

Dec. 23, 2019

Request for Review

Via Hand Delivery to:  
Maryland State Board of Education  
200 West Baltimore Street  
Baltimore, Maryland 21201

Appellants:

M. F.

S. L.

S. K.

*Our forefathers and mothers came to this country because we offered unique legal guarantees of equal opportunity. They got rich, and America got rich. Every time we expanded our civil rights to include another oppressed minority, America got richer. America is not rich in spite of civil rights. America is rich because of civil rights.*

*-Justin W. Dart, Jr.*

**COME NOW** Appellants, M.F., S.L., and S.K., by and through their attorneys, Lorraine Lawrence-Whittaker and Mary R. Poteat, and **LAWRENCE WHITTAKER, PC**, hereby request that the Maryland State Department of Education review the November 21, 2019 decisions of the Board of Education of Howard County and in support thereof offer the following unto this Board:

**DECISIONS APPEALED:**

Final Howard County Board of Education Attendance Area Adjustment Plan, approved on November 21, 2019.<sup>1</sup>

**STATEMENT OF FACTS:**

On January 24, 2019, the Board of Education directed that the Howard County Public School System, (“HCPSS”) initiate a systemwide school boundary review to address both overcrowding and underutilization of certain area schools. On June 4, 2019, a letter from the Superintendent was emailed through the *HCPSS News* system announcing the

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<sup>1</sup> Plan summaries over the course of work sessions make clear that any “changes in school boundaries are only final with Board approval of **entire plan**” on November 21, 2019, from which Appellant now appeals.

[https://go.boarddocs.com/mabe/hcpssmd/Board.nsf/files/BHXMAT5ED687/\\$file/REVISED%20Combo%20BOE%20plan%20Polygons%20reassigned%20as%20of%2011%2014%202019.pdf](https://go.boarddocs.com/mabe/hcpssmd/Board.nsf/files/BHXMAT5ED687/$file/REVISED%20Combo%20BOE%20plan%20Polygons%20reassigned%20as%20of%2011%2014%202019.pdf)

systemwide boundary review to stakeholders. In the letter, the Superintendent assured the HCPSS Community that improvements to prior review procedures would ensure focus on the “ideas presented in the Feasibility Study” and, with particular emphasis, that he personally would “value the needs and perspectives of all of our students, families and staff.” See *HCPSS New* email dated June 4, 2019. The email referenced public input opportunities<sup>2</sup>, including community sessions and online survey participation. That email was apparently the first attempt by the school system to notify students and parents or other stakeholders that major change could be coming. Although the very lengthy email offered language support “upon request,” the entirety of the email is written only in English, in stark contrast to the message of inclusion by the Superintendent. The following week, on June 11, 2019, the *HCPSS News* system email to the HCPSS Community acknowledged anxieties and promised the Superintendent would “use the [Feasibility] study, as well as public input gathered during this process to present his recommendation to the Board on August 20, 2019.”<sup>3</sup> The input sessions and online survey commenced and overwhelmingly, respondents to the adjustment survey categorized keeping feeds of students together to be the primary concern<sup>4</sup> (65.95% of responses); followed closely by maintaining communities or neighborhoods<sup>5</sup> (59.59% of responses) and transportation considerations<sup>6</sup> (42.64% of responses). Notably, respondents to the survey rated considerations of race, ethnicity, socioeconomic status and academic performance and consideration for English learners at only 19.12% in terms of importance. See *Superintendent’s Attendance Area Adjustment Plan* at page 7 attached hereto as **Exhibit 1**. None of the considerations felt most important by survey respondents were given priority by the Superintendent’s master plan. Having commissioned the 2019 Feasibility Study and surveying only 1480 total respondents<sup>7</sup> to the operative **Q5**<sup>8</sup> inquiry, the Superintendent, advancing his own agenda, assembled a plan which utterly and arbitrarily ignored both sources of input. On August 22, 2019, the Superintendent presented his comprehensive plan for attendance adjustment giving considerations to what he deemed were the *driving priorities*:

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<sup>2</sup> Four community input sessions were held in July. A sparse 800 reported total people attended the four community input sessions. An online survey accepted feedback between June 14, 2019 and August 1, 2019.

<sup>3</sup> The presentation of the Superintendent’s Attendance Area Adjustment Plan was rescheduled from August 20, 2019 to August 22, 2019 due to inclement weather.

<sup>4</sup> Also consistently ranked highly by survey respondents at the community input sessions.

<sup>5</sup> Also ranked amongst the highest priority at 3 of 4 community input sessions.

<sup>6</sup> Ranked higher by remote communities.

<sup>7</sup> There is no data from which to glean whether the respondents were students or parents or disinterested or duplicate responses. What is clear is that 1480 responses, to the extent representative at all, would represent less than 2.5% of the total projected enrollment for school year 2020-21.

<sup>8</sup> **Q5** Regarding prioritizing the standards listed in Policy 6010 in the online survey was noted as **Q2** in the survey supplied to the community input respondents. See *Survey Results* attached as **Exhibit 2**.

1. Balance capacity utilization among schools throughout HCPSS, cost effectively. <sup>9</sup>
2. Advance equity by addressing the distribution of students participating in the Free and Reduced- price meals program (FARMs) across schools to the extent feasible.<sup>10</sup>
3. Plan ahead for the High School #13 redistricting by minimizing double moves as much as possible. <sup>11</sup>

The Superintendent believed that, while his plan “differ[ed] significantly” from the very costly Feasibility Study, his recommendations would “move the District forward notably in balancing capacity utilization across schools;” a consideration ranked low by survey respondents. *See Superintendent’s Attendance Area Adjustment Plan* at page 4 attached hereto as **Exhibit 3**. The plan defined “equity” as “providing the access, opportunities, and support needed to help students ... reach their full potential by removing barriers to success that individuals face. It does not mean equal or giving everyone the same thing.” *Id.* Although the Redistricting plan utilizes FARMs data to redistribute the polygons, the plan, as well as the Feasibility Study, curiously include the racial and ethnic demographics of each school both before and after proposed implementation of redistricting. Ultimately, however, it was not the Superintendent’s plan approved by the Board on November 21, 2019.

Following the announcement of the Superintendent’s plan the Board held seven public hearings and nine open work sessions and the public was invited to comment and permitted to submit written testimony. The period for any public feedback closed on November 19, 2019. During many lengthy work sessions debate about what criteria should be used in the decision making process and what goals were being considered and how success should be measured; apprehension about time constraints arose. Some Board members advocated for returning to the Feasibility Study for more informed, professional guidance to the process citing issues of bias and personal agenda in the competing plans under consideration; some voiced concerns that this redistricting was being improperly used to equalize socioeconomic status within the county. After the opportunity for oral testimony had long passed, the board eventually settled on a combination of plans introduced by Board members themselves – laypeople to geospatial analysis, which included polygons not previously under consideration for redistricting in any plan. No notice was ever sent to those polygons added for late consideration. None of the considerations felt most important by survey respondents were given priority by the final plan. Finally, the plan, as approved in a controversial<sup>12</sup>

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<sup>9</sup> Ranked in terms of importance at 19.05% by survey respondents.

<sup>10</sup> FARMs was not a consideration on the survey, its inclusion is a thinly veiled proxy for improper race-based disbursement of students receiving FARMs.

<sup>11</sup> Not a consideration on the survey at all.

<sup>12</sup> The Board later acknowledged the November 21, 2019 vote was accomplished in violation of the Open Meeting Act.

vote in the late hours of November 21, 2019, moved approximately 5,800 students to new schools, ostensibly to both alleviate overcrowding and to achieve socio-economic balance suspiciously and improperly using FARMs data as a proxy for race to do so. Also of significance to Appellants, the final approved plan allowed students with existing 504 and IEPs to apply for redistricting exemptions to remain in their current school and continue with their current educational plans.

### **STANDARD OF REVIEW:**

Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board are considered *prima facie* correct, however, the State Board will substitute its judgment for that of the local board where such decisions are arbitrary, unreasonable, or illegal. COMAR 13A.01.05.06; *Kitzmiller Charter [Sch.] Initiative, Inc. v. Garrett County Bd. of Educ.*, MSBE Op. No. 13-52 (2013). A local board decision will be regarded as 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. Likewise, a local board decisions is deemed illegal if it is one or more of the following: (1) Unconstitutional; (2) Exceeds the statutory authority or jurisdiction of the local board; (3) Misconstrues the law; (4) Results from an unlawful procedure; (5) Is an abuse of discretionary powers; or (6) Is affected by any other error of law. COMAR 13A.01.05.06. *See also School Commissioner v. City Neighbors*, 400 Md. 324 (2007).

### **DISPRATE IMPACT OF REDISTRICTING EXEMPTIONS ON STUDENTS WITH PENDING 504/IEPs:**

One of the nation's first laws barring discrimination based on disability was enacted with little notice. No hearings were held, no debate took place on the floor of either house of Congress, and the name of the provision's author has long been forgotten.<sup>13</sup> The Rehabilitation Act of 1973 was a spending bill that authorized aid to people with disabilities. Section 504 of the Act simply made it illegal for recipients of federal funds to discriminate on the basis of disability. It was modeled on the language of Title VI of the Civil Rights Act of 1964,<sup>14</sup> which barred recipients of federal funds from discriminating on the basis of race, color, or national origin.<sup>15</sup> Section 504 of the Americans with Disabilities Act guarantees that a child with a disability has equal

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<sup>13</sup> Shapiro, Joseph P., *No Pity: People with Disabilities Forging a New Civil Rights Movement*, Random House, Times Books, New York, 1993, at p. 65.

<sup>14</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

<sup>15</sup> 42 U.S.C. Section 2000d states that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

ACCESS to an education and that it is comparable to an education provided to those who do not have a disability. Section 504 states:

*No otherwise qualified individual with a disability in the United States...shall, solely by reason of...disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.* 29 U.S.C. 794.

Section 504 is a civil rights law that prohibits discrimination against individuals with disabilities. The child may receive accommodations and modifications. Simply put, recipients of federal funds may not use practices and policies that have a disproportionate, adverse impact on the classes of people protected by the federal civil rights laws. If they do use such practices and policies, courts have required recipients to show that they were pursuing a valid business objective and that there are *no alternative methods of fulfilling the objective that have a less discriminatory impact*.<sup>16</sup>

First, and most important, Section 504 is based on the premise that tax dollars will not be used to establish, promote, or reinforce discrimination against people with disabilities. Entities that violate Section 504 risk termination of their federal monies by the agency that issued the funds.

The law requires that students with disabilities be educated along with nondisabled students to the maximum extent appropriate to the needs of the students with disabilities. Similarly, the Individuals with Disabilities Education Act (IDEA) requires schools to develop, according to specific standards, an individualized education program (IEP) for each eligible student with disabilities. An IEP that meets the requirements of the IDEA also fulfills the requirements of Section 504 and Title II for an appropriate education for a student with disabilities. Students with disabilities have a legal right to a free appropriate public education (called FAPE). The right is guaranteed by the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act. FAPE is the term used to describe the educational rights of children with disabilities in the United States. This right is guaranteed by the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act (IDEA.)

Since Section 504 of the Rehabilitation Act of 1973 is a civil rights law, and the Individuals with Disabilities Education Act (IDEA) is an educational law, a child who receives services under 504 does not benefit from the same mandates as a child who receives special education services under IDEA. Nevertheless, each are afforded important civil rights from these laws and public schools must respect same. Likewise,

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<sup>16</sup> *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Circuit, 1993).

the Maryland Commission on Civil Rights enforces the provisions of law designed to protect individuals from discrimination in employment, housing, and public accommodations. Md. Code Ann., State Gov't. Art. 20-101, et seq., prohibits discrimination based on the individual's race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, disability or genetic information. Parents or guardians must be allowed to have an impartial hearing, with the opportunity to participate in the discussions. A review procedure must be made available to parents or guardians who disagree with the hearing decision.<sup>17</sup>

School board policies, programs, or decisions that disproportionately impact members of a protected group are illegal. It is possible that an otherwise neutral policy may violate the civil rights of protected groups such as students with learning differences or disabilities.

To assess disparate impact cases, courts will use a three-part analysis. First, it will look at whether the individual is a member of the class of persons protected by the law and whether the individual was denied some benefit or right conferred to others under the policy. The court will then look at whether the governmental entity had some legitimate, nondiscriminatory reason for its policymaking decision. Lastly, it will look at whether the reasons offered by the government were merely pretext. Pretext can be shown by articulated reasons that had no basis in fact or were not the true reason for the decision or were insufficient to justify the action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994). This type of analysis is often referred as the *McDonnell Douglas* test.

Each Appellant has at least one child in the HCPSS with learning differences raising to the level of educational intervention, however, because placements had not been finalized or the medical treatment plans had not yet been solidified, these students became ineligible to be approved for the desired exemptions. These students, and all similarly situated students, entitled to 504 and/or IEP Plans not yet in place, have had their civil rights to be afforded their FAPE violated by Appellee when Appellee failed to make reasonable accommodations to extend the exemption for these children. It is inexcusable that Appellee has made no provision whatsoever for children in the process of obtaining their federally mandated accommodations or educational plans for critical exemptions that mean the difference between their ability to make significant and appropriate academic progress and not. Appellee has violated these children's federally mandated rights by failing to extend exemption periods for children in this process. It must be overturned.

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<sup>17</sup> U.S. Department of Education, Office for Civil Rights, Student Placement in Elementary and Secondary Schools and Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, Washington, D.C., 2010.

**RELIEF SOUGHT:**

Appellants seek to have redistricting adjustments made by the Appellee declared illegal pursuant to COMAR 13A.01.05.06 as unconstitutional, as well as being arbitrary; and, for the said area adjustment plan therefore to be voided in its entirety, or, in the alternative, for those portions of the redistricting plan declared illegal and/or arbitrary to be voided; and, for the State Board of Education to issue an order declaring such acts void, and directing the Appellee that the area adjustments made pursuant to the November 21, 2019 votes may not be acted upon, and instead, the 2019-2020 Howard County Public School System attendance areas must remain in place for the 2020-2021 HCPSS school year.

Respectfully submitted:

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Lorraine Lawrence-Whittaker

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