ROBIN SHAFFER,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
CALVERT COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Order No. OR13-03

ORDER

The Appellant, Robin Shaffer, has requested reconsideration of the December 17, 2012 decision of the State Board, *Robin Shaffer v. Calvert County Board of Education,* MSBE Op. No. 12-57. In that case, we upheld the decision of the local board to place a letter of warning in the Appellant's file for his inappropriate physical and verbal interaction with a student.

COMAR 13A.01.05.10D sets forth the standard for reconsideration of a decision by the Maryland State Board of Education, "A decision on the request shall be made in the discretion of the State Board except that a decision may not be disturbed unless there is sufficient indication in the request that:

(1) The decision resulted from a mistake or error of law; or
(2) New facts material to the issues have been discovered or have occurred subsequent to the decision.

COMAR 13A01.05.10E further provides that "[t]he State Board may refuse to consider facts that the party could have produced while the appeal was pending."

For the reasons stated by the local board in its Reply and Opposition to Appellant's Request for Reconsideration, which we incorporate here (see attached), we decline to reconsider our decision.

MARYLAND STATE BOARD OF EDUCATION

Charlene M. Dukes
President

BEFORE THE MARYLAND STATE BOARD OF EDUCATION

ROBIN SHAFFER *

Appellant *

v. *

CALVERT COUNTY BOARD OF EDUCATION *

Respondent. *

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

REPLY AND OPPOSITION TO APPELLANT'S REQUEST FOR RECONSIDERATION

The Calvert County Board of Education (County Board), by and through its undersigned counsel, responds to Appellant's Request for Reconsideration, and respectfully requests the State Board of Education to DENY Appellant's request, pursuant to State Board Regulation (COMAR) 13A.01.05.10C, for the reasons set forth below.

1. Appellant requested reconsideration of the decision of the Maryland State Board of Education (MSBE) in *Robin Shaffer v. Calvert County Board of Education*, Opinion No. 12-57 (December 17, 2012) pursuant to COMAR 13A.01.05.10.
2. COMAR 13A.01.05.10D sets forth the standard for reconsideration of a decision by the Maryland State Board of Education as follows:

> "A decision on the request shall be made in the discretion of the State Board except that a decision may not be disturbed unless there is sufficient indication in the request that:
>
> (1) The decision resulted from a mistake or error of law; or

(2) New facts material to the issues have been discovered or have occurred subsequent to the decision.

3. COMAR 13A.01.05.10E further provides that "[t]he State Board may refuse to consider facts that the party could have produced while the appeal was pending."
4. Appellant alleges four items that Appellant believes constituted mistake or error of law under COMAR 13A.01.05.10.D.(1), namely:
    a. MSBE Board member Guffrie M. Smith, Jr. is a former member of the Calvert County Board of Education who "materially participated in this decision". (Appellant Request for Reconsideration at page 2, hereinafter "ARR.2")
    b. There was a genuine dispute of material fact that required MSBE to transfer the case to the Office of Administrative Hearings.
    c. There was undue delay by MSBE in issuing an opinion.
    d. The actions of the County Board and MSBE were unconstitutional and because Appellant was not afforded due process, Appellant was unable to defend himself.
5. Appellant alleges that he has discovered new facts material to the issue that were not available at the time of the MSBE decision, pursuant to COMAR 13A.01.05.10.D.(2), namely:
    a. Deputy Superintendent Robin Welsh, in her letter of October 3, 2012, responding to a complaint filed by Appellant with the United States EEOC Baltimore Field office, stated "it was reported that Mr. Shaffer had inappropriately grabbed and dragged a first grade student with disabilities. An

investigation revealed that Mr. Shaffer had yanked, grabbed and dragged the student" (ARR, Exhibit C, paragraph 2); Appellant claims:

i. He was not aware of this information; and

ii. It was impossible for the nurse to not have heard or seen anything.

b. The Calvert County Department of Social Services could not legally confirm whether Calvert County Public Schools (CCPS) reported the incident in question to Child Protective Services unless they accepted a report for investigation. (ARR. Exhibit B)

c. CCPS investigation into the incident was flawed.

d. CCPS did not question the first grade student involved or his parents.

e. CCPS suspended Appellant for a day and Appellant allegedly has a witness that will testify the school secretary told him the Appellant was on administrative leave.

RESPONSE

THERE WAS NO MISTAKE OF ERROR OF LAW BY MSBE IN AFFIRMING THE COUNTY BOARD IN THE SUBJECT CASE

1. **MSBE Board member Guffrie M. Smith, Jr. *has never been a member of the Calvert County Board of Education* and his participation in the unanimous MSBE decision was not inappropriate and did not prejudice Appellant or MSBEs decision (Appellant Request for Reconsideration at page 2, hereinafter "ARR.2")**

Mr. Smith was an *educator* with Calvert County Public Schools (1964-1975 and 1981-2004) and he also served 6.5 years with the Maryland State Department of Education (1975-1981). At no time has he served on the Calvert County Board of Education. Appellant does not cite any statutory or regulatory authority to support his assertion that Mr. Smith's participation constitutes a mistake of MSBE or an error of law; nor would Appellant be able to because it does not exist. Furthermore, even assuming for sake of argument that Mr. Smith was precluded from participation in the subject case for whatever reason, there is no evidence presented by Appellant to suggest his non-participation would have changed the unanimous vote of those MSBE Board members voting to uphold the decision of the County Board or that the decision of MSBE was not supported by the record before it as a matter of law; thus no prejudice would have been afforded Appellant in the MSBE decision even with Mr. Smith's participation.

For the foregoing reasons there was no mistake or error of law committed by Mr. Smith joining in the unanimous MSBE affirmation of the County Board decision in the subject case.

2. **There was no genuine dispute of material fact that required MSBE to transfer the case to the Office of Administrative Hearings.**

Despite Appellant having an opportunity to meet with the Superintendent of schools with his collective bargaining unit representative, and being given numerous opportunities to submit any evidence in support of his version of events, Appellant never provided any evidence to support his version of the events on the day in question other than his own statements the incident did not happen as described by four witnesses. Further, Appellant's

only explanation as to how four people could have come up with their independent statements is the "possibility" that there may be a conspiracy of people who are attempting to make him look bad. However, even Appellant stated this was only a possibility that should be examined. (See Record Before the Calvert County Board of Education, hereinafter "R.", at page.4, referencing Superintendent's Exhibit, hereinafter "S.", 10, page 9, "12 Points..." paragraph 11)

As MSDE has held in the past, Appellant's *mere allegation* of what occurred does not warrant a right to an evidentiary hearing without at least some credible evidence in support of Appellant's allegation. See *Darnell & Tillie Lynn v. Anne Arundel County Board of Education,* MSDE Opinion No. 04-20 (April 21, 2004), at page 3. Appellant's mere disagreement with the Superintendent's decision was insufficient to create a genuine dispute of material fact which would warrant an evidentiary hearing, particularly given there is no other evidence in the record to support Appellant's assertion. See *Elsie Coleman v. Howard County Board of Education,* MSBE Opinion No. 01-40 (December 5, 2001), page 3, paragraph 2 and footnote 2 (disagreement with local Board's decision was not sufficient to support a request for evidentiary hearing where there was a lack of evidence to support the Appellant's disagreement). In the instant case, as in *Coleman*, Appellant was given the opportunity to submit materials in support of his case to the Superintendent and the local Board, which Appellant did. However, other than **Appellant's own statements**, which as they evolved, **corroborate much of the testimony of the witnesses** attesting to his inappropriate conduct, there has been no evidence submitted to support Appellant's claim he did not conduct himself as attested to by the four witnesses. Even Appellant notes in his

appeal to the State Board the entire case boils down to "his word" against the four witnesses. (See page 2, paragraph 1 of Appellant's appeal to MSBE, dated April 19, 2012)

When Appellant's statements are placed against the statements of the four witnesses, the statements of the witnesses that **Appellant was holding the student's hand above the student's head** when he took the student from the health room to his office (See "Facts" in County Board's Memorandum In Support of Motion for Summary Affirmance, Fact 74), **Appellant closed the door to his office once he had the student in his office** (Fact 73), **Appellant was alone in his office with the student** in the absence of the student's 1:1 aide (Fact 51) and **Appellant was addressing the student with a firm tone and raised voice** (Facts 43 & 52) **are all conceded** as at least possible, if not actual, **by the Appellant** himself. Consequently, even Appellant's testimony lends credence to the four witnesses' version of events.

Furthermore, while continually claiming he could produce numerous witnesses in support of his claims relating to the events that transpired, and despite ample opportunity to produce such witnesses, Appellant has failed to produce any testimony in support of his version of the events in question. This includes Appellant's failure to procure a statement from the school nurse who told the Administrative staff she did not observe anything because she was otherwise engaged during the time of the incident. In fact, Appellant even now, in support of his Motion for Reconsideration, admits he has no response corroborating his version of events from the school nurse despite his most recent attempts to gain such support from her. (ARR.3, and Exhibit A)

Consequently, faced with the testimony of four witnesses to a spontaneous event, with similar versions of the event in question; and the Appellant's concession on a majority

of the critical points of the incident over the course of his testimony, and with nothing more than Appellant's hypothesizing the witnesses could be conspiring against him serendipitously, on the spur of the moment, the record in the subject case clearly supported MSBE's conclusion that the County Board and Superintendent could reasonably come to the conclusion the testimony of the witnesses was more credible than Appellant's bald assertion they were in error and therefore conclude the Appellant was deserving of the letter of warning.

It is well established by MSBE that issues of witness credibility are for the local board or trier of fact to determine. See *Darnell & Tillie Lynn v. Anne Arundel County Board of Education,* supra, at page 3, paragraph 6. Thus it was entirely appropriate for the Superintendent, and ultimately the Board, to weigh the issue of witness credibility, which was the only issue in question given Appellant provided nothing but his own testimony in his defense. Furthermore, MSBE's conclusion to accept the County Board's determination of witness credibility is supported under the law.

Unsupported statements or conclusions are insufficient to create genuine dispute of material fact. See *Ewing v. Cecil County Board of Education,* 6 Op. MSBE 818, 820 (1995). In light of there being no evidence to support Appellant's self-serving statements, and further given the Appellant's own statements were conflicting and supportive of the four witness statements against him, as a matter of law, there was no genuine dispute of material fact and Appellant was not entitled to have MSBE refer the matter to the Office of Administrative Hearings.

For the foregoing reasons, there was no mistake or error of law committed by MSBE regarding referral of the subject case to the Office of Administrative Hearings.

3. **There was no undue delay by MSBE in issuing an opinion.**

Appellant cites no provision of law to support his contention that there was "undue delay" in MSBE rendering its decision. Even assuming for the sake of argument the length of time it took MSBE to render their decision was, for whatever reason, deemed to be an undue delay of its decision, Appellant provides no legal authority to support the fact it was a "mistake" or "error of law" for MSBE to have taken the length of time it did. Finally, Appellant has not demonstrated any prejudice or actual harm suffered even if the length of time it took MSBE to render its decision was deemed to be an undue delay.

For the foregoing reasons, there was no mistake or error of law by MSBE in the amount of time it took to render its decision in the subject case.

4. **The actions of the County Board and MSBE were constitutional and Appellant was afforded due process and the opportunity to defend himself.**

The County Board afforded the Appellant due process required by law and every opportunity to provide corroboration of his version of the events in question, which Appellant sought to do as evidenced by his voluminous submissions on appeal. Despite Appellant's numerous opportunities to provide his version of events and obtain corroboration of his version of events, Appellant admits he was unable to produce any evidence other than his own statement of events, conjecture and speculation as it pertained to other witnesses' version of events and that the entire case "boils down to four 'witnesses' against [his] word. Nothing more." (Appellant Appeal to MSBE of April 19, 2012, on page 2, paragraph 1)

The Appellant was aware of the accusations made and was provided two opportunities to give his version of events with CCPS staff, was provided his Loudermill Letter (R. S.7) and then had a third opportunity to render his version of events at the meeting with the Superintendent on November 15, 2011. The Superintendent then gave Appellant time to provide additional evidence in support of his version of events prior to the Superintendent making a final determination of what, if any, discipline was warranted. (R .4, page 3, paragraph 3 of Superintendent's Memorandum of Law). In addition, the Appellant has been provided numerous opportunities through written appeals to provide his version of events; which Appellant has clearly pursued.

For the foregoing reasons, there was no mistake or error of law by MSBE in affirming the decision of the County Board in the subject case.

THERE ARE NO NEW FACTS MATERIAL TO THE ISSUES THAT WERE NOT ABLE TO BE DISCOVERED PRIOR TO THE MSBE DECISION

1. **Deputy Superintendent Robin Welsh's letter of October 3, 2012, responding to a complaint filed by Appellant with the United States EEOC Baltimore Field office, recited what the record before the County Board and MSBE reflected pertaining to Appellant's actions and did not contain any new evidence.**

Appellant's attempt to characterize Ms. Welsh's letter as containing new evidence is completely without basis. The testimony of the witnesses in the record before the County Board and MSBE clearly provide the foundation and support for Ms. Welsh's comment in her letter to the EEOC; all of which the Appellant and MSBE were well aware of throughout

the appeal process. Furthermore, Appellant's contention relating to the school nurse was also previously raised on appeal by Appellant and the record clearly indicates the school nurse had no knowledge of the event, despite the Appellant having every opportunity to obtain a statement from the nurse to the contrary. In fact, Appellant admits in his Motion for Reconsideration that his most recent attempt to gain support for his version of events from the school nurse have failed to receive a response from her. (ARR. Exhibit A)

For the foregoing reasons Ms. Welsh's comments in her letter of October 3, 2012 do not constitute new evidence, which was material to the issues and unavailable at the time of MSBE's decision.

2. **The Fact Calvert County Department of Social Services (CCDSS) could not legally confirm whether Calvert County Public Schools (CCPS) reported the incident in question to Child Protective Services unless they accepted a report for investigation (ARR. Exhibit B), Is Information Which Appellant Could Have Provided As Part of The Appeal Before The Local Board and Does Not Affect the Testimony of Record Supporting The Inappropriateness of Appellant's Actions.**

The uncontroverted testimony of record was that CCPS staff did report the incident and the actions of Appellant for which he was disciplined to the Calvert County Department of Social Services. At that point CCPS is no longer involved with the decisions of CCDSS and how they handle the reported information. The information provided by Appellant pertaining to his inquiry to CCDSS and their response is not new evidence material to the case, which was unavailable at the time of the MSBE decision. The inquiry Appellant made could have been made at the time of his appeal to the County Board, which it was not. In addition, the

response does not indicate they did not receive the report from CCPS, it simply confirms for Appellant that under the law they cannot disclose what reports they receive unless they open an actual investigation. Finally, the information has no bearing on the fact the record before the County Board and MSBE clearly supported the decision of the County Board, regardless of whether the Department of Social Services could legally confirm the report.

For the foregoing reasons the inability of the Calvert County Department of Social Services to legally confirm the reporting of incidents absent an official investigation does not constitute new evidence, which was material to the issues and unavailable at the time of MSBE's decision.

3. **The CCPS investigation into the incident was not flawed and does not constitute new evidence that was material to the issues and unavailable at the time of the MSBE decision.**

Appellant does not introduce any new evidence that was material and not available at the time MSBE rendered its decision; rather, Appellant simply reargues his case on appeal as it pertains to the investigatory process.

For the foregoing reasons the Appellant's arguments pertaining to the investigatory process do not constitute new evidence, which was material to the issues and unavailable at the time of MSBE's decision.

4. **The fact CCPS did not question the first grade student involved, or his parents, is not new evidence that is material to the issues and was not available at the time of the MSBE decision.**

This specific argument was not raised by Appellant before the County Board, though it certainly could have been raised. Even had it been raised, the uncontroverted testimony of four independent eyewitnesses and the Appellant's own testimony was more than satisfactory corroboration of the events warranting the disciplinary action against Appellant. Given the special needs of the very young child and the fact the child's parents were not witnesses to the event, it was not at all unreasonable that the Superintendent did not find it necessary to speak with the child or the parents of the child. In any event, this evidence is not new and was clearly available to be raised by Appellant throughout the appeal process below.

For the foregoing reasons the Appellant's arguments pertaining to the failure to question the child at issue or the child's parents does not constitute new evidence, which was material to the issues and unavailable at the time of MSBE's decision.

5. CCPS did not suspend Appellant for a day and the school secretary does not speak for the Superintendent of Schools.

Appellant raised this identical issue in his original appeal to MSBE, on page 3, paragraph numbered 6 of his appeal. This is not new evidence and was clearly before MSBE when it made its decision herein. As Appellant states, he had scheduled leave for Friday, October 21, 2011; he was not suspended with pay. He was told to report to Human Resources upon his return on Monday October 24, 2011, for consideration of a temporary reassignment pending the completion of the investigation, pursuant to the authority of the Superintendent to assign personnel. The Superintendent did not recommend suspension of Appellant, nor did the County Board consider suspension at any time in the proceedings; consequently Appellant was afforded all due process required under law.

With regards to Appellant's alleged witness that would testify to a conversation in which the school secretary indicated the Appellant was on administrative leave, Appellant provides no evidence of such testimony in his Motion, other than his own unsubstantiated statement. Furthermore, even if we were to assume such a witness did exist and would testify exactly as stated by Appellant, Appellant has not demonstrated it was not available to be produced at the time of his initial appeal to the County Board, before the MSBE decision. Finally, were we to assume the secretary did make such a statement, it has no bearing on the case because the school secretary does not speak for the Superintendent and the record is clear the Superintendent did NOT suspend the Appellant, but only issued a reprimand. Therefore, the secretary's statement in any event would not be material to the issues at hand and the record upon which the County Board and MSBE based their respective decisions.

For the foregoing reasons Appellant's claim that he was suspended and there is a new witness to testify that the school secretary told the witness the Appellant was on "administrative leave" does not constitute new evidence, which was material to the issues and unavailable at the time of MSBE's decision.

CONCLUSION

The circumstances upon which MSBE would grant a reconsideration request are narrow. Despite Appellant's attempts to meet the burden for reconsideration, his Motion for Reconsideration fails to meet the requirements as a matter of law. Appellant's contentions generally amount to a re-argument of the same arguments put forth in his original appeal. Along with his previous arguments, Appellant attempts to introduce material, which, in addition to having no bearing on the case, is information that was readily available at the

time of the original proceeding, which Appellant chose not to pursue or introduce. Public policy does not support attempts to re-litigate issues that have been conclusively resolved, *ad nauseam*, in the hopes of securing a victory at one point in time that they were unable to secure at an earlier point in time. For that reason, MSBE has narrowly construed the grounds upon which reconsideration will be granted. Appellant's request fails to meet the threshold for reconsideration required by law.

Appellant has been provided a full and complete opportunity under the law to have presented his case in support of attempting to overturn the County Board's decision in the subject case. MSBE reviewed the entirety of the record and properly concluded that the County Board decision should be affirmed. There has been no mistake or error of law and there have been no new facts material to the issues that have been discovered that were not able to have been produced prior to the MSBE decision.

WHEREFORE, for the foregoing reasons, the Appellants Motion For Reconsideration must be DENIED and the decision of the Maryland State Board of Education (MSBE) in *Robin Shaffer v. Calvert County Board of Education*, Opinion No. 12-57 (December 17, 2012) must stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 31, 2013 I mailed a copy of the foregoing Reply and Opposition to Appellant's Request for Reconsideration, via US Mail, first-class, postage prepaid to: Robin Shaffer, 407 Windmill Drive, St. Leonard, MD 20685.

Dario Agnolutto