Dec. 23, 2019
Request for Review
Via Hand Delivery to:
Maryland State Board of Education
200 West Baltimore Street
Baltimore, Maryland 21201

Appellant: Marta Alacron Polygon 1142

> *"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."*
>
> *- Chief Justice Earl Warren*

COMES NOW Appellant, Marta Alarcon, by and through her attorneys, Lorraine Lawrence-Whittaker and Mary R. Poteat, and **LAWRENCE WHITTAKER, PC**, hereby requests that the Maryland State Board 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.[1]

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 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. *See June 4 Email* attached hereto as **Exhibit 1** The email referenced public input opportunities[2], 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

---

[1] 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/BHXNAT5ED687/$file/REVISED%20Combo%20BOE%20plan%20Polygons%20reassigned%20as%20of%2011%2014%202019.pdf

[2] 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.

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."[3] That June 11, 2019, email provided no language support information whatsoever; the same holds true for the June 19, 2019; June 26, 2019; July 12, 2019; August 7, 2019; and August 22, 2019 email reminders sent to stakeholders. *See June11 Email* attached hereto as **Exhibit 2** 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[4] (65.95% of responses); followed closely by maintaining communities or neighborhoods[5] (59.59% of responses) and transportation considerations [6] (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 3**.[7] 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[8] to the operative **Q5**[9] 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*:

1. Balance capacity utilization among schools throughout HCPSS, cost effectively. [10]
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.[11]
3. Plan ahead for the High School #13 redistricting by minimizing double moves as much as possible. [12]

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 5**. The plan defined equity as providing the access, opportunities,

---

[3] The presentation of the Superintendent's Attendance Area Adjustment Plan was rescheduled from August 20, 2019 to August 22, 2019 due to inclement weather.

[4] Also consistently ranked highly by survey respondents at the community input sessions.

[5] Also ranked amongst the highest priority at 3 of 4 community input sessions.

[6] Ranked higher by remote communities.

[7] Only the individual pages Superintendent's Plan referenced herein are attached as exhibits.

[8] 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.

[9] **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 Online Survey Results* attached as **Exhibit 4**.

[10] Ranked in terms of importance at 19.05% by survey respondents.

[11] FARMs was not a consideration on the survey, its inclusion is a thinly veiled proxy for improper race-based disbursement of students receiving FARMs.

[12] Not a consideration on the survey at all.

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. 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[13] 5-2 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 Appellant, the final approved plan allowed for exemptions.

Appellant Alarcon is the Spanish speaking parent of a 4th grader enrolled at Longfellow Elementary School in the HCPSS System. Alarcon speaks little English and is not conversational in the language. Appellant was completely unaware of the redistricting process until Sunday, December 14, 2019, when the news started to spread through Howard County's primarily Spanish speaking community. No efforts had been made by Appellee to inform the Appellant, in Spanish, that the process was happening, that it may affect her school age child, or that she had a right to submit oral or written testimony. Appellant learned, 23 days after the conclusion of an intense multi-month process, that her son had been moved from Longfellow ES to Clarksville Elementary School when her Polygon, No. 1142, was moved in the waning days of the process. And still, Appellant learned of this significant change in her child's school life only via word of mouth in the Spanish community. Appellant's son as a 4th grader would have been eligible for an exemption from being moved had Appellee been promptly notified Appellant, in Spanish, of the change and her right to seek an exemption for his 5th grade year. However, the exemption period closed on December 13th, 2019 – still with no word from HCPSS of her child's exemption rights in a language Appellant could decipher. Hispanic/Latino children comprise 11.3% of the student population of HCPSS. *See Fast Facts* attached as **Exhibit 6**. According to the U.S Census Bureau, American Community Survey 2012-16 microdata, the most commonly spoken foreign

[13] The Board later acknowledged the vote was accomplished in violation of the Open Meeting Act.

language in Howard County is Spanish, at 20.4%. *See Balt. Sun Art. Diversity by the Numbers: As Howard County has grown, so has its racial and cultural mix* attached as **Exhibit 7**.

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).

ARGUMENT:

The November 21, 2019, decision of the Howard County Board of Education regarding the Attendance Area Adjustment Plan is both arbitrary and illegal as the plan approved, with specific regard to Appellant and all similarly situated Non-English, Spanish speaking parents of Howard County, bares no rational relationship to the stated objectives and purpose of redistricting; ignored the Feasibility Study; is premised on improper race-based considerations; has been arbitrarily culled together by a Board of laypeople with admittedly little understanding of geospatial analysis; and passed without providing the same level of either notice to, or opportunity for, Appellant to be heard nor afforded other affected families before infringing upon Appellant's and all similarly situated Howard County residents' protected property interests in violation of the Equal Protection Clause of the United States Constitution made applicable to the States by the Fourteenth Amendment and guaranteed by Article 24 of the Maryland Declaration of Rights.

On November 21, 2019, the Howard County Board of Education voted on an Attendance Adjustment Plan which materially and disproportionately affected the fundamental Constitutional rights of Appellant, and other families similarly situated throughout the County for whom English is not their native language, without providing adequate notice to all those who would be -- *or could have been* affected. The acknowledged irregular vote was enrolled in an unconstitutional violation of Appellant's Equal Protection and Due Process rights.

All citizens are guaranteed the same rights, privileges, and protections irrespective of race or national origin. Further, states are required, through the Equal Protection Clause, to govern impartially—not draw distinctions between individuals based upon differences that are irrelevant to a legitimate governmental objective. The net effect of the approved plan as compared to stated objectives is not significant enough to justify the negative impact of violating due process to separate communities and uproot students. As such, the Attendance Adjustment Plan decision of the local board,

made on November 21, 2019, in the absence of due process, is arbitrary, unreasonable, and illegal and cannot stand. COMAR 13A.01.05.06.

EDUCATIONAL BENEFITS ARE AN IMPORTANT PROPERTY RIGHT NOT TO BE INFRINGED UPON WITHOUT DUE PROCESS:

The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits. *Goss v. Lopez*, 419 U.S. 565, 572-3 (1975) (*quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The covenant of a *thorough and efficient System of Free Public Schools* as ordained by Article VIII of the Maryland Constitution and codified by the General Assembly, is found at MD Code Ann., Educ. §1-201. Accordingly, the State is constrained to recognize a student's legitimate entitlement to public education as a property interest protected by the Due Process Clause. *Goss v. Lopez,* 419 U.S. at 574

> The Fourteenth Amendment of the U.S. Constitution, as well as Article 24 of the Maryland Declaration of Rights . . . prohibits the deprivation of life, liberty, or property without due process of law." *In re Ryan W*, 434 Md. 577, 608-09 (2013) (*quoting Roberts v. Total Health Care, Inc.*, 349 Md. 499, 509 (1998)). Courts apply a two-part inquiry to determine whether there has been a due process violation, considering (1) whether State action has been used (2) to deprive a person of a substantial property interest. *Id.* at 609. In order to have a substantial property interest, 'a person clearly must have more than an abstract need or desire for it.' *Evans v. Burruss*, 401 Md. 586, 593 (2007) (*quoting Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). A person must "have a legitimate claim of entitlement" to the property interest. *Id. See Milstein v. Montgomery Bd. of Educ. of Montgomery County,* MSBE Op. 15-35 (2015).

When the deprivation of a property interest is at stake, at a minimum, the deprivation must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Goss v. Lopez,* 419 U.S. at 579. If state action deprives one of a property interest, the reviewing body must balance the various interests at stake in order to determine the procedural due process which is constitutionally required under the circumstances. *Hortonville Dist. v. Hortonville Ed. Assn.,* 426 U.S. 482, 494-96 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976); *Goss v. Lopez, supra*, 419 U.S. at 577-80; *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 604, 607, 610 (1974). *Pitsenberger v. Pitsenberger*, 287 Md. 20, 28 (1980).

Once determined that an interest is entitled to due process protection, the pertinent inquiry then shift to what process is due. *Goss v. Lopez, supra*, 419 U.S. at 577. The analysis in determining what process is due requires consideration of both the government and private interests. *Hortonville Dist. v. Hortonville Ed. Assn., supra,* 426 U.S. at 494. This essentially involves balancing the various interests at stake. *Riger v. L & B Limited Partnership, supra,* 278 Md. at 289. In considering any due process claim, the starting point is identifying the constitutionally protected property interest at stake. *Gardner v. City of Balt. Mayor*, 969 F.2d 63, 68 (1992); *see Frall Developers, Inc. v. Bd. of Cty. Comm'rs*, No. CCB-07-2731, 2008 WL 4533910, at 8 (2008). *Farrell v. Cox* (D. Md. 2019). Adequate due process requires that any infringement of a property right be preceded by " '. . . notice and opportunity for hearing appropriate to the nature of the

case.' "*Goss v. Lopez, supra*, 419 U.S. at 579, *(quoting Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313, (1950)). Fundamentally, therefore, due process requires the opportunity to be heard " 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge, supra*, 424 U.S. at 333 (*quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *Pitsenberger v. Pitsenberger*, 287 Md. 20 (Md. 1980).

***MINIMUM* NOTICE REQUIREMENTS:**

In 2002 the Maryland General Assembly made the specific finding that:

> ... the inability to speak, understand, or read the English language is a barrier that prevents access to public services provided by State departments, agencies, and programs, and that the public services available through these entities are essential to the welfare of Maryland residents. It is the policy of the State that State departments, agencies, and programs shall provide **equal access** to public services for individuals with limited English proficiency. *See* MD State Govt. Code Ann., § 10-1101.

The Legislature provided the following guidance to effectuate and facilitate its declaration of equal access to public services for individuals with limited English proficiency; MD State Govt. Code Ann. § 10-1102 defines **equal access** as a means to be *informed* of, *participate* in, and *benefit* from public services offered by a State department, agency, or program, **at a level equal to English proficient individuals**. **Limited English proficiency** is defined within that same section to mean the inability to adequately understand or express oneself in spoken or written English language. The obligation to provide equal access to public services thereby imposed through this legislative finding was made specifically applicable to the Maryland State Department of Education; for full implementation by July 1, 2005, under MD State Govt. Code Ann., §10-1103(c)(3)(v). As such, the Department of Education (and by extension local boards of education) is affirmatively charged with the responsibility to take **reasonable steps** to provide equal access to all of the operations and/or services of the department for individuals with limited English proficiency.

> **(b) Reasonable steps**. -- Reasonable steps to provide equal access to public services include:
>
> **(1)** the provision of oral language services for individuals with limited English proficiency, which must be through face-to-face, in-house oral language services if contact between the agency and individuals with limited English proficiency is on a weekly or more frequent basis;
>
> **(2) (i)** the translation of vital documents ordinarily provided to the public into any language spoken by any limited English proficient population that constitutes 3% of the overall population within the geographic area served by a local office of a State program as measured by the United States Census; and
>
> **(ii)** the provision of vital documents translated under item (i) of this item on a statewide basis to any local office as necessary; and
>
> **(3)** any additional methods or means necessary to achieve equal access to public services.

The head of the State Department of Education is the State Board of Education. *See* Md. Educ. Code Ann.§2-102(a). The Department has final authority over all matters of compulsory education that affect the State and is charged generally with the care and supervision of public elementary and secondary education. *See* Md. Educ. Code Ann.§2-106. The State Board adopts bylaws, rules and regulations which have the force and

effect of law with respect to the administration of the public schools. *See* Md. Educ. Code Ann. §2-205(c). Further, the State Board is mandated to exercise general control and supervision over the public schools and educational interests. *See* Md. Educ. Code Ann. §2-205(g). In fact, the State Board is empowered to invoke the courts of the State to enforce its bylaws, rules and regulations in its oversight. *See* Md. Educ. Code Ann. §2-205(d). The Maryland Court of Appeals has consistently held that the county boards of education are agencies of the state. *Montgomery County Education Association v. Board of Education of Montgomery County*, 311 Md. 303, 317, (1987); *Board of Education of Prince George's County v. Prince George's County Educators' Association*, 309 Md. 85, 95 n. 3 (1987); *McCarthy v. Board of Education of Anne Arundel County*, 280 Md. 634, 650 (1977). The Maryland statute clearly supports this conclusion.

FAILURE TO PROVIDE NOTICE IS A FATAL VIOLATION OF STATE AND FEDERAL LAW:

School redistricting is an operation undertaken by the local boards of education, a State agency, under the umbrella of the State Department of Education and, therefore, subject to the Maryland General Assembly's Legislative finding that all persons have equal access to Department operations or services. Fundamentally, therefore, the core components of due process, a substantive right, require notice of the local board's proposed action and an opportunity to be heard. *See Milstein v. Montgomery Bd. of Educ. of Montgomery County,* MSBE Op. 15-35 (2015). Families affected, at a minimum, should have received notice about the proposed redistricting changes in a meaningful way with meaningful opportunity to be heard and participate in the decision making process. The 2019 Feasibility Study, which relied on independently verified data, and the Superintendent's Plan, both acknowledge that the Howard County Public School System is extremely diverse.[14] With the potential of limited English proficiency well is excess of the State mandated 3% threshold requirement to provide equal access, the Board is imputed with the knowledge that, absent due process protections, many to whom the Superintendent vowed inclusion in the redistricting process, would be adversely affected and therefore, should have been put on notice and encouraged to voice their concerns.

Decisions made in complete absence of notice to those adversely affected are unconstitutional. Appellant, who is Hispanic, a constitutionally-protected class, and **not** English proficient, lives on Harper's Farm Road in Columbia,[15] within the area designated as Polygon 1142 and her child currently attends Longfellow Elementary School. Longfellow Elementary School, it should be noted, has a Hispanic population of 23% pursuant to the Feasibility Study. *See 2019 Feasibility Study* at Page 98 attached as **Exhibit 8**. Appellant received no appreciable notice that redistricting was even being considered. The June 4, 2019 announcement email, solely in English, was ineffective in terms of providing notice to parents who are not English proficient. Much of the discussion of this plan among affected parties (as well as instructions on how to submit written testimony, sign up to testify, and the listed dates for public BOE meetings where the plan would be discussed) took place on Facebook and other social media platforms – again, which would require fluency in English (and access to technology, which may be

[14] Race/Ethnicity of HCPSS FY19: Asian - 22.4%; Black/African American – 24%; Hispanic/Latino – 11.3%; White -35.8%; Other <5%; Two or more races – 6.2% *See* **Exhibit 6.**

[15] With reference to 13A.01.05.02A.(1), Appellant does not have access to email, therefore cannot provide the requested email address. Appellant will receive any and all communication from the Board care of her undersigned attorneys.

lacking for some families) to comprehend the impact and to voice their opinions like everyone else. There was no so called Spanish language *Backpack* mail sent home with students at Longfellow Elementary (nor likely other schools), there was no chatter at the bus stop or discussion around the neighborhood because Longfellow Elementary School - including Polygon 1142, was not under consideration for redistricting in any plan advanced until approximately **one week** in prior to the final vote; more than 5 months removed from the announcement email, well after the public input sessions were completed, with no opportunity for Appellant to testify before the Board, and only days before all opportunity for comments evaporated. Appellant was not informed of any proposed plan in her native language and not given the any opportunity to comment. In fact, Appellant received no decipherable notice from HCPSS at all that the redistricting decision to displace the child from Longfellow had been made. The Appellant learned of the decision after the fact from her neighbor. Upon discovering the child would be transferred to Clarksville Elementary School for school year 2020-21, the child became distraught and was inconsolable for the rest of that evening. What is worse, the child is a rising 5th grader in his beloved school who would have been eligible for an automatic exemption to remain at his current school for his final year of elementary education. The information came too late Appellant received no notice of the exemption option from HCPSS either.

VIOLATION INFECTED THE ENTIRE REDISTRICTING PROCESS:
Arguably, the same violation infected the process for non-English speaking parents throughout the county because notice -- in their own languages -- that their children could be moved far from their current schools, and possibly to schools that did not provide the crucial educational and social supports they needed, simply was not provided. The issue of notice and whether non-English speaking parents were contacted in their native language was raised and answered with a "no" during a BOE meeting/work session in early November 2019. The response from BOE head Mavis Ellis was that this critical communication to non-English speakers was not done because the Board did not have time to do so, and that the non-English speaking parents would be informed later. This misguided, and frankly dismissive, attitude of the Board utterly trampled upon the fundamental rights of those affected and the mandates of MD State Govt. Code Ann., §10-1103. Hardships for many students, including going from walking to being bused to school; families losing difficult-to-obtain spaces in before- and after-school child care programs; neighborhoods being unnecessarily split and very small feeds being moved in violation of HCPSS Policy 6010; and in hundreds of cases, Title 1 children losing crucial educational supports, including low student-teacher ratio and additional paraeducators; after-school tutoring; and special interventions (including extra reading assistance, counseling, weekend meals and free medical care at their schools) which they relied upon, by being moved to non-Title 1 schools happened to the non-English speaking families, not for or with them. By not being notified in a way they could understand, these protected classes were denied their constitutionally-mandated rights to due process. They were not granted the same right to comment as was granted to the other involved parties. The trigger of due process protection was met, as school redistricting involves a governmental action. Therefore, this is a violation of the Equal Protection Clauses of both the Maryland and U.S. Constitutions.

The 14th Amendment guarantees that "no state shall deprive any person life, liberty or property without the due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws."** The amendment has been

judicially determined to apply to both legal cases and administrative proceedings (such as the Board of Education's meetings in this instance to debate, hear public testimony, and ultimately pass the plan.)

Please note that HCPSS also did not communicate after the fact with these families in their native languages either. Fortunately for some on social media, two community members independently took the time to translate a flyer that explained such important information as how to opt out of being redistricted for certain groups of students, including those receiving special education and rising seniors, fifth and eighth graders. The school administrators still did not send out such communication themselves, and thus violated their own policy of equal communication with these protected classes.

Board member Christina Delmont-Small, who voted against the boundary revisions, said the effort was flawed and that neighborhoods were not given equal attention. Some students who live less than a mile from a school were shifted to schools miles away, she said, and some walkers were made into bus riders. Neighborhoods were divided, she said. "The redistricting process is broken, and I believe we failed our students and our parents and our community. We could have done better." [16]

KNOWING RELIANCE ON SIGNIFICANT AMOUNTS OF FAULTY DATA IS ARBITRARY:

From the time Dr. Martirano released his recommended area adjustment plan on August 22, 2019 through the September public comment hearings and then the October and eventually November work sessions of the Appellee, the use of FARMS data – the percentage of Free and reduced meal eligible students in any given school or polygon - unfortunately loomed large in the adjustments negotiated and eventually adopted by Appellee. FARMS, in fact, unequivocally took the starring role. Appellee Member Wu summed it up well when he said, "We made a crisis by placing balance FARM rate as highest priority in this redistricting." *See HCBOE Video Minutes Nov. 21, 2019 at 5:52.*

While Appellant does not agree whatsoever that FARMS rates should have held such a prominent role in the redistricting process for reasons stated otherwise herein, if the Appellee was bound and determined to rely upon FARMS data as the primary data driver of the adjustments, then they had a responsibility to refrain from knowingly making their decisions on significantly flawed data. They did not.

On Nov. 21, 2019, **prior** to the official votes taking place, it became abundantly clear to the Appellee members, and all those watching, that this FARM data set that they had used to take apart and put back together Howard County's school attendance area like a misshapen jigsaw puzzle, was, in reality, completely and substantially ***wrong*** - not slightly skewed, not mildly flawed, but plain old wrong. The Appellee had used reduction of FARMS rates by 5-10% in high FARMS rate schools as the yardstick by which success was measured. However, it became abundantly clear shortly into the Nov. 21 meeting that numerous schools' FARMS rates had inexplicably changed by up to 7% on the data set handed to the Board Members prior to the final voting was to commence. In other words, Appellee may have relied upon a particular school's FARM rate at 40% when they started the process and upon which they took their votes on

[16] D. St. George, *Controversial Redistricting plan Adopted in Maryland School System*, washingtonpost.com

November 18, 2019. But then, on the night of the official vote, before voting started, the Board members were handed updated data and that same school may be now **STARTING** with a FARMS rate at 33% - **before** any adjustments to its attendance area are made. *See HCBOE Nov. 21, 2019 Video Minutes 3:39 -4:06.*

Appellee Board members knew they were about to vote on moves for numerous schools throughout the system – and now they knew that they had made those adjustments on significantly faulty data. They spent 37 minutes discussing the problem – but then went ahead and commenced cementing in the adjustments made on undeniably, significantly, flawed data.. *Id. at 4:06.*

In the case of *Dipti Shah, et al.* v. *Howard County Board Of Education*, Op. No. 02-30 (2002), Appellant Shah made the argument that the HCBOE had improperly relied upon flawed data and therefore their decision was arbitrary. The State Board in that case affirmed for the local Board because the local Board did not knowingly use flawed data, the flaws were not significant and, in fact, "the flaws in the Superintendent's data were pointed out by citizens and **corrected** before the BOE's plan was adopted." *Shah* at 18. **Emphasis added.** However, the *Shah* opinion made this significant point, "[T] he claim [is] that the BOE made some of its assumptions based on incorrect data. This claim assumes that a decision based on some data that is inaccurate would be arbitrary or unreasonable. **That may be true if the data relied upon was known to be incorrect and substantial portions of it were inaccurate."** *Shah at 17.* In the *Shah* case, the BOE had "the latest and most accurate data available" in order to make its decisions on January 24, 2002. *Id. at 18.* But we know that is not the case in the current redistricting. Every adjustment voted upon on November 21, 2019 was set at the November 18, 2019 meeting and each adjustment set at the November 18, 2019 meeting was determined based upon the earlier, deeply flawed data set. **No** changes were made to the plan set on November 18, 2019 in the final motions and votes taken on November 21, 2019 – despite the unequivocal knowledge of the Appellee on November 21, 2019 that all of the adjustments to be enacted were predicated, as their primary priority, on significantly and deeply flawed FARM data. The votes taken on November 21, 2019 cannot be seen as anything but arbitrary, by definition. They must be overturned.

IMPROPER USE OF RACIAL CLASSIFICATION IN SCHOOL ASSIGNMENT:
"It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved In Community Schools v. Seattle School District No. 1,* 551 U.S. 701, 720, 127 S.Ct. 2738 (2007). "[R]acial classifications are simply too pernicious to permits any but the most exact connection between justification and classification." *Parents Involved* at 720, *quoting Gratz v. Bollinger*, 539 U.S. 244, 270, 123 S. Ct. 2411 (2003).

In deciding *Parents Involved*, the Supreme Court found it was unconstitutional for school districts to assign students solely based upon their race. In applying the strict scrutiny test, a test applied in cases where governmental action uses individual classifications of race as a basis of decision making, the Court determined that the school assignment plans of the two challenged school districts therein, failed to meet the high standards of the strict scrutiny test. *Parents Involved* was a split decision however, on the first and second prongs of the strict scrutiny test. The first prong, the "Compelling State Interest" prong, requires the governmental actor to justify that the

use of racial characteristics are for a compelling state interest. In *Parents Involved*, the Court, led by Justice Kennedy on this point, was satisfied that the Appellee school districts' interests in creating racially diverse schools met the first prong of the test. However, the second prong of the strict scrutiny test, the "Narrowly Tailored" prong, was not satisfied. Justice Kennedy joined Chief Justice Roberts and Justices Thomas, Alito and Scalia to find that the second prong was not satisfied and thus the assignment plans were unconstitutional.

Specifically, the Roberts' Court found that Appellees' actions were not narrowly tailored to achieve the compelling state interest. *Parents Involved,* 551 U.S. at 726. The Court held that the Appellee school districts failed to demonstrate that their racially based redistricting plans were capable of actually meeting the stated "educational and societal benefits;" rather, they were designed to merely mirror the overall demographics of the individual school systems. *Id.* at 726-27. Most importantly for the instant appeal, the Court found that the districts "failed to show they considered methods other than explicit racial classifications to achieve their goals." *Id.* at 735. "[N]arrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives. '" *Id.* In the instant matter, the HCBOE, and its financial overlords,[17] the Howard County Council, made it clear from the start that the real objective here was to racially "desegregate" HCPSS and to use the school redistricting process to do so. The Appellee blatantly used FARMS rates – the rate of children living in any given HCPSS polygon that were eligible for the federal Free and Reduced Meals program administered by HCPSS – as a thinly veiled, unconstitutional proxy for race. The first winds any in the Howard County community caught of this intended scheme was a press release from three members of the Howard County Council titled "Councilmembers Mercer Rigby, Jones and Jung Call on Howard County Public School System to Develop Integration Plan" on August 13, 2019. *See* ***Exhibit 9***. "Howard County Councilmembers.....will introduce a council resolution in September calling on the HCPSS to develop a county-wide integration plan to desegregate schools." *See* ***Exhibit 9***. The Press Release was timed to be released while HCPSS Superintendent, Dr. Michael Martirano was meeting with Councilman Jones – one of the resolution's sponsors. This was just days before Dr. Martirano was to present his redistricting plan to the Appellees.

Numerous statements thereafter by public officials on both the County Council and

---

[17] It is well documented that HCPSS is chronically underfunded by the Howard County Council and has been for some time. ("[BOE] members including Vaillancourt and Christina Delmont-Small stated that they felt this year's budget woes were symptomatic of a larger problem in the county that the school system is chronically underfunded." https://www.baltimoresun.com/maryland/howard/columbia/ph-ho-cf-school-budget-0308-story.html) In this school year, the Appellee was required to cut over 90 para educator positions. https://www.hcpss.org/f/aboutus/budget/fy20/2020-board-approved-operating-budget-revised.pdf, FY20 budget at page 15 (141.1 Teacher and para-educator position cuts included 73.0 para-educators, 15.0 Teacher Pool positions, 20.2 Instructional Technology Teachers, and 33.2 Math, Reading and Math Instructional Support Teachers). The HCPSS's Comprehensive Annual Financial Report for Fiscal Year End June 30, 2019 contains a modified adverse opinion from its auditors due to over $39.2 million deficit in its healthcare fund. https://www.hcpss.org/about-us/budgets/health-fund/ In addition, two critical capital planning projects remain unfunded, the renovation and expansion of Hammond High School and the replacement of Talbott Springs Elementary School- both schools subject to unsanitary conditions such as mold and vermin. https://www.msn.com/en-us/news/us/hammond-high-talbott-springs-elementary-construction-projects-are-back-on-the-table/ar-BBY7dZd

BOE, indicated that this redistricting was really about racially "desegregating" HCPSS schools – schools that have been held up as a model of diversity in Maryland and throughout the United States. "As Chair of the Howard County Board of Education, capable of casting only one vote, I support this resolution that focuses on the socioeconomic and **racial desegregation** of Howard County Public Schools." Mavis Ellis. ***Exhibit 9. Emphasis added.*** In discussing a feeder plan put forth by fellow BOE Member, Christina Delmont Small, Appellee Member Sabina Taj responded: "This would be a beautiful thing if we didn't have a history of slavery, of segregation, of 12 years to take desegregating schools, ... If we had housing policies that didn't include redlining... And to permanently imbed a segregated structure unless there is some way not to do that would be unconscionable." *HCBOE Video Minutes, November 5, 2019 at 0:44.*

But how do FARMS rate connect to race and where would the Appellees even get the idea to use FARMS as such a proxy? The answer resides in a document written and presented by General Counsel for HCPSS, Mark Blom. In March 2019, Mark Blom presented a document he titled *"A Legal Roadmap from Desegregation to Diversity in America's Public Schools – Take a 4-wheel drive, it's going to be a bumpy ride"* to the Appellees. In that document, Mr. Blom provides the legal history of school desegregation jurisprudence and the recent developments in that area of law over the last 20 years since mandatory student desegregation busing orders from Federal Courts were terminated. *See* ***Exhibit 10***. On Page 19 of Mr. Blom's Report, he details what other "Trailblazing School Boards" across the U.S. have instituted, including: "Redistricting or Boundary Line Adjustments. The school board determines student attendance zones using socio-economic criteria (typically measured by FARM eligibility) or **race** along with other educational or financial factors." *Id. at pg. 20.* ***Emphasis added.*** And "Use of Socio-economic Status. The school board uses a family's socio-economic status as criteria in a student assignment policy. Typically the family's eligibility for FARMS is used." *Id.*

Lest there be any question of the message Mr. Blom was exhorting to the BOE – desegregation via socio-economic status ("SES") as a thinly veiled proxy for race – Mr. Blom provided examples of how other school districts have successfully used SES to pursue "racial integration." *Id. at 21.* In discussing the example of Cambridge Massachusetts Public School, Mr. Blom stated: "The district's switch from **race** to socio-economic status did not hamper its pursuit of **racial integration**. In 2001-02, the last year the district used **race** as the **primary desegregation factor**, 66% of the elementary and middle school students attended a **racially balanced** school. In 2011-12, using socio-economic status instead, the percentage had climbed to 84%." *Id. at 20-21.* ***Emphasis added.*** Or when describing Champaign (Illinois) Community Unit School District 4, "it used race as a criterion for achieving diversity. In 2009, in response to the Supreme Court's decision in *Parents Involved,* Champaign substituted socio-economic status as the diversity indicator, determined by a family's eligibility for FARMS." *Id.*

> Imperatively, when recommending how to proceed, Mr. Blom states: "The use of terminology is very important, as citizens (and potential plaintiffs) are watching and recording the school board proceedings. The term "**racial balancing**" should not be used. ...

> Consider using socio-economic indicators instead of race... If redistricting is used to achieve diversity, develop redistricting plans using **race-neutral** criteria, and then among those proposals select a plan that best achieves diversity. Race neutral criteria include general educational considerations, financial factors such as transportation costs, building utilization, feeds between school levels, neighborhood continuity, natural geographic boundaries, etc. Diversity factors such as socio-economic status, race, educational attainment of parents, disability status, English as a second language, etc. may be added as considerations." *Id at 24.* ***Emphasis added.***

Unfortunately, the Appellee was not listening carefully to all Mr. Blom had to say. He clearly advised the Appellee to use "race neutral criteria" to develop any plans, and only then would "diversity factors" such as SES be appropriate to be "added"– as second tier considerations. *Id*

As was apparent to all those observers Mr. Blom was concerned about, the **race neutral** criteria that were supposed to comprise the foundation of the HCBOE's plan were consistently and deliberately subordinated to a second tier consideration meant to ***enhance*** but not drive the overall diversity of the redistricting plan. As best expressed by BOE Member Chao Wu – a member who voted in the majority for the vast majority of the adjustments made, "We made a crisis by placing FARM rate as highest priority in this redistricting." *HCBOE Video Minutes November 21, 2019 at 5:52.*

While the Appellant does not fault HCPSS for desiring a diverse learning environment, as stated above, deliberate use of racial classifications in school assignment, and in this case, thinly veiled proxies for racial classifications, is not acceptable and instead, blatantly unconstitutional. When describing their decision in *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325 (2003) in *Parents Involved,* the Court noted, "[T]he use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be 'patently unconstitutional.'" *Parents Involved* at 723 *citing and quoting Grutter*, at 330. The Court proscribed the idea of viewing diversity through the lens of "white/nonwhite... and black/'other' terms." *Id. at 723.* Indeed, relying upon "racial classifications in a 'non-individualized, mechanical' way" was soundly rejected. *Parents Involved at 723.*

Lastly, Appellant asserts that independent analysis of the units moved in this matter, HCPSS's polygons, show that the redistricting using FARMS rates was anything but a race neutral exercise in obtaining diversity. *See* ***Exhibit 11.*** Dr. Hotopp found that members of certain racial groups – African-Americans and Caucasians - were far more burdened in this redistricting than were other significant racial groups in Howard County such as Asians and Latinos. ***Exhibit 11.*** One would expect that the adjustments made throughout the plan would affect various identifiable racial groups relatively proportionately. Hotopp's findings indicate that this is not the case. As an African-American, Appellants child is included in those children disproportionately affected by this deliberate governmental action seeking to use race to redistribute children in the HCPSS. Appellant's child is of a protected class, and thus heightened scrutiny must be applied herein. Appellees must show that they took a narrowly tailored path with race

neutral tools used to achieve their diversity goal, or otherwise that such tools were not available or effective. There is no record to suggest that this was the case. The Appellee's redistricting plan offends the protections enshrined in the Equal Protection Clause, is unconstitutional, and must therefore fall.

RELIEF SOUGHT:

Appellant seeks to have redistricting adjustments made by the Appellee declared illegal pursuant to COMAR 13A.01.05.06 as an unconstitutional violation of Equal Protection and Due Process resulting from unlawful procedure, as affected by other error of law, 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:

Lorraine Lawrence-Whittaker

Mary R. Poteat, Attorney at Law
LAWRENCE WHITTAKER, PC
5300 Dorsey Hall Drive, Suite 100
Ellicott City, MD 21042
(410)997-4100
LLW@LWTrialTeam.com
MRP@LWTrialTeam.com

Declaración jurada

Yo, Marta Alarcón, juro bajo lapena de perjurio y por el conocimiento personal que lo siguiente es verdaderoy correcto:

1. Mi nombre es Marta Alarcón. Tengo más de 18 años de edad y soy el padre y tutor legal de . Soy residente del Condado de Howard, Maryland, soy competente para testificar, y tengo conocimiento personal de los hechos y asuntos aquí expuestos.
2. Hablo muy poco inglés y español se habla exclusivamente en mi casa.
3. Mi familia vive en en Columbia, MD, me dijeron y creo que mi familia se encuentra dentro del Polígono 1142.
4. Mi hijo está actualmente un estudiante de 4 grados inscrito en la Escuela Primaria Longfellow en el Sistema HCPSS.
5. Desconocía por completo el proceso de redistritación hasta el domingo 14 de diciembre de 2019.
6. Nadie de la escuela me informó que mi hijo estaba en peligro de ser reubicado en una nueva escuela.
7. No me dieron cuenta de la redistritación o de las sesiones de aportes de la comunidad hasta el 14 de diciembre de 2019.
8. No estaba al tanto de la reunión de la Junta para discutir la redistritación.
9. Nadie en la escuela me notificó que mi hijo podía permanecer en Longfellow por quinto grado porque tenía una exención automática.
10. Para cuando me enteré de una exención, ya era demasiado tarde y no sabía cómo hacerlo.
11. No tengo correo electrónico y no uso el correo electrónico.
12. Aprendí acerca de la redistritación escolar de mi vecino.
13. Mi hijo no trajo a casa una notificación sobre la redistritación de la escuela.
14. Quiero que mi hijo se quede en su escuela actual durante su último año de escuela primaria.

Marta Alarcón

Marta Alacaon

12-23-19

Fecha

Affidavit

I, Marta Alarcon, swear under the penalty of perjury and upon personal knowledge that the following is true and correct:

1. My name is Marta Alarcon. I am over 18 years of age and am the parent and legal guardian of . I am a resident of Howard County, Maryland, I am competent to testify, and have personal knowledge of the facts and matters set forth herein.
2. I speak very little English and Spanish is spoken exclusively in my home.
3. My family lives on in Columbia, MD, I was told and I believe my family is located within Polygon 1142.
4. My child is currently a 4th grader enrolled at Longfellow Elementary School in the HCPSS System.
5. I was completely unaware of the redistricting process until Sunday, December 14, 2019.
6. No one from the school informed me that my child was in danger of being relocated to a new school.
7. I was not made aware of the redistricting or the community input sessions until December 14, 2019.
8. I was not aware of the Board meeting to discuss redistricting.
9. I was not notified by anyone at the school that my child could stay at Longfellow for 5th grade because he had an automatic exemption.
10. By the time I found out about an exemption, it was already too late and I didn't know how to do it.
11. I do not have email and I do not use email.
12. I learned about the school redistricting from my neighbor.
13. My child did not bring home a notification about redistricting from school.
14. I want my child to stay at his current school for his last year of elementary school.

Marta Alarcon
Marta Alacaon

12-23-19
Date