

THOMAS MARSH,

Appellant

v.

ALLEGANY COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 05-09

OPINION

On July 23, 2003, the State Board issued Opinion No. 03-25 in the appeal referenced above affirming the November 12, 2002 decision of the Allegany County Board of Education to consolidate and reconfigure school districts in Allegany County based on shifts in population, physical condition of existing school buildings, and other factors. The local board established a long term plan for completion of a new high school in the western region, closing of certain schools, renovation of an elementary school, and redistricting of certain areas. Of specific relevance to this appeal, the local board decided to consolidate Westmar and Beall High Schools in a new school facility slated for completion for the 2007-2008 school year,¹ and to move students at Westmar Middle School to the Westmar High School building in Lonaconing.² Mr. Marsh disagreed with the decision claiming that it was arbitrary, unreasonable, and illegal.³ As with other school redistricting appeals, the State Board referred the appeal to the State Office of Administrative Hearings.

Instead of granting a full evidentiary hearing, the administrative law judge, Thomas G. Welshko (ALJ), conducted an extensive prehearing conference and determined that there were no genuine disputes of material fact that would trigger an evidentiary hearing. Upon review of the record, the State Board adopted the ALJ's findings of fact and conclusions of law and upheld the Allegany Board's school closings and consolidation decision.

Mr. Marsh appealed the State Board's decision, maintaining that he should have been

¹The new school would be built adjacent to the current Beall High School.

²The local board also decided to close Beall Elementary School and reassign students to other elementary schools pending renovation of Frost Elementary School, and to keep George's Creek Elementary School open pending completion of the renovation at Frost. Matters regarding the elementary schools are not at issue in this appeal.

³The local board also made an April 2003 decision to proceed with the consolidation of Westmar and Beall High School without waiting for the new high school to be built. This action was stayed by the State Superintendent and is not at issue in this appeal.

granted a full evidentiary hearing because the totality of his submissions created a dispute of material fact regarding the local board's decision and rationale. The circuit court agreed with Mr. Marsh's view and directed the State Board to conduct further proceedings consistent with the court's opinion which required a full hearing. Accordingly, the State Board remanded the case to the Office of Administrative Hearings for a full hearing on the merits of the school closings and consolidation decision.

Judge Welshko, the same ALJ who had previously handled this case, conducted a hearing on the merits of Appellant's appeal on September 20 – 24, 2004 and November 3 – 5, 2004.⁴ On December 3, 2004, Judge Welshko issued a proposed decision recommending that the State Board uphold the local board's November 12, 2002 consolidation and reconfiguration decision. A copy of the ALJ's proposed decision is attached as Exhibit 1. Because Appellant filed objections to the proposed decision, the parties presented oral argument to the State Board on February 22, 2005.

Appellant's Objections to the ALJ's Proposed Decision

Appellant's objections can be divided into two basic categories. In the first category, Appellant argues that Judge Welshko should have recused himself from hearing this case. In the second category, Appellant argues against the factual conclusions reached by Judge Welshko, maintaining that these conclusions lack sufficient evidence in the record.

Recusal of Judge Welshko

Upon this case being remanded to the OAH, Appellant requested that Judge Welshko recuse himself from hearing this case. Judge Welshko determined that he would not recuse himself and proceeded to conduct the hearings and issue a proposed decision. Appellant objects arguing that Judge Welshko was unable to impartially decide the case because the Appellant successfully argued to have the circuit court reverse Judge Welshko's earlier decision, which "left him [Welshko] with a predisposed mindset to unfairly favor the actions of the local board". The local board argues that there is no evidence that Appellant failed to receive a fair and impartial judgment. In fact, the local board indicates that "Judge Welshko basically 'bent over backwards' to assist the Appellant in the actual trial of these proceedings".

The Maryland regulations applicable to administrative law judges employed by the Office of Administrative Hearings found at COMAR 28.02.01.08A(1) require a judge to conduct a "full, fair, and impartial hearing". COMAR 28.02.01.08C(1)(a) provides that a "judge shall withdraw from participation in any proceeding in which personal bias or other reasons render the judge unable to provide an impartial hearing and decision, or when an appearance of impropriety may

⁴The transcript of those proceedings consists of more than 1,700 pages and more than 100 exhibits. Twenty-one witnesses called by Appellant testified. Three witnesses testified for the Allegany County Board.

reasonably be inferred from the facts.” *See also Reed v. Baltimore Life*, 127 Md. App. 536 (1999)(In order to justify recusal, one must show that the judge assigned is incapable of rendering a fair and impartial judgment); *Jefferson-El v. State*, 330 Md. 99, 107 (1993)(In order to overcome the presumption of impartiality, “the party requesting recusal must prove that the [decision maker] has a ‘personal bias or prejudice’ concerning him or ‘personal knowledge of disputed evidentiary facts concerning the proceedings.’”). As stated in *Reed*, 127 Md. App. at 552:

[A]ppellant’s accusations of judicial bias are analogous to participating in an athletic contest “under protest” or filing a formal complaint against the umpire because one is unhappy with what the umpire perceives to be the appropriate ball or strike call or against a referee because of an adverse foul call. Unless there is palpable and demonstrable indicia of judicial bias, evidentiary calls and actions taken by the trial judge in the conduct of a trial are more appropriately reviewed in the context of whether the judge’s rulings comport with applicable law, rather than by divining a motive speculatively attributed to the trial judge by counsel. It is settled law that a motion for recusal may not ordinarily be predicated upon the judge’s rulings in the case at hand or a related case. (Citations omitted).

Here, Appellant gives no basis for Judge Welshko’s recusal other than the fact that the matter was previously before Judge Welshko on a motion for summary affirmance; the circuit court found error with these earlier proceedings, and Judge Welshko has again ruled in favor of the local board in the proposed decision currently before the State Board. While Appellant alleges that Judge Welshko should have recused himself from this case on remand to OAH, Appellant fails to cite to any portion of the record where Judge Welshko acted impartially or with personal bias. We therefore do not find that Appellant has met his burden of demonstrating that Judge Welshko should have recused himself from this matter. The fact that Appellant “was skeptical and paranoid of having the same Judge preside over the hearing” is insufficient to justify recusal. *See Appellant’s Objection to ALJ Opinion*, p.1, paragraph 3.

Factual Conclusions

Appellant’s objections to the ALJ’s factual findings are as follows:⁵

- The ALJ found that although Westmar Middle School is well maintained, it is in need of significant renovation. Items needing installation, repair, or replacement include a non-ADA compliant means of ingress and egress, the heating/ventilation system, electrical

⁵In raising the evidentiary objections, Appellant fails to cite to any specific page of the 1,700 page transcript.

service, plumbing, windows, internet access, and fire protection. Proposed Decision at 6 – 7, ¶ 5.

Appellant argues that the IAC report rated the building as being in good condition. Appellant does not acknowledge that assessing how well a school is maintained is not the same as assessing its condition. The 3DI report indicated that Westmar Middle has a facility condition index (“FCI”) of 25.06, which means that it would cost 25.06% of the replacement value of the school for renovations. There was also testimony that this estimate was on the low side. *Id.* at 40 – 41.

- The ALJ found that Westmar Middle School has wireless internet access but that the local board decided not to wire the school to the Internet through DSL or other forms of high speed access. *Id.* at 7, ¶ 5. Appellant argues that Westmar Middle is being treated differently from the other schools which are wired for computers despite the fact that there is a grant which could pay for the wiring of the school. Appellant fails to mention that the electrical service at Westmar Middle is inadequate to sustain a computer lab at the school; the school uses fuses instead of circuit breakers, and laboratories lack ground fault circuit interrupter (GFCI) outlets. *Id.* at 6, ¶ 5C.
- The ALJ found that transporting students from Westernport, Barton, Lonaconing and Midland areas to Frostburg using school bus transportation on Route 36 would be safe. *Id.* at 10, ¶ 17. Appellant argues that the ALJ ignored testimony from parents and video and pictures that Route 36 is unsafe. Appellant ignores the testimony of Jay Walbert, the school system’s Supervisor of Transportation, who indicated that Route 36 is a modern highway by Maryland State Highway Administration standards and that many portions of the highway have been replaced in recent years. Mr. Walbert also testified that school bus traveling distances have no relationship to accident rates; that transporting students on a school bus is one of the safest methods of transportation; and that most accidents in Allegany County occur in places other than Route 36. *Id.* at 30 –31.
- The ALJ found that in the spring and summer of 2002, the local board determined that it was necessary to consolidate and reconfigure the school districts based on population changes. *Id.* at 10 –11, ¶20. Appellant argues that this was a conspiracy to close the Westmar schools which had been predetermined through a process that began in 2000. Pursuant to § 4-109 of the Education Article, Annotated Code of Maryland, each local board determines the geographical attendance area for its schools. In this case, all appropriate procedures were followed by the local board in making its closing and consolidation decisions; we find no evidence of an alleged conspiracy.
- The ALJ found that the local board considered input from a variety of sources in reaching its decision, including the School Community Committee Reports and comments made by speakers at the public hearing. These other sources included the MGT performance audit, the 3DI facility utilization study, recommendations of the superintendent and his

staff, and public comment from the meetings in the months preceding the public hearing. *Id.* at 15, ¶ 32. Although Appellant argues that the ALJ ignored several reports and other pieces of evidence that do not support the local board's actions, the record discloses that the Westmar Middle School Community Committee, the Westmar High School Community Committee, and the Beall High School Community Committee each ultimately endorsed the Allegany County Board's long-range school closing and consolidation plan.

- The ALJ certified Dr. Craig Howley, Associate Adjunct Professor at Ohio University, as an expert witness in school size research. Dr. Howley testified that large schools contribute to poor student achievement in economically depressed rural areas, such as the Georges Creek region. Dr. Howley concluded that no new high school should be constructed with a capacity of more than 1000 students. *Id.* at 20. Appellant argues that because the ALJ accepted Dr. Howley as an expert witness, the ALJ should have given Dr. Howley's testimony more weight. However, the record discloses that the ALJ gave Dr. Howley's testimony less weight because Dr. Howley did not visit any of the relevant schools and gave his opinion in the abstract, and because Appellant did not show that Dr. Howley's views had widespread acceptance in the nationwide educational community. *Id.* at 22.
- Appellant also argues that recommendations to create community schools were ignored. To the contrary the record discloses that the ALJ did note that Appellant offered evidence of the community school concept to rebut the local board's use of school underutilization as a basis for closing and consolidating certain schools. However, as the ALJ explained, implementation of the community school concept would do nothing to address underutilization. State-rated capacity considers only the student population, not, for example, the number of adults who go to evening gymnastics classes. We concur with the ALJ's conclusion that while the community school concept might be beneficial to some members of the community, the concept does nothing to alleviate underutilization of the school with respect to its State-rated capacity. *Id.* at 21-22.
- The ALJ states that “[p]rojecting future population trends is a matter of educated guesswork.” He found that the local board relied on data from its planning department, the County Health Department, and the U.S. Census Bureau that a “reasonable person would accept as valid in formulating a decision with respect to population trends.” *Id.* at 28. Appellant argues that the ALJ ignored evidence that Allegany County as a whole is projected to have population increases. Appellant ignores the fact that data utilized by the local board demonstrates the population of Westmar Middle has been declining and that there is no projection for growth of the student population in the Westernport area where that school is located. *Id.* at 25.
- The ALJ states that “Appellant presented no evidence that the BOE knowingly relied on

false information.” *Id.* at 29. Appellant argues that the local board did rely on false information because it asserts in its rationale that Westmar Middle School is one of the oldest schools in the system. Appellant maintains that Westmar Middle is one of the newest schools. Appellant’s argument on this point is irrelevant. In making its decision, the local board was well aware of the age and condition of the Westmar Middle School building and the other school buildings under consideration. Further, the ALJ provided a thoughtful analysis of the local board’s consideration of the age and condition of school buildings. *Id.* at 29.

- Appellant argues that the ALJ should have considered Appellant’s argument that “consolidation kills kids” given that the Westmar community has always had concerns about the safety of their children if required to travel further on Route 36 to Frostburg. Appellant’s argument was based on a newspaper article concerning a student who died in an accident while traveling as a passenger in a friend’s car on the way to Westmar High School. Appellant maintained that had the previous consolidation of Westmar High School not taken place, this student might be alive today. The ALJ found Appellant’s argument that “consolidation kills kids” constituted unsupported conjecture and rebuked Appellant for making such an inflammatory statement which had no basis in fact. *Id.* at 31.
- With respect to the closure of Beall and Westmar High Schools and the building of a new high school, the ALJ concluded that the local board considered the objections of the communities and made a reasoned decision not to maintain the status quo. *Id.* at 27-40. Appellant misconstrues that statement and argues that the ALJ erred by stating that the local board was only required to consider the objections of the communities. The proposed decision makes clear that the local board considered all of the factors set forth in COMAR 13A.02.09.01B with regard to school closings, considered the objections and concerns of the communities, and ultimately made a well reasoned decision for school closure and consolidation.⁶
- The ALJ found the *Accardi* Doctrine inapplicable to this case. Appellant argues that *Accardi* applies and requires the reversal of the local board’s decision. The *Accardi* Doctrine provides that “[a]n agency of the government must scrupulously observe rules, regulations, or procedures which it has established.” *U.S. ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954). “This principle applies to regulations that are intended to confer important procedural benefits upon an individual as opposed to regulations adopted to ensure the orderly transaction of business before the agency.” *Singletary v. Maryland State Dept. of Public Safety and Correctional Services*, 87 Md. App. 405, 418-19 (1991).

⁶The ALJ’s analysis of the high school closing and consolidation decisions is on pages 27-40; the rationale supporting the closure of Westmar Middle and transfer of students to Westmar High is on pages 40-45.

While the Court of Appeals has held the *Accardi* doctrine applicable to administrative proceedings in Maryland, a complainant must still show that prejudice to him or her resulted from the agency violation in order for the agency decision to be struck down. *Pollack v. Patuxent Institution Bd. of Rev.*, 374 Md. 463 (2003). We do not believe that the *Accardi* Doctrine is implicated in this case because appellants who challenge school redistricting, consolidation, and closing decisions have no liberty or property interest in maintaining school districts in their present form. Even if *Accardi* were applicable, Appellant has not demonstrated prejudice because he was given an extensive evidentiary hearing on his appeal. *See* ALJ's analysis at pages 46-48.

As the ALJ correctly noted, local board decisions on school redistrictings, closings, and consolidations are quasi-legislative in nature, not judicial or quasi-judicial. *See Elprin v. Howard County Board of Education*, 57 Md. App. 458, 465 (1984) in which the Court of Special Appeals held that a resident of a school district has no liberty or property interest in a school remaining "as is." Rights to be afforded interested citizens in such matters are limited. *See* ALJ's Proposed Decision at 22-23. As the ALJ explained, "competing groups might desire different alternatives. The BOE [Board of Education] has to choose. It cannot satisfy everyone." *Id.* at 50.

CONCLUSION

Judge Welshko determined that the local board's decision was not arbitrary or unreasonable. He noted that the local board gave a detailed explanation in its rationale concerning the impact of the proposed closing on the following factors as set forth in COMAR 13A.02.09.01B: (1) student enrollment trends; (2) age or condition of school buildings; (3) transportation; (4) educational programs; (5) racial composition of student body; (6) financial considerations; (7) student relocation; and (8) impact on community in geographic attendance area for school proposed to be closed and school, or schools, to which students will be relocating. He further noted that these rationales were substantially supported. *See* Proposed Decision at pp. 23 – 24 – for closure of Beall and Westmar High Schools; pp. 25 – for closure of Westmar Middle School.

In response to Appellant's contentions that the local board's decision was illegal because it was not based on substantial or correct evidence, Judge Welshko determined that the local board's plan was supported by substantial evidence and complied with all of COMAR's requirements regarding public comment and publication. With regard to other miscellaneous arguments made by Appellant, the ALJ found that those arguments lacked merit as well. *See* Proposed Decision at pp. 48 – 52.

Based upon our review of the extensive record in this matter and consideration of the arguments of the parties, we adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge. We thereby affirm the school closings and consolidation decision made by the Allegany County Board of Education on November 12, 2002.

Edward L. Root
President

Dunbar Brooks
Vice President

Lelia T. Allen

JoAnn T. Bell

J. Henry Butta

Beverly A. Cooper

Calvin D. Disney

Clarence A. Hawkins

Karabelle Pizzigati

Maria C. Torres-Queral

David F. Tufaro

March 23, 2005

Exhibit 1

THOMAS R. MARSH	*	BEFORE THOMAS G. WELSHKO
V.	*	AN ADMINISTRATIVE LAW JUDGE
BOARD OF EDUCATION	*	OF THE MARYLAND OFFICE
OF ALLEGANY COUNTY	*	OF ADMINISTRATIVE HEARINGS
	*	OAH NO.: MSDE-BE-09-04-31234 ⁷

* * * * *

PROPOSED ORDER

STATEMENT OF THE CASE
ISSUE

SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On December 3, 2002, the Board of Education of Allegany County (the “BOE”) issued a decision in which it decided to consolidate and reconfigure school districts, contingent upon the construction of a new high school (the “BOE Plan”). On December 20, 2002, Thomas R. Marsh, individually, and as spokesman for a citizens group known as Taxpayers’ Alliance for Fair & Honest Government, along with the mayors of five affected towns, filed an appeal of that decision with the Maryland State Board of Education (the “State Board”). On February 3, 2003, the State Board transmitted these appeals to the Office of Administrative Hearings (“OAH”), to conduct a contested case hearing with respect to the Appellant(s)’ appeal.

⁷Formerly OAH No. MSDE-BE-09-200300003.

On January 28, 2003, in anticipation of this case's transfer to OAH, the BOE, through counsel, filed three separate motions: (1) a *Motion for a More Definite Statement*, (2) a *Motion to Dismiss*, and (3) a *Motion for Summary Affirmance*. The BOE requested that it be allowed to make oral argument in support of its motions. I granted this request in my letter to the parties dated February 14, 2003.

On April 9, 2003, I convened an in-person pre-hearing conference/motions hearing at the Office of Administrative Hearings in Hunt Valley, Maryland, pursuant to Code of Maryland Regulations ("COMAR") 28.02.01.13 and 28.02.01.16. Thomas R. Marsh represented himself.⁸ G. Gary Hanna, Attorney at Law, represented the BOE. At that conference, I addressed the BOE's motions, along with prospective discovery disputes, evidentiary matters and scheduling of the hearing on the merits (assuming such a hearing was necessary).

On May 2, 2003, I issued a Proposed Decision in which I granted the Board's *Motion for Summary Affirmance*. On July 23, 2003, the State Board affirmed that decision. The Appellant disagreed with that decision and, on August 20, 2003, he filed a petition for judicial review. On

⁸ This case was originally captioned "*Thomas Marsh, Individually, and as Spokesman for the Taxpayers' Alliance for Fair & Honest Government v. Board of Education of Allegany County.*" In my February 14, 2003, letter to the parties, I ruled that since the Taxpayers Alliance for Fair & Honest Government was an artificial entity, it had to be represented by legal counsel at all proceedings. That entity did not secure legal counsel for the April 9, 2003, pre-hearing conference. Consequently, I concluded that it ceased to be a participant by default. (See COMAR 28.01 .02.20A.) The mayors of the five towns, who also signed the original complaint and request for hearing, also failed to appear at the pre-hearing conference, so their further participation in this matter ceased as well. Mr. Marsh, however, decided to continue as the sole complainant/appellant.

February 4, 2004, the Honorable W. Timothy Finan, Circuit Judge, Circuit Court for Allegany County, reversed the State Board's decision and remanded this case for further proceedings. On May 17, 2004, the State Board returned the case record to the OAH for a hearing on the merits.

I conducted a hearing on the merits of the Appellant's appeal at the offices of the Board of Education of Ailegany County in Cumberland, Maryland, on September 20, 21, 22, 23 and 24, 2004, and on November 3, 4 and 5, 2004. The Appellant, Thomas R. Marsh, appeared without representation. G. Gary Hanna, Attorney at Law, represented the BOE.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Office of Administrative Hearings, and the COMAR regulations governing appeals to State Board. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004); COMAR 2802.01; and COMAR 13A.01.05.07.

ISSUE

Whether the decision of the BOE on November 12, 2002, regarding the closing, consolidation, and reconfiguration of public schools within the Allegany County School System was arbitrary, unreasonable, or illegal.

SUMMARY OF THE EVIDENCE

I. Exhibits.

The Appellant offered eighty-five (85) exhibits. All of those exhibits, except Appellant Nos. 23, 45, 67 and 73, were admitted. The BOE offered twenty-five (25)

exhibits. All of the Board's Exhibits were admitted.

II. *Testimony.*

A. *The Appellant.*

The Appellant presented the testimony of the following witnesses:

Karen Treber - Assistant to the President and Counsel for Frostburg University.

Diane May - Parent, Member of Westmar Middle School Community Committee.

Dr. Yale Stenzler - former Executive Director of Interagency Committee on School Construction for the State of Maryland ("IAC"). Dr. Stenzler was admitted as an expert in the condition of school buildings and education-related matters.

Hon. John Hafer - State Senator.

Diane Amann - parent, member of the Westmar High School Community Committee.

Hon. Donald T. Smith - Mayor of Westernport.

Kristina McNemar - student, Westmar High School.

Patricia "Trish" Morgan - Parent.

Clinton Bradley - resident of Westempport.

Paula Fuller, parent, resident of Mount Savage, Maryland.

Liridy Shank, Technology Teacher, Westmar Middle School.

Reverend Thomas Brackefl - Member, Westmar Middle School Community Committee.

Dr. Donna "Dee" Truesdale - Former member of the BOE. Dr. Truesdale was admitted as an expert in educational administration.

Dr. John O'Connell - former Superintendent of Allegany County Public Schools.

Dr. O’Connell was admitted as an expert in educational policy and management.

Dr. Craig Howley – Associate Adjunct Professor at Ohio University. Dr. Howley was admitted as an expert in school size research.

Greg Smith – Principal, Beall High School.

Wayne Nicol – Principal, Westmar High School.

Martin Crump – Principal, Westmar Middle School.

Jay Walbert – Supervisor of Transportation, Allegany County Public Schools. Mr. Walbert testified as an adverse witness for the Appellant.

John Wagoner – Assistant Superintendent for Administration and Finance for Allegany County Public Schools. Mr. Wagoner testified as an adverse witness.

Thomas R. Marsh, Appellant.

B. *The BOE.*

The following witnesses testified for the BOE:

William J. AuMiller – Superintendent of Allegany County Public Schools.

John “Slug” Armstrong – School Counselor, Beall High School.

Vincent C. Montana – Supervisor of Maintenance and School Construction for Allegany County Public Schools.

FINDINGS OF FACT

After considering all of the evidence presented, I find the following facts by a preponderance of the evidence:

Findings Concerning Allegany County and the Affected Communities, in General.

1. The Allegany County Public Schools System currently maintains four high

school districts. Its high schools currently consist of Allegany High School, which serves the Cumberland area, Beall High School, which serves the Frostburg area, Fort Hill High School, which serves the northeastern part of the county as well as a small part of the southwestern region, and Westmar High School, which serves the southwestern part of the county. (Test. App., chart; (Bd. #8/19)

2. The southwestern area of Allegany County includes what is known as the Georges Creek region. The Georges Creek region comprises the towns of Luke, Westernport, Lonaconing, Barton and Midland. (Test. App., map)

3. Over the past twenty years, Allegany County has sustained a marked decline in its school-age population. It has dropped from nearly 13,470 in the early 1980s to 9,719 in 2002. (Test. AuMiller; Bd. #8/1 9; Bd. #1 7/1 3)

Findings Concerning the Affected Schools.

Westmar Middle School.

4. Westernport is the site of Westmar Middle School. This facility formerly served as Bruce High School (“Bruce”) from 1957 to 1985. In 1985, the BOE decided to consolidate high school populations. It transferred students from Bruce to what was then called Valley High School in Lonaconing. Valley High School subsequently became Westmar High School. (Test. App., Crump, Nicol)

5. Westmar Middle School is well-maintained. It is, nonetheless, in need of significant renovation, Items needing installation, repair or replacement include:

a. *Non-ADA compliant means of ingress and egress.* Since the school building was originally built in 1957, any renovation would require it to be made compliant with the federal Americans with Disabilities Act (“ADA”). This would require significant expenditure of funds because the school is built into a terrace and has five different levels. An elevator would have to be built for disabled students, for example. Ramps would also have to be installed.

b. *Heating/ventilation system.* Two 200 horsepower gas/oil boilers and a coal boiler provide heat to the school. When all three units are working, heating is adequate. The coal boiler often breaks down, however, so heating is frequently inadequate because the gas boilers alone cannot heat the school. Heat is controlled through pneumatic regulation. Ductwork is beyond its useful life and contains asbestos insulation. Heat to classrooms is provided by Herman Nelson units. Parts must be cannibalized from other schools to make repairs to these units, because the manufacturer no longer makes the units present in the school. There is no air conditioning.

c. *Electrical service.* Westmar Middle School is the only school in Allegany County that uses fuses instead of circuit breakers. The electrical service is inadequate to sustain a computer lab at the school. Lavatories lack Ground Fault Circuit Interrupter (“GFCI”) outlets.

d. *Plumbing.* Corrosion is evident in the galvanized steel piping. Iron from the pipes leeches into drinking water, giving it a brown color. The water remains safe to drink. Lavatories are equipped with Bradley basins for student washing. Bradley basins are operated by foot pedals. They have not been commonly installed in schools since the 1950s.

e. *Windows.* The windows at the school are steel frame; they allow much heat to escape to the exterior and are not up to current standards of energy efficiency.

f. *Internet access.* Westmar Middle School generally has wireless Internet access. The BOE has decided not to wire the school to the Internet through DSL or other forms of high-speed access.

g. *Fire Protection.* The alarm system is outdated and inadequate. Fire doors are not ADA-compliant.

(Test. Crump, Montana and AuMiller; App. #52 (video); Bd. #6/5)

6. Westmar Middle school’s Facility Condition Index (“FCI”) is 25.06, meaning it would cost 25.06% of the full cost of the replacement value of the school to

renovate the facility. (Test. Montana; Bd. #12/8)

7. Westmar Middle School's State-rated capacity is 741. During the 2001 - 02 school year, 368 students attended the school; projections for the 2002-03 school indicated that 356 students would be attending the school. (Bd. #1 7/1 3)

Beall High School.

8. Beall High School was originally built in 1939 and was opened to students in 1941. A junior high school addition was built in 1968. A limited renovation took place in 1986. (Test. G. Smith)

9. Beall High School is well-maintained. Like Westmar Middle School, it is, nonetheless, in need of significant renovation. Items needing installation, repair or replacement include:

a. *Non-ADA compliant means-of ingress and- egress;* -The-school has a ramp at the front entrance, but the ramp is at an angle of incline steeper than the recommended angle for access. There is no electronic opening device installed for the front door. There is an elevator, dating from 1986, which serves three floors of the original building. There is no elevator for the western annex.

b. *Heating/ventilation system.* Heating of the school is accomplished by a combination low-pressure steam and hot water system. Radiators can be found in classrooms. There are four boilers installed to provide heat. Boiler No. 1 dates from 1940; is coal-fired and not operational. Boiler No. 2 dates from 1968; it is natural-gas fired, but is not operational. Boiler No. 3 is natural-gas fired. It dates from 1968, is operational, but is beyond its useful life. Boiler No. 4 dates from 1993 and is operational. Pneumatic controls regulate the radiator heat.

c. *Electrical service.* There is single 1,000 ampere, 120-240 volt service. Some wiring was replaced during the 1986 renovation, but most is original. There was some upgrading of the fluorescent lighting.

d. *Plumbing.* The copper, potable water and cast iron, sewer systems were not upgraded during the 1986 renovation. Wall mounted sinks, Bradley basins, urinals and floor-mounted toilets are operational, but are aged well-beyond their useful life. Toilets are basically ADA-equipped with handrails.

e. *Fire Protection.* A limited sprinkler system is located in the lobby of the building. A non-addressable fire alarm system is operational, but inadequate.

There is exit and emergency lighting, but it is aged and inadequate.

(Test. G. Smith; App. #46 (video); Bd. #4)

10. Beall High School's FCI is 25.02. (Test. Montana; Bd. #12/8)

11. During the 2001-02 school year, 588 students attended Beall High School; projections for the 2002-03 school indicated that 613 students would be attending the school. (Test. Smith; Bd. #17/13)

Westmar High School.

12. Westmar High School is housed in the original Valley High School building constructed in 1953. The Board authorized significant renovations of the school in 1995. As a result, Westmar High School has some of the most up-to-date facilities in the Allegany County School System. (Test. Nicol, App.; App. #51)

13. Westmar High School has the following items of pertinent interest:

a. *Heating/ventilation system.* Three natural gas-fired boilers provide heat through a two-pipe hot water distribution system. All three boilers are in good condition. Air conditioning is provided in selected locations by means of rooftop units.

b. *Electrical Service.* The fluorescent lighting for the offices and classrooms was upgraded during the 1995 renovation, it is in excellent condition. The intercom and telephone system was also upgraded and, similarly, in excellent condition. Receptacles in the lavatories are GFCI. The school has a back-up diesel generator.

c. *Plumbing.* The plumbing was upgraded in 1995 and 1996 and is in excellent condition.

d. *Fire protection.* A fire sprinkler system protects the entire building. The fire alarm system includes an annunciator panel and strobe alarm devices for the visually impaired. Smoke detectors are located in the corridors and storage closets. The exit light system is in good condition. Motion detectors provide security monitoring against intruders.

e. *Environmental* All asbestos was removed from the building in 1995.

There are no underground storage tanks. Lead contamination potential is minimal.
(Test. Nicol, App.; Bd. #5/6)

14. Westmar High School's FCI is 7.19.

15. Westmar High School's State-rated capacity is 711. During the 2001-02 school year, 448 students attended the school; projections for the 2002-03 school indicated that 442 students would be attending the school. Smaller enrollments ranging in the mid-300s can be expected by 2010 if the school would remain a high school. (Bd. #17/13)

Findings Concerning Transportation.

16. The Georges Creek region is connected primarily by Maryland Route 36. While this highway is a two-lane road, except for a divided four-lane portion near its junction with Interstate 68, improvements over the last several years qualify it as a modern highway. This classification is still appropriate, even though Route 36 has some significant curves (e.g., Ray's turn) and is often used by coal trucks. (Test. Walbert; App. #55 (video))

17. Transporting students from the Western port, Barton, Lonaconing and Midland areas to Frostburg using school bus transportation on Route 36 would be safe. (Test. Walbert)

Findings Concerning Pertinent Allegany County Student Population Trends.

18. There have been steady declines in the population of the Georges Creek region since the 1970s. The combined student population of Bruce and Valley High Schools before the 1985 consolidation was 656. The current Westmar High School enrollment for the 2004-05 school year (which includes the former Bruce and Valley High School districts) is 391. (Test. AuMiller)

19. There have been small decreases in the enrollment at Beall High School. Enrollment was 605 students in 2000; during the 2004 -05 school year it was 581. Projections in for 2010 indicate that the student population could decline to the mid400s. (Test. AuMiller; App. #69)

Findings Concerning the School/Closing Districting Process.

20. In the spring and summer of 2002, the BOE determined that it was necessary to consolidate and reconfigure school districts in Allegany County because of shifts in population. On June 11, 2002, the BOE directed William AuMiller, Superintendent of Schools for Allegany County (“Superintendent”), to formulate and present recommendations for school consolidation/reconfiguration, predicated on the assumption that the county would move to a three high school district. Dr. AuMiller submitted his report on August 26, 2002. (Test. AuMiller; App. #38)

21. Based on the Superintendent’s recommendations, the BOE decided to go forward with a plan that would reduce Allegany County’s number of high schools from four to three. This would entail merging the Beall and Westmar High School districts and transferring the combined student population to a new “Western” High school to be built adjacent to the site of the current Beall High School. As a consequence, the BOE proposed to convert Westmar High School in Lonaconing into kindergarten through eighth grade elementary/middle school. It then proposed to close the current Westmar Middle School. No changes would take place until the 2007 -08 school year, when the new Western High School would be completed. (Test. AuMiller; App. #37, #38, Bd. #3/16)

22. In accordance with Allegany County School Board policy, the BOE established School Community Committees at the sites affected by the proposed

consolidation/reconfiguration. These committees were charged with studying the various recommendations made by the Superintendent and the BOE based on the eight factors related to school closing/consolidation delineated in COMAR I 3A.02.09.01 (b).⁹

Accordingly, the committees studied the Superintendent's recommendations, prepared reports, and submitted them to the BOE for review. (Test. AuMiller, App., May, Brackett, Truesdale; App. #49, Bd. #2/16, #3/16)

23. The Westmar Middle School Community Committee, whose members included the Appellant as a community representative, submitted a report to the BOE on October 1, 2002. (Test. Brackett; Bd. #3/16)

24. The Westmar Middle School Committee addressed all eight factors listed in COMAR I 3A.02.09.01 (b) in its report. Although the committee expressed some reservations about further consolidation of schools in the Georges Creek region and noted its concerns about the additional time needed to transport students to consolidated schools, among other things, the committee ultimately endorsed the BOE's plan. Its report Summary states the following:

Keeping the above information in mind and keeping the education of our children first, we believe that the recommendation of continuing with the current instructional program (grades 6 - 8) at the existing location for the immediate future shows promise. The Committee does have concerns about a K - 8 school at the present Westmar sight [sic]. We believe the School Community would be better served by retaining the three-tier system and making the present Westmar High School a "state-of-the-art" middle school. We also stand firm with not closing Westmar Middle School or transferring to the new Westmar Elementary/Middle School located in Lonaconing until a new "state-of-the-art" high school has been built for the Westmar/Beall High School students. By following the recommendations of the Superintendent's Long-Range Facilities Plan, the consolidation, closing, and redistricting process can be done in the proper manner. There is

⁹These factors are specifically noted in Finding of Fact No. 33.

no educational benefit to moving the high school students to Beall next year. Dr. AuMiller has¹⁰ . . . of need in the Westmar District and throughout the county. We support the long-range plan.

(Bd.#3/1 6)

25. The Westmar High School Community Committee submitted a report to the BOE addressing the eight pertinent factors and ultimately endorsed the BOE's plan. The conclusion of its report to the BOE states the following:

We oppose any redistricting or consolidation in the county unless it is done for educational gains. Education is not simply a matter of numbers, and saving money should not be the guiding principle. Ultimately, the quality of education that our students receive should be the most important consideration. If the educational future of our students includes a state-of-the-art high school that creates an improved learning environment and provides educational benefits, then we support the Superintendent's proposal.

(Bd. #2/1 6)

26. The Beall High School Community Committee submitted a report to the BOE addressing the eight school closing/consolidation factors and ultimately endorsed the BOE's plan. The conclusion of its report to the BOE states the following:

Attaining equity for western Allegany County was a key component in developing this report. Cumberland high schools were renovated and funded. Westmar [High School] was very recently renovated, but Beall was allowed to deteriorate. Equity and fairness were often used words in this committee's time together and in this subsequent report. Let us now introduce another key word: vision. We feel that sound educational and fiscal decisions can only be made with a look to the future. Political decisions, which are typically made without vision, could be disastrous in this case.

¹⁰When printing its report, it appears the Committee inadvertently cut off the last line on page 9.

Alternatively, perhaps this is the time for a political decision: failure to treat portions of the county with fairness and equity will have unavoidable negative consequences.

Given Beall High's accessibility from numerous areas, projected population growth, location and long-term partnership with Frostburg University, and the building's present physical location, we hope that the Board will unanimously support building a brand new high school in the Frostburg area. We believe that a 1,400 to 1,500 student capacity school in Frostburg would make a tremendous contribution to Allegany County.

(Test. Armstrong; App. #48)

27. After receiving the School Community Committee reports, the BOE scheduled a public hearing to take place on November 11, 2002, at Beall High School in Frostburg, Maryland, for comment on the Superintendent's recommendations. The BOE advertised the public hearing in local newspapers; the advertisement described the procedures that would be followed at the public hearing and set time limits for submission of materials (Test. AuMiller; Bd. #20/17).

28. On November 11, 2002, the BOE held its public hearing as scheduled at Beall High School in Frostburg, Maryland, in accordance with the provisions of COMAR 13A.02.09.01C(1) and (2). Twenty-two speakers appeared at the public hearing, including representatives of the School Community Committees for the affected schools. The Appellant testified against the proposal along with residents of the Allegany High School District, who believed that county funds should not be spent on a new high school for the western region. (Test. AuMiller; Bd. #21118)

29. Based on the School Community Committee comments, the BOE decided to modify its proposal to convert Westmar High School to an elementary/middle school. Instead, that school would be converted to a middle school without the elementary school component. (Test. AuMiller)

30. On November 12, 2002, the BOE met and made a final decision concerning the consolidation/reconfiguration and school closing recommendations. The BOE voted in favor of the consolidation/school-closing plan. The first motion, which involved the proposal to close Beall and Westmar High Schools and reassign the students at those schools to a new or renovated high school facility for the western region beginning with the 2007-08 school year passed unanimously. The second motion, which involved the proposal to close Westmar Middle School and reassign middle school students to the Westmar High School building, pending completion of the new high school in 2007, passed 3-2. The third motion to close Beall Elementary School, pending the Frost Elementary School renovation, and reassign students to other elementary schools in the region, passed 3-2. The fourth motion to keep Georges Creek Elementary School open pending completion of the renovation of Frost Elementary School at the beginning of the 2007 08 school year passed 3-2. (Test. Truesdale; App. #24)

31. On December 3, 2003, the BOE issued its *Rationale for Consolidation/Reconfiguration of Schools*. With the precondition that State and local funding would be available, the BOE approved the following plan:

a. Upon completion of the new or renovated high school in the western region, with a projected date of completion at the beginning of the 2007– 2008 school year, that Beall and Westmar High Schools be closed with students reassigned to the new or renovated high school facility.

b. Upon completion of a new or renovated high school in the western region, with a projected date of completion at the beginning of the 2007 _2008 school year, that Westmar Middle School be closed with students reassigned to the current Westmar High School.

c. Upon completion of the Frost Elementary renovation, with a projected date of completion at the beginning of the 2007 _2008 school year, that Beall Elementary School be closed with students reassigned to Frost Elementary, Georges Creek Elementary and/or Mt. Savage Elementary/Middle Schools.

d. Upon completion of the Frost Elementary School renovation, with a projected date of completion at the beginning of the 2007 _2008 school year, that Georges Creek Elementary School remain open with elementary students in the western region redistricted as recommended in the long range educational facilities plan.

32. In addition to considering the School Community Committee Reports and comments made by speakers at the public hearing, the BOE considered input from a variety of sources in reaching its consolidation/reconfiguration plan decision. These other sources included the performance audit of Allegany County Public Schools performed by MGT of America (“MGT”), the facility utilization study performed by 3D International (“3DI”), recommendations of the Superintendent and his staff and public comment from the meetings in the months preceding the public hearing. (Test. AuMiller)

33. The sources of information considered by the BOE contained references to the factors that the BOE must evaluate with respect to school closings listed in COMAR

13A.02.09.01(b). The BOE considered these factors in formulating its plan. Those factors are noted as follows:

- Student enrollment trends;
- Age or condition of school buildings;
- Transportation;
- Educational programs;
- Racial composition of student body;
- Financial considerations;
- Student relocation;
- Impact on community in geographic attendance area for school proposed to be closed and school, or schools, to which students will be relocating.

34. On December 20, 2002, the Appellant, Thomas R. Marsh, filed a 42-page appeal with the Maryland State Board of Education challenging the BOE's decision. The Appellant's appeal document contained 42 attachments (labeled "A" through "PP").

35. The Appellant resides in Westernport, Maryland. He owns property in that community and operates several businesses. He has no children in the Allegany County Public Schools at this time. (Test. App.)

DISCUSSION

I. Introduction.

While the Appellant may have shown that the BOE's decision-making process was less than perfect, he nonetheless has not shown its ultimate decision concerning school

closing and consolidation was arbitrary, capricious or illegal. I conclude that the BOE complied with all applicable law in adopting its plan involving the affected schools.

II. The Law.

Section 4-120 of the Maryland Education Article states the following:

§ 4-120.

(a) If a county board considers it practicable, it shall consolidate schools.

(b) Each county board shall arrange for the transportation of students to and from consolidated schools.

Md. Code Ann., Educ. § 4-120 (2004).

The Maryland Department of Education has amplified this statutory section through the promulgation of regulations. COMAR 13A.02.09.01 states the criteria that a local school board (or superintendent) must apply before it can consolidate districts and close a school:

.01 Adoption of Procedures to Govern School Closings.

A. Each local board of education shall establish procedures to be used in making decisions on school closings.

B. The procedures shall ensure, at a minimum, that consideration is given to the impact of the proposed closing on the following factors:

(1) Student enrollment trends;

(2) Age or condition of school buildings;

- (3) Transportation;
- (4) Educational programs;
- (5) Racial composition of student body;
- (6) Financial considerations;
- (7) Student relocation;

(8) Impact on community in geographic attendance area for school proposed to be closed and school, or schools, to which students will be relocating.

C. The procedures shall provide, at a minimum, for the following requirements:

(1) A public hearing to permit concerned citizens an opportunity to submit their views orally or to submit written testimony or data on a proposed school closing. This includes the following:

(a) The public hearing shall take place before any final decision by a local board of education to close a school;

(b) Time limits on the submission of oral or written testimony and data shall be clearly defined in the notification of the public meeting.

(2) Adequate notice to parents and guardians of students in attendance at all schools that are being considered for closure by the local board of education. The following apply:

(a) In addition to any regular means of notification used by a local school system, written notification of all schools that are under consideration for closing shall be advertised in at least two newspapers having general circulation in the geographic attendance area for the school or schools proposed to be closed, and the school or schools to which students will be relocating;

(b) The newspaper notification shall include the procedures that will be followed by the local board of

education in making its final decision;

(c) The newspaper notification shall appear at least 2 weeks in advance of any public hearings held by the local school system on a proposed school closing.

D. The final decision of a local board of education to close a school shall be announced at a public session and shall be in writing. The following apply:

(1) The final decision shall include the rationale for the school closing and address the impact of the proposed closing on the factors set forth in Regulation .OIB;

(2) There shall be notification of the final decision of the local board of education to the community in the geographic attendance area of the school proposed to be closed and school or schools to which students will be relocating;

(3) The final decision shall include notification of the right to appeal to the State Board of Education as set forth in Regulation .03.

COMAR 13A.01.05.05, establishes the standard of review of decisions of county Boards of Education that involve local policy. That section states the following in pertinent part:

.05 Standard of Review.

A. General. Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall be considered *prima fade* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal.

B. A decision may be 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.

C. A decision may be 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.

D. The appellant shall have the burden of proof by a preponderance of the evidence.

I will address each of the criteria cited in COMAR in turn.

III. Whether the BOE Plan was Arbitrary or Unreasonable.

A. Whether the BOE Plan was “Against Sound Educational Policy.”

The Appellant has put forth many reasons why the BOE’s school closing/consolidation plan is against sound educational policy. His most cogent arguments, however, concerned the BOE’s failure to consider building a smaller, new high school in Frostburg to replace the existing Beall High School and keeping all of the remaining schools in the Georges Creek region open and converting them into community schools (i.e., using them for other purposes other than solely for the

education of students during the regular school day). To support his argument, he presented the testimony of Dr. Craig Howley, Associate Adjunct Professor at Ohio University, who was admitted as an expert in school size research. He also presented the testimony of Dr. John O'Connell, former Superintendent of Allegany County Public Schools, who was admitted as an expert in educational policy and management.

Dr. Howley testified that studies he has conducted revealed that there is a demonstrable link between student achievement and school size in economically depressed areas, particularly rural areas, such as the Georges Creek region. Dr. Howley maintained that in such areas, large schools contribute to poor student achievement. Based on his studies in states other than Maryland, Dr. Howley concluded that, overall, no new high school should be constructed with a capacity of over 1,000 students. In rural areas, however, he asserted that no new high school should be constructed with a capacity of over 600 students.

Dr. O'Connell testified in favor of utilizing the community school concept to address the underutilization of school buildings in Allegany County. The Appellant offered this testimony to rebut the BOE's use of underutilization of schools as a basis for closing schools and consolidating districts. As a preface to understanding the Appellant's argument in this regard, the State Board determines the utilization rate by dividing the number of students by its state-rated capacity. The State Board has maintained a policy that local boards of education should strive for an 85% utilization rate. Any utilization

rate below 60% requires local boards of education to provide justification to the State Board concerning why the utilization rate is so low. Westmar Middle School, for example, had a utilization rate of approximately 50% during the 2001– 02 school year. This is below the 60% minimum.

Dr. O’Connell noted when he was superintendent of Allegany County Public Schools in 2000, he proposed using the community school concept to foreclose the consolidation and closure of schools that the BOE was considering at the time. The BOE initially was receptive to this concept, but it ultimately did not implement it as proposed by Dr. O’Connell. The BOE went through with consolidation of schools that year.

The Appellant argued that based on the testimony of these two experts, the BOE adopted a plan that did not comport with sound educational policy. The proposed new high school is being built for approximately 1,000 students. Based on Dr. Howley’s conclusions, the Appellant contended that this size is not appropriate for students who reside in a rural, impoverished area. Moreover, the Appellant argued that based on Dr. O’Connell’s expert testimony, consolidation could have been avoided if the BOE had simply implemented the community school concept in all of the affected schools. The Appellant added that he presented Dr. Howley’s studies to the BOE before it made its decision and that it was aware of Dr. O’Connell’s past proposals by virtue of his being superintendent.

The BOE argued that the Appellant’s arguments and evidence did not show that its

plan went against sound educational policy, It noted that Dr. Howley’s testimony was made in the abstract. He did not visit the affected schools in Allegany County before forming his opinion. Moreover, with regard to implementing the community school concept to address underutilization the BOE averred that implementation of this concept would do nothing to address underutilization. The State Board only considers student population in relation to State-rated capacity to arrive at a utilization rate. It does not take into account whether the school building is used for adult gymnastics classes in the evening, for example, in making this determination. Additionally, as proposed by Dr. O’Connell, the school community concept would also involve renting portions of school facilities to private businesses. (Dr. Yale Stenzler also testified as a proponent of the school community or “community learning center” concept.) Martin Crump, principal of Westmar Middle School, was skeptical of this kind of use of school facilities. He noted that if private entities operated on school properties, unknown individuals would be traversing school grounds during the school day. He cited this as a potential security risk to students. Customers of the private enterprises could not be screened as visitors to schools currently are.

I must decide in the BOE’s favor on this point. I accept the BOE’s argument that Dr. Howley’s opinion is worth less since he gave it in the abstract and he did not visit any schools. Additionally, to find that the BOE breached a form of “standard of care” related to educational decision-making by proposing a new, 1,000-student school, the Appellant

would have to show that Dr. Howley’s conclusions have widespread acceptance in the nationwide educational community. He has not done so.

Furthermore, I agree with the BOE that the implementation of the community school concept, while it might be beneficial to the communities at issue, does nothing to alleviate underutilization as defined by State Board policy.

I will also emphasize that, as will be true in all of the areas explored here, the Appellant must be mindful that the Board’s decisions are quasi-legislative in nature, not judicial or quasi-judicial. (*See Elprin v. Howard County Bd. of Ed.*, 57 Md. App. 458, 465, 470 A.2d 833 (1984), in which the Court of Special Appeals held that a resident of a school district possesses no liberty or property interest in a school in his district remaining “as is,” without changes result from closure or consolidation. Accordingly, the decision to close or consolidate schools is a quasi-legislative matter and the rights to be afforded to interested citizens are limited.) Therefore, even if there were merit to some of the arguments expounded by the Appellant, the BOE is free to choose another course of action if it deems that circumstances warrant it.¹¹

B. Whether a Reasoning Mind Could Have Reached BOE’s Decision(s).

The question of “whether a reasoning mind could not have reasonably reached the

¹¹I’ll also note that as another Administrative Law Judge once observed, “it is likely that in most instances ‘sound educational policy’ is in itself rather difficult to quantify, making the determination of what is contrary to sound educational policy somewhat elusive.” *Community United for Responsible Education v. Bd. of Educ. of Allegany County*, 6 Op. MSBE 85, 99 (1991).

conclusion the county board reached,” however, is far less nebulous than what is against sound educational policy. The BOE gave a detailed explanation in its rationale concerning each of the criteria mandated by COMAR. The BOE’s explanations for each decision incorporated in its plan is summarized below.

With respect to the closure of Beall and Westmar and reassignment of the students from those schools to a new or renovated facility, the BOE gave the following explanations for its decision:

a. *Student Enrollment Trends.* The BOE noted that the population of Westmar in Lonaconing has been shrinking, while the population of Beall in Frostburg has been growing. A new high school or renovated Beall High School in Frostburg would serve both populations and “allow for efficient use of all the county’s school buildings to take place.”

b. *Age or Condition of the School Buildings.* Both Beall and Westmar are relatively old, although Beall was renovated in 1985 – 86 and Westmar in 1995 –96. Therefore, new construction or renovation is warranted.

c. *Transportation.* The BOE considered transportation costs and the need for students to travel greater distances and, overall deemed the costs and distances to be manageable.

d. *Educational Programs.* The BOE considered the Beall High School Community Committee Report, which concluded that educational programming at Beall must improve. That report further concluded that improved education programming could be achieved “with appropriate facilities” at a new school. The BOE determined that “a new facility would offer the highest quality of education for each of the students in Beall High School and Westmar High School.”

e. *Racial Composition of the Student Body.* Although the BOE anticipated that racial composition would not be a major issue, primarily because the Westmar and Beall High School populations are mainly

Caucasian, it did note that “the combination of the two high schools into a state of the art facility would enable more minority students to have access to other minority students, and would enable more Caucasian students to have the ability to interact with non-Caucasian students, since more Caucasian students would be available.”

f. *Financial Considerations.* The BOE explained that a by-product of consolidation would enable Allegany County Public Schools “to retire several of its more cost ineffective buildings in poor physical condition.” Further, Westmar High School could be converted into a middle school. This would permit Allegany County Public Schools to cease using the current Westmar Middle School and Beall High School buildings as schools which, in turn, would result in cost savings because these older school buildings are more costly to operate.

g. *Student Relocation.* The BOE indicated that although it was difficult to determine the impact of student relocation, it did not anticipate any significant problems with relocating students since the new school would be located in the western region of Allegany County. It also noted that the communities involved supported the consolidation of the Westmar and Beall student populations into a new state-of-the-art facility.

h. *Impact on community in geographic attendance area for school proposed to be closed and school, or schools, to which students will be relocating.* The BOE projected that the new high school would enhance the attractiveness of the Frostburg region, which is already a growth area in Allegany County. Moreover, it averred that such a facility would enhance the county as a whole. Additionally, the BOE also projected enhancement of the long-term partnership that the existing Beall High School has had with Frostburg University. More students would be able to avail themselves to Frostburg’s facilities because the new school would be in close proximity to the university.

(Bd. #25)

Regarding the closure of Westmar Middle School and reassignment of the students from that school to the current Westmar High School building in Lonaconing, the BOE gave the following explanations for its decision:

- a. *Student Enrollment Trends.* The BOE noted that the population of Westmar Middle School has been declining. It noted that there is not a projection for growth of the student population in the Westernport area, where the school is located.
- b. *Age or Condition of the School Buildings.* The BOE noted that the current Westmar Middle School building is the oldest school facility in the Allegany County system. It is the only school in the county not wired for the Internet and is not entirely handicapped accessible. The current Westmar High School was recently renovated, “which would enable middle school students to enjoy a newly remodeled, state-of-the-art facility without any additional capital improvements.”
- c. *Transportation.* The BOE considered transportation costs and the need for students to travel greater distances and, overall deemed the costs and distances to be manageable, even though there would be a slight increase in the cost to transport students from Westernport to Lonaconing.
- d. *Educational Programs.* The BOE noted that the facilities at the recently renovated Westmar High School building are superior to those in the current Westmar Middle School facility. As noted, the high school building has been wired for the Internet, while the middle school has not.
- e. *Racial Composition of the Student Body.* The BOE anticipated that racial composition would not be changed by moving students from the current Westmar Middle School to Westmar High School.
- f. *Financial Considerations.* The BOE indicated that the current Westmar Middle School has the highest operating costs in all of Allegany County. It further noted that as the student population declines, “it is imperative that the system better utilize existing facilities.” The BOE also reasoned that since funding is based on the number of students, the money available to the system is reduced proportionately. This mandates reducing the number of buildings that the school system operates, where feasible.
- g. *Student Relocation.* The BOE stated that since the entire student population of Westmar Middle School would be relocated to the current Westmar High School, the move will not have any impact how students interact with one another. It noted that students who live closer to Westernport will actually have a shorter commute. The BOE emphasized

that its actions were designed to minimize student relocation while maximizing their educational opportunities.

h. *Impact on community in geographic attendance area for school proposed to be closed and school, or schools, to which students will be relocating.* The BOE indicated that although it realized that “any school closure will inevitably bring some concern and stress to all communities involved,” the plan with its time line for implementation has received overwhelming endorsement of the affected communities.

(Bd. #25)

Concerning the closure of Beall Elementary School (after the completion of Frost Elementary School renovations), with reassignment of students to the Frost, Georges Creek and/or Mt. Savage Elementary Schools, the BOE gave the following explanation for its decision:

a. *Student Enrollment Trends.* The BOE indicated that student enrollment in the county is declining; except in the Frostburg area, suggesting that only one elementary school is needed in Frostburg.

b. *Age or Condition of the School Buildings.* The BOE considered the report of 3D1, which noted that Beall Elementary requires “significant physical improvements” and is located in the center of Frostburg. Frost Elementary, by contrast, is located on an 11.3 acre site near an extensively renovated recreation complex. It is located on the edge of town where future expansion and renovation would be more easily accomplished.

c. *Transportation.* The BOE determined that since the Beall and Frost Elementary Schools serve the same community, transportation issues involved with transferring students from Beall Elementary to Frost Elementary would be minimal. The BOE anticipated that students transferred from Beall Elementary to Georges Creek or Mt. Savage would be living closer to those schools, thus obviating any transportation difficulties.

d. *Educational Programs.* The BOE noted that the reassignment of students from Beall Elementary to Frost would give them greater educational opportunity since the Frost Elementary building has been recently renovated and a recreation facility is adjacent to the school.

e. *Racial Composition of the Student Body.* The BOE indicated that the racial composition of the student body would not be negatively affected by the consolidation/reconfiguration.

f. *Financial Considerations.* The BOE explained that closing Beall Elementary, after renovating Frost Elementary, would reduce expenditures since the closed school would no longer have to be maintained. The 3DI also estimated that it would cost significantly more to renovate Beall Elementary than it is costing to renovate Frost Elementary.

g. *Student Relocation.* The BOE referred back to its comments on transportation and indicated that the impact of relocation would be minimal.

h. *Impact on community in geographic attendance area for school proposed to be closed and school, or schools, to which students will be relocating.* The BOE explained that since Beall Elementary and Frost Elementary are less than two miles apart, there would be no impact on the community as a result of the closure of Beall.

(Bd. #25)

With respect to its fourth decision to reassign students to Georges Creek Elementary School through redistricting, the BOE cross-referenced its rationale for closing Beall Elementary School. It also noted that since it was not closing Georges Creek Elementary School, the criteria for “school closing” referred to in COMAR 13A.02.09.01(b) were inapplicable. (Bd. #25)

Although the Appellant’s appeal document mentions the closure of Beall Elementary School and the redistricting of elementary school students, the Appellant

essentially presented no evidence regarding this part of the BOE's decision. He concentrated on the middle school and the high schools. In any event, I find that given that the BOE provided reasons for its decisions regarding the elementary schools, those decisions have not been shown to be such that a reasoning mind could not have reached them.

I will now turn to the areas where the Appellant made specific arguments. The Appellant attacked the BOE's decisions regarding Westmar Middle School, Westmar High School, Beall High School and the building of a new western high school in Frostburg on many fronts. In essence, he charged the BOE of relying on "false facts" in reaching its decision. I will start by examining the Appellant's arguments concerning the closure of Beall and Westmar High Schools and the building of a new high school.

Westmar High School.

Enrollment Trends.

The BOE first addressed student enrollment trends. It found that the population of Westmar in Lonaconing has been shrinking, while the population of Beau in Frostburg has been growing. A new high school or renovated Beau High School in Frostburg would serve both populations and "allow for efficient use of all the county's school buildings to take place."

The Appellant argued that the information the BOE used was incorrect. He presented population data, which showed that although the population of his town,

Westernport, had been shrinking, it has stabilized. He also presented data from the Maryland Planning Commission showing the population of Allegany County, overall, will increase by about four percent in the next decade.

The BOE, however, noted that it based its projections based on long-term data provided by its planning department, the Allegany County Health Department (regarding birth and fertility rates) and the United States Census Bureau. See Board's Exhibit No. 17/13 at p. 48.

Projecting future population trends is a matter of educated guesswork. I find that the BOE relied on data that a reasonable person would accept as valid in formulating a decision with respect to population trends. As I will repeat several times here, the Appellant has not shown that the BOE knowingly relied on faulty data or actually falsified data to justify its plan. Without such evidence, I cannot state that a reasoning mind would not reach the same conclusions that the BOE did in reaching its conclusions.

Age and Condition of School Buildings.

The BOE noted both Beall and Westmar High Schools were relatively old structures although Westmar High School had been significantly renovated in 1995 – 96. It relied on the 3DI study, the MGT study and its own data in formulating its rationale.

The Appellant asserted that the BOE's reasoning, again, was flawed because Westmar High School is in excellent condition after being renovated. Again, he questioned why the BOE did not employ the community school concept, build a smaller

new high school in Frostburg and keep Westmar High School in its present location (and Westmar Middle School in its present location).

The BOE contended that utilization of facilities drove its decision on this issue. Beall High School is a 65-year-old structure with much of its infrastructure falling into the category of beyond its useful life. It has a FCI of 25.02 according to 3DI. The population of the Westmar District continues to shrink while Beall continues to show modest growth. Hence, there is a utilization advantage of combining the two districts into one school. Nevertheless, Dr. AuMiller, testifying for the BOE, pointed out that it looked into consolidating the Beall students into Westmar High School and found that this would be impractical. The State-rated capacity of the school is 711. The 2001 -02 student population of the two schools combined would be 1,036. Thus, while Westmar High School is in better condition, it is too small. While Beall High School is larger, it is too old. The BOE decided that the ideal solution would be to build a new high school to serve both populations. A reasoning mind could have reached the same conclusions as the BOE. The Appellant presented no evidence that the BOE knowingly relied on false information.

Transportation.

The BOE noted that the additional transportation costs for the combined high school would be somewhat greater than its current expenses, but they would be manageable. The Appellant, however, accused the BOE of concentrating on costs, rather

than student safety, and the inconvenience having to travel longer distances would cause students and parents.

During the hearing, the Appellant showed a video that depicted several stretches of Maryland Route 36, the highway that school buses would have to use to transport students to and from the new western high school in Frostburg. While the BOE's reports and rationale deemed this thoroughfare "a modern highway," the Appellant noted it still has long curves, railroad crossings, is used by coal trucks and can be impacted by fog. He contended that the highway has not changed from his childhood some 50 years ago. He argued that given the condition of the roadway and the added distances involved, more accidents causing harm to school children will result.

The Appellant also offered a newspaper article concerning a student who died in an accident while traveling as a passenger in a friend's car on the way to Westmar High School. Noting that Westmar High School is, itself, a result of a prior consolidation, the Appellant averred that had that consolidation not taken place, this student might be alive today. In his opening statement, he offered this observation: "consolidation kills kids."

The Appellant also called parent and student witnesses who testified about the dangerousness of Route 36. He called Jay Walbert, the BOE's Supervisor of Transportation, as an adverse witness to prove his contentions. Nevertheless, Mr. Walbert's testimony did not prove the Appellant's contentions; it refuted them. Mr. Walbert indicated that by Maryland State Highway Administration standards Route 36 is

a modern highway. Many portions of it have been replaced in recent years. Those replaced sections have been given a Route 936 designation by the State Highway Administration. Mr. Walbert also testified that school bus traveling distances have no relationship to accident rates and that conveying students to school on a school bus remains one of the safest methods of transportation available. Moreover, Mr. Walbert presented data showing most accidents in Allegany County occur in places other than Route 36. Interstate 68 has the most accidents, he noted. (Bd. #7)

The Appellant presented no other evidence to show Mr. Walbert's conclusions about road and bus safety were faulty. The BOE relied on Mr. Walbert's views in making its conclusions by virtue of his position as transportation supervisor. Therefore, there has been no showing of unreasonableness.

The Appellant's argument that "consolidation kills kids" constitutes unsupported conjecture. I rebuke the Appellant for making such an inflammatory statement which has no basis in fact.

The Appellant further argued that aside from safety considerations, the BOE did not recognize the inconvenience to parents and students that consolidation into a new high school in Frostburg would cause. Kristina McNemar, a Westmar High School student, testified about how difficult it would be for her mother to take her to after school activities at the current Beall location or Allegany High School, where she believed she might be transferred if Westmar High School closes.

Nevertheless, the BOE weighed this factor. It realized that students in the Westmar district would have to travel further to get to the new high school. However, it determined that other advantages—such as more and varied activities at the new school—outweighed some of the transportation disadvantages. Its decision was not unreasonable.

Educational Programs.

The BOE indicated that, “a new facility would offer the highest quality of education for each of the students in Beall High School and Westmar High School.” Yet, the Appellant argued that Westmar High School is one of the best performing high schools in the State with regard to overall academic performance. He contended that there would be no change in the education offered at one school as opposed to two schools.

Dr. AuMiller, however, disputed the Appellant’s views. He noted that while the two schools offer comparable education now, this might not be true in the future. Shrinking enrollment at Westmar High School would, by necessity, require staff reductions, thereby reducing the school’s educational programs. Given the “highly qualified teacher” mandates of the No Child Left Behind Act, staff reductions would be problematic. A physical education teacher can no longer fill-in in for a history teacher on a regular basis based on the requirements of the Act. If the two school populations are merged, though, the BOE would have greater flexibility in assigning teachers. This rationale is sound and reasonable.

The Appellant, however, also noted that staff shortages could be alleviated by the

satellite schools program. Students could take courses by closed-circuit television or through the Internet. The BOE, however, believes that a live teacher in the classroom is the best way to provide education. Satellite programs were only used for elective courses in the past, it noted. This is another example of the Appellant trying to impose his “better” solutions on the BOE. My task here is not to decide what is “better,” but to decide what is unreasonable. The Appellant has not shown the BOE’s rationale here is unreasonable.

Racial Composition of the Student Bodies.

Both student populations are largely Caucasian, according to the BOE’s rationale, so racial composition was not a factor the BOE dwelled on. The Appellant made no arguments regarding this rationale.

Financial Considerations.

The BOE stated that retiring aging structures such as old Beall High School and Westmar Middle School would save money on deferred maintenance. The Appellant, however, stated that the BOE’s assumptions about cost savings are flawed. He indicated that in meetings just prior to the November 12, 2002 vote, the BOE stated it would save money in the first year of consolidation. John Wagoner, Assistant Superintendent for Administration and Finance debated the BOE president on this issue. The State Superintendent ordered an audit and found consolidation would actually cost money in its first year. The Appellant again accused the BOE of relying on suspect data. He contended

that when a board of education relies on flawed information, its rationale is not supported by the record. He cited *Samuel Hall v. Board of Education of Somerset County*, 4 Op. MSBE 628 (1986) and *Communities United for Responsible Education v. Allegany County Board of Education*, 6 Op. MSDE 85 (1991) to support his contention.

Nevertheless, I find that the BOE correctly addressed this issue by noting that while the figures regarding the first year might assumed by the BOE president have been too optimistic, it is still true that money would be saved in subsequent years. According to 301, it will cost roughly \$9.2 million to renovate Beall High School and \$4.5 million to renovate Westmar Middle School for a total of \$13.7 million. Although the new high school will cost \$34 million, the legislature has enacted a 90-10 formula for new school construction whereby the *State* will be responsible for 90% of the construction costs. While costs for furnishing the school will come out of county funds, the cost to the county, under this formula, will be less to build a new school than to fully renovate the two existing ones. The BOE considered this. The Appellant has not shown unreasonableness on the BOE's part with respect to this criterion.

Student Relocation.

The BOE insisted that it was difficult to assess the impact of student relocation. It noted, however, that the School Community Committees in the western region, by in large, supported the consolidation plan combined with the building of the new school.

The Appellant vehemently disputed that the population of the Georges Creek

region by in large supported consolidation. He offered a packet of letters sent by citizens of the region to his group, Taxpayer's Alliance for Fair and Honest Government, and forwarded to Senator John Hafer, asking that certain members of the BOE be removed because of their support for the consolidation plan. Moreover, he insisted that the only reason that the Westmar Middle School Community Committee and the Westmar High School Community Committee supported the BOE's proposed plan was that their members knew the board would pursue consolidation in any event, and by voting for the plan with the new school *proviso*, they hoped to delay or destroy the plan.

The Appellant offered the testimony of several witnesses who supported his contentions regarding the lack of support by members of the Georges Creek community. Dr. Donna "Dee" Truesdale was a BOE member in November 2002. She had been an opponent of consolidation, but actually voted yes on all four of the motions before the BOE on November 12, 2002. The last three motions passed by a 3-2 majority with Dr. Truesdale being the deciding "for" vote. Dr. Truesdale explained why she voted as she did:

I could have stopped that particular plan, but with nothing there, with nothing there [repeated], then the new members, the new Board, could right away move very easily to move to consolidate immediately into the existing Beall.

So, I thought that if they did that, which indeed they did, that having a plan, some sort of plan in effect, would be grounds for someone -I mean, for someone who was going to intervene, looking at the State Board or the Superintendent to say, well, there is a plan here and you're doing this.

I thought that ultimately whatever happened that the best thing would be to leave these students in their schools along Georges Creek and build a new Beall that would be just for the current Beall area or maybe a little larger to allow for growth, that that would be the best. But that was not something that I could see that anybody on the Board was going to agree to.

And so I thought if consolidation is going to come, it is better to do it so it is delayed until there is a good facility there rather than leaving the Board that was coming in an opening to consolidate immediately.

Transcript (T.) at 725 -26, September 22, 2004.

Dr. Truesdale also expressed the idea that making consolidation contingent on the new school being built might derail the plan altogether, since, at the time, she doubted Allegany County would receive the necessary State funding needed to build a new high school.¹² (T. at 727)

Nevertheless, whatever can be said about Dr. Truesdale's reasons for voting as she did, she did have *reasons*. Furthermore, the BOE had evidence to justify why it proceeded with its plan. Therefore, the Appellant has not shown unreasonableness on the part of the BOE by the nature of the way its members voted.

The Appellant and Dr. Truesdale also indicated that the BOE should not have relied on the recommendations of the Westmar Middle, Westmar High and Beall High School Community Committees because their recommendations were made under duress. They pointed out that while their bottom line recommendations supported the BOE's plan, reading commentary on each of "the COMAR criteria" would give a different

¹²It seems that Dr. Truesdale attempted to use a tactic akin to the "poison pill" defense employed by corporations to prevent hostile takeovers.

picture. Reverend Brackett testified that his committee (Westmar Middle School) wrote a report supporting a plan that the members really did not agree with; they only supported it to avoid a worse alternative—immediate consolidation into the antiquated Beall High School.

The BOE, however, had no reason to suspect that the School Community Committees were not truly supporting the BOE’s plan. The BOE had no obligation to read between the lines. Indeed, it had no obligation to follow the recommendations of the School Community Committees. As a quasi-legislative body, it only had the obligation to consider the committees’ comments before making its own reasoned decision.

Moreover, I agree with the BOE’s observation that Reverend Brackett and other committee members (and, for that matter, Dr. Truesdale) were less than sincere in their actions. If what Reverend Brackett testified to represents the views of the whole Westmar Middle School Community Committee, then that committee’s members were remiss in not expressing their true feelings.

Impact on the Affected Communities.

The BOE commented in its rationale that locating a new high school at the Beall site in Frostburg “would enhance the attractiveness of the Frostburg region.” It also noted that the new high school would benefit from “the special relationship” that the current Beall High School has with Frostburg University.

The Appellant criticized the BOE’s rationale here on several grounds. Most

prominently, he accused the BOE of only considering how the new school would enhance Frostburg and its adjacent communities, while ignoring how uprooting students and consolidating districts would actually cause harm to the Georges Creek region. He indicated that these adverse effects are not even mentioned by the BOE, so it can be inferred that it did not consider them. Additionally, he accused the BOE of again using falsehoods to support its plan by noting that Frostburg University has no “special relationship” with Beall High School. He called Karen Treber, Assistant to the President and Counsel for Frostburg University, who testified that there was no formal “special relationship” between the two schools. The Appellant argued that since the BOE based the premise that a special relationship existed on false information, its decision must be considered arbitrary and illegal. He cited *Hurl v. Board of Educ. of Howard County*, 107 Md. App. 286, 667 A.2d 970 (1995) in support of his assertion. ““Decisions contrary to law or unsupported by substantial evidence are not within the exercise of sound administrative discretion, but are arbitrary and illegal acts.”” 107 Md. App. at 306, 667 A.2d at 980.

The BOE responded that it did consider the affects on the Georges Creek region and determined that, overall, a new, state-of-the-art high school would benefit that region as well as Frostburg. It noted that while there may be no formal special relationship between Beall High School and Frostburg University, there are informal connections between the schools. On cross-examination by the BOE’s counsel, Ms. Treber admitted

that Frostburg University has a number of its student teachers who do their student teaching in the Allegany County Public Schools. She also agreed that Allegany County Public School students could take advance placement college courses at Frostburg University. Ms. Treber further noted that Frostburg University hosts Beall High School's—and Westmar High School's—proms. Therefore, even though there is no formal agreement between the two schools, there are informal agreements between Frostburg University and the Allegany County Public Schools in general. (T. at 101 — 02) Since Beall High School is so physically close to Frostburg University, it is the *particular* Allegany County Public School that has the most contact with the University. Thus, there is a “special relationship.”

Again, I must agree with the BOE's position. As can be discerned from reviewing the record as a whole, the BOE did consider the costs and benefits to the Georges Creek region by closing Westmar High School and merging its student body with that of Beall High School once a new high school is built. This was a rational and reasonable decision on the BOE's part. It was not done on a whim.

With regard to the lack of a “special relationship” between the two schools, simply because there is no signed, written agreement does not mean the two schools do not enjoy a special relationship. The BOE intimated what that relationship is; I need not repeat it here.¹³ Moreover, the Appellant's reliance on *Hurl* is misplaced. *Hurl* involved the appeal

¹³I will note that the Beall High School Community Committee referred to a “special relationship” between the two schools in its report. The BOE, in effect, was

of a teacher who objected to her transfer from one school to another within the same system. Ms. Hurl appealed to the State Board, who upheld her transfer, and then sought judicial review. The quotation that the Appellant relies on is often made in one form or another to describe how courts view their role in reviewing administrative decisions. Nevertheless, the Appellant failed to mention that in *Hurl*, the appealing teacher offered ten reasons why her transfer was arbitrary and/or illegal. The Court of Special Appeals rejected all ten reasons. The court concluded that the State Board, which upheld Howard County's decision, *did* rely on substantial evidence in upholding Howard County's actions, which, it also found not to be arbitrary or illegal. Additionally, when there is substantial evidence to support a board of education's decision and a reviewer (an administrative law judge, the State Board or the courts) disagrees with that decision, the reviewer must nonetheless uphold the board of education's decision, despite his reaching a different conclusion. *Board of Education of Montgomery County v. Montgomery County Educ. Ass'n, Inc.* 66 Md. App. 729, 740, 505 A.2d 905, 911(1986), *aff'd* by *Montgomery County Education Association, Inc. v. Board of Educ. of Montgomery County*, 311 Md. 303, 534 A.2d 980 (1987).

Having completed my review of the Appellant's dispute of the rationale supporting its rationale related to the high schools, I will now turn to the Appellant's attacks on its

following the lead of one of its school community committees. (See Finding of Fact No. 13; App. #48)

rationale supporting the closure of Westmar Middle School and the transfer of students to the Westmar High School site.

Westmar Middle School.

Enrollment Trends.

The BOE indicated that student enrollment is declining in the Westemport area where Westmar Middle School is located. Again, the Appellant disputes this. As noted previously, he presented evidence showing that Westernport's population has declined, but that decline has leveled off.

As I noted above, the BOE relied on data that it had no reason to doubt in making its conclusions. The BOE made a reasonable conclusion based on this data.

Age and Condition of School Buildings.

The BOE stated in its rationale that Westmar Middle School is in poor condition and "the oldest facility" in the county. It noted that Westmar Middle is the only school in its system not wired for the Internet and is not entirely handicapped accessible. By contrast, the current Westmar High School was recently renovated, "which would enable middle school students to enjoy a newly remodeled, state-of-the-art facility without any additional capital improvements."

The Appellant again accused the BOE of falsifying facts regarding this school. He noted that a 1998 maintenance report indicated that Westmar Middle School was in "excellent" condition. He questioned how it could go from excellent to poor in only four

years. He also showed a video depicting how well the school is maintained, focusing considerable attention on the school's shiny floors. He further asserted that the one reason Westmar Middle is not wired to the Internet is purposeful neglect. He averred that the BOE expended grant money to wire every school in the county to the Internet except Westmar Middle.

The BOE, however, presented evidence that contradicted the Appellant's assertions. It noted that assessing how well a school is maintained is not the same as assessing its condition. The BOE offered the 301 report and the testimony of Vincent G. Montana, Supervisor of Maintenance and School Construction for Allegany County Public Schools, to support its conclusions.

3DI indicated that Westmar Middle has an FCI of 25.06, meaning that it would cost 25.06% of the replacement value of the school to renovate it. 3DI's report noted that Westmar Middle School had been constructed as Bruce High School in 1957. The heating system is in need of substantial upgrading. Two gas boilers must be augmented with a coal boiler to provide adequate heat to the school. The coal boiler, however, is subject to breakdowns. The electrical service is antiquated and needs to be replaced. (The school still has a fuse box.) The windows are steel frame, which allows heat to escape to the exterior. Additionally, the school is built on five levels. Renovating the school would require making it ADA compliant. This would be a challenge given these different levels. The plumbing is corroding. Drinking water in the school, while safe, has a brown tint to

it. Although 301 determined it would cost \$4.5 million to renovate the school, Mr. Montana testified that he believed that figure was on the low side based on his experience. Nevertheless, he agreed with all of the other conclusions set forth in the 301 report.

The BOE also noted that its did not wire Westmar Middle School to the Internet because the electrical service could not support a computer lab. Mr. Montana confirmed this. The BOE indicated, however, that Westmar Middle School does have wireless access to the Internet.

I reject the Appellant's views that the BOE's rationale regarding Westmar Middle School is arbitrary or unreasonable. The Appellant has attempted to compare apples with oranges in citing the BOE's maintenance reports concerning the school to dispute the "condition" of the school. 3DI assessed the school's facilities to determine whether they met current standards. It found that they do not. 3DI was not looking at whether the school's floors were shiny or whether its door handles were polished. By analogy, a collector of automobiles could maintain a Model T Ford in almost factory-new condition. The good condition of this car, however, does not make it new. It remains an antique.

With regard to Internet access, I conclude that the BOE supported its assertions with credible evidence. The school does not have wired Internet access, which could serve students better than the wireless system now in place. Since the electrical system of the school will not support a wired computer lab and because of the high costs of

renovation in general (particularly with regard to the ADA issues), the BOE reasonably concluded that Westmar Middle was an appropriate candidate for closure. Westmar High School, where Westmar Middle's students would be relocated, had been renovated in 1995 – 96 and has systems in place that would accommodate updates such as wiring for computer labs. The Appellant has not shown any unreasonableness on the part of the BOE with regard to its assessment of the condition of Westmar Middle School.

Transportation.

The BOE indicated that transportation costs might increase since students would have to be bused from Westernport to Lonaconing, but those increased costs would be slight. The Appellant made essentially the same arguments concerning the BOE's alleged failure to consider safety factors here as he did with regard to the high schools. For the reasons already set forth, I reject his arguments and find the BOE's rationale to be reasonable.

Educational Programs.

The BOE indicated that Westmar High School's more up-to-date facilities would allow a more diverse educational program. It again mentioned that this school is wired to the Internet whereas Westmar Middle is not. I have already addressed the Appellant's arguments in this regard and have rejected them. I conclude the BOE has assessed the criterion reasonably.

Racial Composition.

The BOE indicated that the homogeneous population of the two schools is such that racial composition is not something that it had to consider in detail. The Appellant presented no arguments in this regard.

Financial Considerations.

The BOE indicated that Westmar Middle School has the highest operating costs of any school in the county, so these expenditures would be saved if the school were closed. It also maintained in its rationale that it would save money by operating fewer facilities. The Appellant included Westmar Middle School in his arguments about the lack of cost savings in general. For the reasons given above, I reject those arguments and conclude that the BOE reasonably assessed cost savings. I cannot say that a reasoning mind would not have reached the same conclusions that the BOE did.

Student Relocation.

The BOE indicated that since the entire Westmar Middle School population would be transferred to the “new” Westmar Middle School in Lonaconing, the move would not have any impact how students interact with one another. Some students actually could have a shorter commute.

The Appellant again reiterated that the BOE ignored the pleas of the Georges Creek communities to maintain the *status quo*. Nevertheless, for the reasons noted, I conclude that the BOE *did* consider the objections of those communities and made a reasoned decision not to maintain the *status quo*. That is all the BOE had to do. *Impact*

on Affected Communities.

The BOE indicated that although it realized “any school closure will inevitably bring some concern and stress to all communities involved, the plan with its time line for implementation has received overwhelming endorsement of the affected communities.”

The Appellant disputed the BOE’s rationale. In addition to maintaining that the affected communities allegedly do not overwhelmingly endorse the BOE’s plan, the Appellant asserted that the BOE has ignored other aspects of how school closure impacts a community. He presented the testimony of the Mayor of Westernport, the Honorable Donald T. Smith. Mayor Smith testified that what the BOE has failed to take into account is that in rural communities, school buildings have a greater value to the populace than they do in urban or suburban areas. He emphasized that a school might be the only public building in such communities (with the possible exception of the fire house). Consequently, many civic groups use schools to have their meetings. Amateur and children’s sports leagues use school playing fields. Schools serve as places of shelter during weather emergencies. Therefore, Mayor Smith explained that the loss of Westmar Middle School would have a far greater impact on Westernport than the BOE has stated in its rationale.

The BOE, however, contended that community use is not something the regulations require it to assess. The BOE’s responsibility is to provide public education to students, not to keep schools operating for community use. Additionally, the BOE stated

that since it did not plan to demolish the school, its facilities could still be used for community purposes. The BOE stated that it believes based on the public comments it has received, there is overwhelming support for its plan, more so than during its prior consolidation plans.

Again, the Appellant is arguing a *non sequitur*. The BOE's only responsibility under the regulatory scheme is to assess the education-related impact a school closing has on the community. It is not required to assess the impact a school closing has on civic groups, nor is it required to assess the loss of the school building as a place of shelter. In addition, the BOE received comments both for and against its plan. It exercised its quasi-legislative discretion and chose a course of action. I conclude the BOE's rationale supported its decision on this point. The Appellant's arguments lack merit.

Elementary School Consolidation.

The third and fourth rationales offered by the BOE concerned closing Beall Elementary School, renovating Frost Elementary School, and redistricting elementary school students to other elementary school locations. The Appellant referred to these actions in his appeal. My review of the Appellant's evidence, however, indicates that he did not present anything to dispute the BOE's rationale. He focused on the middle and high school decisions. Nevertheless, upon reviewing the BOE's rationale and the exhibits it presented, I conclude that the BOE had supportable reasons for its decisions to close Beall Elementary, renovate Frost Elementary and consolidate school districts beginning

with the 2007 -08 school year. I find no arbitrariness on the BOE's part in reaching its conclusions.

IV. Whether the BOE's Plan was Illegal.

The Appellant alleged that the BOE's plan was illegal because it was not based on substantial or correct evidence. He cited *Hurl* on this point as well. He also contended that the BOE never issued a decision to the affected parties, so they could avail themselves to their appeal rights. On this point (and other points not discussed in detail), he relied on the *Accardi* doctrine.

The BOE maintained that it had more than sufficient evidence to support its plan. It also argued that it complied with all of COMAR's requirements regarding public comment and publication.

As I discussed previously I conclude that the BOE had a sufficient basis to justify its plan. Simply because the Appellant does not agree with the conclusions the BOE reached based on that evidence, does not make that plan illegal.

As far I can discern, the BOE publicly issued its rationale for its decision to implement its plan on December 3, 2002. Prior to this, it announced the four components of its plan at a public meeting on November 12, 2002 and obtained public comments on November 11, 2002. Twenty-two individuals, including the Appellant spoke during the November 11, 2002, public hearing.

Even assuming that the BOE erred in not properly issuing its decision, the *Accardi*

doctrine would not necessarily apply. In essence, the *Accardi* doctrine states that federal administrative agencies must follow their own rules, and if they do not, the resulting agency action is invalid; no showing of prejudice by the complaining party is necessary. *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260, 268, 74 S. Ct. 499, 503, 98 L.Ed. 681 (1954). Maryland, like many states, has adopted the *Accardi* doctrine in some form and has applied it to the actions taken by state and local agencies. Maryland courts, however, generally have taken a more pragmatic approach in applying the *Accardi* doctrine. In *Hopkins v. Inmate Grievance Commission*, 40 Md. App. 329, 391 A.2d 1213 (1978), the Court of Special Appeals held that the *Accardi* doctrine does not apply to an agency's departure from procedural rules adopted for the orderly transaction of agency business. The rules at issue here were adopted for just such a purpose, and not to confer any substantive rights to complaining parties. More recently, in *Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 823 A.2d 626 (2003), the Court of Appeals held that in Maryland to invalidate State or local agency action based on the *Accardi* doctrine, there must be a showing of prejudice to the complaining party stemming from agency's failure to follow its rules. 374 Md. at 501, 823 A.2d at 649. Given that prior appellate cases have held that Appellants in actions challenging school board decisions have no liberty or property interests in maintaining school districts in their present form—and that the Appellant cannot show any direct harm to his own interests since he has no family members in the Allegany County Public Schools at this time—the Appellant cannot show

any prejudice to himself resulting from the BOE's actions and, hence, the *Accardi* doctrine is inapplicable. See *Bernstein v. Board of Education of Prince Georges County*, 245 Md. 464, 226 A.2d 243 (1967); *Welch v. Board of Education of Baltimore County*, 477 F. Supp. 959 (D. Md. 1979); *Elprin*, 57 Md. App. at 464, 470 A.2d at 836.

Furthermore, the Appellant exercised his right to file a timely appeal, which conclusively demonstrates that the Appellant suffered no prejudice even if the BOE had not published its rationale strictly according to COMAR.¹⁴

V. Miscellaneous Contentions by the Appellant.

The Appellant also made a number of arguments that do not fit neatly into the categories referenced under CCMAR 13A.01.05.05. I will address those arguments here. The Appellant alleged that the BOE misconstrued the recommendations of the MGT Study in commissioned in 2000. He maintained that the MGT study recommended employing the community school concept. It made no recommendation to close or consolidate schools. The Appellant also emphasized that MGT criticized the BOE for not eliciting greater community involvement before making its decisions. In a related argument, he charged that the BOE did not permit public comment to be inserted in the 301 study, the subsequent study that it commissioned in 2001 – 02. He maintained that citizens have a Constitutional right to be part of the “deliberative process.”

¹⁴The notice requirements in COMAR 13A.02.09.01C(2) actually only apply to [the] “parents and guardians of students in attendance at all schools that are being considered for closure by the local board of education.” As noted, none of the Appellant’s children attend the affect schools at this time.

The BOE maintained that the MGT study commended it for its previous consolidation efforts. It was actually silent on whether further consolidation should be done. Moreover, the BOE actually preferred not having public comment in the 301 study. It wanted an impartial view of its schools conducted by an independent organization. The BOE further argued that the Appellant did not cite any constitutional, statutory, regulatory authority which required it to have public input into the studies it conducted.

I conclude that the BOE had every right to commission studies and use the information provided by the organizations conducting the studies for whatever purposes it deemed appropriate. To repeat, as a quasi-legislative body, the BOE has the discretion to make decisions regarding the closing and consolidation of schools as long as it follows required processes and justifies those decisions. It has done so here. I further agree with the BOE that the Appellant has cited no authority that requires it to obtain public comment in its studies.

The Appellant further maintained that arbitrariness and unreasonableness can be inferred from the BOE's "preconceived plan" to close or redesignate schools in the Georges Creek region. He insisted that the BOE has "targeted" the Georges Creek schools for closure on at least four occasions, putting the residents there "through the COMAR process" each time. As a corollary to these charges, the Appellant contended that the BOE has treated the COMAR process as a mere formality. It did not matter what the residents said in their School Community Committee reports or at public hearings

held by the BOE. The BOE has remained deaf to their comments and committed to school closure and consolidation. The Appellant also referred to remarks made by BOE member Timothy Woodring, who stated on one occasion that the BOE’s decision to close and consolidate schools “was not a rush to judgment but the continuation of a plan”—providing further evidence of the BOE’s preconceived ideas and refusal to consider options other than school closure or consolidation.

The BOE responded that it had no obligation to do what the Georges Creek residents or any “vocal minority” wanted; it only had the obligation to consider their comments. During cross-examination, when the Appellant asked Dr. AuMIller why the BOE did not offer the Georges Creek region residents a choice, he responded succinctly, “it is not the public’s right to have a choice, it’s the public’s right to have input.” He maintained that the public had input regarding all facets of the BOE’s plan.

The BOE has stated its obligations under CCMAR correctly. Competing groups might desire different alternatives. The BOE has to choose. It cannot satisfy everyone.

The Appellant also made reference to case law to illustrate general principles governing administrative law decisions. He cited the *Chicago Junction Case (Baltimore & Ohio Railroad Co. et al. v. the United States et al.)*, 264 U.S. 258, 44 S.Ct. 317, 68 L.Ed. 667 (1924) (Brandeis, Justice) for the proposition that “the provision for a hearing implies the privilege of introducing evidence and the duty of deciding in accordance with it.” 264 U.S. at 265, 44 S.Ct. at 319–20. The Appellant went on to cite *Heaps v. Cobb*,

185 Md. 372, 45 A.2d 73 (1945), which cited the *Chicago Junction* case as precedent. The *Heaps* court quoted the *Chicago Junction* case, stating, ““To refuse to consider evidence introduced or make essential finding without support is arbitrary action.”” 185 Md. at 378; 45 A.2d at 76. He also cited *Hecht v. Crook*, 184 Md. 271, 40 A.2d 673 (1945) for the same premise.

One cannot disagree with the pronouncements of these courts regarding the obligation of agencies and hearing officials to consider all evidence introduced and have their decisions supported by facts. It is my view, however, that the BOE did consider everything put before it and made a reasoned decision to adopt the closing/consolidation plan at issue. Additionally, the case law cited by the Appellant, while essentially still good law, is quite old. The Supreme Court has not cited the *Chicago Junction* case in any decision since 1971, and that citation was made in a dissenting opinion. *See Investment Co. Institute v. Camp*, 401 U.S. 617, 641, 91 S.Ct. 1091, 1104, 28 L.Ed.2d 367 (1971). The Supreme Court and other courts may not be citing the *Chicago Junction* case today because the Supreme Court ushered in the modern era of administrative law with its decision in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Six years later, in 1976, the Court clarified its holding in *Goldberg* with its decision in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18. Examinations of contemporary administrative law precedents at the Supreme Court level usually begin with these cases.

Finally, the Appellant argued that the BOE never gave attention to his alternative plans—those involving conversion of the affected schools to community schools, or to kindergarten to 12th grade, so as to utilize the school facilities more effectively without closing them and consolidating districts. However, again, it is the BOE’s prerogative not to follow any suggested alternative as long as its plan is not arbitrary, unreasonable or illegal. I have found that its actions were not arbitrary, unreasonable or illegal, and that the Appellant has failed to meet his burden of proof. I recommend that the State Board uphold the BOE’s school closure and consolidation plan, contingent upon the completion of a new western high school to be built at the site of the existing Beau High School at the start of the 2007 – 08 school year.¹⁵

CONCLUSIONS OF LAW

The decision of the Board of Education of Allegany County announced on November 12, 2002, regarding the closing, consolidation, and reconfiguration of public schools within the Allegany County School System, was not was arbitrary, unreasonable, or illegal. Md. Code Ann., Educ. § 4-120 (2004); COMAR 13A.02.09.01; COMAR 13A.01.05.05.

¹⁵In writing this proposed decision, I have attempted to address all of the Appellant’s arguments. Given the sheer volume of those arguments, however, it is possible I have not addressed every argument that he made in detail. To the extent that I have not addressed a particular argument, I conclude that, as a whole, the BOE complied with every aspect of the regulations and committed no factual or legal error that would warrant reversal of its decision.

PROPOSED ORDER

I PROPOSE that the decision of the Board of Education of Allegany County announced on November 12, 2002, and supported by its Rationale for *Consolidation/Reconfiguration of Schools*, dated December 3, 2002 (i.e., the BOE plan), be **UPHELD** by the State Board.

December 3, 2004

Thomas G. Welshko
Administrative Law Judge

NOTICE OF RIGHT TO FILE OBJECTIONS

Any party adversely affected by this Proposed Decision has the right to file objections with the Maryland State Department of Education, do Sheila Cox, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, within fifteen (15) days of receipt of the Proposed Decision. CCMAR I 3A.01 .05.07F. The Office of Administrative Hearings is not a party to any review process.