Dec. 23, 2019

Request for Review

Via Hand Delivery to:

Maryland State Board of Education
200 West Baltimore Street
Baltimore, Maryland 21201

Appellants:

David McCormack Jill Miron Tayter

COMES NOW Appellants, David McCormack and Jill Miron Tayter, by and through their attorneys, Lorraine Lawrence-Whittaker and Mary R. Poteat, and **LAWRENCE WHITTAKER, PC**, hereby requests that the Maryland State Board of Education review the November 21, 2019 decisions of the Board of Education of Howard County and in support thereof offer the following unto this Board:

DECISIONS APPEALED: Final Howard County Board of Education Attendance Area Adjustment Plan, approved on November 21, 2019.[1]

STATEMENT OF FACTS: On January 24, 2019, the Board of Education directed that the Howard County Public School System, ("HCPSS") initiate a system wide 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 system wide 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. 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

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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.

7. None of the considerations felt most important by survey respondents were given priority by the superintendent's master plan. Having commissioned the 2019 feasibility study and surveying only 1480 total respondents 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. 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 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

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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.

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] 5-2 vote in the late hours of November 21, 2019, moved approximately 5,800 students to new schools, ostensibly to both alleviate overcrowding and to achieve socio-economic balance suspiciously and improperly using FARMS data as a proxy for race to do so. Appellants McCormack and Tayter are the parents of school age children currently enrolled at Clemens Crossing Elementary School. Appellant Tayter, a resident of polygon 2132 has a first grade daughter. Appellant McCormack, a resident of polygon 132 has a son, who is currently a kindergartner at Clemens Crossing. Both children have been redistricted to Bryant Woods Elementary School in the Appellee's attendance area adjustments.

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

Violation of Ethical Requirements by Chair Ellis is an Abuse of Discretionary Power

By letter dated November 21, 2019, LaShanda Whaley, Chair of the HCPSS Ethics Panel informed the Appellee:

> "[F]or any polygon in which a Board member is a resident and/or homeowner, the redistricting plan's effect on that polygon, whether it is moved or not moved at any level, should be justified on a quantitative basis consistent with the quantitative decision criteria affecting all other polygons. Quantitative criteria could include but are not limited to: balancing school utilization, balancing FARM populations, minimizing travel times for students, and minimizing HCPSS costs. If the outcome under an approved redistricting plan for a Board member's polygon is not transparently the result of applying consistent quantitative criteria, public trust in the process will not be maximized and additional complaints to the Ethics Panel seem likely." *See Exhibit 1.*

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

HCPSS Policy 2070 prescribes the ethical obligations of HCBOE members. Pursuant to said policy, a BOE member violates the ethics policy by "participating in a matter that would have a financial impact on them or their immediate family." *See HCBOE Policy IV.P.6.* Chair Ellis blatantly violated Policy IV in the redistricting deliberation and final votes.

Of greater importance herein though, Appellees are subject to the Howard County Public Ethics Law. Section 22.202(f)(1) of said law defines the scope of elected officials subject to the act as, "any individual who holds an elective office of the County."[11] Section 22.204 lists the prohibited acts, including participation in a matter in which the official has an interest.[12] The Ethics Code defines interest as "a legal or equitable economic interest, whether or not subject to an encumbrance or a condition, that is owned or held, in whole or in part, jointly or severally, directly or indirectly." *Ho. Co. Pub. Ethics Law 22.202(k)(1).* Chair Ellis violated the Howard County Ethics Law when she participated in a series of moves described below, by her participation in the area adjustment deliberations and the votes in which she had an economic interest.

Board Chair Mavis Ellis resides in Polygon 2135, in Columbia.[13] Real estate website Zillow estimates that her residence is currently worth $327,903.[14] Ms. Ellis has been a member of the Appellee Board since being elected in November 2016, Chair of the Board since 2018 and Vice Chair of the Board from 2017-2018. *See Appellee Website.* During the late stages of the redistricting process, Chair Ellis's polygon was moved from Swansfield Elementary School to Clemens Crossing Elementary during a series of moves introduced by Ms. Mallo. The specific justification offered for this move was that it would "make a contiguous area with polygon 133." However, Polygon 133 did not stay at Clemens Crossing. It was quietly removed, leaving Chair Ellis' neighborhood as an odd polygon "bulge," hanging off the Clemens Crossing adjusted attendance area like an odd curiosity.[15] Significantly, no quantitative criteria was offered when

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[11] 22.202(f)(2) excludes certain officials: "Elected official does not include the sheriff, state's attorney, register of wills, the clerk of court, or a member of the Maryland General Assembly." Appellee members are not identified as excluded from the ethics law.

[12] Section 22.204 – Prohibited conduct and interests.

(a)Participation Prohibitions

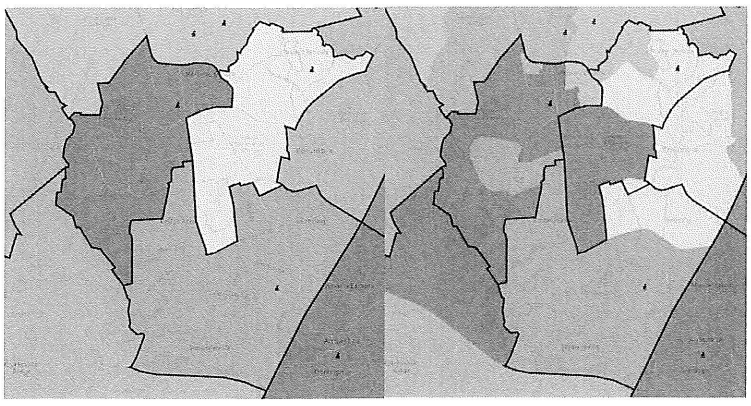
(1) Except as permitted by Commission regulation or opinion, an official or employee may not participate in:

(i) Except in the exercise of an administrative or ministerial duty that does not affect the disposition or decision of the matter, any matter in which, to the knowledge of the official or employee, the official or employee or a qualified relative of the official or employee has an interest.

[13] Chair Ellis' exact address has not been disclosed for privacy purposes. Undersigned Counsel will provide evidence of same, if challenged, at hearing.

[14] Undersigned Counsel will provide an Exhibit at hearing, however chooses not to publicly publish Chair Ellis' home address for privacy purposes.

[15] Original attendance area vs. redistricted attendance area for Clemens Crossing



Chair Ellis' Polygon was inelegantly left dangling off the side of the Clemens Crossing attendance area. Most importantly, there was **no declaration** from Chair Ellis, or Ms. Mallo, regarding the obvious conflict blooming right before their eyes.

The moves that set up this area adjustment started however in the Pointers Run neighborhood – Polygons 64, 129, 1164 and 1129. Movement of the Pointers Run polygons, East from Pointers Run Elementary School to Swansfield Elementary School, caused a capacity issue at Swansfield which then was used as justification for moving polygons out of Swansfield to Clemens Crossing. In past redistricting, polygons had always been moved West due to the perennially available capacity in the Western HCPSS schools. However, this time, in curiously beneficial moves particularly for Chair Ellis, the adjustments were made in an Easterly direction – where capacity did not exist. Thus, this set the stage for the Chair's personal financial gain as described, herein. The Pointers Run polygons are likewise, specially aggrieved by the ethical violations addressed herein.

To be on notice that such a move would cause a conflict of interest, Chair Ellis or Ms. Mallo would, of course, have needed some sort of information along the way that would flag for them the fact that a change of elementary schools may result in a difference of value in one's home. Chair Ellis and Ms. Mallo had just that information conveniently available to them as it was commissioned by the Appellee and then posted on Appellee's website, via "Board Docs."

In 2016 Appellee commissioned the Sage Policy Group[16] to study, among other economic items, the effects to Howard County home values of its school system. Sage produced a report titled "The Economic Implications of Howard County's State-Leading School System." The report assessed the "impact of Howard County student performance on home values. Specifically, Sage deployed a hedonic pricing model to establish the statistical impact of student achievement on assessed property values. Hedonic pricing models represent a standard econometric apparatus by which to determine the relationship between one phenomenon and another. In this case, the relationship is between 4th grade test scores and home prices in Howard County." *See Exhibit 2 at 3.*

The average test score for Clemens Crossing was 451.2. The average for Bryant Woods was 405.5. The average from Swansfield Elementary School was 421.1. The Sage model estimates that there should be an approximately 11% difference in property values between a home that attends Clemens versus a nearly identical home that attends Bryant Woods. To test this proposition, MLS reports were pulled on homes that were sold in 2019. *See Exhibit 3* Homes in Clemens Crossing were compared with similar homes in the Hawthorn neighborhood. The Hawthorn neighborhood attended the same high school and middle school as the Clemens Crossing neighborhood, however Hawthorn was districted to attend Bryant Woods rather than Clemens Crossing Elementary School. The average sales price of CCES homes were approximately 10% higher than the BWES homes, indicating that the relationship described in the Sage Report is still relevant in 2019.

Sage's Hedonic pricing model would indicate that redistricting a home from Swansfield to Clemens Crossing would raise property values by 7.2%. Thus, by moving her neighborhood

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[16] Attached hereto as Exhibit 2.

from SWES to CCES, Chair Ellis stands to gain $23,600 in the value of her home - exactly the type of financial impact prohibited in HCPSS Board Policy 2070.IV.P.6 and the Howard County Public Ethics Law.

The only polygons removed from CCES in the final plan were polygons 132, 1132, and 2132. These polygons were allegedly removed from CCES due to CCES being significantly over capacity. The capacity utilization issue used to justify the removal of these polygons from CCES was caused solely and directly by the move of Chair Ellis' polygon and its neighboring polygons into CCES. At no point during the capacity utilization discussion triggered by her move to CCES did Chair Ellis declare her conflict or abstain from voting when it would clearly result in a financial windfall with regard to her property value. The dearth of quantitative justification for the aforementioned moves, combined with Chair Ellis' financial gain from her polygon attending CCES demonstrate an abuse of discretionary power in violation of COMAR 13A.01.05.06.C.5.

It is clear that the homeowners in Polygons 132, 1132 and 2132 that were moved out of CCES were specially aggrieved due to an expected loss in value to their homes, such as the Appellants herein. Likewise, the Pointers Run polygons, 64, 129, 1164 and 1129, were also specially aggrieved in this scheme. However, all students and parents of HCPSS are damaged any time, such as here, a clear and blatant ethical violation was allowed to contaminate the process. As noted otherwise herein, these moves were not discrete and independent of one another. Each and every move was interdependent and interwoven with each other move. When one move fails, the whole plan fails – not just at the elementary school level, but at the middle and high school levels as well. *See argument on OMA violation herein.*

Beyond that though, an ethical violation such as this, that irreparably stains the redistricting actions of the Appellee, most importantly stains the perceptions of the public and their trust in their government institutions. "Howard County, recognizing that our system of representative government is dependent in part upon the people maintaining the highest trust in their public officials and employees, finds and declares that the people have a right to be assured that the impartiality and independent judgment of public officials and employees will be maintained ... It is evident that this confidence is eroded when the conduct of the County's business is subject to improper influence and even the appearance of improper influence" *Ho. Co. Pub. Ethics Law Sec. 22.201(a) &(b).* Assaults upon the public trust must not be tolerated. The first step to restoring public trust in such situations is to void the tainted actions involved – thus, the whole plan must be voided.

The COMAR standard herein holds that the State Board of Education may substitute its judgment for the local Board if a decision is arbitrary, unreasonable or illegal. *COMAR 13A.01.05.06.* Illegal actions include actions that are "an abuse of discretion" or are the result of "unlawful procedure" or "affected by any other error of law," among others. *Id.* The Appellee's adjustment plan is clearly illegal pursuant to all three of these options.

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 permit any but the most exact connection between justification and classification." *Parents Involved* at 720, *quoting Gratz v. Bollinger,* 539 U.S. 244, 270, 123 S. Ct. 2411 (2003).

In deciding *Parents Involved*, the Supreme Court found it was unconstitutional for school districts to assign students solely based upon their race. In applying the strict scrutiny test, a test applied in cases where governmental action uses individual classifications of race as a basis of decision making, the Court determined that the school assignment plans of the two challenged school districts therein, failed to meet the high standards of the strict scrutiny test. *Parents Involved* was a split decision however, on the first and second prongs of the strict scrutiny test. The first prong, the "Compelling State Interest" prong, requires the governmental actor to justify that the use of racial characteristics are for a compelling state interest. In *Parents Involved*, the Court, led by Justice Kennedy on this point, was satisfied that the Appellee school districts' interests in creating racially diverse schools met the first prong of the test. However, the second prong of the strict scrutiny test, the "Narrowly Tailored" prong, was not satisfied. Justice Kennedy joined Chief Justice Roberts and Justices Thomas, Alito and Scalia to find that the second prong was not satisfied and thus the assignment plans were unconstitutional.

Specifically, the Roberts' Court found that Appellees' actions were not narrowly tailored to achieve the compelling state interest. *Parents Involved,* 551 U.S. at 726. The Court held that the Appellee school districts failed to demonstrate that their racially based redistricting plans were capable of actually meeting the stated "educational and societal benefits;" rather, they were designed to merely mirror the overall demographics of the individual school systems. *Id.* at 726-27. Most importantly for the instant appeal, the Court found that the districts "failed to show they considered methods other than explicit racial classifications to achieve their goals." *Id.* at 735. "[N]arrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives. '" *Id.* In the instant matter, the HCBOE, and its financial overlords,[17] the Howard County Council, made it clear from the start that the real objective here was to racially "desegregate" HCPSS and to use the school redistricting process to do so. The Appellee blatantly used FARMS rates – the rate of children living in any given HCPSS polygon that were eligible for the federal Free and Reduced Meals program administered by HCPSS – as a thinly veiled, unconstitutional proxy for race. The first winds any in the Howard County community caught of this intended scheme was a press release from three members of the Howard County Council titled "Councilmembers Mercer Rigby, Jones and Jung Call on Howard County Public School System to Develop Integration Plan" on August 13, 2019. *See Exhibit 5.* "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 5.* 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

[17] It is well documented that HCPSS is chronically underfunded by the Howard County Council and has been for some time. ("[BOE] members including Vaillancourt and Christina Delmont-Small stated that they felt this year's budget woes were symptomatic of a larger problem in the county that the school system is chronically underfunded." https://www.baltimoresun.com/maryland/howard/columbia/ph-ho-cf-school-budget-0308-story.html) In this school year, the Appellee was required to cut over 90 para educator positions. https://www.hcpss.org/f/aboutus/budget/fy20/2020-board-approved-operating-budget-revised.pdf, FY20 budget at page 15 (141.1 Teacher and para-educator position cuts included 73.0 para-educators, 15.0 Teacher Pool positions, 20.2 Instructional Technology Teachers, and 33.2 Math, Reading and Math Instructional Support Teachers). The HCPSS's Comprehensive Annual Financial Report for Fiscal Year End June 30, 2019 contains a modified adverse opinion from its auditors due to over $39.2 million deficit in its healthcare fund. https://www.hcpss.org/about-us/budgets/health-fund/

In addition, two critical capital planning projects remain unfunded, the renovation and expansion of Hammond High School and the replacement of Talbott Springs Elementary School- both schools subject to unsanitary conditions such as mold and vermin. https://www.msn.com/en-us/news/us/hammond-high-talbott-springs-elementary-construction-projects-are-back-on-the-table/ar-BBY7dZd

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 5.* ***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 6.* On Page 19 of Mr. Blom's Report, he details what other "Trailblazing School Boards" across the U.S. have instituted, including: "Redistricting or Boundary Line Adjustments. The school board determines student attendance zones using socio-economic criteria (typically measured by FARM eligibility) or **race** along with other educational or financial factors." *Id. at pg. 20.* ***Emphasis added.*** And "Use of Socio-economic Status. The school board uses a family's socio-economic status as criteria in a student assignment policy. Typically the family's eligibility for FARMS is used." *Id.*

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

Imperatively, when recommending how to proceed, Mr. Blom states:

> "The use of terminology is very important, as citizens (and potential plaintiffs) are watching and recording the school board proceedings. The term "**racial balancing**" should not be used. ... Consider using socio-economic indicators instead of race... If redistricting is used to achieve diversity, develop redistricting plans using **race-neutral** criteria, and then among those proposals select a plan that best achieves diversity. Race neutral criteria include general educational considerations,

> financial factors such as transportation costs, building utilization, feeds between school levels, neighborhood continuity, natural geographic boundaries, etc. Diversity factors such as socio-economic status, race, educational attainment of parents, disability status, English as a second language, etc. may be added as considerations." *Id at 24.* ***Emphasis added.***

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

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

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

Lastly, Appellant asserts that independent analysis of the units moved in this matter, HCPSS's polygons, show that the redistricting using FARMS rates was anything but a race neutral exercise in obtaining diversity. *See Exhibit 7.* Dr. Hotopp found that members of certain racial groups – African-Americans and Caucasians, in particular - were far more burdened in this redistricting than were other significant racial groups in Howard County such as Asians and Latinos. *Exhibit 7.* 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. However, in the case of the Appellants, all immigrant families from different parts of Asia, they were essentially classified by the Appellee as being "white" when discussions of diversity were addressed. They no longer were considered as "diverse enough" in Appellee's view – they were instead lumped in with their Caucasian counterparts in the Appellee's ham handed approach. Appellants' children are all 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. They did not.

On Nov. 21, 2019, **prior** to the official votes taking place, it became abundantly clear to the Appellee members, and all those watching, that this FARM data set that they had used to take apart and put back together Howard County's school attendance area like a misshapen jigsaw puzzle, was, in reality, completely and substantially ***wrong*** - not slightly skewed, not mildly flawed, but plain old wrong. The Appellee had used reduction of FARMS rates by 5-10% in high FARMS rate schools as the yardstick by which success was measured. However, it became abundantly clear shortly into the Nov. 21 meeting that numerous schools' FARMS rates had inexplicably changed by up to 7% on the data set handed to the Board Members prior to the final voting was to commence. In other words, Appellee may have relied upon a particular school's FARM rate at 40% when they started the process and upon which they took their votes on 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 8 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 2132 from Clemens Crossing Elementary School to Bryant Woods Elementary School – the Appellants polygons included. 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.[18] *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 2132 moves as previously described – the motion was passed with the same majority. *Id. at 4:16.* It is significant to note here that the adjustment vote that initially failed was part of the chain moves described herein that, in large part, began with Appellants' polygons being moved from Pointers Run to Swansfield Elementary.

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 –

[18] 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.

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 – Appellants' polygons being the subject of the failed vote. 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.

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 9 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

Appellants seek 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.

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