Dec. 23, 2019

Request for Review

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

Appellant: Avinash Dewani
Polygon 276

COMES NOW Appellant, Avinash Dewani, by and through her attorneys, Lorraine Lawrence-Whittaker and Mary R. Poteat, and **Lawrence Whittaker, PC**, and hereby files this appeal, and requests that the Maryland State Baord 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 News* email dated June 4, 2019. Community input commenced and overwhelmingly respondents to the HCPSS conducted Adjustment Area survey categorized keeping feeds of students together to be the primary concern[2] (65.95% of responses); followed closely by maintaining communities or neighborhoods[3] (59.59% of responses) and transportation considerations[4] (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 7Attached hereto as

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

[3] Ranked amongst the highest priority at 3 of 4 community input sessions.

[4] Ranked higher by remote communities.

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 to the operative **Q5**[5] inquiry,[6] 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. [7]
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.[8]
3. Plan ahead for the High School #13 redistricting by minimizing double moves as much as possible. [9]

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 as **Exhibit 2**. 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. Although the Redistricting plan utilizes FARMs data to redistribute the polygons for the schools, the document includes the racial and ethnic demographics of each school before and after implementing the plan. 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 ensued about criteria to be used, goals to be considered and how success was to 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

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[5] **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.

[6] 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.

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

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

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

opportunity for oral testimony had long passed, the board eventually settled on a combination of plans introduced by Board members – 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 ranked most important by survey respondents were given priority by the final plan. Finally, the plan, as approved in a controversial[10] 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 exceptions. Appellant Dewani is the father of two boys, one with significant learning differences who is a fourth grader, and a boy who is a kindergartner. They reside in polygon 276 in the neighborhood. Of significance, while Appellant's fourth grader is eligible for exemption both as a rising 5th grader, but also for his IEP, his younger brother, while still only a kindergartner, has proved to be a critical help to his older brother in his schooling. The younger brother does not qualify for an exemption and he will be moved to Running Brook Elementary School for the next and future school years. Both boys will suffer. The moves identified herein were late in the process, after the live public comment period had ended, and without sufficient notice to parents of children in polygons 148, 276 and 302.

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.01.05.05A; *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 parents of Howard County, bares no rational relationship to the stated objectives and purpose of redistricting; ignored the

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

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 other similarly 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, 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 shifts 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).

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.[11]

Decisions made in complete absence of notice to those adversely affected are unconstitutional. Appellant, who is of Indian descent, a racial minority is a member of a constitutionally-protected class, lives within the area designated as Polygon 276 which currently attends Northfield Elementary School. Appellant received no appreciable notice that redistricting was even being considered as his polygon was not thrown into the mix until later October, 2019, after all of the public comment sessions had finished.. There was no chatter at the bus stop or discussion for parents such as Appellant, because his children were not in a polygon that was in the redistricting mix, until almost the very end of the process. It was not until October 28, barely three weeks before the final vote, that Appellants' polygon was first even considered for movement. This was well after the public input sessions were completed on October 15, 2019 leaving Appellant no opportunity to testify before the Board, and only shortly before all opportunity for comments evaporated.

VIOLATION INFECTED THE ENTIRE REDISTRICTING PROCESS

Arguably, the same violation infected the process for all late notified parents -- 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. 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 para-educators; after-school tutoring; and special interventions (including extra reading assistance, counseling, weekend meals and free medical care at their schools) which they relied upon were not considered for the late notified families. These families 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

[11] 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 1, attached.*

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.)

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." [12]

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,[13] the

[12] Appellees Video Minutes, Nov. 21, 2019 at 5:49.

[13] 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."

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 3***. "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 3***. 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 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 3 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 4***. 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

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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

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 5***. 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 5***. 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. Appellant's children, however are 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.

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." *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. <u>They did not</u>.

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 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.

OPEN MEETINGS ACT AND PROCEDURAL VIOLATIONS

The Maryland Open Meetings Act, commonly referred to as the "OMA" or the "Sunshine Law," is found in the General Provisions Article of the Maryland Annotated Code at §3-101 through 3-501. As a legislative unit of our government, the Howard County Public School System Board of Education (HCBOE) is subject to the OMA and fully aware of its obligations pursuant to the OMA. The OMA requires a member of the governmental body be designated and take OMA training before it can meet in a closed session; the designated person must be present in order to close a session or the public body must complete an OMA compliance checklist that is to be included in the minutes of the meeting. Gen. Prov. Art. §3-213. *See also*

Frazier v. McCarron, No. 4 Sept. Term 2019 (MD COA, Nov. 20, 2019) at Slip opinion pg. 19. "The clear policy of the Open Meetings Act is to allow the general public to view the entire deliberative process." *CLUB v. City Board of Elections*, 832 A.2d 804, 810 (2003). Although a governmental body such as the HCBOE may meet in closed, executive session, it is highly restricted in doing so. A public legislative body in Maryland may only close a meeting to the public to conduct business related to the items listed in §3-305(b) of the General Provisions Article. *See* ***Exhibit 5*** *and Frazier v. McCarron,* No. 4 Sept. Term 2019 (MD COA Nov. 20, 2019) at 14. Unless the business is of a subject listed therein, the body is prohibited from closing its session and hiding its deliberations from the public. *Frazier* at 14.

In order to meet in closed session, any such legislative body must follow a specific procedure dictated by General Prov. Art. §3-302 Notice, and §3-302.1 Availability of Agenda to Public as well as §3-305(d). Before meeting in either open or closed session the public body must give "reasonable advance notice" to the public. Gen. Prov. §3-302(a). "Observation by citizens is possible only when they have notice that such deliberations are planned by their elected representatives." *Club*, at 811. It should be in writing and include notice of that all or part of the session may be "conducted in closed session." §3-302(b)(3). The body shall make available, in advance, an agenda, which includes whether the body expects to close any portion of the session. Gen. Prov. Art. §3-302.1(a)(1)(ii). Before closing a session, the body must conduct a recorded vote on closing the session, the vote must pass by a majority of the members present and the presiding officer must make a written statement as to the reason for closing the session, including citation to the authority under Gen. Prov. §3-305 for doing so. Gen. Prov. Art. §3-305(d). *See also Frazier* at 14.

On November 21, 2019 as the Appellee, was conducting its open session to make its formal votes for redistricting sections of the County to new schools and shortly after starting the voting process at the elementary school level, the Appellee brazenly violated the OMA in numerous ways, and thus engaged in illegal acts in violation of Gen. Prov. Arts. §3-301, 3-302 and 3-305. Appellee's meetings are subject to Robert's Rules of Order. *See* ***Exhibit 6.*** Appellee also violated its Rules of Order, conducting the meeting in violation of Robert's Rules of Order and thus its decisions resulted from unlawful procedure. On November 21, 2019 Jennifer Mallo, member of the Appellee's board, introduced a motion to move Polygons 1132, 132 and 32 from Clemens Crossing Elementary School to Bryant Woods Elementary School. See *Video Minutes of Appellee, November 21, 2019 at 4:09.* The motion was seconded by Chairwoman Mavis Ellis. *Id. at 4:10.* A vote was conducted by Administrator Kathleen Hanks and failed, with members Vicky Cutroneo, Kristen Coombs, Chao Wu and Christine Delmont-Small residing in the majority, voting no. *Id. at 4:11.* In what can only be termed as lightning fast speed, Ms. Mallo immediately introduced a motion to recess to "consider the impacts of the failure of that last motion." *Id. at 4:11.* Ms. Mallo clearly announced on the record the intention of the "recess" was to consider the failure of the previous motion and its impact – signaling to the other Board members, the intended purpose was to confer in closed session. It was immediately seconded by Sabina Taj. *Id.* Chairperson Ellis then announced that the board was going into recess. *Id.* Member Wu ask if a vote was necessary, upon which Ms. Mallo and Chairwoman Ellis both stated "No." *Id.* Ms. Ellis, and Ms. Coombs quickly left the dais, followed by the other Board members shortly thereafter. *Id.* By the admission of Chairperson Ellis, via statement read into the record at the December 17, 2019 Board meeting, the Appellee met in violation of the OMA to discuss the failed vote and how it would affect the rest of the elementary school moves as they were all "interwoven and interdependent." HCBOE *Video Minutes December 17, 2019 at 1:10.*

Approximately four minutes after leaving the dais on November 21, 2019, all of the Board members returned and a visibly shaken and crying Kristen Coombs, made a motion to reconsider the failed motion.[14] *Id. at 4:15.* It was seconded by Ms. Taj. *Id.* Ms. Coombs then stated "Because otherwise the entire plan falls apart" as she continued to cry on the dais. *Id.* The motion for reconsideration was approved, 4-3, with Mallo, Coombs, Ellis and Taj in the majority and the Appellee continued on to revote on the Polygon 1132, 132, and 32 moves as previously described – the motion was passed with the same majority. *Id. at 4:16.*

Maryland takes violations of the OMA extremely seriously, as most recently affirmed by the Court of Appeals in the *Frazier* case: "The legal issues presented emanate from Subtitles 3 and 4 of OMA. Subtitle 3 states the 'thou shalts' and the 'though shalt nots.' They are **not mere guidelines** for public bodies. They are couched in **mandatory** language and, indeed, would hardly implement the legislative policy expressed in §3-102 if not so expressed." *Frazier* at 14. ***Emphasis added.*** "Violations of those mandates are not 'technical' in nature; nor are they **ever** harmless. ... Conduct that has a demeaning effect can be contagious and **cannot be** considered **harmless**. It strikes at the **core** of our democracy – the right and power of the citizens to control their government – even if harm is not immediately perceptible." *Id.* at 14. ***Emphasis added.*** There is no doubt that the Appellee violated the OMA during the November 21, 2019 voting session by deliberating on a subject not exempted from the requirement to meet in public pursuant to the OMA. The Appellee has expressly admitted it: "[T]he Board publicly acknowledges and corrects what appears to us to be a violation of the Open Meetings Act..." *HCBOE Video Minutes December 17, 2019 at 1:10.* However, the Appellee has only broadly recognized its violation with regard to the closed meeting conducted after the Board members left the dais that evening. The Appellee also violated the OMA in its failure to properly notify the public that a closed session may occur in violation of §3-302(b)(3) of the act. Further, in order to close a session to the public, the Board must take a vote that passes via a majority of the members present to close the session and it must document the reason for the closed session including the authority to do so under §3-305 of the act and a listing of topics to be discussed. Gen. Prov. Art. §3-305(d). None of these procedures were followed. This amounts to five (5) **separate violations of the act**. It wasn't as if one of the Board members didn't try to hit the brakes – Dr. Wu asked "De we need to vote?" But the desperate need to get behind closed doors to pressure Coombs was driving the bus by that point with all law and procedure were thrown aside due to the threat Mallo and Ellis perceived to their carefully crafted plan to force unnecessarily broad redistricting. Significantly, these violations came very early in the voting session for redistricting moves, during the first block of schools to be voted upon – elementary schools. Appellee, by the extemporaneous statement of Coombs as she brought the motion for reconsideration ("Because otherwise the entire plan falls apart") and by Chairperson Ellis when she read her statement into the record on December 17, 2019, ("Each adjustment had an interdependency that was interwoven" and "Impact of the vote went beyond just Clemens Crossing due to the interdependency of the West Columbia Elementary Schools." Ellis, *Id.*), admits that the failure of that one vote was inextricably intertwined with the remainder of the elementary school moves, both before and after the vote, and, in fact, the entire plan through each school level.

[14] That Ms. Coombs made the motion to reconsider is based upon the minutes of the Board and statements of Kathleen Hanks, the Board Administrator. The official video minutes of this meeting do not include MS. Coombs' Motion to Reconsider.

As is clear from the Appellee's own statements, the OMA was violated. All actions taken in violation of applicable law are illegal, and thus their votes on all of the redistricting adjustments must be declared void. As all of the adjustments were "interwoven and interdependent", the violations of the OMA did not just taint the few Polygon moves that were the subject of that particular motion; the violations fatally poisoned the roots, trunk, bark, branches and leaves of the redistricting tree *in toto*. This was a fully integrated plan from elementary schools to middle schools and then to high schools – and all of it was infected by the blatant violations of the Appellee in violating the act. Of major concern during any redistricting is the issue of "feeds." Feeds are comprised of the amount of students progressing from one level of schooling at a particular school to the next higher level of schooling at a particular school; *i.e.* which elementary schools "feed" into which middle schools, etc. Because each and every elementary school involved in the redistricting was infected by the OMA violations by the Board's own admissions, every school to which those elementary schools feed were also affected and likewise for the high schools to which the middle schools feed. To close observers of the process, it was clear that it wasn't just the elementary school plan that would now fall apart with the failed motion. The middle school and high school portion of the plan would have also fallen apart because all of the feeds would be disturbed, and in some cases, decimated, leaving capacity utilization at numerous schools wildly and somewhat unpredictably outside the bounds necessary to allow the schools to function. This one failed elementary school vote threw every part of the redistricting "plan" into chaos. Thus, the stakes for bringing Ms. Coombs back into line quickly came into focus for the plan proponents. That focus rapidly progressed into unlawful, illegal, backroom pressure to get Ms. Coombs to change her vote – pressure exercised **knowingly** and **deliberately** outside public view – all of it in violation of Maryland Law and the public's trust.

It must not ever be forgotten that this misbegotten episode found its genesis cradled also in unlawful procedure. Robert's Rules, the procedural rules adopted by the Appellee and therefore its binding rules of order, hold that any motion for recess must be voted upon. See **Exhibit 5** at 69. When Ms. Mallo moved to recess for the unlawful purpose of pressuring Ms. Coombs to change her vote on the failed motion, Member Wu asked, correctly, about the need for a vote. Both Mallo and Ellis stated "No" and then briskly left the meeting room. COMAR 13A.01.05.06 (C) Standard of Review, states that a decision "may be illegal if it is one or more of the following: ... (4) Results from unlawful procedure .... (6) is affected by any other error of law". The votes to redistrict the Howard County Public School System taken on November 21, 2019 to redistrict, are, in their totality, illegal, as they resulted from unlawful procedure and frankly, way beyond just error of law – blatant violations of law as enumerated herein. The failure to abide by the Appellee's rules of procedure, which are meant, at least in part, for the protection of the public, was another distinct unlawful procedure. The Appellee's attempt to correct the illegal vote by ratification on December 17, 2019 was ineffective and improper. Certain board members acknowledged on the record that the Appellee's statement regarding the secret meeting was misleading and inaccurate. The misleading and inaccurate statement evidences the fact that the Appellee willfully violated the Act.

RELIEF REQUESTED

Appellant seeks to have Appellee's Nov. 21, 2019 redistricting adjustments declared illegal pursuant to COMAR 13A.01.05.06 as unconstitutional, as 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

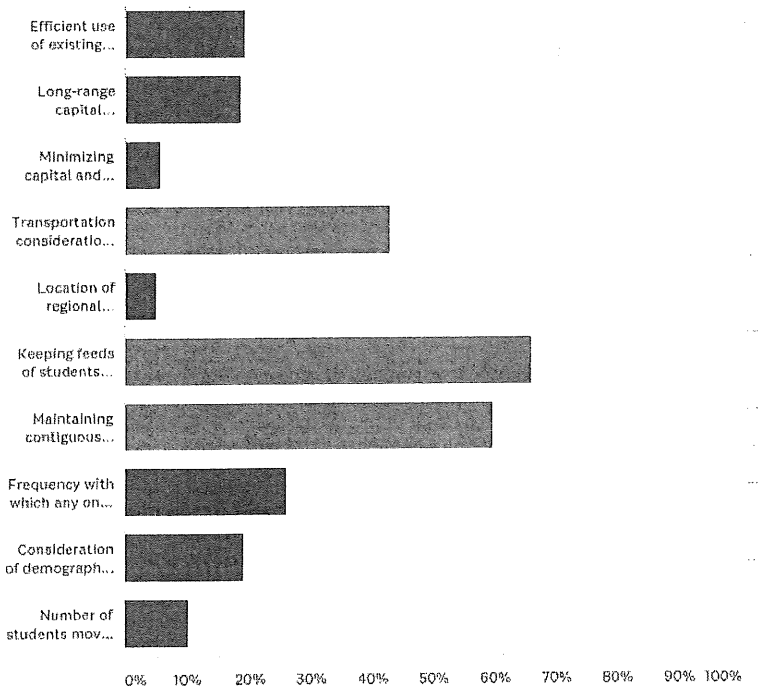
Attendance Area Boundary Review Survey

The online survey accepted feedback from June 14 through August 1, and 2,176 responses were received. The majority of respondents prioritized limiting student travel times, maintaining walkable distances, and boundary continuity.

The charts below illustrates the responses to question five from the Attendance Area Boundary Review Survey. This question asked respondents to prioritize the criteria in Policy 6010. For more information on the Attendance Area Boundary Review Survey, see Appendix B.

Q5: The standards listed in Policy 6010 are shown below. Select up to three (3) of the standards you believe are MOST important for consideration during the Boundary Review Process.

Answered: 1,480 Skipped: 698



ANSWER CHOICES	RESPONSES	
Efficient use of existing seats (e.g. capacity utilization between 90% and 100%.) (Policy 6010 IV.B.1.a)	19.05%	282
Long-range capital projects (e.g. new school; additional seats; the building's hallways, cafeteria, septic capacity, ability to facilitate higher long-range enrollment) (Policy 6010 IV.B.1.b)	18.51%	274
Minimizing capital and operating costs (Policy 6010 IV.B.1.c)	5.68%	84
Transportation considerations (e.g. walkers, bus routes, etc.)(Policy 6010 IV.B.1.d)	42.64%	631
Location of regional programs, including placement or removal of programs, which may impact the school capacity/utilization (e.g. JROTC; Pre-K; Regional ALS) (Policy 6010 IV.B.1.e)	5.00%	74
Keeping feeds of students together from one school to the next (e.g. Larger groups of students moving together from ES to MS and MS to HS) (Policy 6010 IV.B.2.a)	65.95%	976
Maintaining contiguous communities or neighborhoods (Policy 6010 IV.B.2.b)	59.59%	882
Frequency with which any one student is reassigned (Policy 6010 IV.B.2.c)	25.88%	383
Consideration of demographic factors (e.g. Race/ethnic and socioeconomic composition of the school, academic performance, level of English learners) (Policy 6010 IV.3.a-d)	19.12%	283
Number of students moved achieves multiple Policy 6010 considerations. (Policy 6010 IV.B.3.e)	10.34%	153

Total Respondents: 1,480

EXHIBIT
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EXECUTIVE SUMMARY

This document contains comprehensive recommendations for elementary, middle, and high school attendance areas. Information collected through the public processes were considered in the development of the recommendations and can be found in the appendices .

The driving priorities for this process:

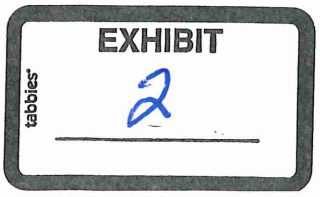
1. Balance capacity utilization among schools throughout HCPSS, cost effectively.
2. Advance equity by addressing the distribution of students participating in the Free and Reduced-price meals program (FARMs) across schools to the extent feasible.
3. Plan ahead for the High School #13 redistricting by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

The plan uses as guiding principles all of the priorities expressed by the Attendance Area Committee (AAC) and community members, consideration of Policy 6010 standards, including transportation times and costs, our fiscal obligations to our county through effective use of existing school resources, our desire to keep school boundaries contiguous, and maintain neighborhood schools and walkable distances for as many students as possible. This proposal differs significantly from the Feasibility Study recommendations and moves the District forward notably in balancing capacity utilization across schools. Howard County Public School System (HCPSS) could move even further toward parity when reviewing school boundaries prior to the opening of new High School #13.

This plan marks a turning point in how HCPSS looks at attendance area adjustments. Previous redistricting processes focused more narrowly on capacity utilization and other factors such as socio-economics took a back seat. This proposal is in alignment with the HCPSS Strategic Call to Action, leading with equity as the driver to provide all students with full access and opportunity to receive the best educational services and supports.

For SY 2020-21, this proposal moves more schools with target for utilization (90% - 110%) than if no changes were made. The number of elementary schools within in target would improve from 22 to 28, middle schools from 14 to 15 and high schools from six to ten. This provides a total improvement from 42 to 53 schools. The schools below target utilization (<90%) decrease from 11 to five and the schools above target (>110%) also decrease from 21 to 16. Additionally, the proposal advances equity by making progress in addressing FARM student distribution across many schools. Through this proposal, the number of elementary schools with FARM rates above 50 percent is cut in half from 12 to six and no elementary school will be above 55 percent. This plan brings all middle schools to under 46 percent FARMs and 11 closer to the county average. This plan brings high schools' FARM percentages from a high of 47 percent to below 43 percent and reduces the top three high schools by at least four percent. Ten high schools will move closer to the county average.

A final decision by the Board is scheduled on November 21, 2019, and would take effect at the star of the 2020-21 school year.



NEWS RELEASE

HOWARD COUNTY COUNCIL

EXHIBIT
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FOR IMMEDIATE RELEASE:
Contact: Felix Facchine, 410-313-2001
ffacchine@howardcountymd.gov

Councilmembers Mercer Rigby, Jones, and Jung Call on Howard County Public School System to Develop Integration Plan

Ellicott City, MD (August 13, 2019) – Howard County Councilmembers Christiana Mercer Rigby, Dr. Opel Jones, and Deb Jung will introduce a council resolution in September calling on the Howard County Public School System (HCPSS) to develop a county-wide integration plan to desegregate its schools. Currently, school district boundaries in Howard County are drawn in a manner that concentrate students participating in the Free and Reduced Meals program (FARMs) into certain elementary, middle, and high schools.

This socioeconomic and racial segregation in the school system is contributing to increasing achievement gaps and decreasing graduation rates for low-income students and students of color. Historic systems have created these achievements gaps and it is incumbent on the County to introduce new systems that foster necessary change.

"I'm extremely proud of this resolution because it recognizes the past and promotes a fair and balanced future for our Howard County Public School System students," said Dr. Jones. "We are working together to resolve the problematic and systematic inconsistencies that lower-income students face every day. This resolution helps to enhance, promote, and encourage a unified and socioeconomic blended education system for all."

"While we often claim to prioritize diversity and inclusion in Howard County, our school districts do not reflect the values of integration and community that we have built our county on," said Councilwoman Mercer Rigby. "For decades, Howard County public schools have become increasingly segregated by race and socioeconomic status. Redistricting is a civil rights issue here in Howard County, and it's time to take meaningful strides toward integration in our education system."

In the last three years alone, graduation rates for students participating in the FARM program have dropped from 83% to 78%, which is 17% lower than the graduation rates for non-FARM students. During the same time frame, FARM program students have become increasingly concentrated in the same elementary, middle, and high schools in Howard County. These disparities in student outcomes can be found in the Howard County Public School System's 2019 Feasibility Study and 2019 Equity Report presented to the Board of Education.

"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," said Mavis Ellis. "Many have called for equity, and it's the Board of Education's hard decisions that will make equity happen for all students in Howard County."

"There's a strength in diversity that benefits our community. Legislation and resolutions alone cannot solve socioeconomic challenges or promote true racial integration; however, they can provide platforms that allow us to correct past errors," said Candace Dodson-Reed, founder of the African American Community Roundtable of Howard County and education advocate. "I applaud Councilwoman Mercer Rigby's and Councilman Jones'

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

Mark C. Blom, Esquire
General Counsel
Howard County Public School System
March 2019

I. THE LEGAL TERRAIN

The United States Supreme Court in *Brown v. Board of Education*[1] ordered America's schools to journey to desegregation "with all deliberate speed." In the ensuing years, schools strolled towards desegregation,[2] but the pace picked up with the passage of the Civil Rights Act of 1964 and active desegregation enforcement by the United States Department of Justice. Schools became increasingly integrated thereafter, so that by 1988, 43% of black students attended majority white schools in the United States. Unfortunately, history reveals that 1988 was also the high water mark for public school integration. Segregation in the public schools began to resurface, and by 1996 integration levels were equal to that of the 1960's.[3]

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[1] 347 U.S. 483 (1954)

[2] " 'All deliberate speed' has turned into a soft euphemism for delay." *Alexander v. Holmes County Board of Education,* 396 U.S. 1218, 1219 (1969).

[3] Justice Breyer summarized America's journey to school integration in *Parents Involved in Community Schools v. Seattle School Dist.* No. 1, 551 U.S. 701, 805 (2007) (Breyer, J., dissenting): "Overall these efforts brought about considerable racial integration. More recently, however, progress has stalled. Between 1968 and 1980, the number of black children attending a school where minority children constituted more than half of the school fell from 77% to 63% in the Nation (from 81% to 57% in the South) but then reversed direction by the year 2000, rising from 63% to 72% in the Nation (from 57% to 69% in the South). Similarly, between 1968 and 1980, the number of black children attending schools that were more than 90% minority fell from 64% to 33% in the Nation (from 78% to 23% in the South), but that too reversed direction, rising by the year 2000 from 33% to 37% in the Nation (from 23% to 31% in the South). As of 2002, almost 2.4 million students, or over 5% of all public school enrollment, attended schools with a white population of less than 1%. Of these, 2.3 million were black and Latino students, and only 72,000 were white. Today, more than one in six black children attend a school that is 99–100% minority. *See*

The nation's U-turn on the road to public school integration presents significant school policy issues, as well as complex legal questions. The last 65 years have seen school systems, parents, and advocates struggle mightily to reach the state of integration envisioned in *Brown* ("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." *Brown Id.,* at 493). While on the road to desegregation, however, the legal and public policy destination changed. Broad-scale diversity in America's schools, not merely white/black racial desegregation, has become the contemporary legal litmus test, and the policy objective of many school boards.

The state of student racial segregation puts many school boards at a crossroads. School boards that stay the course in the face of racial segregation risk legal challenges. Alternatively, school boards can turn towards initiatives that increase racial integration. And risk legal challenges in doing so. School board attorneys can guide their school boards toward diversity (nee desegregation) using lawful policies and initiatives, but the journey is likely to be controversial and clamorous. The smoothest legal journey occurs, ultimately, when a community understands that diversity is not about getting people of different races in close proximity to one another. It's a mindset of shared personal beliefs that value diversity.

Appendix A, *infra.* In light of the evident risk of a return to school systems that are in fact (though not in law) resegregated, many school districts have felt a need to maintain or to extend their integration efforts." *See,* School Desegregation in 2017 – The Process of Achieving Unitary Status, Lindsay Anne Thompson, Esquire. *See also* The Problem We All Live With, Nikole Hannah-Jones.

II. THE LEGAL UNCERTAINTY OF STAYING THE COURSE

In the face of increasing racial segregation and ongoing racial disparities in educational outcomes, parents and advocates have been active and litigious.[4] Numerous lawsuits have been filed and legal action threatened as a means of addressing the rise in segregation and its educational impacts.

The state of New Jersey was sued in May 2018 in a complaint calling for the state-wide desegregation of its public schools. *Latino Action Network v. New Jersey.* Public schools in New Jersey are some of America's least integrated, even though the state's population is increasingly diverse. The lawsuit claims that about 66% of New Jersey's African American students and 62% of its Latino students attend schools that are more than 75% non-White. The lawsuit blames the lack of integration on residential segregation, and seeks the repeal of the state requirement that students attend the school district in which they reside. A retired state Supreme Court justice is leading the case on behalf of a coalition of plaintiffs.

In July 2018, the Minnesota Supreme Court gave the green light to a potentially potent desegregation lawsuit. In *Cruz-Gusman v. State of Minnesota*, No. A16-1265 (Minn. Jul. 25, 2018), parents sued the state of Minnesota alleging that the public schools in Minneapolis and St. Paul are segregated relative to surrounding school districts. The complaint alleges that:

1) Students are assigned and confined to schools that are separate and segregated;
2) Those schools are separate and unequal;
3) The state has engaged in, or permitted practices, that caused or contributed to the segregation.

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[4] *See How Do You Get Better Schools? Take the State to Court, More Advocates Say,* Goldstein, Dana, New York Times, August 21, 2018.

The case is particularly significant because the plaintiffs claim that these circumstances violate the Minnesota state constitution. More specifically, the plaintiffs allege that the racial and economic segregation caused by the State's practices violate the Education Clause, Due Process Clause, and Equal Practice Clause of the State's constitution. The State of Minnesota moved to dismiss the complaint on grounds on justiciability, claiming that the suit failed to state a cause of action. The Minnesota Supreme Court rejected that argument, permitting the case to go forward. In ruling that the alleged facts constitute a valid claim that the state constitution has been violated, the Court stated:

> It is self-evident that a segregated system of public schools is not "general," "uniform," "thorough," or "efficient." (Quoting the disjunctive requirements of the State's Education Clause). *Cruz-Gusman*, at No. A16-1265 (Minn. Jul 25, 2018), p.15, n. 6.

The Minnesota Court's finding that its state's constitutional provisions can provide a remedy for segregated schools may propel litigation in other states, especially the court's use of the Education Clause, since the state's Education Clause is similar to that of most states. The potential for parents to use the state Education Clause provision as a vehicle for desegregation suits may open up new routes for legal challenges in segregated locales, even while the U.S. Department of Education reduces its enforcement actions and courts more liberally release school districts from federal desegregation orders.

Disaggregated data on educational outcomes creates a potential potent predicate for litigation. Data demonstrating disparate results in areas such as achievement scores, student discipline, harassment complaints, and student arrests can serve as a basis for a legal challenge. In New York City, the City's Independent Budget Office issued a report in December 2017 concluding that the achievement gap between the races has been widening significantly in the city's

public schools. In Florida, the state chapter of the NAACP has threatened to sue the Lee County School Board due to racial disparities in student discipline. Nationwide, the U.S. Department of Education reports an increase in student racial harassment complaints in 2017 (up 25% from 2016), as it cuts back on the number of OCR investigators and adopts internal guidance narrowing the scope of its civil rights investigations. Education Week Research Center analyzed federal data and reported in 2017 that in 43 states and the District of Columbia African American students are arrested at school at disproportionally high rates.

This data is providing fuel for litigation. The Collier County public school system (Florida) was sued in 2016 by the Southern Poverty Law Center alleging discrimination against immigrant students. The Kern High School district in California settled a lawsuit in 2017 alleging that the district disproportionately disciplined minority students. In the 50-page settlement, the district agreed to adopt new discipline policies based on recommendations from experts on unconscious racial bias and to pay damages of approximately $100,000. The South Orange-Maplewood school district in New Jersey was sued in February 2018 by minority parents alleging that the school district was systematically depriving African-American students of access to challenging classes. The lawsuit also alleges that the school district sponsors de facto segregation throughout the district.

III. THE LEGAL UNCERTAINTY OF COURSE CORRECTIONS

While inaction in the presence of segregation and data reflecting disparities by race may invite litigation, so may action. For decades, school boards have pursued policies that promote diversity. "[M]yriad school districts operating in myriad circumstances have devised myriad plans, often with race-conscious elements, all for the sake of eradicating earlier school segregation, bringing about

integration, or preventing retrogression." *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 806 (2007) (Breyer, J., dissenting). The route has often been contentious and the legal outcome uncertain. The legal principles that apply to *voluntary* diversity efforts are markedly different than those that apply to actions taken to remedy the effects of *de jour* segregation. *See Swann v. Charlotte-Mecklenburg,* 402 U.S. 1 (1971). School boards pursuing voluntary diversity initiatives must often follow a route lacking adequate lighting and known guardrails.

The application of constitutional principles to voluntary governmental racial classifications leads to complex legal analysis. The use of race in school board policies is not exempt from this complexity. In its most relevant decision, *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007) ("*Parents Involved*"), the United States Supreme Court issued five opinions on the constitutionality of voluntary efforts by two school districts to use individualized racial classifications to achieve diversity. The result of these five opinions was a majority conclusion that the use race as a factor in determining a student's school assignment is unconstitutional.

In *Parents Involved,* the two school districts (the Seattle School District and the Jefferson County Public School District) relied "upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole." 551 U.S. at 710. The Seattle School District operated an open choice enrollment plan. If too many students chose the same school as their first choice, a series of tiebreakers were used to determine the students' school assignments. The second tiebreaker depended on the racial composition of the school and the race of the individual student. The Jefferson County Public Schools used a voluntary student assignment

plan, which required all nonmagnet schools to maintain an African-American enrollment of between 15 and 50 percent. Individual students were assigned, and permitted to transfer, to schools based on their race.

Each of the five opinions in *Parents Involved* held that the school boards' policy must pass the Equal Protection Clause's strict scrutiny test, but they differed on the application of the Clause and the outcome. To satisfy strict scrutiny, a governmental policy that uses race must pass a two-prong test: 1) the use of race must serve a compelling state interest, and 2) the use of race must be narrowly tailored to achieve that interest. Four of the nine Justices concluded that the school boards' goal of diversity did not qualify as a compelling state interest, and thus held the policies unconstitutional for that reason. Justice Kennedy wrote a separate opinion, holding that a school board's pursuit of diversity *is* a compelling state interest. He concluded, however, that the plans were not narrowly tailored, and thus were unconstitutional because they failed the second prong of the strict scrutiny test. Four Justices dissented, opining that the plans were constitutional, and stating explicitly that the pursuit of diversity in the K-12 arena of public education is a compelling state interest.

Justice Kennedy's concurrence is crucial because it formed a 5-vote majority opinion on the Court that achieving diversity and avoiding racial isolation serves a compelling state interest. Justice Kennedy's retirement from the Court, however, combined with constitutional views likely to be held by his successor, now casts some uncertainty as to future Court opinions on this subject. Those opinions are likely to be shaped by the move of Chief Justice John Roberts to the swing vote position, becoming in the forecast of University of Chicago law professor Justin Driver, "the least swinging swing justice in the post-World War II era.[5]

[5] *How Brett Kavanaugh Would Transform the Court*, The New York Times, Liptak, Adam, September 2, 2018.

A. A Detour to Strict Scrutiny - Caution Ahead

A school board policy touching on race must comply with the Equal Protection Clause of the Constitution, and will be judged by either the strict scrutiny test or rational basis test. Educational policies that utilize race typically fall into one of three categories, and the pertinent Equal Protection Clause test varies accordingly. Those categories are: individual racial classifications, race-conscious policies, and race-neutral initiatives.

When individual racial classifications are used, the strict scrutiny test applies. *Parents Involved.* Under strict scrutiny, a governmental policy is constitutional only if 1) it serves a compelling state interest, and 2) the use of individual racial classifications is narrowly tailored to achieve that interest. Individual racial classifications are present in a school board policy if a student's race becomes dispositive in its implementation.

1. The Compelling State Interest Prong of the Strict Scrutiny Test

In *Parents Involved,* five justices in separate opinions concluded that school boards have a compelling state interest in achieving racial diversity and avoiding racial isolation. The other four Justices held those interests not to be compelling, noting that the Court had only recognized diversity to be a compelling interest in the field of education in two circumstances. One is at the college and university level, and the other is when a public school system has been found to have engaged in *de jure* segregation in violation of the Constitution.

Justice Kennedy provided the fifth vote in *Parents Involved* to form a majority view that achieving racial diversity is a compelling interest of school boards. Given Justice Kennedy's retirement from the Supreme Court, it is worth noting that the Ninth Circuit Court of Appeals decision in *Parents Involved* (an en banc opinion) also found diversity to be a compelling state interest. Similarly, the

Sixth Circuit of Appeals, in its decision in the companion case of *McFarland v. Jefferson County*, found diversity to be a compelling interest in the field of public education. In addition, the First Circuit Court of Appeals has held diversity to be a compelling interest in the field of K-12 education. *Comfort v. Lynn School Committee,* 418 F. 3d 1 (1st Cir. 2005).

The decision of the First Circuit Court of Appeals in *Comfort* offers a prime example of a judicial conclusion that diversity serves a compelling state interest in the K-12 field of public education and, moreover, of the constitutionality of a race-conscious diversity plan. The city of Lynn had been experiencing racial segregation in its schools for some time due to residential housing patterns. The Lynn School Committee adopted a plan to sponsor ten magnet schools as a means of integrating the student body. Believing that the magnet school initiative by itself would be insufficient, the Lynn School Committee also adopted a student transfer policy in which race is a consideration. The transfer plan classifies every school by one of three categories: racially balanced, racially isolated, or racially imbalanced. A school is racially balanced if the percentage of non-white students falls within the range of the overall proportion of minorities in the district. A school is racially isolated if the school's non-white population falls below the racially balanced range. A racially imbalanced school exists when the non-white population is higher than the racially balanced range.

Under the Lynn school board's policy, every student is assigned to his or her neighborhood school. If a student seeks a transfer to another school, however, the race of the student and the racial category of the school is considered in approving or denying the transfer. For example, a white student would be permitted to transfer out of a racially isolated school and into a racially imbalanced school. A non-white student would be permitted to transfer out of a racially imbalanced school and into a racially isolated school. Transfers that would worsen

the racial imbalance in the sending or receiving school are denied. This policy treats students differently based on race, as illustrated by the following example. If a white student and a non-white student both attend a racially isolated school and each request a transfer to a school that is racially imbalanced, the white student's request would be approved, and the non-white student's request would be denied.

The Court of Appeals upheld the Lynn school board's plan. It applied the strict scrutiny test, and concluded that diversity in a K-12 public school system is a compelling state interest. The court noted, in fact, that the record provided a solid basis for concluding that there is a *stronger* interest in promoting diversity at the K-12 education level than at the college or university level. In its argument that promoting diversity is a compelling interest, the school board provided extensive expert testimony, which was relied on heavily by the District Court and the Court of Appeals. The court in *Comfort* also held that the school board's plan satisfied the narrowly tailored prong of strict scrutiny. The Court concluded that the effect on students was minimally invasive, because the plan applied to only voluntary transfers. Additionally, the school board amply demonstrated its compliance with the constitutional requirement to consider race-neutral alternatives, since the record reflected that the school board seriously considered six race-neutral alternatives and found them insufficient.

The Supreme Court has squarely recognized diversity as a compelling state interest in the field of higher education. In *Fisher v. University of Texas at Austin,* 136 S.Ct. 2198 (2016), a case concerning a race-conscious admission program at the University of Texas, the Court provided several reasons why promoting student diversity at a college or university serves a compelling state interest. The Court accepted the following as compelling interests: diversity promotes cross-racial understanding, helps to break down racial stereotypes, enables students to

better understand persons of different races, promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society. Those reasons seem equally applicable in a public school setting, and school boards should assert these interests and support them with expert educational opinion. The *Fisher* Opinion holding those interests to be compelling at the university level was written by Justice Kennedy, who similarly found diversity to be a compelling state interest in the field of K-12 education in *Parents Involved.*

2. The Narrowly Tailored Prong of the Strict Scrutiny Test

The Supreme Court utilized a 4-part test to determine whether the narrowly tailored prong was satisfied in two key cases analyzing race-conscious college admission programs. *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). First, a race conscious program cannot utilize a quota system. Second, the plan cannot "unduly harm members of any racial group." *Grutter*, *Id* at 341. Third, the government must consider and use any workable, race-neutral alternatives. Fourth, the use of race must be limited in time. In *Grutter*, the Court stated that the time limitation element can be satisfied by "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Grutter*, *Id* at 342.

The obligation to consider race-neutral alternatives is perhaps the hardest of the four requirements to satisfy, because the Court engages in a critical analysis of adopted plans. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). In determining if a plan is narrowly tailored, courts do not defer to the judgment of educators. *Fisher.* While narrow tailoring does not require the exhaustion of every conceivable race-neutral alternative, it does require that a

school board demonstrate that race-neutral alternatives are either unavailable or unworkable. *Fisher*. In *Parents Involved*, Justice Kennedy concluded that the school districts had not shown their plans to be narrowly tailored because he found the plans to be only generally worded, resulting in uncertainty in how the plan would be implemented and students impacted. Justice Kennedy's Opinion demonstrates that providing the court with specific plan details is imperative to satisfying the narrowly tailored prong:

> The discrepancy identified is not some simple and straightforward error that touches only upon the peripheries of the district's use of individual racial classifications. To the contrary, Jefferson County in its briefing has explained how and when it employs these classifications only in terms so broad and imprecise that they cannot withstand strict scrutiny. See, *e.g.*, Brief for Respondents in No. 05–915, at 4–10. While it acknowledges that racial classifications are used to make certain assignment decisions, it fails to make clear, for example, who makes the decisions; what if any oversight is employed; the precise circumstances in which an assignment decision will or will not be made on the basis of race; or how it is determined which of two similarly situated children will be subjected to a given race-based decision. *See ibid.; see* also App. in No. 05–915, at 38, 42 (indicating that decisions are "based on … the racial guidelines" without further explanation); *id.*, at 81 (setting forth the blanket mandate that "[s]chools shall work cooperatively with each other and with central office to ensure that enrollment at all schools [in question] is within the racial guidelines annually and to encourage that the enrollment at all schools progresses toward the midpoint of the guidelines"); *id.*, at 43, 76–77, 81–

> 83; *McFarland* v. *Jefferson Cty. Public Schools*, 330 F. Supp. 2d 834, 837–845, 855–862 (WD Ky. 2004)....
>
> One can attempt to identify a construction of Jefferson County's student assignment plan that, at least as a logical matter, complies with these competing propositions; but this does not remedy the underlying problem. Jefferson County fails to make clear to this Court—even in the limited respects implicated by Joshua's initial assignment and transfer denial—whether in fact it relies on racial classifications in a manner narrowly tailored to the interest in question, rather than in the far-reaching, inconsistent, and *ad hoc* manner that a less forgiving reading of the record would suggest. When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.

The plurality opinion in *Parents Involved* also was highly critical of the school districts' efforts to show that their plans were narrowly tailored. Unpersuaded that the school districts' intent in adopting the plans was to obtain educational benefits from a diverse school environment, the plurality opinion charges the school districts with an egregious form of racial discrimination - - racial balancing.[6] Justice Roberts, author of the plurality opinion, provides an admonition instructive to school board and their attorneys:

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[6] "The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the 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.' *Id.*, at 330." *Parents Involved* at 14. *See also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 23-24 (1971) ("The District Judge went on to acknowledge that variation 'from that norm may be unavoidable.' This contains intimations that the 'norm' is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse."

> [I]t is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate....
>
> This comparison makes clear that the racial demographics in each district—whatever they happen to be—drive the required "diversity" numbers. The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead the plans are tailored, in the words of Seattle's Manager of Enrollment Planning, Technical Support, and Demographics, to "the goal established by the school board of attaining a level of diversity within the schools that approximates the district's overall demographics." ...
>
> The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits....
>
> This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. *Id* at 729.

This is an important message to school attorneys to ensure that the trial record contains comprehensive specifics on a policy's implementation, as well as a rationale rooted in compelling educational interests.

B. *Rational Basis - - the Toll-free Highway*

Race-neutral and race-conscious strategies need only satisfy the Equal Protection Clause test of rational basis. Examples include magnet schools, boundary line adjustments, open enrollment policies, and voluntary transfer policies.

Under the rational basis test, a school board's use of race must be upheld if it is "rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). In determining whether an action is reasonably related to a legitimate state interest, courts invoke a deferential standard of review. School boards and educators get the benefit of this deference: "[J]udges are not well suited to act as school administrators. Indeed, in the context of school desegregation, this Court has repeatedly stressed the importance of acknowledging that local school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils." *Parents Involved*, 551 U.S. at 848-49, 127 S.Ct. 2738 (citing *Milliken v. Bradley*, 418 U.S. 717, 741-42, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974)).

In *Parents Involved*, Justice Kennedy stated that if school authorities "are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion, solely on the basis of a systemic, individual typing by race." *Id* at 789. Justice Kennedy also gave examples: "School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and

tracking enrollments, performance, and other statistics by race." *Id* at 707. Although these mechanisms are race conscious, they do not "lead to different treatment based" on race, so it is "unlikely any of them would demand strict scrutiny to be found permissible." *Id* at 789.

A case in point is *Doe v. Lower Merion School District,* 665 F.3d 526 (3rd Cir. 2011), *cert. denied* (2012). In *Lower Merion*, the school board adopted a school redistricting plan in which student race was a factor. Although the formal goals of the redistricting plan did not include race, the school board did consider the racial make-up of students who would be impacted by the various redistricting plans. The plaintiffs argued that because race was a factor in the school board's selection of a redistricting plan, strict scrutiny must be applied to its decision.

The Third Circuit Court rejected the argument that the school board's plan should be analyzed under strict scrutiny, holding that the rational basis test applied because the plan was "facially race neutral, assigning students to schools based only on the geographical areas in which they live." *Id* at 545. The Court of Appeals noted that the plan, "on its face, neither uses racial classification as a factor in student assignment nor distributes any burdens or benefits on the basis of racial classification." *Id.* The Court differentiated this case from the holding in *Parents Involved* that strict scrutiny applied because in *Parents Involved* the school board policy used race as a sole factor. For the Lower Merion school board, race was merely a consideration.

The Third Circuit Court of Appeals provided an instructive distinction between plans that explicitly classify based on race and those that merely consider race. The court stated:

> "The consideration or awareness of race while developing or selecting a policy, however, is

> not in and of itself a racial classification. Thus, a decisionmaker's awareness or consideration of race is not racial classification. Designing a policy "with racial factors in mind" does not constitute a racial classification if the policy is facially neutral and is administered in a race-neutral fashion." *Id* at 548.

In order for strict scrutiny to apply, the plan would have to be "unexplainable on grounds other than race" or it must be shown that "other legitimate redistricting principles were subordinated to race such that race was the predominant factor motivating the District's redistricting decision." *Id* at 556.

The Third Circuit further noted: "The [Supreme] Court has never held that strict scrutiny should be applied to a school plan in which race is not a factor merely because the decisionmakers were aware of or considered race when adopting the policy." *Id.* The redistricting plan adopted by the Lower Merion school board involved merely the consideration of race, and thus the applicable standard is the rational basis test.

IV. THE U.S. TRAFFIC SIGNAL – GREEN LIGHT TO RED LIGHT

In 2011, the Office for Civil Rights, U.S. Department of Education, issued a Dear Colleague letter entitled *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*. The Guidance identified the following types of actions that a school board may take to increase diversity, listed from the clearly constitutional to the most constitutionally suspect:

- Race-neutral options, such as open enrollment policies and the geographic placement of special program schools.

- The generalized use of race, such as developing redistricting proposals based on race-neutral factors and then using race as a consideration among viable proposals.
- The individualized use of race, such as using race at the individual student level.

In July 2018, the U.S. Department of Education rescinded its 2011 Guidance, and substituted a Dear Colleague Guidance letter from 2008. The 2008 Guidance letter states: "The Department of Education strongly encourages the use of race-neutral methods for assigning students to elementary and secondary schools." Speculation abounds as to whether the Department's shift in lanes, from encouraging race-based approaches to supporting race-neutral approaches, signals a shift by the Department from *promoting* to *challenging* race-conscious school policies.

The role that the United States Government is playing in this journey has been rendered more uncertain by the recent decision of the U. S. Department of Justice to challenge Harvard University's race-based admissions process by filing a Statement of Interest in *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College*[7]. Angling to have a say in the outcome of this litigation,[8] the United States challenges Harvard's policy as a half-hearted and woefully inadequate attempt to comply with the strict scrutiny requirements set forth by the Supreme Court in its higher education rulings on diversity admission policies. The United States accuses Harvard of racial balancing, to the detriment of Asian-American applicants. If the United States succeeds in their effort to have Harvard's race-conscious admissions policy thrown out on the argument that it

[7] Case No. 1: 14-CV-14176-ADB (D.Mass, Boston Division), Document 497, filed August 30, 2018.
[8] "The United States has a substantial interest in this case because its resolution could have a significant impact on the .....interpretation and scope of the Equal Protection Clause ...." Id, Pg. 4, Fn 6

violates the constitutional rights of one minority group, i.e. Asian-Americans, majority race candidates would be among the beneficiaries.

V. TRAILBLAZING SCHOOL BOARDS AND THEIR VEHICLES

Over 100 school boards and charter schools have instituted policies to increase the diversity of students at their schools.[9] These districts, and the methods they have used, can serve as models for school boards seeking viable and proven diversity initiatives.

A. Types of Initiatives

1. Controlled Choice. Parents specify their preferences for a school in priority order, and assignments are made based on the parent's choice and the school district's diversity goals. Typically, bus transportation is provided. Controlled choice plans are in effect in the Jefferson County Public School District (Kentucky), Cambridge Public School District (Massachusetts), and Champaign Community Unit School District 4 (Illinois).

2. Magnet Schools. The school district creates schools with a specialized theme, curriculum, or pedagogy to attract students from outside the attendance area on a voluntary basis. Examples include Montessori, STEM, International baccalaureate, early college or dual enrollment, and fine arts programs. These magnet schools may be located in areas of high poverty or concentrations of minorities and are used to attract high income or majority populations into the school. Some districts reserve a certain percentage of seats in a magnet school for students based on socio-economic criteria (see, as examples,

[9] School Integration in Practice: Lessons from Nine Districts, Kahlenberg, Richard D. 2016, The Century Foundation, https://tcf.org/content/report/school-integration-practice-lessons-nine-districts/

the diversity plans in the Hartford Public School System (Connecticut) and the Chicago Public Schools).

3. 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 and financial factors. The Eden Prairie School District in Minnesota utilized this approach in 2010.

4. 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. The Jefferson County Public School District (Kentucky) uses a three-prong definition, however, creating a composite index score based on income, race, and educational attainment.

B. School System Exemplars

1. Cambridge Public Schools (Massachusetts)

The Cambridge Public School (CPS) system implemented a controlled choice policy in 1980, "when the Cambridge School Committee voted to desegregate the schools by moving away from a neighborhood schools model."[10] The CPS controlled choice plan has served as model for many other districts. The original school plan used race as a criterion for student assignment, but concern about the constitutionality of using race caused the district to switch to socio-economic status as a criterion in 2001. Parents select three preferred schools, and school assignments are made in consideration of the family's choices, the family's socio-economic status, and the district's goal of achieving a socio-economic

[10] https://www.cpsd.us/cms/one.aspx?portalId=3042869&pageId=3477782)

balance in the schools. When the percentage of students in a school who receive a free or reduced lunch is within 10 percentage points of the district-wide percentage of free and reduced lunch students, the school is deemed to have met the district's definition of socioeconomic balance. 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%.

2. Champaign Community Unit School District 4 (Illinois)

The Champaign Community Unit School District 4 (Champaign) instituted a choice-based enrollment plan in 1997 modeled after the Cambridge, Massachusetts plan. Like the Cambridge plan, 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. Student assignments are implemented so that each school falls within 15 percentage points of the district average of FARMS enrollment. Elementary school parents rank their school choices, and assignments are issued to achieve socio-economic balance. At the middle school and high school level, student diversity is maintained through geographic attendance zones that are redrawn periodically to ensure socioeconomic balance.

3. Jefferson County Public Schools (Kentucky)

After the Supreme Court invalidated its student assignment plan in *Parents Involved* due to its individualized use of race, the Jefferson County Public School District (JCPS) continued its pursuit of student diversity through a redesigned plan. The new plan, adopted in 2008, broadened the definition of

diversity to include race, income, and educational attainment. At the elementary, middle, and high school level, student assignment is implemented with the aim of insuring that each school in the school district is socio-economically diverse.

All of the census blocks in the school district are designated as a Category 1, Category 2, or Category 3, based on the average income level, race, and educational attainment of the parents in the category. For example, for the income factor, the income level in Category 1 is less than $42,000, in Category 2 between $42,000 - $62,000, and in Category 3 more than $62,000. The assignment of students at the elementary school level is different than at the middle and high school level. There are 92 elementary schools in the JCPS arranged in 13 clusters comprising 5 to 8 elementary schools. The selection of schools within each cluster is designed to maximize diversity among the 3 categories. Parents of elementary school students rank their preference for schools within their designated cluster, and the school district determines the child's specific school assignment based on the parent's preference and the district's goal of achieving diversity. The district's goal is that every school have an index rating of between 1.4 and 2.5 based on the 3 Category system. Every student is guaranteed an assignment to a school within the cluster assigned to their neighborhood. At the secondary level, students are assigned to schools based on attendance zones that are drawn to maximize the diversity of those zones. To do that, the district sometimes uses non-contiguous attendance zones. The new plan was the subject of a lawsuit, filed in state court in 2010, by parents claiming that state law required school children to be assigned to their neighborhood school. In 2012, the Kentucky Supreme Court upheld the JCPS plan. *Jefferson County Board of Education v. Fell,* 391 S.W.3d 713, 727 (2012)

4. Lynn Public Schools (Massachusetts)

Each student may attend their home school, which is based on traditional boundary line adjustments. However, out of district requests are determined based on the racial diversity and class size of the requested school.[11]

5. Hartford Public Schools (Connecticut)

The city of Hartford, Connecticut has a poverty rate of approximately 34%, and its residents are approximately 44% Hispanic, 38% African-American, and 16% white. The surrounding suburbs, by contrast, are approximately 65% white.[12] Working with 30 surrounding school districts, Hartford Public Schools adopted an interdistrict enrollment plan that uses open choice options and magnet school offerings to improve the economic and racial makeup of its schools.

VI. CONCLUSION – Bon Voyage!

School boards seeking to promote student diversity through policies and initiatives need not sit stalled, unsure if legal avenues exist. They do. Will the journey be controversial? Perhaps. But several lawful options are available, many of which have successful track records.

VII. RECOMMENDATIONS – A Travel Guide

1. The school board should publicly discuss and document through research how promoting diversity and avoiding racial or economic isolation supports the school system's mission. Create a record that identifies the compelling interests to be served by diversity.

[11] http://www.lynnschools.org/departments_parentinfocenter.shtml#gpm1_6

[12] https://tcf.org/content/report/hartford-public-schools/

2. The school board should consider if race-neutral approaches are available, workable, and adequate to achieve the desired levels of diversity. Document why race-neutral alternatives were determined to be unworkable or insufficient.
3. The school board's record should reflect in-depth consideration of how a proposed diversity policy will be implemented. If a strict scrutiny analysis is applied, with its requirement that the plan be narrowly tailored, the school board will have to demonstrate that it carefully considered how the policy will be implemented and its effects on racial groups. *See Parents Involved.*
4. There are professionals in the field of diversity, including experts in the public education arena. Consider using them. For an example of the value expert testimony can provide a board of education in these cases, *see Comfort v. Lynn School Committee,* 418 F.3d.1 (1st Cir. 2005).
5. The use of terminology is very important, as citizens (and potential plaintiffs) are watching and recording the school board's proceedings. The term "racial balancing" should not be used. Also "diversity" should be defined broadly, not simply as a White vs. African American issue.[13]
6. Consider using socio-economic indicators instead of race. Initiatives that promote socioeconomic integration often result in racial integration as well, and are easier to defend legally.
7. Choice plans and magnet school initiatives are far less contentious than boundary line adjustments (redistricting).
8. If redistricting is used to achieve diversity, develop redistricting plans using race-neutral criteria, and then among those proposals select a plan

[13] *But see, Comfort v. Lynn School Committee*, 418 F.3d 1, (1st Cir. 2005) (upholding a school board's diversity plan that focused only on White and African-American students against a claim that the district's conception of diversity was too narrow, stating that "this white/nonwhite distinction reflects the reality of Lynn's experience.").

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. The school board may select an option that best promotes diversity based on the Board's established factors.

9. In considering the impact of various redistricting proposals on race, the school board should consider the impact on all races and not just on White or African-American students. *But see* footnote 13.
10. Diversity initiatives and policies should not result in decisions being made based solely on the race of an individual student.
11. Re-assess diversity policies every few years to satisfy a requirement of the narrowly tailored test.

VIII. RESOURCES – Road Maps and Supplies

1. School Board Diversity Initiatives – Summaries

a) *School Integration in Practice: Lessons from Nine Districts*, Kahlenberg, Richard D., 2016, The Century Foundation https://tcf.org/content/report/school-integration-practice-lessons-nine-districts/

b) *Achieving Educational Excellence for All: A Guide to Diversity-Related Policy Strategies for School Districts*, National School Boards Association, College Board, and Education Counsel, 2011

https://cdn-files.nsba.org/s3fs-public/reports/EducationExcellenceForAll-HighRes.pdf?zKxgWRMf_Ml4x41pIMWRWiPG.bVcnqE0

2. School Board Diversity Offices

   a) Denver Public Schools, Culture, Equity, and Leadership Team, https://celt.dpsk12.org.

   b) Oakland Unified School District, Office of Equity, https://www.ousd.org/equity

   c) Jefferson County Public Schools (Louisville, KY), Diversity, Equity and Poverty Division, https://www.jefferson.kyschools.us/department/diversity-equity-and-poverty-programs-division

   d) Cambridge Public Schools, Diversity, Equity and Inclusion Department, https://www.cpsd.us/cms/one.aspx?portalId=3042869&pageId=33736969

   e) Burlington School District, Office of Diversity, Equity, and Community Partnerships, http://www.bsdvt.org/wp-content/uploads/2017/07/BSD-Diversity-Plan-2014-2017.pdf

   f) Guilford County Schools, Office of Diversity, Equity and Inclusion, www.gcsnc.com/domain/2412#calendar25503/20180820/month

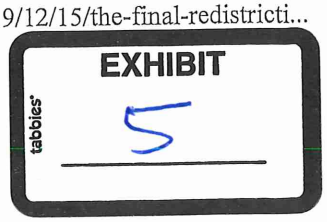
3. Chief Diversity Officer Positions

   a) *What Does A Chief Diversity Officer Actually Do?* Ashley Thorne and Peter Wood (National Association of Scholars, September 26, 2008),

https://www.nas.org/articles/What_Does_a_Chief_Diversity_Officer_Actually_Do

b) *Standards of Professional Practice For Chief Diversity Officers,* National Association of Diversity Officers in Higher Education, Worthington, Stanley, and Lewis (2014), https://www.nadohe.org/standards-of-professional-practice-for-chief-diversity-officers

c) *Hiring a Diversity Officer Is Only The First Step. Here are the next 7.*, Yvette M. Alex-Assensoh, June 5, 2018, The Chronicle of Higher Education, https://www.chronicle.com/article/Hiring-a-Diversity-Officer-Is/243591



The Final Redistricting Plan Has the Hallmarks of Race-based Redistricting

juliehotopp December 15, 2019 Uncategorized

The analysis here is solely my own. It was not done as part of my professional work or in collaboration with my community.

Disclosure: I attempt to provide a fair and unbiased look at this important issue. However, I live in a polygon that is be redistricted and there is the potential for this to unintentionally introduce bias.

Summary

Recently, Howard County Maryland has initiated a major redistricting effort. In addition to attempting to balance capacity, an attempt was made to balance other factors including school feeds and the distribution of students in schools participating in the free and reduced meals (FARM) program, a proxy for the economic situation of students and their families. These efforts are supposed to be occurring in accordance to the board of education's policy 6010 and state and national laws. However, the end result for the elementary school redistricting plan shows a strong influence of the racial/ethnic composition of the students being moved, calling into question if this is actually race-based redistricting done under the guise of FARM-based redistricting. More specifically, polygons that are majority Caucasian and African American are more likely to be moving when compared to polygons that have a majority of Asian students, despite there being a similar percentage of Asian and African American students and only 10% more Caucasian students in the school district. Additionally, the predominantly Asian polygons have a mixture of both negative and positive moves as measured by the test scores of the sending and receiving schools, while the vast majority of moves of Caucasian students are negative, despite these groups seemingly having similar levels of participation in the FARM program and living in adjacent areas.

This post is aimed at providing an analysis of the available data and allowing others to provide input both on the implementation of this analysis as well as the interpretation.

Ultimately, I appeal to the school district and the board to make better aggregated data available to examine this important matter, given prior decisions by the Supreme Court that have prohibited race-based redistricting based on the equal protection clause in the 14th amendment to the constitution. My understanding is that the courts have found previously that the onus is on the school system to provide data to demonstrate race based redistricting is not occurring.

Background

Howard County divided students and families into polygons that are geographical areas that are a proxy for neighborhoods. There are 701 polygons and each polygon has a unique identifier that is a three or four digit number. Data was provided in June 2019 as part of a Maryland freedom of information act request that specifies the characteristics of each of the polygons, albeit heavily redacted because of family education rights and privacy act (FERPA). FERPA is a federal law that protects student education records in the interest of privacy.

This heavily redacted data from June 2019 is what is used in this analysis, and methods have to be employed that address the problems of using this heavily redacted data. This data was released as HCPSS MPIA Request #2020-054. It is available through the Internet Archive Wayback Machine at: **https://web.archive.org/web/20190916225724/https://www.hcpss.org/school-planning/boundary-review/. ** In addition, data on the final plan is used that was made available following the final board meeting in November 2019 at: **https://go.boarddocs.com/mabe/hcpssmd/Board.nsf/goto?open&id=BHVK9W5058E1**. This data is not as heavily redacted since results were aggregated by school, which includes many polygons. However, it is useful only in examining the final plan, as similar data is not available for alternate plans used through the process.

Analysis of the overall race/ethnic demographics of students moved in the final plan

In order to look at overall trends in the demographics of students moved, I relied on data solely within Comparison_for_Board from Board Docs from the final board meeting. I will use the racial designations that the board uses in quotes, even though some may not be the societal norm. Thus far, I have only examined the elementary school redistricting map as it saw the least amount of time for public input and the greatest number of changes.

Estimating missing data. Because of FERPA, some of the data is missing, but using some basic assumptions we can estimate what the real data would look like.

1. I assumed that the categories "American Indian or Alaska Native" and "Native Hawaiian or Other Pacific Islander" is always at or near 0%. This seems fairly reasonable given the overall percentage of individuals of these races/ethnics reported elsewhere for Howard County, in general, and the school population, more specifically. Consistent with this, at the bottom of the table all the demographics data sums to 100%. It is not clear how the board collects this demographic data and how data from students/families that do not report a race designation are considered, but since it sums to 100% it seems that every student is somehow taken into account.

2. I then determined what percentage was missing for all other populations due to listing that they are "<=5%." To do this, I summed all the columns that had data. I took the difference between 100% and this summed percentage to determine the percentage not accounted for. When there was only one data point missing, that percentage was assigned to it. When two data points were missing, the percentage was divided by two and used to fill the two categories with missing data. When three data points were missing, the percentage was divided by three and used to fill the three categories with missing data. I was initially reluctant to move to ones where three data points were missing. But in all cases, it was clear that the number being used was likely correct. For instance, when 16% of the data is missing. Dividing by 3 yields 5% for each, with a leftover 1% that is likely due to a combination of Native Americans, Pacific Islanders, and rounding errors. In no case was data estimated to be <3% suggesting that these approximations are close to reality.

3. I then determined the real number of students in each category moved. In looking at this analysis, it is important to remember that students are not evenly distributed between schools, so the real number of students of each demographic needs to be determined not just the percentage. To determine this number, each of the percentages is multiplied by the student population size measured in students. The student population size changes with redistricting. Therefore, the student population size was determined by multiplying the capacity (column C) by the percent capacity for 2020-21 with no change (column D) or under the boards plan for 2020-21 (column I). The percentage for each demographic is then multiplied by the population size with no change or under the boards plan to determine the number of students moved for 2020-2021 with no change and under the boards plan, respectively. The difference between these two numbers is the number of students being moved. Of course, each student is counted twice in this method, once for the sending school, and once for the receiving school. Therefore, I counted only those students at the receiving school, rounding to the nearest whole number (which seem reasonable since we only move whole children). This provides an estimate of the number of students moved in each demographic, within the limitations of the public data which likely has some errors for rounding as well as the assumptions made. This yields 536 "White" students, 386 "Black or African American" students, 278 "Asian" students, 211 "Hispanic" students,

and 66 "Two or More" students moved of a total of 25,784 students.

4. I then determined the absolute number of students in each category for the entire district. If we look at the total percentage of students there are 34% "White," 25% "Black or African American," 22% "Asian," 12% "Hispanic," and 7% "Two or More." These percentages equate to: 8,844 "White" students; 6,343 "Black or African American" students; 5,657 "Asian" students; 3,056 "Hispanic" students, and 1,766 "Two or More" students.

5. Use a Fisher's Exact Test and Chi-Squared Test to show that the demographics of students moved is not representative of the demographics of students in our school system. The appropriate statistical test is one that can be used with categorical data containing whole numbers, which are most frequently a Fisher's Exact Test and/or a Chi-Square Test. We can use these tests to determine whether a sample distribution is representative of a larger distribution (that is, whether the moved students are representative of all of the students in the district).

To better explain it, these tests can determine whether a bag of M&Ms has an appropriate distribution of every candy color based on the frequency of all colors. For instance, assume a bag of M&Ms has 30 M&Ms of 6 colors. On average, you would expect to get 5 of each color. Some statistically appropriate variation would mean that you might have 6 or 4 pieces of one color, and maybe even a few with 7 or 3 pieces. But you would expect to get at least one candy of each color.

However, a typical bag of plain M&Ms does not show an equal distribution of the different colors. Instead, there are fewer green M&Ms, because the manufacturer does not put in an even amount of each color, instead putting in only 10% green M&Ms (**https://www.dealnews.com/features/The-Color-Mixture-in-an-M-Ms-Bag-Is-a-Precise-Science-and-Other-Candy-Facts/626727.html**). A Fisher's Exact test or Chi-Squared test can tell you that the actual distribution does not match with an even distribution. That is how we will compare students in this analysis. The difference between the two statistical tests relates to when there is limiting data; in those cases, a Fisher's Exact test is more desirable. A low p-value is something that is unlikely to happen by chance—like getting an entire bag of green M&Ms. In this case, we have plenty of data and can use either statistical test.

Using RStudio v.1.2.5019 running R v 3.6.1 (2019-07-05) in a Windows 10 environment, we can see that the distribution of the racial/ethnic demographics of students being moved is different than the distribution of the racial/ethnic demographics of students in the school district. (Hypothesis: students being moved are representative of the students in the school system; Fisher's Exact test; p-value = 0.0004998; hypothesis rejected). In particular, more "Hispanic", "White", and "Black

or African American" students are being redistricted, and fewer "Asian" and "More than 2" students are being moved than expected based on the actual distribution of students.

I also repeated this analysis removing the students reported as being of 2 or more races, since they have to be removed in the analysis below. It yields a similar result (Hypothesis: students being moved are representative of the students in the school system; Fisher's Exact test; p-value = 0.0009995; hypothesis rejected).

Interpretation. This result alone indicates there is likely a problem suggesting race-based redistricting occurred, one that is not explained by FARM-based redistricting. One could try to argue that this is expected given that students that participate in the free and reduced meals program are not expected to be evenly distributed between the different racial demographics. However, an examination of polygon race and FARM data suggests that "Asian" and "White" students have similar FARM characteristics; yet they are not being treated equally as required under the equal protection clause of the 14th amendment of the US Constitution. The number of "Asian" and "African American or Black" students are similar suggesting that it is not merely because "Asian" students are under-represented relative to "White" students.

Barriers to further analyses. I do not have data to directly compare FARM and racial demographics with this dataset. I also cannot compare this outcome to other proposed outcomes to see if any of the proposals were less biased. Given that this data is aggregated by the initial and final plans at the school level, it lacks the granularity to make these associations. However, the June data that is denoted by polygon does contain more granular data for these two characteristics.

Analysis of the overall race/ethnic demographics and FARM of students moved in the example plan in the feasibility study.

To look at all other plans, we have to rely on the June data for FARM and race/ethnic demographics. The problem with the June data is that it is more heavily redacted due to FERPA. In this case we cannot use a Chi-squared test because we have categories with "0" values and values <5. So, we will again use a Fisher's Exact test to first look at race/ethnicity and FARMs simultaneously.

1. Analysis plan for dealing with redacted data. We can't infer numbers in this dataset because the data is so heavily redacted. However, we can classify each polygon by race/ethnicity by using the majority value. In this case, majority should not be taken to mean >=50%, but the highest number. So if a polygon has 34 "Hispanic" students and 33 students from each of the other demographic groups, the polygon will be labeled "Hispanic," despite only slightly more than 20% of the students being

"Hispanic."

Each polygon was assigned to a race/ethnicity based on the population with the highest number, under the assumption that the highest number would be a number reported. I cannot foresee a situation when that would not be the case, but with redactions it is always hard to tell. Each polygon was further assigned as being higher in students participating in the FARM program using the Title 1 criterion of 40%.

2. Calculate the distribution of data for all of the redistricting polygons. We expect a plan to move students equally from all demographic groups. Therefore we will compare the distribution of students moved to those for the entire population. For all 701 polygons, you get the following result:

Race/Ethnic	FARM population	# Polygons moving
White	Unknown	132
White	<40%	115
White	>40%	8
African American or Black	Unknown	1
African American or Black	<40%	24
African American or Black	>40%	84
Asian	Unknown	37
Asian	<40%	44
Asian	>40%	9
Hispanic	Unknown	1
Hispanic	<40%	0
Hispanic	>40%	11
Unknown	Unknown	135
Unknown	<40%	76
Unknown	>40%	21

This just establishes the distribution one would expect if students are being moved equally within the groups. If we return to our example of M&Ms, this is your hypothesis of the manufacturer sets as the distribution of colors in a bag of plain M&Ms. However, it is important to note how much data is not actually being examined because it is unknown, either for demographics or the FARM population. In fact, we can only examine 295 of the 701 polygons, which is only 42% of the data. We also have very few "Hispanic" polygons and no "2 or more" polygons.

3. Compare the distribution of polygons moved in the example plan in the feasibility study. In this plan, there are 44 polygons moving yielding the following distrubiton.

Race/Ethnic	FARM population	# Polygons moving
White	Unknown	10
White	<40%	6
White	>40%	0
African American or Black	Unknown	1
African American or Black	<40%	0
African American or Black	>40%	4
Asian	Unknown	3
Asian	<40%	1
Asian	>40%	0
Hispanic	Unknown	0
Hispanic	<40%	0
Hispanic	>40%	1
Unknown	Unknown	8
Unknown	<40%	7
Unknown	>40%	3

When performing statistical tests, it is important consider the hypothesis you are

testing. In this case, the hypothesis to be tested is: "The demographics data of the polygons being moved in the feasibility plan reflects the distribution of the demographics data of the total polygons," which is a 15×2 contingency table. The best test is a Fisher's test since we have zero values and many low values. This cannot be analyzed with a Fisher's exact without using a simulated p-value. There are issues noted in the literature with simulated values yielding final p-values that are too high. Keeping that in mind, the result is a p-value 0.2569 which is a p-value that is high enough that we do not reject the hypothesis. As such, the polygons moving in the example plan in the feasibility study are likely representative of all polygons. Very importantly, this demonstrates that there was the possibility to build a plan that moved students equally.

4. Compare the distribution of polygons moved in the superintendent's plan. In this plan, there are 98 polygons moving.

Race/Ethnic	FARM population	# Polygons moving
White	Unknown	16
White	<40%	14
White	>40%	1
African American or Black	Unknown	1
African American or Black	<40%	3
African American or Black	>40%	17
Asian	Unknown	2
Asian	<40%	3
Asian	>40%	0
Hispanic	Unknown	0
Hispanic	<40%	0
Hispanic	>40%	3
Unknown	Unknown	15
Unknown	<40%	16
Unknown	>40%	7

The hypothesis to be tested is: "The demographics data of the polygons being moved in the superintendent's plan reflects the distribution of the demographics data of the total polygons." Keeping in mind all the prior limitations , the result is a p-value 0.01849 and we reject the hypothesis. The polygons moving in the superintendent's plan are not representative of all polygons.

5. Compare the distribution of polygons moved in the final plan. In this plan, 80 polygons are moved yielding the following result:

Race/Ethnic	FARM population	# Polygons moving
White	Unknown	16
White	<40%	12
White	>40%	0
African American or Black	Unknown	0
African American or Black	<40%	1
African American or Black	>40%	17
Asian	Unknown	2
Asian	<40%	5
Asian	>40%	1
Hispanic	Unknown	0
Hispanic	<40%	0
Hispanic	>40%	2
Unknown	Unknown	8
Unknown	<40%	11
Unknown	>40%	5

The hypothesis to be tested is: "The demographics data of the polygons being move d in the final plan reflects the distribution of the demographics data of the total poly gons", which is a 15×2 contingency table. Keeping that in mind the limitations previ ously noted, the result is a p-value 0.1014 and it is unclear if the polygons being mov ed reflect the distribution of all polygons.

Interpretation. First, the data shows that we live in an amazingly diverse community and we should celebrate that more. The vast majority of polygons appear to have a variety of demographics mixing race and ethnicity and socioeconomics, and likely far better than most school districts in the nation. Second, it is possible to redistrict and have a plan that is not race-based, as demonstrated with the example plan in the

feasaiblity study. But, as soon as local officials became involved, this equality disappears–most obviously with the Superintendent's plan. That has been seen time-and-time again, humans naturally introduce their biases.

If you look at the raw numbers, there are very few points that differ between the superintendent's plan and the final plan, frequently being the difference between a "0" and "1." This suggests the same problem exists in the final plan. However, by aggregating data at the polygon level we lack the data needed to fully test this hypothesis; yet, it is the only data available for analysis by the public.

There are several further indications that this needs to be done on better data. Specifically, the number of "Hispanic" polygons and "2 or more" polygons are disproportionately low at the polygon level, with no "2 or more" polygons despite that being 7% of the student body. This isn't unexpected as they are significantly less likely to ever achieve a majority. Given that the initial results showed a disproportionately high number of Hispanic students moving and a disproportionately low number of "2 or more" student moving, this is a very important consideration.

The initial analysis shows a disproportionately low number of "Asian" students moving. Given that the polygon analysis shows the "Asian" polygons have the same FARM population characteristics as "White" polygons, this suggests that to some extent race-based redistricting may have occurred. Otherwise "White" and "Asian" children should be moving equally.

It is possible that due to geographical considerations, these populations are different. However, in this plan elementary school children are to be uprooted from their neighborhoods and transported many miles, sometimes through the busiest portions of Howard County. As such, it seems unlikely that Asian polygons were not within that several mile zone that could have been redistricted (e.g. from Centenniel Elementary School to Longfellow Elementary School). Such a geographical analysis is beyond my abilities without more significant computational resources than I personally have, particularly given that in order to be rigorous such an analysis should not be done "as the crow flies" instead needing to be done "as the school bus drives."

Barriers to further analyses. The major barrier in this case is the lack of high quality data. It is understandable and correct to redact data on FERPA. However, the issue of race-based redistricting is important and needs to be properly examined before a redistricting plan is implemented.

Solution. Ultimately, only the Howard County Public Schools can aggregate the data in a different way that would enable a robust analysis of this question within the limits of FERPA. Such data should be made available to students and their families as well as a

rigorous analysis by an unbiased individual, which likely is not the public school system or board as they now have a vested interest in seeing this plan move forward. In such an analysis, each student should be categorized by race/ethnicity and participation in FARM. The directionality of the move should also be assessed. Those should then be aggregated based on students proposed to be moved and those proposed not to be moved. These aggregated statistics should then be made available. Those should then be subjected to the appropriate statistical analysis which involves not only looking at the current plan and the board plan, but also other key plans (which serve as controls).

One can only be left to wonder, if the consultants had been asked to include FARM rebalancing in their equation, would they have been able to come up with a fair FARM-based redistricting plan that did not have the hallmarks of race-based redistricting? Such a plan would have the potential to also have been devoid of potential conflicts of interest.

Other notes

I have not analyzed the Mallo, Wu, or Delmott-Small plans in the same way yet. I have not analyzed the middle school or high school plans.

For the final board plan, I was also able to assign a directionality to moves with a positive move being one that resulted in a move for a polygon from a school with lower test scores to one with higher test scores, and a negative move being one that resulted in a move for a polygon from a school with higher test scores to one with lower test scores. However, in any other plan, those numbers were not available. In addition, it is not clear what one would compare them to in order to do a statistical test, since test scores are not changing for those students not proposed to be moved. But if anyone has any ideas, those results are as follows. However, this may be the most startling view as the only double digit moves of polygons are of "White" students that do not participate in the FARM program or where the FARM status is unknown being moved to schools with lower test scores and "African American or Black" students in polygons with a high percentage of kids participating in the FARM program being moved to schools with higher test scores. While "Hispanic" and "2 or more" students, may be significantly undercounted. There is no obvious explanation for the results for "Asian" students, unless students were not protected equally, as required by the equal protection clause of the 14th amendment.

Race	Directionality	FARM >40%	# Polygons Moved
White	Negative	Unknown	15
White	Negative	No	11
White	Negative	Yes	0
White	Positive	Unknown	1
White	Positive	No	1
White	Positive	Yes	0
Black/ African American	Negative	Unknown	0
Black/ African American	Negative	No	0
Black/ African American	Negative	Yes	1
Black/ African American	Positive	Unknown	0
Black/ African American	Positive	No	1
Black/ African American	Positive	Yes	16
Asian	Negative	Unknown	1
Asian	Negative	No	3
Asian	Negative	Yes	0
Asian	Positive	Unknown	1
Asian	Positive	No	2
Asian	Positive	Yes	1
Hispanic	Negative	Unknown	0
Hispanic	Negative	No	0
Hispanic	Negative	Yes	0
Hispanic	Positive	Unknown	0

Hispanic	Positive	No	0
Hispanic	Positive	Yes	2

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juliehotopp December 15, 2019 Uncategorized

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BOARD OF EDUCATION OF HOWARD COUNTY Handbook

Adopted – November 20, 2014
Amended – February 26, 2015

EXHIBIT
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6

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d. Act as public relations officer for the Board.
e. Act as liaison to the Board's attorney [and HCPSS General Counsel].
f. Ensure participation by the Board in MABE committees and activities.

2. Vice Chairman

The Board Vice Chairman shall assume such administrative and leadership tasks as designated by the Chairman, in addition to any duties and responsibilities required by law. In the absence of the Chairman, the Vice Chairman will assume the responsibilities of the Chairman.

The Vice Chairman shall:

a. Assume responsibility for written responses to the Public Forum speakers.
b. Assume responsibility for oversight of the Ombudsman function.

E. Rules of Order and Voting

Board of Education meetings are conducted in accordance with Robert's Rules of Order Newly Revised 10th Edition. Certain modifications to the procedures are allowed for flexibility and informality, since the Board consists of only seven members and one Student Member, and it is quite different from a large Assembly. The Board is also guided by its own rules, state statutes, and State Department of Education bylaws, which establish the following:

- A quorum consisting of a majority (five members) of the Board shall be present to convene a meeting and to transact business. Under §3-701 of the Education Article of the Annotated Code of Maryland, there are restrictions on the items on which the Student Member can vote. These are noticed and highlighted on each Board agenda. Passage of a motion by the Board on these particular matters requires an affirmative vote of four (4) Board members.

- Each member, including the Chairman, has the right to vote when present. It is the duty of every member to vote and, especially with significant issues, to explain his or her rationale for the vote. Abstaining from the vote should be used rarely.

- At times it may appear that an individual decision could not be made with objectivity. If a potential personal or ethical conflict exists, the Board member is encouraged to seek legal advice regarding the need to recuse oneself from a vote. The decision to recuse is between the Board member and one's conscience and should not be challenged.

- Board members may not vote in absentia or by proxy. On February 28, 2013, the Board developed "Remote Participation Protocols" that are approved annually. The protocols are available on the Board's website.

- "A motion or resolution may not be declared adopted without the concurrence of a majority of the whole board; namely: four members when the board consists of six or seven, and five members when the board consists of eight or nine." See COMAR 13A.02.01.01A.

- A quorum of five members requires five (5) votes in either the affirmative or the negative, except in those cases where the Student Member is ineligible to vote. In those cases, four (4) votes in the affirmative or negative are sufficient for Board action. A two/thirds vote (which is needed to affirm a Board member's "call the question") of six is required if the Student Member is eligible to vote on the matter; five, if the Student Member is ineligible, in either the affirmative or the negative.

- The Board adopts its agenda at the beginning of a business meeting. Unless changed by the Board, the order in which items appear on an agenda will be followed. Any changes in the adopted agenda are made by consensus or by majority vote.

- Any Board agenda item introduced which involves a matter of policy first shall be presented as a report. Generally, 30 days following the presentation of the report, a public hearing will be held. Normally, action will be taken at the next regular meeting.

A Board member's personal integrity and core values play a significant part in how that person votes on key issues. Votes should not be "traded." Voting requires a logical, consistent approach, but it is also emotional at times. One of the key lessons of survival on the Board is to not dwell on losses. One must remember that, after consideration of the facts and what is best for the students, after hearing from constituents, and after considering the advice of the Superintendent and staff, reasonable people may still reasonably disagree. It is not appropriate to be disagreeable.

Board members should always remember that the educational process and Board leadership must always move forward. Tough votes are taken, and once they're taken, you move on. Collegiality is especially important. The Board member whose vote you needed and wasn't with you may be the supporting vote you receive at the next meeting. Furthermore, it is unprofessional to criticize another Board member's vote and stated position. After a difficult meeting, it is highly recommended that Board members make an effort to re-establish cordial relations and to relieve the accumulated tension.

See **Appendix B, Parliamentary Motions Guide,** and **Appendix C, Phrases for the Presiding Officer**.

F. Meetings

All meetings of the Board of Education are public meetings, except for closed meetings as permitted under Maryland law. The Board is legally required to hold public meetings at least 22 times each year, with at least one meeting in July and August and two

CODE OF MARYLAND REGULATIONS (COMAR)
TITLE 13A STATE BOARD EDUCATION
SUBTITLE 02 LOCAL SCHOOL ADMINISTRATION

CHAPTER 01 LOCAL BOARDS OF EDUCATION

.01 Meetings.

A. Rules for Meetings. The rules generally adopted by deliberative bodies for their government shall be observed by the local board of education. A motion or resolution may not be declared adopted without the concurrence of a majority of the whole board; namely: three members when the board consists of five, four members when the board consists of six or seven, and five members when the board consists of eight or nine.

CHAPTER 03 LOCAL ADMINISTRATIVE AND SUPERVISORY STAFF

.01 Organization and Administration.

A. Accommodations, Duties of Local Administrative and Supervisory Staff . The local board of education shall provide suitable space and equipment for the administrative and supervisory staff of the local superintendent. The administrative and supervisory staff shall spend their time performing duties consistent with their positions, or as may be assigned by the local superintendent.

Parliamentary Motions Guide

Based on *Robert's Rules of Order Newly Revised (11th Edition)*

The motions below are listed in order of precedence. Any motion can be introduced if it is higher on the chart than the pending motion.

YOU WANT TO:		YOU SAY:	INTERRUPT?	2ND?	DEBATE?	AMEND?	VOTE?
§21	Close meeting	I move to **adjourn**	No	Yes	No	No	Majority
§20	Take break	I move to **recess** for	No	Yes	No	Yes	Majority
§19	Register complaint	I rise to a **question of privilege**	Yes	No	No	No	None
§18	Make follow agenda	I call for the **orders of the day**	Yes	No	No	No	None
§17	Lay aside temporarily	I move to **lay** the question **on the table**	No	Yes	No	No	Majority
§16	Close debate	I move the **previous question**	No	Yes	No	No	2/3
§15	**Limit or extend debate**	I move that debate be limited to ...	No	Yes	No	Yes	2/3
§14	**Postpone to a certain time**	I move to postpone the motion to ...	No	Yes	Yes	Yes	Majority
§13	**Refer** to committee	I move to refer the motion to …	No	Yes	Yes	Yes	Majority
§12	Modify wording of motion	I move to **amend** the motion by ...	No	Yes	Yes	Yes	Majority
§11	Kill main motion	I move that the motion be **postponed indefinitely**	No	Yes	Yes	No	Majority
§10	Bring business before assembly (a **main motion**)	I move that [or "to"] ...	No	Yes	Yes	Yes	Majority

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Jim Slaughter, Certified Professional Parliamentarian-Teacher & Professional Registered Parliamentarian
336-378-1899(W) 336-378-1850(F) P.O. Box 41027, Greensboro 27404 web site: **www.jimslaughter.com**

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Incidental Motions - No order of precedence. Arise incidentally and decided immediately.

YOU WANT TO:	YOU SAY:	INTERRUPT?	2ND?	DEBATE?	AMEND?	VOTE?
§23 Enforce rules	**Point of order**	Yes	No	No	No	None
§24 Submit matter to assembly	I **appeal** from the decision of the chair	Yes	Yes	Varies	No	Majority
§25 Suspend rules	I move to **suspend the rules** which …	No	Yes	No	No	2/3
§26 Avoid main motion altogether	I **object to the consideration** of the question	Yes	No	No	No	2/3
§27 Divide motion	I move to **divide the question**	No	Yes	No	Yes	Majority
§29 Demand rising vote	I call for a **division**	Yes	No	No	No	None
§33 Parliamentary law question	**Parliamentary inquiry**	Yes (if urgent)	No	No	No	None
§33 Request information	**Request for information**	Yes (if urgent)	No	No	No	None

Motions That Bring a Question Again Before the Assembly - no order of precedence. Introduce only when nothing else pending.

§34 Take matter from table	I move to **take from the table** …	No	Yes	No	No	Majority
§35 Cancel or change previous action	I move to **rescind/ amend something previously adopted...**	No	Yes	Yes	Yes	2/3 or maj. w/ notice
§37 Reconsider motion	I move to **reconsider** the vote ...	No	Yes	Varies	No	Majority

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