

MONOCACY MONTESSORI
COMMUNITIES, INC.

Appellants

v.

FREDERICK COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 06-17

OPINION

This is an appeal by a charter school, Monocacy Montessori Communities, Inc. (MMCI), from a “commensurate funding” decision of the Frederick County Board of Education (local board). The local board filed a Motion for Summary Affirmance and a Memorandum and Supplemental Memorandum in Support. MMCI filed a Response and the local board filed a Reply.

FACTUAL BACKGROUND

The Frederick County Board of Education was the first school system in Maryland to adopt a policy on Charter Schools and the first to approve a charter school application. This occurred in June, 2002, prior to the passage of the charter school law.

MMCI began operation in the 2002-03 school year with 168 students and it has grown to approximately 242 students in the 2005-06 school year. The local board has approved the MMCI charter for an eight year term.

When MMCI obtained its original charter, there were no statutory directives concerning funding of a charter school. The local board, therefore, established a policy to govern the funding allocation. That policy stated that the allocation for MMCI would include: (1) the cost of salary and benefits for the staffing positions identified in a charter school; (2) an appropriate amount for materials of instruction and equipment; and (3) proportionate allocations from the following budget categories: building specific mid-level management, instructional salaries, instructional supplies, instruction-other, and appropriate fixed charges less budgeted amounts for extracurricular activities. The policy also stated that the allocation would not include FCPS resources necessary for central administration, special education, pupil personnel, health services, transportation, operations, maintenance, fixed charges, community service, and capital outlay.

Apparently, in addition to the above described charter school funding policy, MMCI agreed that “expenses such as teachers’ salaries, employee benefits, and the various types of required insurances will be paid by [the local board] for the charter school.” In addition, MMCI was to receive all federal funds for which MMCI students were eligible and its share of any system-wide gifts or endowments to the Frederick County Public Schools.

In its initial year (2002-2003), MMCI received \$5,348 per pupil.

In July 2003, the Maryland Public Charter School Program became law. *See* Md. Educ. Code Ann., § 9-101, *et. seq.* One provision of that law addresses funding. It requires a local board to “disburse to a public charter school an amount of county, State, and federal money for elementary, middle, and secondary students that is commensurate with the amount disbursed to other public schools in the local jurisdiction.” *Id.* § 9-109.

During the 2003-2004 school year, various local school systems applied the new statute to determine funding for charter schools in their system. In the spring of 2005, three disputes about commensurate funding reached this Board. *City Neighbor Charter School v. Baltimore City Board of School Commissioners* (request for declaratory judgment); *Lincoln Public Charter School v. Prince George’s County Board of Education* (direct appeal); *Patterson Park Public Charter School v. Baltimore City Board of School Commissioners* (direct appeal). On May 26, 2005, this Board issued three Revised Opinions in which it determined that, because it had the responsibility to “explain the true intent and meaning of the provision of the Education Article that pertains to public schools and public school systems in Maryland . . .”, Md. Educ. Code Ann. § 2-205(e), it was required to explain the meaning of certain provisions of the Maryland Charter School Program Act.

This Board explained the meaning of two significant terms in the statute, “commensurate” and “disbursed.” This Board decided, based on the plain meaning of those words, that commensurate meant “proportionate” and that disbursed meant “expended.” The Board stated:

Thus, under the plain meaning rule, we believe the legislature intended that a public charter school receive federal, State, and local funding in an amount proportionate to the amount of funds expended for elementary, middle, and secondary level students in the other public schools in the same system. This includes funding for services for which students in the public charter schools are eligible such as free and reduced price meals, pre-kindergarten, special education, English-language learners, Perkins, Title I, and transportation.

This Board recognized, however, that there was an inherent problem in ascertaining whether a charter school was actually funded in an amount proportionate to the amount expended in other public schools in the system. The problem was – – there were no established formulas used by school systems to calculate funds expended for each school within their systems. Thus, it would provide no meaningful guidance to say, without further explanation, that charter schools were entitled to an amount proportionate to the amount of funds expended in the other schools in the system.

Therefore, this Board developed a formula that would, in its opinion, result in a proportionate amount. That formula is: total operating budget¹ ÷ September 30 enrollment count for previous year = average per pupil funding - 2% for reasonable administrative costs for school system central office functions. Any restricted state or federal funds for which the charter school or its students were *not* eligible would be subtracted from that adjusted per pupil amount. Moreover, the charter school would need to reimburse the school system for any buy backs from the local school system.

In this case for the 2005-2006 school year, the local board did not use the formula set forth by this Board, but used one that it asserts is “aligned with the direction” given by the State Board in its Revised Opinions. The local board asserts that its formula is appropriate because the “situation in Frederick County is unique in the State of Maryland and is very different from the facts presented in the appeals heard by MSBE from Baltimore City and Prince George’s County. . . there is a history in Frederick County and funding is not just simply a theoretical concept.”

The formula used by the local board had three steps. First, it subtracted from the total budget all restricted budget amounts targeted for specific programs and services. That resulted in the “unrestricted budget.” Second, it adjusted the total unrestricted budget proportionally subtracting the value of the services it provided in-kind and directly to MMCI. It divided that amount by the number of students enrolled. This formula resulted in a per pupil amount of \$6,838. Finally, the local board would add on to that per pupil amount any restricted funds for which charter school or its students were eligible.

The local board argues that this methodology is consistent with the State Board rulings. But, the local board argues, if the State Board does not agree with that argument, the State Board’s rulings and formula are legally wrong.

In its Response, MMCI argues that because the “County Board’s budget provided for overall per pupil spending of \$9,597,” the local board has not provided commensurate funding to MMCI. MMCI focuses on the meaning of commensurate, arguing that it means “equal” funding. It asserts that, although the local board has not made all the figures available, the amount of funding provided to MMCI for the 2005-06 school year, \$6,838 per pupil, is less than 72% of the amount provided to other public schools in the system. That, it concludes, is not equal funding.

MMCI does not argue that the prior State Board rulings or the formula should apply here. It essentially argues that the State Board should adopt MMCI’s equal funding formula and award MMCI \$9,597 per student.

STANDARD OF REVIEW

¹This amount shall exclude debt service and adult education, but include all state, local, and federal funds whether restricted or unrestricted.

This case represents a controversy or dispute regarding the rules and policies of a local board. In these types of cases, the decision of the local board is considered prima facie correct unless this Board decides that the local board's decision was arbitrary, illegal, or unreasonable. COMAR 13A.01.05.05(A). A decision is arbitrary or unreasonable if it is contrary to sound educational policy or if a reasoning mind could not have reached the conclusions of the local board. COMAR 13A.01.05.05(B). A decision is illegal if it is unconstitutional; exceeds the authority of the local board; misconstrues the law; results from unlawful procedure; is an abuse of discretion; or is affected by any other error of law. COMAR 13A.01.05.05(C).

ANALYSIS

The question presented in this case is whether MMCI has received commensurate funding. The dispute herein centers on which funding formula should be used to determine commensurate funding – the State Board's, the local board's formula, or MMCI's equal funding formula? We begin our analysis with the proposition that the local board's decision to use its own formula is prima facie correct. We have asked, therefore, whether that decision is illegal, arbitrary, or unreasonable? We analyze first the local board's position that its decision is a legal one, even though it has used a formula different from the State Board's formula. Thereafter, we will address MMCI's argument that the local board's decision is illegal and should be reversed.

A. The Local Board's Position

The local board asserts that its approach to funding MMCI is legal because it is consistent with the State Board's formula and results in commensurate funding. The local board, however, has used a different methodology from the one used by the State Board. For example, instead of using the total operating budget to calculate the average per pupil amount, the local board's formula backed out all restricted funds and in-kind services from the total operating budget before calculating the average per pupil amount. The local board did not take a flat 2% administration fee but has withheld the entire amount of the Administration budget, \$6.9 million. Finally, the local board did not include any reimbursement for transportation in its total unrestricted budget amount.

The local board's formula is not consistent with the State Board's formula. The question is whether that inconsistency renders the local board's decision illegal *per se*? Therefore, we asked: Is a deviation from the State Board's formula an error of law? The answer to that question depends on whether the State Board's formula is a lock-step mandatory one or whether it allows flexibility depending on the circumstances.

This Board stated when it issued its Revised Opinions that they were "issued . . . as guidance and direction not only to the parties in this appeal but also to the other charter school applicants and local school systems in Maryland for the refinement of their working relationships on behalf of public school children throughout this State." Ex. A at 5-6.

The question has arisen in this appeal, and in others, whether this Board's formula, announced in an adjudicatory proceeding, rather than by regulation, could actually be applied to school systems that were not parties to the Revised Opinions. The Maryland Court of Appeals has consistently held that administrative agencies are not precluded from announcing new principles in adjudicative proceedings and that the choice between rulemaking and adjudication lies within the agency's discretion. *See, e.g., Consumer Protection Division v. Consumer Publishing Co.*, 304 Md. 731, 753-754 (1985); *Maryland Assoc. of Health Maintenance Organizations v. Health Services Const Review Comm'n*, 356 Md. 581, 600 (1999). Only once has the Court of Appeals mandated that an agency proceed by rulemaking. In that case, *CBS v. Comptroller*, 319 Md. 687 (1990), the Comptroller announced a substantially new and generally applicable policy which also changed existing rules. *Id.* at 699. Thus, the court held that if an agency changes existing law or formulates a rule of widespread application, it must do so through the rulemaking process. *Id.*; *see also Department of Health and Mental Hygiene v. Chimes*, 343 Md. 336, 346 (1996).

In the Revised Opinions, this Board did not change any existing rules, but it could be argued that the Board formulated a rule of widespread application if the Board intended that the formula it presented in the Revised Opinions had to be used, *without deviation*, by every local school system in calculating a charter school's funding allocation, no matter what the circumstances. As this opinion reflects, we did not intend such a rigid approach to determining commensurate funding.

As this Board has recognized, the term commensurate funding has meaning only when it can be reduced to dollar and cents. The State Board formula, when used, results in a bottom line amount of money that this Board considers proportionate/commensurate funding. If a school system decides to use a different formula, it is our opinion that that formula must result in a bottom line amount of money such that this Board could conclude that the school system was providing proportionate/commensurate funds to the charter school.

The analysis set forth herein illustrates how the State Board formula can be used as a measure of whether a local school system has provided proportionate funding to a charter school. The facts concerning the local board's methodology places this issue in context.

The facts of this case reflect a several year history of charter school funding by the local board and a commitment and collaboration with MMCI over that time period. Under the local board policy that applied prior to the enactment of the charter school statute, the funding allocation to MMCI generally included salaries and instructional costs, but did not include administration, special education, pupil personnel, health services, transportation, operations, maintenance, fixed charges, community services and capital outlay.

When the State Board issued its Revised Opinions, the President of the local board directed the FCPS staff to re-evaluate the budget allocation to MMCI. As a result, the FCPS staff submitted a revised budget allocation for MMCI for the 2005-2006 school year, which the local board approved, increasing the allocation by \$176,000. The per pupil amount increased from \$6,112 to \$6,838.

Mr. Keller, Executive Director for Fiscal Services, has explained in his affidavit how FCPS staff arrived at the new per pupil amount. First, they established the total budget for each of fifteen general budget categories and from those amounts subtracted all restricted budget dollars. Thus, from the total operating budget of \$376,481,306, they subtracted \$19,561,570 in restricted dollars resulting in a total unrestricted budget of \$356.9 million.

They then took the total unrestricted budget and adjusted each of the fifteen categories further. For example, the total unrestricted budget for Administration was \$6.9 million. Instead of assessing the 2% administrative charge the staff included \$0 in the charter school budget for this category.² It did so because FCPS provides all central office functions to MMCI. It used the same rationale to include \$0 for Special Education, Pupil Personnel, and Food Services because FCPS provides each of those services in-kind directly to MMCI. The staff included \$0 for transportation because, pursuant to the Charter School Agreement, MMCI agreed that transportation was generally its responsibility.

The staff included the total unrestricted budget funds in each of the following categories: Instructional Salaries; Instructional Supplies; Other Instructional Costs; Operations; Maintenance; and Capital Outlay. *Id.*

In the remaining categories, the staff reduced the total unrestricted budget amount. For example, the Mid Level Management Category was reduced from \$28 million to \$20.9 million because the Curriculum, Administrative and Supervision Office funds support training for delivery of State/Federal programs and provides oversight for the Charter School. The Health Services category was reduced from \$4.5 million to \$47,132 because the majority of the category represents in-kind services provided by the Frederick County Government. MMCI is, therefore, assigned a health technician and nurse by the County Health Department. The \$47,132 represents funding for medical supplies. *Id.* The staff reduced the Fixed Charges category from \$73.2 million to \$49.2 to exclude funds that represent in-kind revenue and expenditures for state retirement, and fringe benefits. *Id.*

After all these calculations were made, the adjusted amount of \$268,270,701 was divided by student enrollment resulting in a per pupil amount of \$6,838.

The question for this Board, therefore, is: Did the local board's formula and methodology result in proportionate funding to MMCI? Using the information and data provided by the parties, we analyzed the FCPS per pupil calculation and compared it to the per pupil amount if the State Board's formula were used.

²We point out that \$6.9 million is less than 2% of total budget of \$376,481,306.

CHART I
Initial Per Pupil Amount

FCPS Calculation

Total Operating Budget	\$376,481,306.00
Restricted Budget	(\$19,561,570.00)
Total Unrestricted Budget	\$356,919,735.00
Further Adjustments for In-Kind Services	(\$88,649,034.00)
Total Budget After All Adjustments	\$268,270,701.00
Estimated Enrollment	39,231
No 2% reduction	-----
Initial Per Pupil Amt.	\$6,838.00

State Board Calculation

Total Operating Budget	\$376,481,306.00

Estimated Enrollment	39,231
Per Pupil Amount	\$9,597.00
Less 2% for Admin.	(\$192.00)
Initial Per Pupil Amt.	\$9,405.00

That chart starkly demonstrates the differences between the two formulas. Specifically, the State Board formula includes up-front all restricted dollars in the Total Operating Budget and does not deduct from that amount the value of any buy backs, whereas the FCPS formula deducts all restricted dollars as well as in-kind services up-front from the Total Operating Budget.

Thus, there is a difference of \$2,567 between the State Board's calculation and FCPS's calculation. If that were the final step in calculating the average per pupil amount, we would necessarily conclude that FCPS is not providing proportionate funding to MMCI.

Another step is necessary, however. Because FCPS provides in-kind services to MMCI, the value of those services must be added back into the initial per pupil amount to reflect the accurate average per pupil amount *expended* on MMCI students.

CHART II
Average Per Pupil Amount

FCPS		State Board	
Initial Per Pupil Amt.	\$6,838.00	Initial Per Pupil Amt.	\$9,405.00
Special Education	\$676.00 ⁴	-----	
Pupil Personnel	\$53.00 ⁵	-----	
Health Services	\$115.00	-----	
Partial Fixed Costs Including State Retirement and Fringes	\$613.00	-----	
Administration	\$176.00	-----	
Food Service	\$2.00	-----	
Total In-Kind	\$1,635.00	-----	
Average Per Pupil Amt.	\$8,473.00	Average Per Pupil Amt.	\$9,405.00

The differences in the dollar amounts when all in-kind services are added to the initial per pupil amount is \$932.00 (\$9,405-\$8,473).

One of the main reasons for the difference is that FCPS put no money into the charter school budget for transportation. As it points out, however, the Charter Agreement dated 1/14/05 states that transportation shall be the responsibility of MMCI except for students who live along on established route and for special education students. Thus, its average per pupil amount does not reflect transportation costs.

⁴This amount has been calculated by using the FCPS total unrestricted Special Education budget. ($\$26,517,455 \div 39,231$ pupils = \$676.00).

⁵Unrestricted Pupil Personnel funds ($\$2,074,282 \div 39,231$ = \$53.00). The same formula applies to all the calculations in this chart: unrestricted budget funds \div enrollment.

All transportation dollars are included in the State Board's average per pupil amount of \$9,405, however. Yet, it is our view that, if MMCI agreed to cover transportation (except for certain students), that the cost of transportation services per pupil should be deducted from the \$9,405 because MMCI essentially has agreed that it is not entitled to the transportation dollars contained in FCPS Total Operating Budget. If that deduction occurred ($\$16,470,287 \div 39,231 = \420 per pupil), the adjusted per pupil amount in the State Board's formula would be \$8,985.

With that deduction, the difference between the State Board's average per pupil amount (\$8,985) and FCPS's average per pupil amount (\$8,473) is \$512.

Moreover, we point out that, for all the calculations presented here, if MMCI and/or its students are eligible for restricted funds, those amounts would be added to the FCPS Average Per Pupil Amount because FCPS deducted those amounts up-front from the Total Operating Budget. Just the opposite would occur in the State Board formula. Because all restricted funds are included in the State Board's Total Operating Budget, restricted funds for which MMCI and/or its students are *not* eligible must be subtracted from the Average Per Pupil Amount.

Thus, the difference of \$512 between the FCPS calculations and the State Board calculations will be further decreased.

II. MMCI's Position

It is MMCI's position that neither the State Board nor the local board are correctly interpreting the term "commensurate." MMCI argues that commensurate means equal, particularly when that term is used in relation to a specific, quantifiable sum of money. Because Maryland courts have not ruled on the meaning of "commensurate," MMCI cites cases from other jurisdictions to support its argument. Based on those cases, MMCI argues that the amount of money disbursed to other schools in the school system is a specific, quantifiable amount, and, therefore, commensurate means equal in this context.

The State Board and the local board's formulas are an attempt to ascertain a specific, quantifiable amount. MMCI asserts that both formulas are illegal, however, because they do not result in "equal" funding to MMCI. It is MMCI's position that equal funding occurs only if the total operating budget (\$376,481,306) is divided by student enrollment (39,231). That calculation results in a per pupil amount for the 2005-06 school year of \$9,597. That amount includes all state, federal, and local dollars, restricted and unrestricted, including administrative costs.

If MMCI were entitled to the full per pupil amount, however, MMCI would receive an amount greater than an "equal" amount of funds. It would receive the full cash payment of \$9,597 and all in-kind services for free. It is our opinion that if MMCI accepts in-kind services from FCPS it would have to buy back those services from FCPS. When the cost of in-kind services MMCI receives from FCPS (\$1,635) is subtracted from \$9,597, the per pupil amount is \$7,962. That amount of cash is, of course, greater than the \$6,838 per pupil payment that FCPS is providing to MMCI currently.

The following chart reflects the calculations that result from each formula.

CHART III
Adjusted Per Pupil Amount Per Formula

	FCPS	State Board	MMCI
Total Operating Budget	\$376,481,306	\$376,481,306	\$376,481,306
Restricted Budget	(19,561,570)	----	----
Total Unrestricted Budget	\$356,919,735	----	----
Further Adjustments For In-Kind Services	(\$88,649,034)	----	----
Total Budget After Adjustments	\$268,270,701		
Estimated Enrollment ÷	39,231	39,231	39,231
Per Pupil Amount	\$6,838	\$9,597	\$9,597
2% Administrative Costs Deduction	-	(\$192 per pupil)	-
Initial Per Pupil Amount (Cash)	\$6, 838	\$9,405	\$9,597
In-Kind Add-Ins	\$1,635	----	----
Transportation Deduction	-	(\$420 per pupil)	-
Average Per Pupil Amount Expended	\$8,473, plus restricted funds	\$8,985, minus restricted funds	\$9,597, minus restricted funds

Based on the amounts reflected in that chart, it is our opinion that the MMCI formula results in an amount greater than a proportionate amount. Therefore, we conclude that using such a formula does not comport with the statutory requirement for commensurate funding.

As to the FCPS formula, we recognize the terms of the pre-existing agreement that MMCI would absorb the cost of transportation. We recognize also that the agreement may be renegotiated in the future and paying the cost of transportation may fall to FCPS, thus resulting in a different average per pupil amount expended. At this point, however, we reduced the State Board's average per pupil amount by \$420 to reflect the transportation agreement.

We also recognize here the value of in-kind services at \$1,635 per pupil. We have not looked behind why particular in-kind services were chosen or whether MMCI had any choice in

the matter. We take this opportunity to encourage school systems to negotiate fairly over the provision of in-kind services. They should not be announced as an edict under which the charter school must live without complaint. We recognize here, however, that in-kind services have a cash value and that if the charter school decided to “buy back” those services from FCPS it would have paid \$1,635 per student. Therefore, we add that amount to the FCPS per pupil calculation.

At this point, the difference between the FCPS formula amount and the State Board’s is \$512. We conclude, using this analysis, that FCPS has not provided proportionate/commensurate funding to MMCI.

We recognize, however, that there is an amount by which each average per pupil amount must still be adjusted; that is – – the amount of unrestricted funds to which the charter school is entitled. That amount must be added to the FCPS per pupil amount and deducted from the State Board’s.

In order to place both formulas on the same footing concerning the restricted dollars, we have recalculated the State Board formula by subtracting the restricted dollars upfront from the total operating budget. The chart below reflects that calculation. That calculation reflects a \$12 difference between the two numbers.

CHART IV
Recalculated Adjusted Per Pupil Amount Per Formula
Minus Restricted Dollars

	FCPS	State Board
Total Operating Budget	\$376,481,306	\$376,481,306
Restricted Budget	(19,561,570)	(19,561,570)
Total Unrestricted Budget	\$356,919,735	\$356,919,735
Further Adjustments For In-Kind Services	(\$88,649,034)	----
Total Budget After Adjustments	\$268,270,701	\$365,919,735
Estimated Enrollment ÷	39,231	39,231
Per Pupil Amount	\$6,838	\$9,097
2% Administrative Costs Deduction	-	(\$192 per pupil)
Initial Per Pupil Amount (Cash)	\$6, 838	\$8,905
In-Kind Add-Ins	\$1,635	----
Transportation Deduction	-	(\$420 per pupil)
Average Per Pupil Amount Expended	\$8,473, plus restricted funds	\$8,485, plus restricted funds

CONCLUSION

To provide commensurate funding, in our opinion, FCPS must provide an additional \$12.00 per pupil to MMCI, plus any restricted funds to which MMCI is entitled.

Edward L. Root
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May 24, 2006