," posted online at <http://mes.kent.k12.md.us> on February 16, 2010

- KCBOE Motion Ex. 3(P): "Schools are back in session after storms," published in Kent County News on February 18, 2010
- KCBOE Motion Ex. 3(Q): "Kent schools are back in session after two storms," posted online at <http://www.stardem.com> on February 19, 2010
- KCBOE Motion Ex. 3(R): "Final school closing forum is held," published in Kent County News on February 25, 2010
- KCBOE Motion Ex. 3(S): "Meetings," published in Kent County News on February 25, 2010
- KCBOE Motion Ex. 3(T): "News from School," posted online at <http://cms.kent.k12.md.us> on February 27, 2010
- KCBOE Motion Ex. 3(U): "Final school closing forum is held," posted online at <http://www.stardem.com> on March 1, 2010
- KCBOE Motion Ex. 3(V): "Rock Hall Middle School to Close," posted online at <http://www.chestertownspy.com> on March 2, 2010
- KCBOE Motion Ex. 3(W): "BOE Consolidation Decision 3/1/10," posted online at <http://gms.kent.k12.md.us> on March 2, 2010
- KCBOE Motion Ex.3(X): "Board Vote: Consolidate Middle Schools," published in Kent County News on March 4, 2010
- KCBOE Motion Ex. 3(Y): "Approved School Consolidation," posted online at <http://gms.kent.k12.md.us> on March 4, 2010
- KCBOE Motion Ex. 3(Z): "Reorganization process ongoing for Kent Schools," published in Kent County News on March 11, 2010
- KCBOE Motion Ex. 3(AA): "Parents Protest School Consolidation in Kent County, MD," posted online at [www.wboc.com](http://www.wboc.com) on March 15, 2010
- KCBOE Motion Ex. 3(BB): "Citizens Force New School Hearing," posted online at <http://kentcomd.com> on March 18, 2010
- KCBOE Motion Ex.3 (CC): "School closing vote delayed," published in Kent County News on March 18, 2010
- KCBOE Motion Ex. 3(DD): "School closing vote delayed until April," posted online at <http://www.stardem.com> on March 21, 2010

- KCBOE Motion Ex. 3(EE): "Final school closing vote to be cast on April 15," published in Kent County News on March 25, 2010
- KCBOE Motion Ex. 3(FF): "Notice of Public Hearing," published in Kent County News on March 25, 2010
- KCBOE Motion Ex.3 (GG): "Notice of Public Hearing," posted online at [www.publicnoticeads.com](http://www.publicnoticeads.com) on March 25, 2010
- KCBOE Motion Ex. 3(HH): "Meetings," published in Kent County News on April 1, 2010
- KCBOE Motion Ex. 3(II): "Notice of Public Hearing," published in Kent County News on April 1, 2010
- KCBOE Motion Ex. 3(JJ): "Notice of Public Hearing," posted online at [www.publicnoticeads.com](http://www.publicnoticeads.com) on April 1, 2010
- KCBOE Motion Ex. 3(KK): "Final school closing hearing held tonight," published in Kent County News on April 8, 2010
- KCBOE Motion Ex. 3(LL): "Libraries, school changes discussed," published in Kent County News on April 8, 2010
- KCBOE Motion Ex. 3(MM): "Meetings," published in Kent County News on April 8, 2010
- KCBOE Motion Ex. 3(NN): "Libraries, school changes discussed," posted online at <http://www.stardem.com> on April 12, 2010
- KCBOE Motion Ex. 4: Minutes from KCBOE's April 15, 2010 meeting
- KCBOE Motion Ex. 5: Letter from Superintendent Wheeler to parents/guardians of KCPS students (May 4, 2010)

The Appellants submitted the following Affidavits in support of their Response and Counter Motion: June 30, 2010 Affidavits of Appellant Dawn M. Graney (D. Graney); and June 30, 2010 Affidavits of Appellant Eleanor T. Collyer (E. Collyer).

The Appellants attached the following exhibits to their Notice of Appeal:

- Notice of App. Ex. 1: KCBOE Resolution (April 15, 2010, effective August 2010)
- Notice of App. Ex. 2: KCBOE March 1, 2010 Meeting Minutes



- Notice of App. Ex. 3: KCBOE Member Sarah Brown's comments from March 8, 2010 KCBOE meeting
- Notice of App. Ex. 4; Board of Education Advisory Committee Report (June 5, 2006)
- Notice of App. Ex. 5: Letter from Hoon & Associates, LLC to KCBOE and Kent County Commissioners (April 28, 2010)
- Notice of App. Ex. 6: Statement of Appellant Eleanor T. Collyer (May 7, 2010)
- Notice of App. Ex. 7: Statement of Appellant Dawn M. Graney (May 6, 2010)