

COALITION FOR BALANCED
EXCELLENCE IN EDUCATION, ET AL.,

Appellant

v.

ANNE ARUNDEL COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 01-29

OPINION

In this appeal, Appellants challenge a decision by the local board to implement a Middle School Plan which Appellants claim places Anne Arundel County Middle Schools in violation of COMAR requirements for instruction in fine arts, physical education, and health education. The Appellants argue that the Plan makes physical education, health education, and fine arts elective courses for middle school students, even though State Board regulations require that these subjects be provided each year for all students in grades K-8.

The local board initially moved to dismiss the appeal, maintaining that it was not filed on a timely basis. For the reasons set forth below, the State Board denied the motion to dismiss, and ordered that the appeal be expedited. Both counsel agreed to expedite briefing of their respective positions in sufficient time to enable the State Board to deliberate on the merits of the appeal during the executive session at the August meeting.

FACTUAL BACKGROUND

In Anne Arundel County middle schools, each school day is comprised of 6 instructional periods. One full period each day is devoted to each of the four core courses of math, science, social studies, and English language arts. Through the 2000-2001 school year, instruction in art, family and consumer science (“FACS”), and technical education was provided in one of the remaining two periods each day. Options offered in the other remaining period were physical education, foreign languages, or music (band, orchestra, chorus, or general music). The mandatory requirement for comprehensive health education was addressed in part through curriculum segments in FACS and in physical education. Instruction in the multiple subject areas that must be addressed in just two periods each day was implemented by employing various scheduling approaches, such as alternating (A/B) days and teaching one subject for just 1/3 of the school year (trimester approach).

The local superintendent appointed a “Middle School Restructuring Committee”

(“Committee”)¹ to study the problem of the below average reading and writing scores among 8th grade students in Anne Arundel County on the MSPAP scores.²

As a result of its study, the Committee recommended the following instructional proposal: starting with the 6th grade in 2001-2002, dedicate one of the two periods that had been used for instruction in physical education, fine arts, foreign languages, FACS, technical education, and health education, to English language arts in order to double the instructional time for that subject. This would reduce collectively the instructional time available for physical education, fine arts, foreign language, FACS, technical education, and health education, by half.

This proposal on the “Middle School Plan” was presented to the local board at its meeting on January 3, 2001, followed by a public hearing on the proposal at its February 7, 2001 meeting. On February 21, 2001, the local board heard further public testimony. At each of these meetings there was no information presented regarding State requirements with respect to instructional programs for fine arts, physical education, and comprehensive health education. However, at each meeting it was pointed out that students would have the “opportunity” to elect to take some of these courses each year during the one period assigned for that purpose. At the February 21 meeting, the local board voted 7-1 to accept the Superintendent’s recommendation for implementation of the Middle School Plan. *See 2/21/01 meeting minutes at 9.*

Middle school principals proceeded to forward information to parents of 5th grade students about 6th grade course selections for the 2001-2002 school year. The number of courses that could be selected from among the subject areas of physical education, fine arts, foreign languages, FACS, technical education and health education was severely limited. For example, students entering 6th grade at Severna Park Middle School were advised that they would be able to elect just two courses from among all these subject areas.

At the local board’s May 2, 2001 meeting, information was presented to the local board regarding implementation of the Middle School Plan, including the effect of the change on the selection of elective courses for grade 6 for the following school year. The aggregate percentage of students participating in each area is shown as follows:

<u>2000-01</u>	<u>2001-02</u>
----------------	----------------

¹The Committee consisted solely of school system employees.

²The local board was informed that, although MSPAP reading scores for students in the fifth grade were above the State average, reading scores by the eighth grade had fallen below the State average. Similarly, county students score above the State average in writing at the time of fifth grade, but have fallen below the State average by the eighth grade. In an effort to assist students, school staff had identified six middle schools throughout the State whose students were showing steady progress. Each of these schools provided its students with more than one period of instruction in reading and language arts. *See Board Memo at 4.*

Art	96.5%	37.5%
FACS	90.9%	37.4%
Band	20.1%	17.3%
Chorus	23.1%	11.7%
General Music	16.4%	5.6%
Orchestra	5.4%	5.7%
Physical Education	79.7%	66.2%
Technology Education	97.6%	41.3%
World Lang. Connections	46.8%	26.9%

See Grade 6 Elective Selections, p.8.³

At the May 2nd meeting, there was opportunity for public comment on the Plan and there was further discussion by the local board. For the first time, the local board directed its attention to the State’s instructional requirements for fine arts, physical education, and comprehensive health education. County staff expressed their understanding that the requirements are satisfied if students are provided an opportunity to participate in the courses. See 5/2/01 minutes at 13-14. During this discussion, the president of the local board suggested that the board “roll back what was initiated and create the elective period taken away as an A/B day and provide language arts mandatory for those who need it, and optional for those who would like to have it, and would like to see if there would be a motion to that effect.” See 5/2/01 meeting minutes at 17. No motion to make such a change occurred. Instead, a board member moved to reaffirm the February 21 decision:

Mr. Brown said there has been a lot of input on and a very thorough examination of this issue in various forms. One of the things he knows for certain is the Board is discussing a topic that will need to continue to grow and change. On February 21, the Board adopted this program for a phased implementation and a clear specification that the program would be re-assessed at each stage. There is not a choice about doing this. He believes the Board has an absolute responsibility to provide all children at all levels the opportunity to succeed. There have been suggestions by the press and in letters and in discussion that the program might change before next year. In the meantime, all the middle school families have made commitments, and human resources are working to restructure and realign. A decision has been made by the Board. The plan is in place. It is not a question of the next step. A message needs to be sent to those who are insecure about what will

³The total number of teaching positions from these areas to be reassigned as a result of the enrollment drop in these courses is 41.39 positions. See Middle School Teachers Added or Reduced By School and Subject.

happen next year. This is an instructional decision that has been made by the Board.

He proposed that the Board reaffirm the previous decision and put the issue behind it and move forward, and he so moved. The motion was seconded. . . .

See 5/2/01 meeting minutes at 18. The local board's vote reaffirming the previous decision was 6-1.

ISSUES

(I) MOTION TO DISMISS

As a preliminary issue, the local board argues that this matter should be dismissed as untimely because the local board action that is the subject of this appeal occurred at the local board's February 21, 2001 meeting and the appeal to the State Board was filed June 1, 2001. State law and regulation require appeals of local board decisions to be filed with the State Board within thirty days of the local board decision. See COMAR 13A.01.01.03B (3). Time limitations are generally mandatory and will not be overlooked except in extraordinary circumstances such as fraud or lack of notice. See *Scott v. Board of Education of Prince George's County*, 3 Op. MSBE 139 (1983); See also COMAR 13A.01.01.03G (2). The State Board has strictly applied this rule of law. See *Christine Schwalm v. Board of Education of Montgomery County*, 7 Op. MSBE 1326 (1998); *Marie Friedman v. Board of Education of Montgomery County*, 7 Op. MSBE 1260 (1998).

The local board maintains that the action taken at the local board's May 2, 2001 meeting was merely a "reiteration or reaffirmation of the decision that had been made on February 21, 2001" and not a final decision from which an appeal may be taken. See Motion to Dismiss at 4. Thus, the local board argues that more than 30 days has elapsed from the date of the local board's decision on the Middle School Plan, barring this appeal to the State Board. The local board cites two zoning cases, *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189 (1980) and *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569 (1994) to support its position that this matter should be dismissed.

In *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, a credit union had obtained a use and occupancy permit on November 18, 1977. On February 8, 1978, the credit union applied for a building permit in order to perform interior renovations, including the addition of a bank vault and teller windows. A building permit for this purpose was issued on April 20, 1978. Thereafter, several area residents wrote letters of complaint. One letter asked the Director of the Department of Environmental Protection ("DEP") to suspend the use and occupancy permit that had been issued on November 11, 1977, and to schedule a show cause

proceeding to determine the validity of the initial use and occupancy permit approval. On July 27, 1978, the Director denied the request.

On appeal from the Director's July 27, 1978 decision, the County Board of Appeals affirmed the Director's actions concerning the permit. However, the Court of Special Appeals held that the County Board of Appeals ". . . should not have addressed the Director's issuance of a permit on November 18, 1977, because the thirty-day time limit set forth in Section 2-112(a)(3) of the Montgomery County Code had already passed before the appeals were filed. . . ." *Id.* at 195. Further, the Court of Special Appeals held that the July 27, 1978 action ". . . was not an appealable order or decision of the DEP," citing the opinion of the County Board of Appeals' hearing examiner, in pertinent part:

The 'decision' which is the subject of Appeals A-504 and A-505 being that evidenced in the letter of July 27, 1978 (Exhibit No. 21 in Case A-505) from the Director of the Department of Environmental Protection is not a final administrative decision, order or determination. It is at most a reiteration or reaffirmation of the final administrative decision or order of the department granting the original Use and Occupancy Certificate on November 18, 1977. If this were not the case an inequitable, if not chaotic, condition would exist. All that an appellant would be required to do to preserve a continuing right of appeal would be to maintain a continuing stream of correspondence, dialogue, and requests of the nature pursued by the appellants herein with appropriate departmental authorities even on the most minute issues of contention with the ability to pursue a myriad of appeals *ad infinitum*.

Id. at 195.

In *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 582-585, UPS asked the Baltimore County Zoning Commissioner for a determination as to whether it could legally operate a parcel distribution facility on property zoned ML. On July 10, 1985, the Zoning Commissioner notified UPS that the use of the property was permitted in the referenced zoning district. On October 28, 1986, UPS obtained a building permit for construction of the parcel distribution facility. On January 11, 1987, a citizen wrote to the Director of the Office of Planning and Zoning and complained that the use should not be permitted. The Zoning Commissioner responded by letter dated January 19, 1987 and informed the citizen that his office had already determined that the proposed use was permitted.

An appeal from the January 19, 1987 letter was filed with the County Board of Appeals. Despite UPS's objection on the ground that the appeal was not filed within 30 days from the issuance of the building permit, the County Board of Appeals heard the Appeal. The Circuit

Court for Baltimore County and the Court of Special Appeals of Maryland affirmed the action of the County Board of Appeals.

On further appeal, the Court of Appeals for Maryland held that the January 19, 1987 letter from a Zoning Commissioner that “. . . simply confirmed or reaffirmed his prior ‘approval’ or ‘decision’ . . .” did not constitute an appealable decision and that the “approval” and “decision” had occurred in 1986 when the actions were taken. *Id.* at 582-583. The Court concluded:

The Zoning Commissioner, in responding to Mr. Hupfer on January 19, 1987, did not grant, deny, decide, or order anything. The Commissioner’s letter simply explained and defended the 1986 decision approving the application for a building permit. Consequently, the January 19, 1987 letter was not an ‘approval’ or ‘decision’ appealable to the Board of Appeals.

Id. at 569.

At first blush, these cases appear to support the local board’s position that its May 2 decision was merely an affirmation or reiteration of the board’s February 21 decision. Both the cited cases and the instant appeal involve a decision rendered by an administrative official or body which reaffirmed an earlier decision, making no change to the earlier decision. However, we believe the two cases can be distinguished from the case at hand.

The cited cases involve complaints filed by members of the public which led to responses by administrative officials denying the complaints and explaining the earlier rulings. In both of the cases, the courts expressed concern over individuals being able to maintain the appealability of a matter at any time simply by raising some issue with the appropriate official in order to get a response from which to appeal, thus circumventing statutory appeal time limits.

This factor is not present in the instant case. Here, the Board of Education of Anne Arundel County on its own accord reconsidered its earlier action through formal procedures and the voting process at its May 2 board meeting. The vote was not requested by a member of the public for the purpose of creating an appealable event. At the meeting, a presentation on implementation of the Middle School Plan was made to the local board, the board heard public comment, then board members reopened discussion of the Middle School Plan. The board president suggested certain changes to the Middle School Plan and requested a motion to that effect, but no motion was made. Instead, the local board moved, seconded, and voted to reaffirm its earlier decision.

We therefore find that the board’s actions constituted a reopening of the Middle School Plan which went beyond a mere explanation or defense of the February 21 decision. The board could have ended the discussion without a formal vote, but chose not to do so. For these reasons, we deny the Motion to Dismiss and find that the appeal was timely filed from the board’s decision

on May 2.

(II) MERITS

The State Board has established by regulation the following requirements for physical education, fine arts, and comprehensive health education:

13A.04.13.01 Requirements for Physical Education Instructional Programs for Grades K-12.

A. The following physical education instructional programs shall be required in public schools for grades K-12:

(1) Grades K-8. Each local school system shall provide an instructional program in physical education each year for all students in grades K-8.

(2) Grades 9-12. Each local school system shall offer a physical education program in grades 9-12 which shall enable students to meet graduation requirements and to select physical education electives.

13A.04.16.01 Requirements for Fine Arts (Art, Dance, Music, Theatre) Instructional Programs for Grades K-12.

A. The following fine arts instructional programs shall be required in public schools for grades K-12:

(1) Grades K-8. Each local school system shall provide an instructional program in fine arts each year for all students in grades K-8.

(2) Grades 9-12. Each local school system shall offer fine arts instructional programs in grades 9-12 which shall enable students to meet graduation credit requirements and to select fine arts electives.

13A.04.18.01 Requirements for Comprehensive Health Education Instructional Programs for Grades K-12.

The following comprehensive health educational instructional programs shall be required in public schools for grades K-12:

- A. Grades K-8: Each local school system shall provide an instructional program in comprehensive health education each year for all students in grades K-8;
- B. Grades 9-12: Each local school system shall offer a comprehensive health education program in grades 9-12 that shall enable students to meet graduation requirements and to select health education electives.

Appellants claim that the Anne Arundel County middle school instructional program, as implemented pursuant to the Middle School Plan, fails to satisfy the State requirements for physical education, fine arts, and comprehensive health education. Specifically, Appellants argue that the Plan makes the subject areas at issue elective courses for middle school students, even though State Board regulations require that these subjects be provided each year for all students in grades K-8.

Local Board's Position

The local board asserts that although the thrust of the appeal is directed at alleged violations of COMAR, the intent of the Appellants is to delay or defeat the implementation of a program of additional reading and language arts instruction for middle school students. From the board's perspective, a program which offers additional reading and language arts instruction constitutes sound educational policy. As such, the board contends that it has not acted arbitrarily or unreasonably in this matter. With respect to the Appellants' assertion that the middle school plan violates mandatory requirements in COMAR, the board affirmatively declares that it provides health education and instruction in fine arts for all students in its middle schools. While it concedes that all students in middle schools are not required to participate in physical education classes every year, it does not believe that this practice violates COMAR.

Moreover, with respect to the requirement for comprehensive health education, the board asserts that the Appellants have acknowledged that "[t]he mandatory requirement for comprehensive health education has been addressed in part through curriculum segments in FACS and physical education." The board concludes that in the absence of an allegation that it does not provide fine arts instruction and health education to middle school students, and in the absence of any documents, affidavits, or proof of the same and in light of the local board's affirmative statement that it does provide such instruction, the State Board should find summarily on behalf of the local board as to those two instructional areas.

As to physical education, the local board concedes that for more than 25 years physical education has been an elective. The board nonetheless believes that it is in compliance with the mandatory language of COMAR through a novel interpretation of the COMAR language. The board's argument is as follows. On November 16, 1998, the State Superintendent of Schools sent a memorandum to each local superintendent asking for verification of compliance with the

physical education requirements. The board maintains that the memorandum described the requirement as follows: “At a minimum, the local school system must provide a physical education instructional program each year for all students in grades K-8.” The board argues that if the minimum requirement were that every school system must require every student in grades K-8 to take physical education every year, there would be no maximum. In the board’s mind, a minimum must be the base line with room for some program service above it. The board thus concludes that by making every student take physical education, the minimum becomes the maximum. *See* Board Memorandum at 13.

The board further argues that directing it to require physical education for every middle school student in the upcoming school year would create an undue hardship. Approximately 17,800 middle school students entered the 19 middle schools in Anne Arundel County on August 27, 2001. If the State Board were subsequently to determine that all middle school students in Anne Arundel County Public Schools must receive physical education instruction in the 2001-2002 school year, that requirement would impose an overly burdensome and undue hardship on the local board.

The school system’s division of human resources has reported that it would have to hire as many as 19 new physical education teachers if all middle school students were required to receive physical education instruction during the current school year. In addition, the instructional and scheduling implications would be daunting due to the A day/B day schedule. The board estimates that these scheduling changes would take a minimum of two weeks. Parents would need to be notified and should be given time to respond to changes in elective subjects. The administrator in the building who is in charge of scheduling would have to handle these matters as well as his or her other duties. Teachers would need time to prepare for new students and some teachers would need time to prepare for teaching a new subject. Because 70 percent of Anne Arundel County Public Schools middle school students currently take physical education, 30 percent of all students would need to find room in their schedules for physical education classes.

Finally, the board argues that the physical education issue has been rendered moot by the local board’s action approved on June 6, 2001 that directed staff to “develop a middle school program for 2002-2003 and beyond that will require every sixth, seventh, and eighth grade student to participate in a comprehensive physical education program each year.” *See* board memorandum at 16. During the upcoming school year, staff members will work to develop an implementation plan for the new physical education standard. Thus, in the board’s mind there is no viable controversy or dispute on the issue of whether or not middle school students in Anne Arundel County will receive physical education instruction each year beginning in 2002-03 and forward.

Appellants’ Argument

In their responsive memorandum, the Appellants first take issue with the board’s assertion that the Appellants’ motive is to block a policy to increase class time devoted to reading and

language arts. The Appellants clarify that their concern

has always been the impact of the Middle School Plan on the *combined* areas of physical education, fine arts, comprehensive health education, foreign languages, family and consumer science, and technical education. By compressing the opportunity for instruction in all of these areas into one period each day of the school year, the local board has short changed the level of instruction required by State Board regulations for physical education, fine arts, and comprehensive health education collectively.

See Memo at 4 (emphasis in original).

The Appellants then assert that the COMAR instructional program requirements for grades K-8 must be construed with reference to and consistently with the corresponding instructional program requirements for grades 9-12. As they note, the COMAR requirements for physical education, fine arts, and comprehensive health education in grades 9 through 12 state that “each local school system shall offer a ... program in grades 9 -- 12 which shall enable students to meet graduation requirements and to select ...electives.” The Appellants argue that if the State Board had intended that these subject areas could be treated as electives in middle school, then the State Board would have used the same or similar verbiage for the grades K-8 requirements. However, the program requirements for middle school are not couched in terms of offerings or electives. Therefore, they assert that the State Board fully intended that the curriculum requirements for grades 6 through 8 be mandatory as they are worded.

As a remedy, the Appellants request that the State Board find that the local board must provide instructional programs in physical education, fine arts, and comprehensive health education to all middle school students in each year of grades 6 through 8. They further request that the Anne Arundel Board “be ordered to modify its middle school curriculum so as to satisfy these requirements with respect to all students and to put the modifications into effect as expeditiously as possible, and no later than January 1, 2002.”

ANALYSIS

As set out above, the language in the State Board regulations on physical education, fine arts, and comprehensive health education is not ambiguous. Each respective regulation requires each school system to provide an instructional program in physical education, health education, and fine arts “each year for all students in grades K-8.” This mandatory requirement is in contrast to the requirement for grades 9 through 12 that each school system “offer” those courses as electives. Based on the plain meaning of the regulatory language, we find that the middle school program that provides students only the “opportunity” to elect to take some of these mandatory

courses each year in grades 6 through 8 does not comply with the regulatory mandate.⁴

Having found noncompliance, we nonetheless recognize that to require the local school system to change its schedule in the 19 middle schools so that each student may take physical education, health education, and fine arts in grades 6 through 8 immediately would pose an enormous burden on the school system including a huge staffing and scheduling problem. On the other hand, we do not find it fair that students have to choose these courses as electives when the regulation requires otherwise. We also understand that other school systems have more periods in the school day that allow the school systems to comply with these regulatory requirements for physical education, health education, and fine arts for all students in grades 6 through 8.

CONCLUSION

For these reasons, we find that the Middle School Plan adopted by the Board of Education of Anne Arundel County does not comply with State Board regulatory requirements for physical education, health education, and fine arts education for all students each year in grades 6-8. We therefore direct the Board of Education of Anne Arundel County to develop a plan now so that all students in grades 6 through 8 in the Anne Arundel County Public School System from this school year forward shall participate in physical education, health education, and fine arts instructional programs. The plan shall be implemented no later than the beginning of the second semester for students on a semester schedule, and no later than the beginning of the third trimester for students on a trimester schedule this school year.

Raymond V. Bartlett
President

Marilyn D. Maulsby
Vice President

JoAnn T. Bell

Philip S. Benzil

Reginald L. Dunn

⁴On the local board's argument that the minimum is the maximum, we find that the local board overlooks the fact that COMAR requires school systems to offer physical education in grades 9 through 12 as an elective. Therefore, when viewing the regulation in its entirety, we believe the maximum would be providing physical education to each student in each grade K through 12.

Clarence A. Hawkins

Walter S. Levin, Esquire

Karabelle Pizzigati

Edward L. Root

Walter Sondheim, Jr.

John L. Wisthoff

September 13, 2001