EDWARD J. PALMER, JR., ET AL.	BEFORE THE
Appellants	MARYLAND
v.	STATE BOARD
WICOMICO COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 99-37

OPINION

This is an appeal of a redistricting decision made by the Board of Education of Wicomico County. The appeal to the State Board was transferred to the State Office of Administrative Hearings where an expedited hearing was scheduled for June 7, 1999. The administrative law judge (ALJ) issued a proposed decision on June 24, 1999, a copy of which is attached as Exhibit 1. Oral argument before the State Board occurred on July 27, 1999.

Having reviewed the record in this matter including the proposed decision of the ALJ and after considering the arguments of the parties, we adopt the Findings of Fact and Conclusions of Law of the administrative law judge. We therefore affirm the redistricting decision made by the Board of Education of Wicomico County.

Walter Sondheim, Jr.
President

Edward Andrews
Vice President

Raymond V. Bartlett

JoAnn T. Bell

Philip S. Benzil

George W. Fisher, Sr.

Morris Jones

Marilyn D. Maultsby

Judith McHale

Adrienne L. Ottaviani
John Wisthoff

July 28, 1999

EXHIBIT I

EDWARD J. PALMER, JR., et al.,	*	BEFORE PAUL B. HANDY,
APPELLANTS[1]	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE OF
BOARD OF EDUCATION	*	ADMINISTRATIVE HEARINGS
OF WICOMICO COUNTY	*	OAH CASE NO. 99-MSDE-BE-04-129

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE

On April 6, 1999, the Wicomico County Board of Education ("BOE") issued a decision approving the redistricting of the boundaries of the geographical attendance areas of Wicomico County's public schools ("redistricting plan" or "the plan"). The purpose for the plan, in essence, is to assign students to the new Salisbury Middle School, to move the sixth grade students from the elementary schools to the middle schools, and to address overcrowding and other issues that were presented under the previous plan. Edward J. Palmer, Jr. and Pamela Palmer

[1]The petition on appeal also named Mr. Palmer's wife, Pamela Palmer and his two stepsons/ Mrs. Palmer's two sons as parties. Since the children did not participate in this hearing, and they are both students and minors, their names have been deleted to protect their privacy interests.

("Appellants"), husband and wife, and parents of students who attend a Wicomico County school, appealed the action of the Board to the State Board of Education.

The Appellants allege that the decision of the BOE is arbitrary, unreasonable, and unlawful, for reasons that will be discussed below.

In accordance with Md. Code Ann., Educ. § 4-205 (1998), a hearing was conducted by Paul B. Handy, Administrative Law Judge, on June 7, 1999, at the Office of Administrative Hearings, W.P. Martin – District Court Multi-Service Center, 201 Baptist St., Suite 7, Salisbury, Maryland 21801. Fulton P. Jeffers, Esq., of Fulton P. Jeffers, P.A., 212 Downtown Plaza, Suite 304, P.O. Box 750, Salisbury, Maryland 21803-0750, appeared on behalf of the BOE. The Appellant Mr. Edward J. Palmer, Jr., appeared in proper person. The Appellant Mrs. Pamela Palmer did not attend the hearing.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1995 & Supp. 1998) and the Rules of Procedure of the Office of Administrative Hearings, Code of Maryland Regulations ("COMAR") 28.02.01.

ISSUES

The issues on appeal are whether the Appellants have standing to object to the BOE's April 6, 1999 redistricting plan, and, if so, the following substantive issues:

(1) Whether the BOE's use of racial balancing as one of the criteria for its plan violated the legal or constitutional rights of the parents or students.

(2) Whether the BOE's decision to pair elementary schools constituted sound

educational policy.

(3) Whether the BOE used sound educational policy in addressing the transportation problems that resulted from the plan, including safety concerns and expenditure of additional funds for transportation.

(4) Whether the BOE's failure to provide parents with federal legal authority for the redistricting plan constituted an unlawful procedure.

(5) Whether the BOE's transportation policy, which failed to provide transportation for disabled students who choose not to attend their assigned schools, rendered the plan arbitrary, unreasonable or illegal.

(6) Whether the BOE violated the due process rights of parents and students by allegedly conducting hearings without allowing meaningful participation and by referring parents and students to officials who did not respond to the questions raised.

(7) Whether the BOE violated 20 U.S.C.A. § 1651 (prohibition against assignment or transportation of students to achieve racial balance), and, if so, whether that violation rendered the plan illegal.

MOTIONS AND PROCEDURAL MATTERS

On May 21, 1999, the BOE filed a Motion for Summary Affirmance ("Motion I"), pursuant to COMAR 13A.01.01.03K, alleging that there were no issues of material fact and that the BOE was entitled to a decision affirming its action. Motion I was denied at the prehearing conference on June 1, 1999, because the BOE had not submitted any evidence to support its

motion, the BOE disputed many of the facts alleged by the Appellants, and the issues raised by the Appellants in their petition had not been firmly established.

At the prehearing conference, the parties agreed that seven substantive issues were generated by the Appellants' petition for appeal.[2] The parties stipulated to the admission of certain documents and to the following facts:

1. The BOE conducted nine (9) public meetings between November 1998 and January 1999, on the redistricting plan.
2. In February and March 1999, the BOE issued two (2) amendments to the plan and conducted a total of three (3) public meetings on those amendments.
3. Ample notice of all of the meetings was given to the public through the local media.
4. The Appellant Edward J. Palmer, Jr., participated in at least one (1) public meeting and expressed his views to the BOE.

In addition, the Appellant Mr. Palmer agreed to accept the determination made by the BOE as to whether the BOE directly received federal funds for transportation of students.

On June 3, 1999, pursuant to an expedited schedule developed at the prehearing conference, the BOE filed a new Motion of the Wicomico County Board of Education for Summary Affirmance. ("Motion II") In Motion II, the BOE alleged that the Appellants lacked standing to object to the redistricting plan, that there were no issues of material fact, and that the BOE was entitled to a decision affirming its action.

---

[2] Issue 5 was later amended with both parties' consent so that it referred to a standard of review set forth in COMAR 13A.01.01.03E.

On June 7, 1999, a hearing was held on Motion II. The parties stipulated that the BOE does not directly receive federal funds for transportation of students. The Appellant Mr. Palmer testified on the issue of whether the Appellants had standing to object to the redistricting plan. This administrative law judge ("ALJ") deferred ruling on the issue of standing. The ALJ granted summary affirmance on Issues 2, 3, 4, 5, 6, and 7. The ALJ denied summary affirmance with regard to Issue 1.

A hearing on the merits was held on June 7, 1999. Following the Appellant's case-in-chief, the BOE renewed its Motion for Summary Affirmance ("Motion III") as to the remaining issue. That motion was granted, and the hearing was concluded.

SUMMARY OF THE EVIDENCE

A. Exhibits

The following documents were admitted into evidence as joint exhibits:

Joint Ex. #1 - BOE Redistricting Decision, dated April 6, 1999.

Joint Ex. #2 - BOE Guidelines for Establishing Student Attendance Areas, approved May 12, 1998.

Joint Ex. #3 - Letter from Peter E. Holmes, Director, Office for Civil Rights ("OCR"), Department of Health, Education and Welfare ("DHEW"), to Superintendent Royd A. Mahaffey, BOE, dated November 29, 1973.

Neither party submitted any additional documents.

B. Testimony

The Appellant Edward J. Palmer, Jr., testified in his own behalf and also presented the testimony of Superintendent William T. Middleton, III. The BOE did not present any testimony.

FINDINGS OF FACT

Having considered all of the evidence and testimony presented, and the stipulations of the parties, I make the following Findings of Fact by a preponderance of the evidence:

1. In the early 1970's, the BOE received several directives from the federal DHEW – OCR, directing that the BOE desegregate its school system. The purpose for the directives was to bring the Wicomico County public schools into compliance with Title VII of the Civil Rights Act of 1964 and other federal mandates regarding desegregation. The BOE agreed to comply with these directives.

2. As part of its desegregation plan, the BOE ordered the redistricting of certain elementary schools in order to achieve racial balancing in those schools. A program called "First Grade Centers" assigned all students in the Salisbury District to attend one of two elementary schools for the first grade and to attend their neighborhood schools for second through sixth grades. The First Grade Centers program did not directly affect students in the Delmar school district or those who attended Delmar Elementary School.

3. The BOE did not implement any new redistricting plan for approximately twenty-four (24) years. During those years, the student population of Wicomico County increased manifold, and many of the schools became overcrowded.

4. In 1989, the BOE appointed a School Facilities Task Force to evaluate the school system's facilities and recommend changes. The Task Force, known as the "Seidel Commission," submitted its report to the BOE on April 10, 1990. The Seidel Commission recommended, among other things, that the Wicomico Applied Technology Center be converted into a middle

school and that the sixth grade be added to the middle school structure.

5. The BOE approved this recommendation for conversion and named the proposed school, "Salisbury Middle School." The BOE eventually decided to open Salisbury Middle School in September 1999.

6. The Seidel Commission also recommended that other schools be built to alleviate overcrowding in the existing schools. The BOE approved a plan to build other schools in the next several years, after the opening of Salisbury Middle School.

7. In 1995, the BOE began planning for the eventual redistricting that would be necessary in light of the new Salisbury Middle School, the changes in the middle school program, overcrowding of existing schools, and the shifting enrollment, trends and population centers.

8. The BOE conducted numerous public meetings in 1996, 1997 and 1998, to discuss the pending redistricting of Wicomico County schools. Notice of each public meeting was placed in The Daily Times, a newspaper having general circulation in Wicomico County.

9. In November 1998, the BOE held a public meeting at which it introduced a new redistricting plan. The BOE published the following "Guidelines for Establishing Student Attendance Areas":

1) Student enrollment projections should include anticipated growth through September 2004.
2) School Size Recommended (optimum number)
   - Elementary: 400-500 (possibly 450-550)
   - Middle: 700-800
   - High: 900-1100
3) Goal for Enrollment Balance (minority percentage of school population)
   - Range of 25% to 45%
4) Elementary Schools
   - A. Nonpaired school – prekindergarten through fifth
   - B. Assignment of first graders to schools within geographic boundaries

of their residence is preferred.

C. Paired schools – preferred grade alignments: prekindergarten through second and third through fifth.

D. Principal and vice principal for each elementary school (250+ students)

5) Sharptown/Cooper Mill – not feasible to use these facilities

6) Completion of Program

Grandfathering September 1999 seniors (students will provide own transportation)

Consider additional high school grade levels

7) Sixth Grade to Middle School

All sixth graders move to middle schools with updated curricular programs in all middle schools.

8) Special Permission Transfers: All contingent upon space available in requested school/grade level/program within established parameters for approving transfers.

9) Attendance patterns that allow students to attend prekindergarten through eighth with same peers are encouraged. [Joint Ex. No. 2]

10. The BOE proposed to "pair" certain elementary schools in order to achieve racial balancing. Under this plan, a school that had a predominantly majority population and one that had a predominantly minority population would be paired together, and the students would attend first the one school and then the other. The BOE proposed this program to replace the "First Grade Centers" program, established in the early 1970's to comply with the federal mandates to desegregate the schools. Delmar Elementary School was not proposed to participate in either program.

11. The Appellants reside in Wicomico County in the Delmar school district. The Appellant Mr. Palmer's two stepchildren, Mrs. Palmer's children, are eleven- and eight-years old. During the 1998-99 school year, both children attended Delmar Elementary School. The older child was in the fourth grade and the younger child was in the first grade.

12. The BOE conducted nine (9) public meetings between November 1998 and January

1999, on the redistricting plan.

13. In February and March 1999, the BOE issued two (2) amendments to the plan and conducted a total of three (3) public meetings on those amendments.

14. Ample notice of all of the meetings was given to the public through the local media.

15. The Appellant Mr. Palmer participated in at least one (1) public meeting and expressed his views to the BOE.

16. On April 6, 1999, the BOE issued its decision approving the redistricting plan, as amended. The amendments did not change the basic features of the plan, i.e., the assignment of students to Salisbury Middle School, the addition of sixth grade to the middle school structure, the pairing of certain elementary schools, the change in geographical boundaries to meet target student population for each school, and achievement of racial balancing in the schools.

17. As a result of the plan, as approved by the BOE, the Appellants' children will continue to attend Delmar Elementary School. The plan will have no known impact on the educational program or school transportation of the Appellants' children. Delmar Elementary School is not subject to pairing with any other school under the plan.

18. The BOE does not directly receive federal funds for transportation of students.

DISCUSSION

In order to prevail on their appeal, the Appellants must prove by a preponderance of the evidence that the decision of the County Board is arbitrary, unreasonable or illegal. COMAR 13A.0l.0l.03E.

Md. Code Ann., Educ. § 4-109(c) (Supp. 1998) provides:

With the advice of the County Superintendent, the County Board shall determine the geographic attendance areas for each school established under this Section.

In establishing the standard of review of decisions of the County Board involving local policy, COMAR 13A.0l.0l.03E provides that the decision of the County Board is considered prima facie correct and defines arbitrary, unreasonable or illegal as follows:

E. Standard of Review.

(1) Decisions.

(a) Decisions of a county board involving a local policy or a controversy and dispute regarding the rules and regulations of the county board shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the county 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:

(i) It is contrary to sound educational policy;

(ii) A reasoning mind could not have reasonably reached the conclusion the county board reached.

(c) A decision may be illegal if it is one or more of the following:

(i) Unconstitutional;

(ii) Exceeds the statutory authority or jurisdiction of the county board;

(iii) Misconstrues the law;

(iv) Results from an unlawful procedure;

(v) Is an abuse of discretionary powers;

(vi) Is affected by any other error of law.

(d) The appellant shall have the burden of proof.

COMAR 13A.01.01.03K provides:

K. Motion for Summary Affirmance.

(1) The State Board may issue a decision on a motion for summary affirmance when there are no genuine issues as to any material facts.

(2) Briefs or memoranda in support of or in opposition to a motion for summary affirmance shall contain the following:

(a) A statement of the reasons upon which it is based;

(b) A statement of the facts;

(c) An argument which includes relevant State Board decisions, if any;

(d) A short conclusion stating the relief sought;

(e) Any supporting documents, exhibits, and affidavits.

(3) Parties shall make every effort to agree to a stipulation of facts and issues.

(4) Oral argument on a motion for summary affirmance may be scheduled before the State Board of hearing examiner as set forth in §L…

This proposed decision will address first the issue of standing and then each issue raised by the Appellants in turn.

The Appellants' standing to object to the plan.

In *Sugarloaf Citizens' Association v. Dept. of Environment,* 344 Md. 271, 686 A.2d 605 (1996), the Court of Appeals of Maryland set forth the distinctions between a party's standing to maintain an action in court vs. standing to participate in an administrative hearing. In that case, a citizens' association challenged the issuance of permits by the Department of Environment for an incinerator which was to be located adjacent to property owned by association members. The ALJ found that the plaintiffs would not be "aggrieved" by the issuance of the permits and therefore lacked standing to challenge this action in an administrative proceeding.

The Court of Appeals stated:

> The requirements for administrative standing under Maryland law are not very strict. Absent a statute or a reasonable regulation specifying criteria for administrative standing, one may become a party to an administrative proceeding rather easily. In holding that a particular individual was properly a party at an administrative hearing, Judge J. Dudley Digges for the Court in *Morris v. Howard Res. & Dev. Corp.,* 278 Md. 417, 423, 365 A. 2d 34, 37 (1976), explained as follows:
>
> "He was present at the hearing before the Board, testified as a witness and made statements or arguments as to why the amendments to the zoning regulations should not be approved. This is far greater participation than that previously determined sufficient to establish oneself as a party before an administrative agency…[citations omitted] Bearing in mind that the format for proceedings before administrative agencies is intentionally designed to be informal so as to encourage citizen participation, we think that **absent a reasonable agency or other regulation providing for a more formal method of becoming a party, anyone clearly identifying himself to the agency for the record as having an interest in the outcome of the matter being considered by that agency, thereby becomes a party to the proceedings**." [emphasis added]
>
> …
>
> For a person or entity to maintain an action under the Administrative Procedure Act for judicial review of an administrative decision, the person or entity "must both be a 'party' to the administrative proceedings and be 'aggrieved' by the final decision of the agency." [citations omitted]
>
> While the term "aggrieved" is not defined in the Administrative Procedure Act, we have held that the statutory requirement that a party be " 'aggrieved' mirrors general common law standing principles applicable to judicial review of administrative decisions." [citations omitted] Accordingly, in order to be "aggrieved" for purposes of judicial review, a person ordinarily must have an interest " 'such that he is personally and specifically affected in a way different from … the public generally.' " [citations omitted] *Id.,* 344 Md. at 286-288.

In the present case, the Appellants challenge a redistricting plan that encompasses virtually all of the public schools in Wicomico County. The Appellants seek to block the implementation of this plan. They live in Wicomico County and they have children who attend Delmar Elementary School, a Wicomico County public school. The boundary changes in the redistricting

plan will affect a number of students who attend this school, in that some students will be transferred out and others transferred in. However, the Appellants' children are not being transferred to another school under the plan, nor are there any known changes to the children's educational programs or transportation services as a result of the plan.

When questioned about the impact of a favorable decision on his family, the Appellant Mr. Palmer testified that he was told that there may be educational changes. He is also concerned because his older child receives special education services, including special transportation services. He did not know if this child would be impacted by the plan. Mr. Palmer was unable to specify how either child would be harmed by the plan, and he proffered no evidence to show that his family was aggrieved by it.

Under the *Sugarloaf* criteria for "standing" to maintain an action in court, the Appellants would be hard-pressed to show that they were "aggrieved" by the implementation of the plan. They did not like the decision of the BOE, nor did they like the way parents and students were treated by the BOE. However, they could not demonstrate that they suffered any harm that was unique to them. Thus, it is quite possible that the Appellants do not have standing to challenge the BOE's action in a court of law. On the other hand, the Appellants appear to meet the much more lenient threshold for standing in an administrative hearing set forth in *Sugarloaf*, i.e., they do have an "interest in the outcome," in that they live in the affected community, they have children who attend a Wicomico County school, and the school is affected in some ways by the redistricting plan.

The next question raised by the holding in *Sugarloaf* is whether this particular type of administrative hearing requires a more stringent standard for standing, as a result of a "statute or a

reasonable regulation." *Id.,* 344 Md. at 286. A careful review of the educational statutes and regulations fails to yield any authority on this issue.

In the case, *Bernstein v. Board of Education of Prince George's County,* 245 Md. 464, 226 A. 2d 243 (1967), the Court of Appeals discussed the issue whether taxpayers had standing to object to a school redistricting plan. The Court assumed that the taxpayers had standing but did not decide the issue. *Id.,* 245 Md. at 466 fn.1. There is one federal case, *Welch v. Board of Education of Baltimore County,* 477 F. Supp. 959 (D. Md. 1979), in which the U.S. District Court found the issue of standing so thorny and complex that it declined to decide the issue. *Id.* at 960-961. In that case, the Court found the plaintiffs' claims of constitutional violations devoid of merit. *Id.* at 961.

There are several decisions of the Maryland State Department of Education that ruled on standing issues. None of those cases presented a situation where the students attended a school that was affected by the redistricting but the students themselves were not.

In *Dorchester Neighborhood Association, Inc., et al. v. Charles County Board of Education,* Op. MSBE No. 99-10 (Issued February 23, 1999), the ALJ determined that a neighborhood association had an interest in the matter because a portion of the members of the association lived in the affected areas. The ALJ stated that economic interests are merely a byproduct of the redistricting decision and economic interests in themselves do not confer standing. The ALJ ruled that the association did not have standing, but that a member of the association who had children in the affected schools could bring the appeal. *Id,* at 1.

The Maryland State Board of Education ("MSBE") held that the ALJ erred in ruling that the association lacked standing; however, this error was harmless because the ALJ addressed the

merits of the case. The MSBE cited with approval its own decision in *Stratford Woods Home Owners' Association, Inc. v. Montgomery County Board of Education,* 6 Op. MSBE 238 (1992), stating:

> In that appeal, a motion was made to dismiss the home owners' association for lack of standing in its own right because the organization had not demonstrated an organizational interest in the change of school district boundaries. The administrative law judge denied the motion, explaining that it was demonstrated to his satisfaction that the organization existed to forward the interests of its membership, all of whom lived in the community, and all of whom had children in Stonegate, anticipated having children in the school, or owned property having a value to be affected by the decision. "The total collective interest of this small community was the interest of the organization, and as such, it was found to have standing." 6 Op. MSBE at 239.
>
> The State Board adopted the findings and conclusions of the administrative law judge and on the issue of standing provided additional clarification:
>
> We find that the home owners' association has standing to bring this appeal **because it represents the interests of association parents who have elementary school children in, or pre-school children who will be in, the affected schools.** To this extent we modify the opinion rendered in *Adams, at al. v. Montgomery County Board of Education,* 3 Op. MSBE 143 (1983). [emphasis added]
>
> *Id.,* at pg. 2.

In the present case, the Appellants' interest in the outcome of the case is stronger than that of a homeowner's association that has some members with children who attend the affected schools. The Appellants do have children in an affected Wicomico County school. They may not have suffered a direct injury but they certainly meet the low threshold for administrative standing enunciated with regard to administrative hearings generally in *Sugarloaf, supra,* and enunciated with regard to a redistricting plan in *Dorchester Neighborhood Association, Inc. v. Charles County Board of Education, supra.*

For these reasons, I find that the Appellants have standing to object to the redistricting

plan because they live in Wicomico County and they have children who attend an affected school.

Issue 1 – <u>The factor of racial balancing in the plan.</u>

The Appellants argue that the BOE acted illegally when it changed the geographical school districts for the purpose of achieving racial balancing. The BOE responds that not only was it proper to consider the racial composition of the schools, the BOE was under federal mandates to do so.

In the seminal cases of *Brown v. Board of Education,* 347 U.S. 483 (1954) ("*Brown I*"), and *Brown v. Board of Education,* 349 U.S. 294 (1955) ("*Brown II*"), the United States Supreme Court held that school boards violated the rights of minority schoolchildren to equal protection under the law, U.S. Const. Amend. XIV, and other rights, when the school boards assigned the minority schoolchildren to separate and inferior schools. The ramifications of these decisions have been litigated extensively over the past forty-five (45) years.

As a result of these decisions, school boards around the country, including Maryland, began to implement plans to desegregate their schools. The issue then arose whether it was lawful for a school board to consider racial balancing as a factor in its redistricting plans.

In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), the U.S. Supreme Court held that busing to achieve racial balance was not permitted when the time or distance of travel risked children's health or significantly impinged on the educational process.

The two leading cases in Maryland on this issue, *Borders v. Board of Education of Prince George's County,* 265 Md. 488, 290 A. 2d 510 (1972), and *Bernstein v. Board of Education of Prince George's County,* 245 Md. 464, 226 A.2d 243 (1967), are more than twenty-five years old. These cases were decided at a time when courts were groping with many issues involving

newly-implemented school desegregation plans. Although the times have changed, both *Borders* and *Bernstein* are still valid precedent in Maryland since their holdings have not been overruled or distinguished.

In *Bernstein,* the Appellants sought an injunction to prevent implementation of a school redistricting plan. The primary purpose for this plan was to alleviate overcrowding in the schools but a secondary purpose was to achieve racial balancing. The Appellants contended, among other things, that the plan was unlawful because of the Board's desire to adjust the racial population of the affected school. Without addressing this issue directly, the Court of Appeals upheld the trial court's finding that the purpose for the plan was to alleviate overcrowding and that the incidental purpose to achieve racial balancing was permissible. *Id.,* 245 at 478-479.

In *Borders,* the Court of Appeals directly addressed the issue whether a school board can redraw school attendance lines for the reason of achieving racial balance. The Court held that it was permissible for the school board to do so, even where the segregation of students was not the result of the actions of the school board. *Id.*, 265 Md. at 494. This type of segregation is often referred to as *de facto* segregation, as opposed to *de jure* segregation, which is caused by the acts of the government. The Court stated, however, that the result of the case might be different if race were the only factor used by the school board in its plan. *Id.*

More recently, in *Freeman v. Pitts,* 503 U.S. 467 (1992), the U.S. Supreme Court revisited this issue in a different context. In 1969, black schoolchildren and their parents entered into a consent order approving a plan to dismantle *de jure* segregation in Dekalb County, Georgia. The U.S. District Court retained jurisdiction to oversee the plan. In 1986, the school system filed a motion for final dismissal, alleging that it had achieved unitary status. The District

Court found that the school system had achieved unitary status in four of six factors, but not with regard to faculty assignments and resource allocation. Therefore, the District Court refused to relinquish jurisdiction as to the remaining problems.

With regard to the factor of student population, the District Court found that while DeKalb County had achieved temporary unity in its student population, that unity did not last long due to demographic changes that were beyond the control of the school system. Therefore, the District Court determined that the racial segregation existing in 1986 was not a vestige of the prior *de jure* system.

The U.S. Supreme Court held that the District Court properly relinquished partial jurisdiction over the school system despite the fact that full compliance had not been achieved. The Court also held that a school board could be in full compliance with an order to achieve racial balancing even if segregation still existed in the school system. The Court addressed the responsibilities of the school district with regard to racial balancing:

> That there was racial imbalance in student attendance zones was not tantamount to a showing that the school district was in noncompliance with the decree or with its duties under the law. Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.... If the unlawful *de jure* policy of a school system has been the cause of the racial imbalance in student attendance, that condition must be remedied. The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation. *Id.* at 1447.

In *Laytonsville Elementary School PTA v. Montgomery County Board of Education,* 6 Op. MSBE 659 (1994), the MSBE adopted the proposed decision of the ALJ. The ALJ ruled that the school board's consideration of race was not shown to be unconstitutional since there

was no showing that longer bus rides rose to the level of constitutional hardship, citing *Borders, supra,* and *Swann, supra.*

In summary, the Court of Appeals has held it is permissible for a school system to consider racial balancing as a factor in its redistricting plan so long as this is not the only factor in the plan. A school system may not bus a child to achieve racial balance if the travel risks the child's health or significantly impinges on the educational process. However, the holding in *Borders, supra,* by the Court of Appeals is somewhat at odds with the reasoning of the U.S. Supreme Court in *Freeman v. Pitts, supra,* to the extent that the Court of Appeals has held that a school board can remedy both *de jure* and *de facto* segregation in its school system.

In the present case, the BOE submitted a letter from the OCR, dated November 29, 1973, [Joint Ex. No. 3] to demonstrate that the BOE was under a federal directive to desegregate its schools. The BOE alleged in Motion II that it was entitled to a decision affirming its action because under *Borders* and *Bernstein,* the BOE was entitled to use racial balancing as a factor in its plan. Because of the federal directives from the OCR, and other federal mandates, the BOE was required to consider racial balancing in any redistricting plan.

This ALJ denied Motion II with regard to this issue because the record did not reflect how the factor of racial balancing was used in formulating the redistricting plan. As a general principle, the BOE was correct in asserting that it could consider the racial composition of the schools. However, the reasoning in *Freeman v. Pitts, supra,* appears to place limits on the discretion of a school board. The record did not indicate whether the school board was remedying a *de jure* system of segregation or a *de facto* segregation resulting from population changes in the past twenty-four years. In addition, there was no evidence of the impact on

schoolchildren in terms of length of travel and similar factors.

In his case-in-chief, the Appellant Mr. Palmer called Superintendent Middleton, who testified to the following: In the early 1970's, the BOE responded to several directives from the OCR by formulating a redistricting plan. One program of this plan was called, "First Grade Centers," which applied specifically to the Salisbury district. The First Grade Centers program provided that all first graders living in Salisbury would attend one of two elementary schools. The students would then attend their neighborhood schools for second through sixth grades. In formulating a new plan, the BOE concluded that this program placed too heavy a burden on a portion of the elementary school students and that it was not working. However, the BOE had to ensure that the new redistricting plan did not resegregate the elementary schools. Therefore, the BOE approved the pairing plan, in which certain elementary schools located in majority and minority communities would be paired together. The students would first attend one school and then the other. The BOE felt this plan was more equitable and would prevent the schools from becoming resegregated.

Superintendent Middleton testified also that the primary purpose for the plan was to assign students to the new Salisbury Middle School and to add sixth graders to all of the middle schools. Racial balancing was a secondary but important factor in the plan.

The BOE again moved for summary affirmance (Motion III) at the end of the Appellants' case. Motion III was granted. The Appellants did not present any evidence of hardship to the students as a result of the plan. Further, the Superintendent's testimony established that the BOE properly considered racial balancing as a factor to ensure that the schools were not resegregated. This use of racial balancing was not only permissible under *Borders, supra,* but also under

Freeman v. Pitts, supra. If the BOE had not considered the impact of deleting the First Grade Centers program on the racial composition of the elementary schools, the Wicomico County schools could have reverted to the *de jure* segregation that the BOE had remedied in the early 1970's.

Issue 2 - <u>Whether pairing of elementary schools was sound policy.</u>

The second issue raised by the Appellants is whether the pairing of elementary schools was contrary to sound educational policy. This issue is not directed to the legality of the decision but its wisdom. The Appellant has the burden of proof to show that the BOE acted arbitrarily or unreasonably. COMAR 13A.01.01.03E(1)(b)(i).

In its oral argument on Motion II, the BOE asserted two grounds for a decision affirming its action: (1) the Appellants' children were not affected by the pairing program because Delmar Elementary was not paired with any other school under the plan; and (2) the Appellant's philosophical disagreement with the policy is not a basis to overturn it.

The Appellant Mr. Palmer conceded that his family was not affected by the pairing of schools. He stated that he learned this in the course of the hearing. Since there is no remedy that the MSBE can give to the Appellants on this issue, the BOE's motion was granted.

It is clear, however, that there was a sound basis for the decision to pair schools, as discussed above.

Issue 3 - <u>Sound policy in addressing transportation concerns.</u>

The Appellants asserted that the BOE failed to address parent and student concerns about safety and transportation costs with regard to the plan, since the plan will require some students to travel to distant schools. The Appellants' concerns are: (1) students who attend safe schools

will be transported to schools in neighborhoods that are not safe; (2) funds will be spent on transportation that could be allocated to educational programs; and (3) the BOE will have to hire additional bus drivers, and the plans for record checks and training of those drivers are inadequate.

The BOE argued that summary affirmance should be granted for several reasons: (1) this is a transportation issue, not a redistricting issue; (2) the issue of safety must be addressed on a case-by-case basis; (3) monetary expenditures are subject to a separate budgetary process that has its own avenues of appeal; (4) the budgetary issues were decided several years ago; (5) since the Salisbury Middle School was approved several years ago, changes in transportation are a non-issue; and (6) the Appellant's children are being transported to the closest elementary school.

Motion II was granted with regard to this issue because the Appellants' children are not affected by changes in the transportation of students as a result of the plan. Therefore, there is no remedy that can be afforded the Appellants. In addition, this ALJ agrees with the BOE that there needs to be a specific showing that a student has had his safety placed in jeopardy and that the mere expenditure of funds is not in itself a basis to overturn the BOE's decision. The Appellants do not allege that any specific student is being placed in danger; they object to the fact that the BOE did not explain to their satisfaction the impact of the redistricting plan on these areas of concern.

Issue 4 - <u>The failure to provide federal legal authority.</u>

The Appellants alleged in their petition that at several public meetings on the proposed redistricting plan, the BOE told the community that there were federal mandates that required the BOE to consider racial balancing as a factor. The Appellant Mr. Palmer stated in the petition that

he brought a copy of Title VII – The Civil Rights Act of 1964, which was 164 pages long, to a meeting, put this document on the table in front of the BOE members, and asked them to show the Appellant where the law was that required the BOE to redistrict for racial balance. The BOE members did not respond to this question. Concerned parents asked the BOE to provide legal authority for the plan but the BOE never did so.[3] The BOE argued that it has no obligation to provide federal legal authority for the plan and that legal advice given by the BOE's attorney is protected under the attorney-client privilege.

There are no specific COMAR provisions that apply to public meetings for redistricting plans. Moreover, the BOE advised this ALJ that the BOE has no local rules regarding public meetings. However, COMAR 13A.02.09.01 provides for the procedures that must be utilized for decisions on school closings.

COMAR 13A.02.09.01A provides that local boards must establish procedures to be used in decisions on school closings. The procedures are required to include public hearings to permit concerned citizens to submit their views orally or in writing, notice of procedures and time limits, and notice of the hearing times and places at the school and in the local media. COMAR 13A.02.09.02C.

Since a school closing is an extraordinary action, on the same level as a redistricting decision in terms of its impact on the students, this ALJ will apply the school closing procedure regulations to this redistricting case by analogy. However, there is no provision in COMAR

---

[3] The Appellants also included in their petition a count which alleged that the BOE violated the federal Freedom of Information Act. However, the Appellants withdrew this count when they were informed that this issue was not properly before the ALJ, and that there were separate procedures for addressing the issue under federal and state law.

13A.02.09.01 or in COMAR generally, that requires a school board to disclose federal legal authority in the course of closing a school or deciding to redistrict. For these reasons, this ALJ granted Motion II with regard to this count.

Issue 5 - <u>The failure to provide transportation for disabled children.</u>

The redistricting plan provided that children could opt to attend a school other than the one assigned to them. However, the BOE conceded that under the plan the BOE would not provide transportation to the other school. The Appellants alleged that the failure to do so rendered the plan illegal.

The BOE argued that all of the same infirmities in the Appellants' position with regard to Issue 3 also apply here. The Appellants maintained that this problem could affect their older child since he is disabled and receives special transportation services.

The Appellants could not demonstrate that there were any current changes to the older child's transportation. If any such problems arise, the Appellants can appeal the BOE's action at that time. Since there has been no impact on the older child, the MSBE can grant the Appellants no remedy. Therefore, this ALJ granted Motion II with regard to this issue.

Issue 6 - <u>Due process.</u>

The Appellants claim that they were denied due process of law, under U.S. Const. Amends. V and XIV, because the public meetings that were held were essentially meaningless. The BOE refused to answer any of the community participants' questions. The BOE instead referred the participants to officials who could answer their questions. However, those officials, when contacted, refused to answer the questions.

The parties stipulated that the BOE conducted nine (9) public meetings with regard to the

original plan, between November 1998 and January 1999. The BOE made two (2) amendments to the plan and conducted three (3) additional public meetings. Ample notice of all meetings was given to the public. The Appellant Mr. Palmer attended at least one (1) public meeting and expressed his views of the plan to the BOE. As indicated above, he confronted BOE members about the federal authority for the decision to achieve racial balancing as part of the plan.

In Motion II, the BOE argued that the Appellants are not entitled under the due process clauses to have their questions answered nor are they entitled to have the BOE adopt their views. Due process requires adequate notice, a hearing and an opportunity to be heard.

The Due Process Clauses set forth in the 5th and 14th Amendments to the U.S. Constitution provide that "no person shall be deprived of life, liberty or property without due process of law."

In *Bernstein, supra,* the Court of Appeals addressed the due process rights of parents with regard to a hearing on a redistricting plan. The parents complained that they were given six days notice of the hearing, that their request for a continuance to retain counsel was denied, and that their participation was limited by the requirement to appoint a spokesperson. The Court of Appeals found that the procedure used was proper, stating:

> For a hearing to be a fair one, an administrative agency, as in more formal tribunals, adequate notice and an opportunity to be heard must be afforded. *Id.,* 245 Md. at 473.

The Court assumed that a liberty or property interest of the parents was implicated in the redistricting decision but did not expressly decide this issue.

In *Welch v. Board of Education of Baltimore County, supra,* the U.S. District Court for the District of Maryland found that property owners in a school district have no liberty or property interest in the outcome of a redistricting decision. *Id.,* 477 F. Supp. at 967, 969. The

Court did not address the due process interests of parents.

The MSBE has consistently held that the *Bernstein* standard is appropriate for deciding whether parents' due process rights have been violated. *See, e.g., Dorchester Neighborhood Assoc., Inc. v. Cecil Co. Board of Education, supra; Doxzon v. Carroll Co. Board of Education,* Slip. Op. No. 99-1 (1999); *Charlestown Area Residents Agst. Redistricting v. Cecil Co. Board of Education,* 6 Op. MSBE 53 (1991). Although the MSBE has not specifically addressed the issue whether parents have a due process interest that is implicated by a redistricting plan, the MSBE has expressed its strong desire that local boards conduct a hearing before issuing a decision on its redistricting plan. *See Dorchester, supra,* at pg. 3. (In that case, the local board had a policy in effect that required at least one public meeting prior to issuing such a decision.)

In this case, the stipulated facts establish that the BOE complied with *Bernstein*. The Appellants were given ample notice of the hearings. A total of twelve public meetings were held on the redistricting plan, in addition to the numerous public meetings that had been held on this issue prior to the introduction of the original plan. The Appellant Mr. Palmer participated in at least one meeting and was afforded an opportunity to be heard.

Based on these facts, Motion II was granted on the due process issue for two reasons: (1) the BOE provided sufficient process; and (2) the Appellants did not establish that they had a liberty or property interest in maintaining the school district as is. On the first issue, even if the Appellants could prove that their questions were not answered or that they were referred to non-responsive public officials, the BOE did not violate their due process rights because the Appellants were afforded notice, hearings, and an opportunity to be heard. That is all that *Bernstein* requires.

On the second issue, this ALJ further found that the Appellants had no liberty or property interest in maintaining the prior districting plan. In *Welch, supra,* the U.S. District Court stated the following:

> The resolution of plaintiff's said contention initially depends upon whether a resident of a school district possesses a liberty or a property interest in a school in his district remaining "as is." [citations omitted] Obviously, plaintiffs possess no such liberty interest. Nor do they have such a property interest unless it is granted to them under state law.

As indicated above, there are no regulations in COMAR that require a public hearing prior to a redistricting decision. Further, the BOE has no local rules on this matter. If the Appellants are entitled to a public hearing, it is because the school closing regulation, COMAR 13A.02.09.01A, applies here by analogy, or the MSBE's mandate of a public hearing in *Dorchester, supra,* encompasses situations where there are no local rules requiring a hearing.

While this ALJ found that the Appellants did not have a liberty or property interest that was implicated by the redistricting plan, the BOE did nevertheless provide ample process as stated above.

Issue 7 - <u>The alleged violation of 20 U.S.C.A. § 1651.</u>

20 U.S.C.A. § 1651 (1998) provides:

> No provision of this Act shall be construed to require the assignment or transportation of students or teachers to overcome racial balance.

The Appellants contend that the BOE's use of racial balancing as a factor in the plan violates this section and is therefore unlawful.

The BOE argued in Motion II that this section does not confer any rights on the Appellants. The section does not prohibit schools from considering the racial composition of the schools but merely states that the law shall not be construed to require such consideration. In

addition, the statute only applies to jurisdictions that receive federal funds for transportation of students. The parties stipulated that the BOE does not directly receive federal funds for this purpose, although it is possible that the BOE receives such funds indirectly through other sources.

Motion II was granted on this issue because the federal statute does not confer any rights on the Appellants, in addition to any rights they may have under Issue 1. In addition, it is likely that the section does not apply to the BOE at all since it does not receive federal funds for transportation, at least not directly.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the April 6, 1999 redistricting plan approved by the Wicomico County Board of Education was not arbitrary, unreasonable or contrary to sound educational policy. COMAR 13A.01.01.03E.

PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, I recommend that the April 6, 1999 decision of the Wicomico County Board of Education to redistrict schools be **AFFIRMED**.

Date: June 24, 1999

Paul B. Handy
Administrative Law Judge