

MARYLAND ACORN, ET AL.

Appellants

v.

NEW BALTIMORE CITY BOARD OF
SCHOOL COMMISSIONERS,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 01-24

OPINION

This is a consolidated appeal involving eight groups of Appellants who challenged the decision of the New Baltimore City Board of School Commissioners to close and consolidate various public schools in the city. The matter was transferred to the State Office of Administrative Hearings for expedited review. A hearing before an administrative law judge (“ALJ”) took place on May 11 and May 21-25, 2001. The ALJ dismissed three Appellants from the case who failed to appear. The remaining Appellants were Maryland ACORN and advocates for Malcolm X Primary School, Edgewood Elementary School, Mildred D. Monroe Elementary School, and Charles Carroll of Carrollton Elementary/Middle School.

On June 11, 2001, the ALJ issued a comprehensive proposed decision, recommending that the school closings and consolidation decision of the New Baltimore City Board be upheld. A copy of the ALJ’s proposed decision is attached to this opinion as Exhibit 1. Exceptions to the ALJ’s report and recommendations were filed and final oral argument was heard by the State Board of Education on June 19, 2001.

The State Board wishes to commend the Appellants’ representatives and counsel as well as counsel for the New Baltimore City Board of School Commissioners for their diligence in advocating their respective positions throughout this appeal. As the administrative law judge aptly observed: “School closures are the most difficult and emotionally charged decisions Board members face. Other parts of the BCPS master plan, which includes educational goals such as reducing class size, enclosing open spaces, etc., are much more popular and easy to support. School closures are much more controversial.” ALJ Opinion, Exhibit 1, at 19.

We have reviewed the record in this matter and have carefully considered the thoughtful arguments raised by the parties as well as the written exceptions made with respect to the ALJ’s proposed decision. Based upon our review and deliberations, we adopt the findings of fact and conclusions of law of the administrative law judge. In doing so, we would like to reiterate the following well-chosen words of the administrative law judge:

The Appellants’ failure to sustain their burden of proof in this case is not due to an expedited hearing, lack of discovery into school system implementation policies and failure to obtain experts. Had

the Appellants obtained their own demographic study, building report and set of recommended closures, it would not change the fact that this Board conducted a process which was thorough, complete, and based upon reliable and accurate information.

ALJ Opinion, Exhibit 1 at 55.

For these reasons as well as those articulated by the administrative law judge, we find that the New Baltimore City Board did not act arbitrarily, unreasonably, or illegally in this matter. We therefore affirm the decision of the New Baltimore City Board of School Commissioners to close nine schools.

Philip S. Benzil
President

Marilyn D. Maulsby
Vice President

Raymond V. Bartlett

JoAnn T. Bell

Reginald L. Dunn

George W. Fisher, Sr.

Walter S. Levin, Esquire

Judith A. McHale

Edward L. Root

Walter Sondheim, Jr.

John L. Wisthoff

Date: June 29, 2001

MARYLAND ACORN, et al.,¹	*	EXHIBIT 1
	*	BEFORE JAMES W. POWER
APPELLANTS	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
THE NEW BALTIMORE CITY	*	OF ADMINISTRATIVE HEARINGS
BOARD OF SCHOOL	*	OAH NO.: MSDE-BE-04-200100001
COMMISSIONERS	*	
* * * * * * * * * * * *		

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

This case arises from a decision by the New Baltimore City Board of School Commissioners, also known as the Baltimore City Public Schools ("BCPS"), on March 13, 2001, to close nine schools. Residents of various school districts within the City and public groups filed appeals with the Maryland State Board of Education ("MSBE") protesting parts or all of the BCPS decision. The State Board consolidated those appeals and, pursuant to the delegation of

¹ On April 23, 2001, the Maryland State Department of Education forwarded to the Office of Administrative Hearings eight appeals, to be heard on a consolidated and expedited basis. After a prehearing conference and motions, three of the Appellants, New Greenmount West Community Association, Lafayette Elementary School and Youth Perspective Empowerment Organization were dismissed from the case. The remaining Appellants are Maryland ACORN, Malcolm X Primary, Edgewood Elementary School, Mildred D. Monroe Elementary School and Charles Carroll of Carrollton School.

authority from the Maryland State Department of Education ("MSDE"), transmitted the appeals to the Office of Administrative Hearings ("OAH") on April 23, 2001, for the purpose of conducting a consolidated and expedited contested case hearing.

A prehearing conference was held on Friday, May 4, 2001, at which time scheduling and discovery issues were addressed, as well as motions. In accordance with Md. Code Ann., Educ. §§ 2-205 and 6-202 (1999); and the Code of Maryland Regulations ("COMAR") 13A.01.01.03E(1), a hearing was convened on May 11, 21, 22, 23, 24 and 25, 2001, before James W. Power, Administrative Law Judge. Mr. Duane Harris and Del. Lisa Gladden represented Edgewood Elementary School. Mr. Mitchell Klein and Norma Washington represented ACORN. Daniel Soeffing and Prof. Terry Hickey, Esq. represented Charles Carroll School. Art Buist, Esq. represented Mildred Monroe Elementary. Leon Polly, Sr. represented Malcolm X Primary School.²

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 the Maryland State Board of Education. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999 & Supp. 2000); COMAR 28.02.01; and COMAR 13A.01.01.03.³

ISSUE

Whether the March 13, 2001, decision of BCPS to close nine schools was arbitrary,

² Malcolm X was represented at the prehearing conference and the first day of the hearing, but did not submit a witness list and did not appear for the remainder of the hearing.

³ The applicable regulations provide that a proposed decision shall be issued by an ALJ within forty-five (45) days of the hearing. COMAR 13A.01.01.03P(2)(c). As this matter was expedited, however, the proposed decision would be issued on or before June 11, 2001.

unreasonable, or illegal. COMAR 13A.01.01.03E.

SUMMARY OF THE EVIDENCE

A. Exhibits

A List of Exhibits is attached to this decision.

B. Testimony

ACORN:

Valerie Kaufman
Rita Neale
Norm Fruchter, Expert in Educational Policy
Norma Washington
Richard Gray Jr., Expert in Educational Policy
Willie Ray
Jackie Graham
Emma Davis
Russell Anderson
Glendine Reynolds

Edgewood Elementary

Donald Millard
Georgine Edgerton
James M. Griffin
Heddy Cook
Duane Harris

Mildred Monroe Elementary

Valerie Belton
Bernard Williams
Carol Higgs
Rose Taylor
Dennis Livingston
State Senator Ralph Hughes

Charles Carroll School

Dr. Gary Thrift

Dr. Patricia Abernathy
Barry F. Williams
Dr. Elizabeth Morgan, Chief Academic Officer
Patrick Noel
Ken Johnson, 3D/I
Ellen Lerner
Darius Irani, Regional Economic Studies Institute ("RESI")

BCPS

Ken Johnson, 3D/International ("3D/I")
Edie House, Media Director BCPS
Dr. J. Tyson Tilden, BCPS Board Chairman
Dr. Elizabeth Morgan

FINDINGS OF FACT

Based upon the evidence presented, I find the following by a preponderance of the evidence:

1. BCPS currently has capacity for 130,000 students, but only has an enrollment of approximately 98,000 students.
2. The trend in enrollment for BCPS is decreasing. However, the rate of decrease is slowing.
3. Schools in BCPS have been converted to Pre-K-8 facilities without the necessary renovations.
4. The average school in BCPS is slightly over 40 years old. Many building system components are beyond their useful life, leading to higher maintenance costs.
5. In 1997, BCPS had approximately 680 million dollars in deferred maintenance and capital renewal items.
6. In an effort to deal with decreasing enrollment and excess capacity, BCPS hired a consulting firm, 3D/International ("3D/I") in December, 1999 to conduct a study of all BCPS schools and make recommendations about possible closings and consolidations.
7. 3D/I is an employee owned corporation in continuous operations since 1953 and providing services in the Baltimore-Washington area since 1982. It provides facility assessment and planning, and program/construction management services to K-12 school districts throughout the nation. 3D/I has offices in Baltimore and ten other cities.

8. 3D/I conducted a study and issued reports in September, October and December, 2000.
9. In its report, 3D/I recommended that the following schools be closed, effective the summer of 2001:
 - School #164 Arundel
 - School #14 Park Heights
 - School #26 Madison Square
 - School #32 Mildred Monroe
 - School #38 Malcolm X Primary
 - School #67 Edgewood
 - School #135 Luther C. Mitchell
 - School #139 Charles Carroll of Carrolton
 - School #202 Lafayette
 - School #216 Frankford Intermediate
 - School #304 Harbor View
10. 3D/I also recommended consideration of closing additional schools, particularly Schools #4, #95, #209, #23. It also recommended construction of two new PreK-8 schools and one middle school.
11. After receiving the 3D/I recommendation, BCPS established a Blue Ribbon School Rezoning Steering Committee, which met eight times from October, 2000 through February, 2001.
12. Six subcommittees were formed from the Blue Ribbon Committee:
 - Budget Subcommittee
 - Food, Facilities and Transportation Subcommittee
 - Program Enhancement Subcommittee
 - Community Engagement Subcommittee
 - Staffing Subcommittee
 - Technology Services
 - Local Steering Subcommittee
13. The Board held public hearings on the proposed school closures on the following dates:
 - November 21, 2000, Lake Clifton-Eastern High School
 - December 14, 2000, Frederick Douglas High School
 - Tuesday, January 16, 2001, Arnett J. Brown Middle School
 - January 31, 2001, BCPS Administrative Headquarters
 - February 24, 2001, Coldstream Park Elementary School
14. Each school proposed for closing established a steering committee, consisting of the area's

executive officer, school principal and parent-teacher group president. Each local steering committee was responsible for providing comments to the CEO on the proposed closing. Fifty-nine (59) steering committee meetings took place between October, 2000 and February, 2001.

15. BCPS conducted meetings with the Mayor's Office, Department of Public Works, and the Baltimore Police Department to assess transportation and safety needs, including the need for crossing guards, bus stops and pedestrian signs.

16. BCPS would realize a savings of \$57,323,553 in capital expenditures, if all twelve schools were closed, as proposed by 3D/I.

Eutaw-Marshburn	\$3,007,968
Park Heights	4,540,755
Madison Square	4,877,427
Mildred Monroe	1,669,198
Malcolm X	1,762,710
Edgewood	2,538,901
Luther C. Mitchell	1,100,272
Charles Carroll	19,765,773
Arundel Elementary	5,151,358
Lafayette	4,797,535
Frankford	7,062,055
Harbor View	1,049,601

17. The Blue Ribbon committee and subcommittees were advisory groups whose role was to review data, information, community input and make informed recommendations to the CEO and the Board concerning the proposed closings by 3D/I. They were to justify to the CEO and Board acceptance or rejection of the consultant's recommendations. These committees were formed after 3D/I issued its recommendations.

18. The CEO reviewed the recommendations of 3D/I and made the following recommendations to the Board:

Arundel Elementary, School #164	Defer decision until spring, 2002
Charles Carroll School #139	Close as of summer 2001
Edgewood Elementary, School #67	Close as of summer 2001
Eutaw-Marshburn , School #11	Defer decision until spring 2002
Frankford Intermediate, School #216	Defer decision until spring 2002
Harbor View Elementary, School #304,	Close as of summer 2001
Lafayette Elementary, School #202	Close as of summer 2003
Luther C. Mitchell School #135	Close as of summer 2001
Madison Square, School #26	Close as of summer 2001
Malcolm X Primary, School #38	Close as of summer 2001

Mildred Monroe Elementary, School #38 Close as of summer 2001
 Park Heights Elementary, School #14 Close as of summer 2001

19. On March 13, 2001 the Board took the following action:

Arundel Elementary School #164	Defer decision until spring, 2002 (8-0 vote)
Charles Carroll School #139	Close as of summer 2001 (7-1)
Edgewood Elementary, School #67	Close as of summer 2002 (7-1)
Eutaw-Marshburn , School #11	Defer decision until spring 2002 (8-0)
Frankford Intermediate, School #216	Defer decision until spring 2002 (7-0)
Harbor View Elementary, School #304,	Close as of summer 2001 (8-0)
Lafayette Elementary, School #202	Close as of summer 2003 (8-0)
Luther craven School #135	Close as of summer 2001 (7-0)
Madison Square, School #26	Close as of summer 2001 (8-0)
Malcolm X Primary, School #38	Close as of summer 2001 (8-0)
Mildred Monroe Elementary, School #38	Close as of summer 2001 (6-2)
Park Heights Elementary, School #14	Close as of summer 2001 (7-1)

20. In making its decision, the Board considered the 3D/I report, oral and written testimony submitted by the public, recommendations of the Blue Ribbon Committee, written comments from BCPS staff and the Boards Implementation procedures for Closing Schools and Reassignment of Students.

21. BCPS will realize savings of \$2,000,000 to \$3,000,000 dollars a year in operating costs as a result of closing the nine schools.

22. BCPS has adopted the following principles for how schools should be organized.

- Enclose open space classrooms
- Provide PreK/K early learning
- Expand full-day kindergarten and pre-kindergarten
- Increase the use of Pre-K to 8 elementary schools
- Reduce the size of large schools

23. BCPS has targeted the following enrollment levels for schools:

Early Childhood Centers	225-325 student
PreK-5 Elementary Schools	350-700 students
PreK-8 Elementary School	500-1000 students
Middle Schools	650-950 students
High Schools	1,250-1,750 students

24. 3D/I provided a two-day training program for evaluators, to be trained in the techniques

and methods of evaluating schools. The evaluation team consisted of an engineer or architect and education facilities planner.

25. In its study, 3D/I utilized the following methodology:

- Develop enrollment projections for the years 2001-2009
- Perform educational adequacy evaluations
- Perform capacity analysis for each school
- Consider other influencing factors
- Consider stakeholder input

Enrollment Projections

26. Baltimore City's population peaked in 1950 when it reached 949,708 people. During the 1950's Baltimore lost 10,000 people. By 1990, the population was 736,014 people. Based on the most recent census, the estimate is that the current population is 632,681.

27. The decline in the general population is mirrored by a decline in the school age population. From 1990-1999, the school age population in Baltimore declined from 145,867 to 134,542. This was a decline of 7.8%. Actual school enrollment declined from 104,790 to 99,376. This was a decline of 5.2%. Ninety percent of the variation of school enrollment is due to changes in the general population.

28. The BCPS Office of Planning performs its own projections of future enrollment. The methods used by BCPS provide an adequate method of accounting for short term projections, but is inadequate to make longer-term projections. This inadequacy is based on the methods being internally inconsistent, displaying inertia, not accounting for the impact of migration, not accounting for changes in housing stock, and neighborhood factors that are likely to impact school enrollment.

29. "Internal consistency" means the projected sum of its parts should add up to the projected total. Under the BCPS methodology, the sum of individual school enrollment projections does not add up to the system wide enrollment projections, beyond the first year.⁴

30. "Inertia" means forecasts are based upon the assumption of stable enrollment. The BCPS methodology assumes a much greater amount of stability in enrollment than is actually reflected in reality. Due to the changing demographics in Baltimore, there is no basis to assume stability in

⁴ An example of the difficulty with the BCPS methodology is seen in its high school projections. The *system wide* high school enrollment projections show a slight upward trend in early years followed by collapsing enrollment starting in 2006. The enrollment projections calculated *by school* indicate a steady increase in enrollment. By the end of the forecast horizon, 2008, the two figures differ by 3,500 students, which amounts to three full high schools.

enrollment to the extent assumed by BCPS.

31. "Net migration and housing trends" means BCPS assumes a closed model and does not incorporate the factors of population migration and housing trends, which in fact occur in Baltimore. This results in forecast error.

32. The Regional Economic Studies Institute ("RESI"), of Towson University, conducted a ten-year enrollment projection for each of the 184 schools in BCPS. It was hired as a subcontractor by 3D/I.

33. The methodology used by RESI is internally consistent, i.e. the sum of the parts add up to the total. The projections also take into account the factors of migration, housing, economic development and private investment.

34. In conducting its evaluation of the BCPS schools, 3D/I utilized the methodology of RESI to obtain a more reliable demographic basis for determining future school enrollment. RESI contacted or attempted to contact over 130 community groups and organizations in conducting its study.

35. RESI used both qualitative and quantitative factors when making its enrollment projections. The input from various community groups was qualitative, and designed to provide a broader input of housing information, and effects on enrollment than the BCPS methodology.

36. Based on the concerns from the Cherry Hill community, RESI recalculated its enrollment projections for the Arundel School closing, by reexamining information it already had and adding to it additional housing information obtained from the community.

37. The effect of the additional information from the community did not affect RESI's enrollment projections for Arundel.

38. The Center City area of BCPS is experiencing a rate of decline faster than the system as a whole. The input from community organizations not actually contacted by RESI would not affect the statistical projections made by RESI with respect to enrollment of the nine schools slated for closure.

39. RESI calculated a "local growth index" for each of the administrative areas of BCPS as well as each school. A local growth index greater than one (1) means that enrollment is projected to increase at a rate faster than the BCPS overall rate of increase. A factor of less than one means enrollment is expected to decline faster than the BCPS overall rate of decline.

School #11, Eutaw-Marshburn has a local growth index of .85.

School #14, Park Heights, has a local growth index of 1.07.

School #26, Madison Square, has a local growth index of .95.

School #32, Mildred Monroe, has a local growth index of 1.05.
School #38, Malcolm X Primary, has a local growth index of .95.
School #67, Edgewood, has a local growth index of 1.07.
School #135, Luther Craven, has a local growth index of 1.00.
School #139, Charles Carroll, has a local growth index of .79.
School #202, Lafayette, has a local growth index of .95.
School #216, Frankford Intermediate, has a local growth index of .86.
School #304, Harbor View, has a local growth index of 1.00.

40. RESI paid special attention to schools that have and are projected to have less than 60% of state rated capacity utilization for five consecutive years.
41. In conjunction with BCPS, 3D/I developed a "Local Rated Capacity," which represents the maximum number of students each school in the system could handle, based on the particular needs of the school system. Due to a high number of special education students and children with special needs, the LRC is lower than the State Rated Capacity, which is the number the State assigns as the maximum capacity for a school.
42. RESI identified one large geographic cluster of underutilized schools and three smaller geographic clusters of underutilized schools. Forty-one of the schools in BCPS are currently utilized less than 60% of State Rated Capacity.
43. The largest cluster of underutilized schools is in the central portion of Baltimore, bounded by 21st St. and Sinclair Lane, Patterson Avenue, Gough Street and Calvert Street. This area contains 25% of the underutilized schools.
44. School #11 is currently utilized at 89% of State Rated Capacity. By 2009, it is projected to be at 55%.
45. School #14 is currently utilized at 70% of State Rated Capacity. By 2009, it is projected to be at 56%.
46. School #26 is currently utilized at 58% State Rated Capacity. By 2009, it is projected to be at 38%.
47. School #32 is currently utilized at 48% of State Rated Capacity. By 2009, it is projected to be at 35%.
48. School #38 is currently utilized at 50% of State Rated Capacity. By 2009, it is projected to be 33%.
49. School #67 is currently utilized at 63% of State Rated Capacity. By 2009, it is projected to be 45%.

50. School #135 is currently utilized at 84% of State Rated Capacity. By 2009, it is projected to be 45%.
51. School #139 is currently utilized at 43% of State Rated Capacity. By 2009, it is projected to be 26%.
52. School #202 is currently utilized at 80% of State Rated Capacity. By 2009, it is projected to be 49%.
53. School #216 is currently utilized at 55% of State Rated Capacity. By 2009, it is projected to be 42%.
54. School #304 is currently utilized at 15% of State Rated Capacity. By 2009, it is projected to be at 26%.

Adequacy of Educational Facility

55. The functional characteristics by which schools were evaluated by 3D/I were as follows:

Adequacy of Educational Facility (this term refers to the relationship between the site and overall housing space of the building and the number of students to be served)

- Safety of the facility
- Healthfulness of the facility
- Accessibility of the facility
- Flexibility of the facility
- Efficiency of the facility
- Expandability of the facility
- Appearance of the facility.

56. In calculating the Educational Adequacy Rating ("EAR"), the total scores for each characteristic of the instrument are converted to percentages. (This is necessary because two of the sections, Adequacy and Efficiency, have scales that go to 200 instead of 100). The EAR falls into the following categories

- 0 - 44 Replacement of building should be considered
- 45 - 59 Building needs major improvements and may require expansion
- 60 - 74 Building needs minor improvements and may require expansion
- 75 - 89 Building serves program needs but may require expansion
- 90 -100 Building is of exceptional quality

57. School #11 had an EAR of .52.
58. School #14 had an EAR of .56.

59. School #26 had an EAR of .62.
60. School #32 had an EAR of .54.
61. School #38 had an EAR of .53.
62. School #67 had an EAR of .52.
63. School #135 had an EAR of .54.
64. School #139 had an EAR of .38.
65. School #164 had an EAR of .59.
66. School #202 had an EAR of .53.
67. School #216 had an EAR of .53.

Facility Condition Index

68. The Facility Condition Index ("FCI") is determined by dividing the estimated cost to repair by the estimated replacement cost of the facility.
69. The replacement cost of the school is determined by multiplying the square footage of the building by \$160 per square foot.
70. The cost of repairs was determined by utilizing RS Means tables for construction and repairs and utilizing the local index for the Baltimore City.
71. The FCI is scored as follows:

 .05 or lower good condition
 .06 - .10 fair condition
 higher than .10 poor condition
72. Seventy-five percent (75%) of the schools in BCPS are in "poor condition."
73. School #32, Mildred D. Monroe, was built in 1971 and has an enrollment of 178 students during the current school year. It is utilized at 62% of the LRC. It has an FCI of .17 (poor) and EAR of 54% (needs major improvement). Projected savings in closing School #32 are \$1,669,198.
74. BCPS has budgeted \$105,000 to enclose open spaces at School #39, the receiving school

for School #32.

75. Students from School #32 can be relocated within one mile of their new school, which is School #39. School #39 is in better condition than School #32 and is also air-conditioned. Forty-seven students will return to their original zoned school. School #39 is currently utilized at 69% and will be utilized at 93% after closure of School #32.

76. School #14, Park Heights, was built in 1976 and has an enrollment of 192. It is utilized at 83% of the LRC. It has an FCI of .10 (poor) and EAR of 56% (needs major improvement). Improvements are needed in the art, music and physical education areas and toilet facilities. Classrooms are open space and will need to be enclosed. This school is smaller than the desired minimal requirements for an elementary school. (LRC capacity is 230 students). Projected savings by closure are \$4,540,755.

77. Students from School #14 can be relocated to School #223. Thirty-three students would return to their original zoned school. School #223 is currently utilized at 74% LRC and would be utilized at 98% of LRC after closing School #14.

78. BCPS has budgeted \$105,300 to cover additional transportation costs associated with closing School #14.

79. School #26, Madison Square, was built in 1963 and had an enrollment of 394 for the current year. It is currently utilized at 68% LRC. It has an FCI of .23 (poor) and an EAR of 62% (needs minor improvement). Total projected savings are \$4,877,427 by closing.

80. Students from School #26 can be relocated to Schools #16, #102 and #250. School #16 is currently utilized at 69% and would be utilized at 86% after closing School #26. School #102 is currently utilized at 70% and would be utilized at 88% after closing School #26. School #250 is currently utilized at 69% and would be utilized at 94% after closing School #26. Ninety-seven students from School #26 would return to their original zoned school.

81. BCPS has budgeted \$105,300 for additional transportation costs associated with closing School #26.

82. School #38, Malcolm X. Primary, was built in 1971. It had an enrollment of 213 during the current year. It has an FCI of .27 (poor) and an EAR of 53 (needs major improvement). It is utilized at 60% LRC. Projected savings are \$1,762,710 by closing.

83. Students from School #38 can be relocated to Schools #254 and #62. Forty-four students would return to their original zoned school. School #254 is currently utilized at 100% and would be utilized at 94% after closing school #38. (Thirty-eight students are scheduled to be transferred out of School #254.) School #62 is currently utilized at 63% and would be utilized at 96% after closing School #38.

84. Community leaseholders at both School #38 and the receiving schools⁵ would be displaced by closing School #38.

85. BCPS has budgeted \$175,500 in transportation costs associated with the closing of School #38. It has also budgeted \$45,000 for installation of a larger freezer at School #62 and \$109,00 for renovation of classroom space at School #62.

86 School #67, Edgewood, was built in 1958. It has a current enrollment of 341 students for the current year. It is utilized at 66% LRC. It has an FCI of .20 (poor) and an EAR of 52% (needs major improvement). Project savings are \$2,538,901 by closing.

87. Students from School #67 can be relocated to Schools #21, #87, #60 and #217. School #21 is currently utilized at 81% and would be utilized at 98% after closing School #67. School #87 is currently utilized at 53% and would be utilized at 89% after School #67 is closed. School #60 is currently utilized at 95 % and would be utilized at 100% after School #67 is closed. However, it would only be at 100% for one year. Enrollment projections show that enrollment would decrease 15% in the following years. School #217 is currently utilized at 77% and would be utilized at 94% after School #67 is closed. Seventy-five students from School #67 would return to their original zoned school.

88. BCPS has budgeted \$140,400 for additional transportation associated with closing School #67.

89. School #135, Luther C. Mitchell was built in 1974 to handle overflow from School #101. It has a current enrollment of 63 students and is only used for pre-K and 1st grade. Enrollment at School #101 is now down. School #135 is currently utilized at 60% LRC. It has an FCI of .43 (poor) and an EAR of 54% (needs major improvements). Projected Savings from closure are \$1,100,272. The building is undersized to its current intended use.

90. Students from School #135 can be relocated to School #101. School #101 currently is utilized at 59% and would be utilized at 75% after closing School #135. Sixteen students from School #135 would return to their original zoned school.

91. BCPS has budgeted \$30,000 for the conversion of two classrooms in the receiving school for School #135.

92. School #139, Charles Carroll, was built in 1927 with an addition in 1972. It has an enrollment of 464 students for the current year and has a PreK-8 program. It is currently utilized at 34%. It does not have the capacity to absorb the students from surrounding schools which are also underutilized.

⁵ These are schools designated to receive students from the schools closed. Each school has one or more designated schools which would receive some or all of the students from a particular school closed.

93. When 3D/I first conducted its building study in 1997, Charles Carroll had an FCI of "good". Due to an error in calculating the FCI, this score was inaccurate. When the evaluation team entered Charles Carroll in 2000, it noticed the FCI score and observed that the appearance of the school did not match the score, in that the building appeared to have major building deficiencies.

94. 3D/I reevaluated Charles Carroll with respect to the FCI, in October, 2000, and the FCI was changed to .53 (poor). Total projected savings from closing amount to approximately \$19,000,000 in capital savings.

95. Students from School #139 can be relocated to Schools #8, #102, #57, #16. School #8 is currently utilized at 52% and would be utilized at 95 % after closing School #139. School #102 is currently utilized at 93% and would be utilized at 94% after closing School #139. School #57 is currently utilized at 79% and would be utilized at 94% after closing school #139. School #16 is currently utilized at 92% and would be utilized at 93% after closing School #139.

96. BCPS has budgeted \$210,600 for transportation costs associated with the closing of School #139 and also \$61,000 for upgrades to the kitchen at one of the receiving schools.

97. School #202, Lafayette, was built in 1963. It has a current enrollment of 302 students and is utilized at 74% of LRC. It has an FCI of .26 (poor) and an EAR of 53% (needs major improvements). Projected savings after closing are \$4,797,535.

98. Students from School #202 can be relocated to Schools #63, #138, #144 and #145. School #63 is currently utilized at 74% and would be utilized at 91 % after closing school #202. School #138 is currently utilized at 91% and would be utilized at 99% after closing school #202. School #144 is currently utilized at 75% and would be utilized at 97% after closing school #202. School #145 is currently utilized at 82% and would be utilized at 94% after closing school #202.

99. BCPS has budgeted \$105,300 in transportation costs associated with the closing of School #202.

100. School #304, Harbor View, was built in 1971 and is designed for special needs students. It shares a site with School #124 and essentially exists on paper only. It has an enrollment of 31 students for the current year and is utilized at 18% LRC. It has an FCI of .35 and an EAR of 60% (needs minor improvement). Projected savings by closing are \$1,049,601.

101. There are no student relocation implications by closing School #304. All students would attend School #124, which located on the same site as School #304. After Closing School #304, School #124 would be at 100% LRC. All assets from School #304 would be transferred to School #124.

102. School #164, Arundel, has a total enrollment of 305 students. It is utilized at 67% capacity. It has an EAR of 59% and FCI of .47. It is one of four similar elementary schools in the Cherry Hill section of Baltimore City.

103. There are new housing developments proposed for the area around School #164. This may have an impact on future enrollment. Additionally; the BCPS needs time to plan for a transition of sixth graders to School #180. A large number of students will also be moving from a Direct Instruction⁶ School to schools that use other instructional programs.

104. Due to the demographic uncertainty and the need for time to transition students, the CEO recommended and the Board approved a deferral of a decision to close Arundel until Spring, 2002.

105. Eutaw-Marshburn, School #11, is currently utilized at 101%. The three proposed receiving schools are utilized at 68 % or less. School #130, the school slated to receive the majority of students from School #11, needs extensive modifications in order to accommodate Pre-K to 8 students. This includes renovation of the vacant fourth floor of the building.

106. There are several new housing developments in the zone which includes School #11. The impact on enrollment is not clear at the present time. Additionally, one of the proposed receiving schools for School #11 is operated by the Edison Company, an outside contractor. Transfer of 52 students to this school would mean a loss to the system of per-pupil costs for 52 students.

107. Based on the demographic factors, need for modification of a receiving school and the possible loss of funding, the CEO recommended and the Board approved to defer the decision on School #11 until Spring, 2002.

108. School #216, Frankford Intermediate, has a utilization rate of 51% and is in poor condition. However, there are housing developments under construction in the area, which may impact enrollment. School #216 presents an opportunity to create some other type of educational complex, based on the appearance and setting of the school campus.

109. Based on the demographic uncertainty and possibility that the site could be used for some other educational purposes, the CEO recommended and the Board approved that a decision to close be deferred until Spring, 2002.

110. There are no racial implications from the closing of the nine schools in question. The racial profile of the receiving schools varies by less than 2%.

111. The enrollment of the receiving schools after closing the nine schools in question will fall within the targeted range BCPS has set for primary, elementary and middle schools.

112. Closing the nine schools and relocating the students will result in students either returning to their original zoned school, attending a school within one mile of their residence or being

⁶ Direct Instruction is a form of phonics based on teaching, different from the general curriculum.

provided bus transportation.

DISCUSSION

Faced with declining enrollments and a limited amount of funding available for education, school systems throughout Maryland are beginning to close and consolidate schools. Their decisions have aroused the emotions of the affected school community and understandably so. We appreciate the desire of parents and neighborhoods to keep open nearby schools that are run efficiently and provide quality education. However, we also understand that the County Boards are faced with balancing the competing needs of their school system with finite resources and must take into account the running of an entire school system and make decisions that will benefit its general needs.

Legal Fund Representative Committee, et al. v Board of Education of Montgomery County, No.81-20, 2 Opinions of MSBE, 370,380 (1981).

As other school systems have been forced to do in the past, BCPS undertook an evaluation and assessment of its buildings for the purpose of determining whether schools could be closed or consolidated. As with decisions by other school systems, this decision aroused the emotions of members of the community.

There are currently 184 schools in the Baltimore City Public School System, with a capacity for 130,000 students. Current enrollment is approximately 98,000 students and declining. As stated by Dr. J. Tyson Tildon, the Board Chairman, at one of the five public meetings held by the Board with respect to the school closings, "We do not have enough money for 180 schools. To be perfectly honest, we don't have enough money for 150 schools, but we will in our efforts redistribute the funds so that roofs do not leak, so that boilers are safe, but you can understand that if we only have funds for a given number, we are not well advised to try to distribute that inappropriately." BCPS #44, p11.

The need to reduce the number of schools also arose from Senate Bill 795 of the 1997 Session of the Maryland General Assembly. The bill provides that the Board shall:

Develop an effective system for planning and providing construction, repairs and maintenance services for school buildings which shall include a review by the Board to assure the most efficient and productive use of the system's resources, including examination and reduction of the cost of underutilized schools and proposal for school mergers or closures if appropriate.

The Appellants offered the testimony of Maryland State Senator Ralph Hughes, who testified that Bill 795 did not mandate closing schools. This is absolutely true, and indeed the language of the bill does not mandate the closing of any school, but does require a study and closings if "appropriate."

Senator Hughes was also correct in pointing out that Senate Bill 795 was the result of a lawsuit by Baltimore City against the State. As a result of that suit and the Senate Bill 795, the City is guaranteed to receive additional funds for a period of years. That funding is guaranteed and does not depend on any school closings. However, these funds are for operating expenses.

But there is an additional state fund available for schools in the area of capital expenditures and improvements. BCPS is in no way guaranteed any of this money under Bill 795. While Senator Hughes may not be familiar with the political pressure put on the City to close schools in order to receive this money, the Board Chairman, Dr. Tildon, clearly is. Dr. Tildon stated that he was told in no uncertain terms by state legislative officials that BCPS would not get additional funding for capital improvements unless schools were closed.

This was also told to the public during the five meetings held in connection with this case.

Ms. Noel: I also want to clarify that the hundred million dollars is operational dollars only. They do not involve capital dollars at all. Right now, we are on average for the past few years only receiving between 40 and 47 million dollars in capital funds for 183 schools. The only year we surpassed that number was the year that the legislature let us put out a special bond, and for that extra 25 million dollars, we were able to leverage additional dollars. We have 680 million dollars in maintenance and another 400 million to meet educational standards for additional science labs, et cetera, so we really have about a

billion dollar price tag, and on average we have about 45, 50 million to work with. BCPS Ex. #44, p 76.

Dr. Tildon did not hesitate to use the term "mandate" at the various meetings that were held. "So the legislatures have mandated that we bring the number of buildings and classrooms down to accommodate the number of students that we have. They make the case that if we were increasing the number of students, we would definitely come to them for additional funds to construct schools. So they make the opposite case, that because we were losing students, we have to reduce our size." BCPS #42 p 6.

While the bill does not mandate closings, it clearly authorizes them, and the underutilization of the BCPS, at least in general terms, was certainly public knowledge when the bill was passed. It should come as no surprise to anyone that the system was going to close schools, given the condition of the system and language of the bill.

If the Board's action was based purely on political factors, then indeed one could question whether it was arbitrary. But the motivation for doing something is not the same as the legal basis justifying it. Had political pressure not been applied, the underlying issue would remain, i.e. whether the closings were supported under the education law. In this case, the Board's action is clearly based upon Senate Bill 795 as well as Md. Code Ann., Educ. § 4-120 (1999):

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

Given the size and complexity of the BCPS, and in an effort to avoid politicizing the process, the Board hired an educational consulting firm, 3D/I, to conduct a facilities utilization study of the zoned schools in BCPS. The purpose of this study was to identify schools that could be closed without affecting the system's educational goals, while obtaining savings in operating

and capital costs. The firm was hired in December, 1999, and issued reports in September, November, and December 2000.

3D/I was actually first hired in 1997 to conduct a study of the physical condition of the buildings in the system. This consisted of an examination and cost analysis of the repair and capital expenses for each school, but did not involve any study or recommendations about actual school closures. The deferred capital costs of the system in 1997 were well over 600 million dollars.

After completing its utilization study in the fall of 2000, 3D/I recommended that twelve schools be closed and listed another four for consideration. On March 13, 2001, the Board met and voted to close nine schools.

To prevail on their appeal, the Appellants must prove by a preponderance of the evidence that the decision of the Board was arbitrary, unreasonable, or illegal. COMAR 13A.01.01.03E. The applicable COMAR regulations address the standard of review 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; or
- (vi) Is affected by any other error of law.

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

The Appellants acknowledge that this is a high standard to meet. But it is the Appellants themselves who argue that a close scrutiny of the Board's decision making process and the consultant's report will show the Board's decision to be arbitrary and the 3D/I report flawed.

Having scrutinized the record and listened to the testimony, I must conclude that it is the Appellant's concerns that give way in the face of the sound basis upon which the Board made its decision. That basis is not simply the 3D/I study, but the entire process by which the decision was made.

The Appellants' arguments fall into two broad categories, those relating to the decision making process by the Board and those involving the consultant's report and methodology.

On the first category, the allegations range from a type of conspiracy, in which the Board allegedly determined what schools would be closed and hired a consultant as a pretext for this decision, to negligence, alleging that the Board abdicated its responsibility and simply let 3D/I make the decision. Making the allegation is one thing, proving it is quite another. In this case, there is simply no evidence to support either extreme.

With regard to the former extreme, the first question is why any member of a Board would take the initiative to close a school. School closures are the most difficult and emotionally charged decisions Board members face. Other parts the BCPS Master Plan,⁷ which includes educational goals such as reducing class size, enclosing open spaces, etc., are much more popular and easy to support. School closures are much more controversial.

As explained by Dr. Elizabeth Morgan, the Chief Academic Officer, school administration

⁷ Senate Bill 795 required BCPS to do several things, including the hiring of a Chief Financial Officer and the establishment of a Master Plan, setting forth the educational goals of the system.

in Baltimore has been nagged in the past by political influence. Individuals and community groups have no hesitation using whatever political influence they wield to prevent schools from closing. According to her, this case was no exception. The Board was also aware of this, as shown by Dr. Tildon's remarks on February 24, 2001 at one of the public forums.

I can assure you of one thing, very, very clear. I know my colleagues and the decision will not be made based on parochial issues. There may be many who will try to influence our decisions along the lines of parochial interest. That will not work. What we do listen to very carefully are the facts and the issues and the concerns.

BCPS Ex. #44, pp 14-15.

Additionally, there is the question of why these particular schools would have been slated for closure by the Board, absent some objective justification. These schools exist in areas of the city with other underutilized schools. There are approximately forty schools utilized at less than 60% capacity. The Appellants offer no explanation why these schools would have been targeted by anyone.

There is also the question of how 3D/I could in any way "rig" the study to justify closing these schools.

3D/I relied on a demographic study by the Regional Economic Studies Institute ("RESI"), based at Towson University, which conducts demographic analysis for many businesses and state agencies. RESI's analysis actually showed a more optimistic projection with respect to Baltimore City and school enrollment in particular. If 3D/I wanted to justify its recommendation based on some preconceived list, it could easily have adopted the BCPS enrollment projections, which showed a steeper decline in enrollment than RESI.

The cost studies were also based upon a well known and objective source, RS Means,

whose figures can be easily confirmed.

Also, 3D/I was not paid for its services based on the number of schools closed or recommended for closure. It was paid a consulting fee, and would have been paid this fee even with no school closures. It is also in a business which directly involves school systems around the country. The fact that it bids on other projects or provides services to school systems in the form of facility or architectural consultations hardly makes it a biased party. Its contract was voted by the Board and was open to public examination.

In light of the clear mandate to the Board to increase utilization and save costs, the natural suspicion would be that these schools were picked due to their high-deferred costs. However, this suspicion is also unfounded. After RESI provided its demographic results, 3D/I started examining possible school closures based on this demographic information. However, the schools eventually closed were not necessarily the ones with the highest deferred costs. It is apparent that the schools were not simply ordered in terms of possible costs savings, but chosen on a much more complex basis.

On this point, the situation of the Charles Carroll School is significant. In the original 1997 building report, this school was actually rated in "good" condition with deferred capital costs on par with other schools. Due to an error on the part of 3D/I, this report was actually inaccurate, and the school was in much worse condition than the 1997 report indicated. The size of this error was significant, amounting to millions of dollars of unreported repairs and a change of rating from good to "poor."

However, 3D/I had already recommended Charles Carroll for closure, based on the earlier data showing the school in much better condition. Of the total capital costs saved by closing

these nine schools, Charles Carroll accounts for about half, after taking into account the revised cost savings. Yet the consultant's report was not based on this information, but information which was much more favorable to the school. Clearly, the potential cost savings of each school was not the sole factor in determining which schools were closed.

If one thinks the Board was in a comfortable position, with the luxury of just picking schools, one should review the transcript from one of the five public hearings held in this case:

COMMISSIONER STRINGFIELD: This is our fourth of these meetings, and all the people concerned, to make sure the audience understands, it get poses (sic) like a you versus us kind of thing. We've asked two mayors and a governor for more money. We have sued the State of Maryland. We are involved to this day in exactly the kind of suit you're describing. I'm not at all sure we have any friends left down there, and you have to have enough friends to get one more than half of the votes so you can get the next round of money. Several people have implied that this is just a budget item for us. We work for no pay, going to these and lots and lots of other meetings because we care about the children, because we care about the schools. We will not go about the business of considering closing schools because we would like to close schools. That is not the issue. The issue is we have to find some way to adequately fund the school system and fund all of the schools so that we can continue to have the small class sizes that people have talked about, and so that we can have the computers some people talked about so that all of our schools and all of our children can have those things, and we have to find some way to fund those while suing the governor and suing the state and asking the mayor for money and asking the City Council for more money, and we have to find some way to make that balance....What we need to hear is are there special reasons why the particular school or that particular school, why closing that school might be particularly problematic because if we don't close School X, whichever one that is, then we almost necessarily have to close the closest school building sitting beside School X, and why is it that it is more problematic that you close X than Y? Those are the kinds of questions that we have to face. We don't say that to you in joy. In fact, I think we say it in sorrow, but this is the reality of the world in which we live. . .

BCPS Ex. #43, pp 135-137. This does not strike me as a Board that was eager to wield the axe and start closing schools.

With respect to the other extreme in the process, the allegation that the Board was negligent is unfounded. One must start with the purpose of the consultant's report and its role in

the process.

A consultant was hired to conduct an objective study of some condition. But it was also hired to make recommendations in light of some prior policy. The fact that a recommendation is not adopted does not mean the report is flawed. 3D/I was hired to conduct a long-term study of facilities and utilization. It did this and provided many recommendations involving the long term planning for the school system. Both RESI and 3D/I were operating with a ten-year time horizon.

The Appellants in this case were provided access to the actual workbook for each school, compiled by 3D/I, containing each school's Educational Adequacy Rating ("EAR") and building summary. They were also provided access to the subcommittee files, containing the work of the various subcommittees created by the Board. They were given access to these documents, based on their proffer that they would show that the Board had no reason to rely on the 3D/I study and should have probed further with respect to the report. In fact, they submitted little or nothing to justify this claim.

3D/I recommended that twelve schools be closed immediately and four more be considered. It also contains detailed recommendations for school construction and improvements.

After the consultant's report, the CEO, Carmen V. Russo, decided that three of the schools had demographic issues and "receiving schools" issues that called for further study. However, that decision was itself based upon the consultant's study and input from the community, and was not indicative that the process was flawed. The CEO recommended that nine schools be closed and that the decision on the other three be deferred until 2002. Additionally, the actual closure of School #62, Edgewood, was moved back to 2002 and the closing of Lafayette, School #202 moved to the summer of 2003.

When the Board voted, it was not voting on the 3D/I study, but on the CEO's recommendation. Given the fact that the study had been done and the CEO made recommendations, it is not surprising that by March 13, 2001, Board members had opinions about closing certain schools. Nevertheless, there is no evidence of any plot by members to vote a certain way. As explained by Dr. Tildon, there was still a degree of uncertainty right up to the time the actual votes were cast.

Additionally, the Board was limited to voting on a straight up or down fashion with respect to each school. It was not free at that point to just start a new study or consider schools not already recommended for closure.

I would be more concerned if the Board members showed up on March 13, 2001, with no information or views about the schools in question. That scenario would indeed be one for disaster, when decisions are made on a last minute basis with no prior thought.

From a consultant's report that actually encompassed sixteen schools, the Board voted to close nine, one of which would not be closed until 2002. Another school, #304, does not involve the relocation of any students and simply involves the consolidation of two buildings on the same campus.

While the votes were by wide margins, there were clearly individual Board members who had doubts about one or other of the schools and voted to keep a particular school open. Many of these clearly arose from concerns expressed by the community. One Board member actually visited a school and elected to vote for it when the Board met on March 13, 2001. One school, Edgewood, received one vote based on concerns of a Board member about possible overcapacity at a receiving school. One school, Mildred Monroe Elementary, actually obtained two votes,

which was more than any other school received. In reviewing the record, the only reason I can find for this was the overwhelming community support which this school received and which impressed two members of the Board.

The Appellants offered numerous witnesses who testified that nobody from RESI or 3D/I ever contacted them to ask for their input. There is nothing to suggest that 3D/I or RESI was under any obligation to personally solicit anyone. The entire process was publicized in newspapers, available on the Internet and free for public distribution. It also extended over many months.

What RESI and 3D/I were required to do, was to allow for public input, which is a far different thing than conducting a telephone campaign to contact every conceivable person who might be affected by the school closings.

Five meetings were held around the city to allow for community input. These meetings were publicized by every form of media imaginable, including newspaper articles. People who could not attend meetings were free to submit documentation. Clearly, not everyone who wanted to could attend all the meetings and not all Board members were present at every meeting. But the public had more than adequate opportunity to raise any concerns it had.

While the Appellants' witnesses may not have known of or attended these meetings, there were clearly hundreds of other people who did. In reviewing the concerns raised by these witnesses, I cannot find a single issue that was not already addressed by someone at the five major meetings which were held.

The Appellants' contention that the subcommittees or 3D/I reports did not include all the community groups affected by the school does not necessarily mean that 3D/I or the

subcommittee were negligent. With respect to the subcommittees, it was incumbent on the particular school to submit a list of any groups affected by the closure of that school. The subcommittee mailed the request to the particular school, but it was not the one responsible for filling it out and sending the form back.

The actual 3D/I study includes a section titled "community impact." The Appellants cite numerous community groups, which either use or have association with a particular school, which were not listed in the section, in support of the position that the 3D/I was negligent. However, this again shows a misunderstanding of the how the study was done.

"Community impact," as used by 3D/I, means organizations with a lease at that particular school. It is clear the purpose of this section was to identify potential legal problems and was not intended to identify every group that might be affected in any way by the school closing.

With respect to the entire subcommittee process, it is important to clarify its role. The subcommittees were not even created until after the 3D/I report was issued. This was by design. Holding hearings and creating subcommittees when there has been no recommendation or actual schools to discuss would be a fruitless exercise. Given the number of schools in the system, public meetings allowing for input from 184 schools, many of which were clearly never considered for closing, would accomplish little.

These subcommittees were not charged with making their own study into which schools should be closed. Nor were they to vote in any way to approve or disapprove the proposed schools. Their role was to ensure that the closings could be handled in terms of budget, staffing, food, transportation, etc. The advisory function of these committees was clearly contemplated and in fact utilized prior to the actual decision of March 13, 2001.

If one looks at the contents of the 3D/I report and the eventual results, it is clear that the votes cast on March 13, 2001, were the considered votes of each school board member, and not the predesigned outcome of a political process, which is precisely what 3D/I was hired to prevent.

What the Appellants mean when they say the decision was "already made," is that their particular view was not ultimately adopted. But this is hardly the same as establishing that the decision was predetermined. A Board's failure to follow the advice of a segment of the community, however significant that segment may be, does not indicate it ignored the advice or that it abused its discretion. *Chevy Chase Elementary School PTA et al v. Board of Education of Montgomery County*, 1 Op. Ed. 479 at 498.

The minimum requirements for public notice and input are set forth at COMAR 13A.02.09.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 .01B;

(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.

The Board in this case went well beyond the minimum requirements and had numerous meetings, four of which focused on particular schools, as well as one final meeting to allow those who could not attend the first four meetings the opportunity to provide input. Members of the public were also free to provide written comments, which many did. The 3D/I report was available and could be scrutinized by anyone wishing to do so.

The Board then created six subcommittees to deal with specific transition issues, including budget, transportation, food, etc. Steering committees were set up in each affected school to deal with local concerns. The Board did not wait until the April 30th deadline, but voted on March 13, one and a half months before the legal deadline, in part to allow sufficient time for any appeals and for a transition.

Additionally, the Board's rationale is clearly written and based upon the consultant's report. When 3D/I's recommendations were not followed, there were clear explanations as to

why.

With respect to the second broad category of concern involving the 3D/I study itself, the issue becomes much more complicated. In his opening statement, Mr. Buist, counsel for Mildred Monroe School, indicated that the study looked good at first sight, but became questionable upon further examination. I found the exact opposite to be true.

When one first looks at the study and recommendations, there are various numerical factors and terms which have no apparent meaning. There is a complex demographic study, which takes time to read, let alone understand. There are, seeming contradictions when one looks at particular schools.

A school with air conditioning is closed, while one without air conditioning remains open. Schools in poor condition are closed, but a school in perhaps worse condition stays open.

A school with a higher local growth index is closed while one with a lower rate stays open.

A school with open space classrooms, which the system is trying to eliminate, remains open, while a school with traditional classrooms is closed. A school with a PreK-8 program, which is actually a goal of the system, is closed, while a PreK-5 school stays open.

A school which has just been wired for computer use is closed, while others schools without this advantage remain open.

If one looks at a single criterion, and keeps applying different criteria to different schools, then indeed the recommendations seem nonsensical. The problem is that the decision was not based upon a single criteria, but a combination of complex factors that are not readily understandable. "[I]t becomes impractical as well as impossible to reconcile each and every school

closure decision with each and every closure criteria." *Argyle Communities United v. Montgomery County Board of Education*, 2 Op. of MSBE, 695, 714 (1982).

If ease of understanding was the primary goal, BCPS could have embarked upon a much simpler process, for example closing the oldest or costliest nine schools in the system. This would have been a straightforward and simple process, which the public could easily have understood. I also have no doubt that such a simplistic process would eventually be held to be illegal.

Since the Appellants themselves suggest that scrutiny of the 3D/I study is required, then such scrutiny must be undertaken.

The first part of the 3D/I methodology actually does not involve 3D/I at all, but RESI. RESI was a subcontractor hired to do a demographic analysis of school enrollment. It is an organization whose business is to provide demographic and population projections for various businesses and governmental entities.

RESI examined the BCPS enrollment methods and determined that there were certain flaws in the methodology. These involved the use of two different enrollment projections, a grade by grade figure and a total system wide figure, which did not equal each other. Consequently, enrollment in the past has not matched the projected enrollment due to this internal error. In fact, some schools in the system are overcrowded, generally at the middle or high school level, due to these errors in projections.

Additionally, the BCPS method did not take into account dynamic factors affecting migration, including various economic development activities throughout the City.

The RESI methodology includes 11 factors and provides a complete and thorough statistical basis upon which to make enrollment projections. Its methodology is more reliable than

the BCPS system and provides a better, although not perfect, basis upon which to make enrolment projections.

RESI identified three areas of the City where schools are utilized at under 60%. It also made an enrollment projection for each school. A score of 1.00 on the local growth index simply means that particular school has the same rate of growth or decline as the system taken as a whole. A score of less than 1.00 means a school is experiencing a steeper rate of loss than the system as a whole. A score of over 1.00 means the system is experiencing a slower rate of loss.

However, the score relates to the system as a whole, and not to other schools. A score of 1.0 does not mean a school has stable enrollment and a score over 1.0 does not mean that a school is experiencing increasing enrollment. One must look to the overall trend of the system.

By any measure, BCPS is experiencing an overall downward trend in enrollment. Therefore, a school with a score 1.0 or above is still experiencing a declining enrollment, only at the same pace as the system in general.

The Appellants' attack on the RESI study centers around a single issue, and that is the factor which takes into account community input. In an effort to ensure that the demographic study avoided the pitfall of the BCPS methodology, RESI contacted or attempted to contact scores of community groups, in addition to numerous other sources. The Appellants claim the report is flawed, because certain community groups listed in the RESI study were not in fact contacted, and certain housing activities were not included.

On this issue, a careful analysis of the role of community input must be made. The RESI study performed the very thing the Appellants contend was necessary, i.e. factoring in the impact of new economic and housing developments. As pointed out in the report however, these

developments are very recent and could not be quantified. Housing developments may be planned, but not actually built. Housing may be built, but not filled. Therefore, the only way to factor in this information into the projections is by attempting to obtain information from the community about activity in the area of a school that might affect enrollment.

"Economic activity," however, is a broad term. Building senior housing in an area will not affect school enrollment. Commercial or other types of development do not necessarily yield more school age children. As the RESI study found, there are in fact people moving back into Baltimore City. However, these people generally do not have school age children.

Additionally, the opportunity for community input did not mean that every community group would in fact have housing information to provide, only that these groups were contacted to see if they had such information. This is clearly spelled out in the study:

RESI sought to incorporate specific neighborhood and school factors into its school enrollment analysis in order to increase the accuracy of individual school enrollment projection. BCPS Ex. #2 p8.

The exact significance of the community input was described in the RESI report.

3.2b Community Analysis The community analysis was used to predict trends in moving averages. Putting more weight on the most recent data would be consistent with high projections for population and enrollment, since the most recent data tend to reflect rates of job growth and investment in the City.

However, this history of growth is a short one, and typically would be outweighed in a moving average scheme by the longer term history, which is essentially one of pure decline in population, jobs and various other measures.

The following community analysis provides the basis for RESI's belief that the short termed positive data represent the beginning of a longer term trend in which net out migration will slow substantially in coming years. This directly impacts the enrollment projection. Information for the community analysis was derived from numerous sources including:

- Newspapers
- Magazines
- Databases housed at RESI
- Other agency databases
- Articles focused on the City's direction.

To augment the available information, RESI contacted numerous Community associations, City offices and private foundations. (emphasis added) BCPS Ex. #2 p9.

The list of organizations is quite extensive and includes 130 such groups. These include some organizations with a city wide interest, such as the Abell Foundation, Annie Casey Foundation, Baltimore City Departments of Housing and Planning, Greater Baltimore Committee, as well as more neighborhood focused groups such as Belair-Edison Community Association, Butcher's Hill Association and Lafayette Square Association.

From the actual results of the RESI study, it is clear that the inclusion of not only the community groups, but all of the additional economic data obtained by RESI had a significant effect on the final enrollment projections. The BCPS and RESI enrollment projections for 2000 are identical, but for 2001 and beyond diverge. This is no doubt due to the addition of the housing and economic information taken into account by RESI, but ignored by the BCPS methodology. RESI's projections actually show a school system with a slower rate of decline than projected by the BCPS.

In formulating its actual methodology, RESI could not start with the information from

various community groups because this information was not in statistical or quantitative form.

RESI started with information from the Maryland Office of Planning to formulate interim baseline enrollment projections. After considering births, deaths and migration, the community analysis information was factored in to provide not only system wide projections but a school by school projection of enrollment. The Appellants are correct that the actual enrollments are in part determined by the input of community information.

From the above analysis, it is clear that the community information which the Appellants cite, was used to augment a statistical model developed by RESI. In no way was the contacting of each and every group in the community who might have information about housing a prerequisite for the final report, as suggested by the Appellants.

I have no doubt that RESI in fact attempted to locate the various groups listed in Appendix A of its report. Mr. Darius Irani from RESI testified and indeed had a list of each group which it attempted to contact. It is also clear that the failure to provide information from these groups was not the fault of RESI. One such group, when contacted, had its phones disconnected.

One group in Cherry Hill was evidently contacted, although a member of the public tried to downplay this contact, stating at one of the five public meetings that nobody really knew what the phone call was about or what questions were being asked. BCPS Ex. 44 p36. I seriously doubt whether a phone call from a demographer at Towson University would cause a great stir from members of any community group. Now that the significance of these phone calls has gained attention, members of the public try to suggest that these calls never were made.

For purposes of the present case however, it does not matter whose enrollment

projections eventually prove the most accurate. Nor does it matter whether information provided now would affect RESI's projections. The time for public input ended in March. One cannot exercise hindsight and judge the Board's decision on information which people now think is relevant, but was not brought forth during a five-month public comment period.

The case of Arundel School, if anything, disproves the Appellants' own claim that new input from the community would change the projections. Concerns were raised by members in the Cherry Hill community about whether RESI had in fact included certain housing or potential housing in the area when conducting its study. In fact, some of the housing pointed out by the community had been considered, but some developments, such as MD 12 public housing that has been vacant, and Charles K. Anderson project (122 units vacant) were not considered.

Not only did RESI go back and consider this additional housing, it used very optimistic projections when revising enrollment projections.⁸ RESI in fact determined that there would be additional students, but this did not affect the enrollment projections, because the receiving schools still had the capacity to absorb these additional students.

In light of the clear improvement of the RESI methodology over the BCPS methodology, and given the thoroughness with which the study was done, the RESI study is a more than adequate basis upon which 3D/I could make its recommendations.

Although Appellants vigorously contested the assumption underlying the school system's enrollment projections and although none can say with certainty whether those projections will be borne out, the school system did not draw its figures out of thin air. It relied on well grounded methodology which was not based on any predisposition.

⁸ One of the issues in Cherry Hill is how many residents will return to Cherry Hill after certain public housing is renovated. RESI was conservative and assumed a 100% return rate.

Chevy Chase, at 132.

The notion that there is some mass migration of families with school age children back into the center city area of Baltimore, undetected by the RESI study, to the level justifying schools as underutilized as the ones in question staying open, is simply not based on any realistic assessment of what is happening in Baltimore City.

After the RESI study, 3D/I used two factors, the Educational Adequacy Rating ("EAR") and the Facility Condition Index ("FCI"). The EAR is an instrument designed to evaluate the adequacy of a building to its intended educational purpose. It consists of several scales, which assess the building's appearance, adaptability for use, safety, etc. These scores are reduced to a percentile and the resulting scores ranges from "replacement candidate" to "exceptional condition".

While the EAR does involve subjective scoring by evaluators, 3D/I conducted a two day workshop to train evaluators on how to use the instrument. They also conducted mock evaluations in which different members would rate the same school and compare their evaluations. This was to ensure some type of consistency in the scoring. The actual evaluation team consisted of an engineer and an educational facilities planner.

An EAR score in no way relates to the actual learning that goes on in the school. It simply rates how well the building fits its purpose. A school may have a low EAR, yet learning occurs inside due to the human interaction. A low score simply means that this human interaction has physical obstacles due to the design or condition of the building.

On the other hand, a school may be brand new, have a high EAR and yet suffer from poor student performance due to the same human factors.

The Facility Condition Index ("FCI") rates the physical condition of the building, taking into account the deferred cost of repair and maintenance, as well as inflation and increased repair costs.

3D/I used the RS Means construction tables for estimating the cost of repairs or improvement. This was actually done in 1997 when 3D/I conducted its first building study. 3D/I then factored in the cost of inflation and the cost of deferred maintenance when arriving at a total savings. For example, a roof which might have only needed repairs in 1997, left unattended, will deteriorate and require higher costs to fix now than in 1997. Therefore, the actual savings is not simply the present cost to repair a roof.

The FCI is obtained by dividing the replacement cost of the building by the estimated cost of repairs and maintenance. As the cost to repair and improve a building increases, it approaches the replacement value of the building. The higher the FCI, the more sense it makes to simply replace the building, since the cost to maintain and improve it is greater than its actual replacement value.

In attacking the cost estimates, the Appellants rely essentially on an ad hoc approach, in which various people gave their opinion about what they thought it really cost to repair a roof, etc. Mr. Livingston, who reviewed the report of Mildred Monroe School, stated that there were different cost estimators to use, and gave an opinion about the cost to make repairs at Mildred Monroe, although he never stated where his numbers came from.

The fact that a different cost estimate would yield different results may be true, but one would have to apply this estimator across the board to every school for it to mean anything. Mr. Johnson, the Project Manager, even stated that RS Means sometimes results in a lower cost than

what actually ensues. One cannot compare Mildred Monroe without a new gym floor, with another school whose members might want a new gym floor. This leads to precisely the type of inequities which the Board is trying to eliminate. The only objective and system wide evaluation in this case is that used by 3D/I.

While the Appellants suggest that the community is willing to maintain these schools in less than perfect condition, it is precisely these conditions that the Board is striving to address. The cost estimates in this case are not for luxury items or brand new buildings, but only to bring these buildings up to "adequate" conditions, as defined by state building standards.

Schools should not be required to exist in a state of disrepair. While the Appellants now claim they are willing to live without a new gym floor or flag pole, or put up with a leaking roof, there are clearly other members of the community who rightfully want to know why these conditions have not been remedied, and insist that their schools have every benefit of maintenance and repairs that the better schools in the system have. These individuals are completely justified in their claim and have every right to insist their school be treated the same as other schools in the system

The State Board has recognized that cost savings effected by school consolidations and closings are a reasonable response to declining student enrollments and partially empty schools. In *Bushey Drive Elementary School Parents v. Bd. of Educ. of Montgomery County*, 1 MSBE 441 (1976), a local board of education chose to close a school and consolidate school operations where declining student enrollments in the county had resulted in surplus classrooms and partially empty schools. The State Board upheld that closing where it was not shown that the decision to close that school was arbitrary, unreasonable, or illegal, and acknowledged that precise

projections are not always possible. The State Board concluded:

While neighborhoods quite understandably become attached to their schools and want to see them kept open even if they are only partially used, it can readily be understood that local boards prefer to consolidate school operations. While there may be some dispute over precisely how much money is saved by any one school consolidation, there is no doubt that consolidations effect some savings. There is also no doubt that our education systems continue to need funds for high-priority needs: the funding of negotiated agreements, programs for handicapped children, for the gifted and talented, and a good many others. We can hardly quarrel with the decision of a local school system to consolidate schools to effect savings which could allow the transfer of available funds to high-priority programs.

Bushey Drive, 1 MSBE at 442.

In Bushey Drive, the State Board upheld the closing of an "extraordinarily well-run school" with a unique non-graded open classroom philosophy and an "exceptionally effective" special education program. The State Board concluded that the closing was not arbitrary, unreasonable or illegal where it was motivated by declining student enrollment that had resulted in a half-empty school and where the closing would effect significant savings.

However, the cost estimates and savings were not done in a vacuum. 3D/I was not free to simply recommend schools close without also accounting for the system's educational goals. These goals include smaller class size, enclosing open classrooms and moving toward preK-8 schools. Also, the Board requested to the extent possible, children attend a new school within one mile of their home. In this way, the actual educational goals of the system get carried over to the new school with a minimum of disruption.

In making its recommendation, 3D/I considers the utilization rate of the school, the EAR and FCI scores and the feasibility of the educational program to be carried over into a new building.

Having awaited the testimony of Mr. Johnson, I expected him to be barraged with questions about how these particular schools were actually chosen, and what the process was in which schools were recommended for closing.

Surprisingly, none of the Appellants explored this area. In reading the study, the only insight one gains is that forty schools are utilized at under 60% capacity and most of these schools exist in three areas of the city. The report also indicates that RESI identified schools that have utilization rates of 60% or less, and are expected to have such rates for at least five years.

From the RESI study and EAR and FCI scores, it easy to get the impression that the selection process consisted of slowly narrowing down the schools from some type of broad category. From 184 schools, the list got narrowed to 41 underutilized schools. From this list, another 16 were either recommended for closure or considered for closure. When one reads the RESI study, it mentions that particular concern was paid to schools with underutilized capacity for five years. And of course, there is also in the background the question of which schools would present the most sizable cost savings in terms of capital and deferred maintenance.

This was the impression I had of the selection methodology and it was clearly not accurate. With respect to the underutilization rates below 60%, the reason for this was not so much a need by 3D/I as a state requirement that school systems identify schools underutilized below this rate. This was not some kind of magic cutoff point, above which schools escaped consideration or below which they were automatically targeted. Two of the schools recommend by 3D/I for closure, Schools #11 and #15, in fact do not meet this requirement, and have only three or four year underutilization rates below 60%. Nevertheless, 3D/I considered them for closing.

Additionally, one school, Eutaw-Marshburn, was recommended for closure by 3D/I, yet it

it is actually overutilized at 101%. Clearly, the utilization rate was not the sole factor.

With respect to the capital savings, this is really a non-issue in the process, although one can easily become cynical and assume that this was the deciding factor. In a system where 75% of the schools are in poor condition, one could practically pick schools at random and be guaranteed that there would be substantial savings. There was no need to target particular schools with high capital maintenance costs. In a school system whose deferred capital costs are approaching one billion dollars, a savings of forty million dollars is not really significant.

The actual process, as explained by Mr. Johnson, was much more intuitive. The project team would meet, recognize excess capacity in a geographic area. The process focused more on areas of excess capacity and not particular schools. This excess amount then translated into a rough number which corresponds to perhaps an elementary school. One then looks at the schools in that geographic area and sees how the programmatic requirements can be met in the existing excess capacity. As explained by Mr. Johnson, the planners met and discussed the data, and got a "feel" for what was possible in a given area.

From this process, 3D/I eventually provided the recommendations the Board considered. The Board in turn created six subcommittees to study the transition aspect of the study and also conducted five public meetings to allow for public input.

With respect to the process, including RESI and 3D/I, the Appellants contend that it is flawed and should be redone. They cite a series of "mistakes" by 3D/I in support of this position.

The entire process as designed, was intended to catch mistakes from all parties and provide an opportunity to cure any mistakes and address any concerns. The process actually began back in 1997 when the facilities were first evaluated and ranked for physical condition. That decision by

itself ensured that a substantial part of the school closing process would be in place when the utilization study started in 2000. The purpose of the RESI study, the subcommittees and the steering committees was to ensure that a broad range of input was allowed.

The Appellants' claim there was a string of mistakes made by 3D/I which justify discarding the whole report is somewhat of a distortion of the facts.

With respect to Arundel Elementary, members of the public expressed their concern that certain housing in the area had not been factored into the demographic projections. They, in turn, hired the Legal Aid Bureau, which worked with 3D/I to investigate the situation. In fact, RESI had considered these developments, went back and considered additional developments not previously considered, and, in the end, did not change their enrollment projections. At this point in time, both RESI and 3D/I stand by their figures.

Although the Board eventually deferred on a decision for Arundel, this was not due solely to the enrollment issue, but others factors including the change from Direct Instruction to the general curriculum and the time needed to improve one of the receiving schools.

As indicated in the CEO's recommendation:

Because the future impact of the new housing developments is not fully clear at this time, and because of the need for sufficient time to plan for the transition of sixth grade students and students from the DI program, I recommend that the decision to close School #164 be deferred to spring, 2002, pending further study and consideration

Issue #1: What impact will the new housing developments in the area have on student enrollment in the area elementary schools?

Solution: The impact of the housing developments is not yet firmly determined, therefore I recommend that the closing of School #164 be deferred for further study. While additional students are projected, there may also be a decline of 100 students within the same time frame.

Issue #2: What impact will the transfers have on students in the Direct instruction program and on sixth grade students moving to School #180?

Solutions: Transition plans will be developed for Direct Instruction students and sixth grade to ensure support for a seamless transition.

Under these circumstances, it is hard to characterize anything 3D/I did as a "mistake."

With respect to Edgewood, the final enrollment of the receiving schools was evidently higher than anticipated. But this was due to the school system not providing accurate information to 3D/I about zoned students in one of the receiving schools. A concern was raised, investigated, and again the Board acted prudently by postponing the actual closing, although it felt it had a sufficient basis to actually close the school.

Members of the public also had their concerns which were in fact totally unjustified. One member testified at a public hearing that a new roof had been installed on Eutaw-Marshburn. The Board investigated and found out that this was not true.

The one concern, which is in fact a problem in this case, is the error which occurred with Charles Carroll School. This Appellant has the dubious distinction of being the least defensible school to keep open, based on the utilization report, yet having the most serious legal issue in the case.

When the evaluation team entered the building in 2000, it was looking at the 1997 facilities report. This indicated that the building was in "good" condition. Upon entering the building the team quickly realized that this building was not in good condition, but had serious problems.

These evaluators had no qualm in communicating their concerns to the Project Manager, Mr. Johnson, who in turn dispatched an engineer to review the building. The engineer performed a new report and found the building was in "poor" condition with millions of additional dollars in

capital and maintenance costs.

With respect to the actual condition of the building, I have no doubt that this building is in poor condition. The engineer inspected the building and noted serious structural and systems problems requiring extensive repairs. Mr. Johnson also inspected the building himself and gave a vivid account of the problems with it. When the building was visited in February 2001, the basement was flooded.

The issue is not what the condition of the building is, but whether this error casts sufficient doubt to the report so as to discard it completely. The entire utilization study hinges in large part on the EAR and FCI scores. The FCI score also translates into capital savings. In turn, the CEO and the Board assume that these numbers are correct and make their decisions based on them. Even Dr. Tildon testified that he may have voted differently if a school was rated "good" instead of "poor".

The decision to conduct the study in 1997 was perhaps a good indicator that the Board knew a thorough study of the building was the first step in closing schools. After the building study was done in 1997, these reports sat in the system. There would have been no reason to go back and review each building report.

However, the nature of the error does not suggest to me any deliberate action on the part of 3D/I. According to Mr. Johnson, certain data was missing with respect to some major systems in the building. He surmised that the three-member team which conducted the study in 1997 somehow committed a data entry error resulting in data being lost. If the opposite had occurred, and defects were noted which in fact did not exist, one would be more skeptical. Therefore, the error must be attributed to some type of accidental event instead of a deliberate one.

More importantly, 3D/I itself discovered the error. The evaluation team had no hesitation alerting the Project Manager to this error. These same teams were the ones who visited every school. The size of this error was enormous, and clearly visible to the team. If the same error had occurred in other schools, I would expect the same evaluators to alert the Project Manager. Yet the only school where this error occurred was School #139.

Finally, the Appellants themselves had access to the FCI scores and reports of the schools in question, as well as the receiving schools. One Appellant offered the testimony of Mr. Livingston, who has a background in construction. Mr. Livingston testified as to the condition of Mildred Monroe School. On many items he concurred with the 3D/I study. However, his differences involved the cost to repair some items, not whether the defects actually existed. He termed some items "luxury items," but there was certainly nothing in his testimony to suggest that this particular report was grossly inaccurate.

Given the nature and circumstances under which this error occurred, I cannot find that it rises to the level of invalidating the entire 3D/I report.

The process must start, but it must also stop at some point. The Appellants' contention that the process must start over is simply avoiding the inevitable. If the process started over, I have no doubt that there will be citizens who miss the newspaper notice and do not manage to get to the public meeting. A new process would not ensure that the school system would not err in providing a certain enrollment statistic, or that every school official would fill out a questionnaire and return it to a subcommittee.

I also question whether starting the process again would ever include input from every conceivable community group, about their own community work. Additionally, I suspect that a

consultant might commit some type of error affecting the cost or nature of school defect.

If 3D/I had utilized the BCPS planning methods of enrollment projections, with its glaring deficiencies, the Appellants would no doubt be pointing out these deficiencies and arguing that a reputable organization like RESI should have done the demographic study. The process can go on forever and the question is not whether it would yield different results, but whether this process itself was valid and reliable.

When the 3D/I methodology is properly understood, many of the Appellants' concerns can be addressed.

The Appellants presented extensive testimony about the various educational programs in each school, and achievements of many of the teachers and students. I have no doubt about these achievements, but the Board's action in this case was not based upon academic considerations, and there is no requirement that it must be. The Board was not trying to eliminate underachieving schools or make decisions based on test scores.

Additionally, the receiving schools, which bore the brunt of the Appellant's attack, were not present at the hearing and did not have the opportunity to tout their achievements, or give their opinions about the closing schools. Therefore, this type of school against school combat does little to address the underlying issue, which involves utilization and facilities planning.

The next major concern is that the educational program not suffer. Unfortunately, on this issue many witnesses simply used the wrong comparison. They point out that a receiving school is an open space school, yet ignore the fact that 3D/I recommends enclosure of these spaces. They suggest that class size will increase, when the only thing that will increase is the total enrollment in the building, not the class size.

They point out transportation concerns, yet ignore the fact the recommendations include funding for buses and increased police assistance. The various improvements needed in the receiving schools, which include food and cafeteria services, are simply ignored by these witnesses, who persist in the belief that the receiving schools will be totally unaffected by these closings. While they may be skeptical about whether the system will actually provide these improvements, BCPS has in fact committed itself to providing them and provided funding for them. At this point, there is simply nothing else the system can do.

The Appellants' concern with the EAR and FCI scores of the receiving schools also becomes understandable. A basic principle of education is that children be educated in the area which they live. It follows that the children attending these schools will go the nearest school, which in most cases is not significantly farther away than the closing school.

In light of the fact that these schools exist in areas of other underutilized schools, it is inevitable that the receiving schools will have EAR and FCI scores that are not substantially better, or may be even worse than the closing school. However, these receiving schools offer better potential for long term capital and educational improvements than the closing schools.

The Appellants cannot cite a single instance where the actual substance of an educational program will be lost, and fail to ignore the very real possibility that the receiving schools will provide new educational opportunities to students which did not exist in the closing school.

The key in this part of the discussion is "loss" of educational programs. In deciding whether to close a school, the Board is not directly attempting to improve educational performance or set policy. There were no promises made by anyone that test scores would immediately improve as a result of closing these nine schools.

Closing schools represents an indirect effort to improve schools, by using facilities wisely and being able to allocate more resources into fewer schools. The decision must be judged in light of an indirect effort to reach educational goals.

On this point, the case of ACORN, which is a housing organization, must be dismissed as essentially irrelevant to the entire case.

Schools exist primarily to educate children. The decisions on how to open or close them are based upon educational and financial factors. The fact that a school may enhance the property value of an area is not a recognized legal basis for keeping a school open. Likewise, the size of the building in light of an educational goal must be looked at with respect to the particular system, not some larger policy perspective.

ACORN suggests that smaller schools provide better education and that many of these schools should remain for this reason. Dr. Morgan clearly explained that with respect to BCPS, the evidence shows the contrary to be true. The recent test scores for BCPS show the larger elementary schools achieving the biggest gains. However, for purposes of this hearing, the relevant facts are that Baltimore City has clearly not adopted ACORN's policy, and its decision to close schools cannot be judged in light of a policy it has never adopted. BCPS has adopted a policy favoring PreK-8 schools, which means larger, more comprehensive schools on a single site, as opposed to the current configuration where a PreK-1 building might be on one site and the remainder of the elementary school is several blocks away.

The fact that the closing schools exist in low economic areas is absolutely correct. But the question is whether these children are being denied any educational benefit. They are not being denied a public education and are not being expelled from the system. Unfortunately, Dr.

Tildon had the unpleasant experience of meeting someone at a public meeting who was under this impression, accusing the Board of "kicking these children to the curb.

Absent a claim of deprivation of equal educational opportunity or unconstitutional discrimination, there is no right or privilege to attend a particular school. *Bernstein v. Bd. of Educ. of Prince George's County*, 245 Md. 464, 472, 226 A.2d 243 (1967). Nor is there a right for a student to attend a particular program of study. *Slater v. Montgomery County Board of Education*, 6 Op. MSBE 365 (1992).

In *Elprin v. Howard County Bd. of Ed.*, 57 Md. App. 458, 465, 470 A.2d 833 (1984), 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 that may be occasioned by closure or consolidation.

Perhaps the biggest concern which becomes understandable in light of the 3D/I study is that of overcrowding. To communities used to seeing 200 children in a school, the prospect of adding an additional 80 students brings with it the fear of overcrowding. However, the utilization results of the closures in this case must be looked at in the reality of the enrollment trends in Baltimore City.

With respect to capacity, there are two relevant measures, the State Rated Capacity ("SRC") and the Local Rated Capacity ("LRC"). The SRC is a number the State assigns to a school and represents the number of students the State believes the system should be able to educate in that building.

However, each school system has its unique needs. Unfortunately, BCPS has a high number of special education and special needs children which renders full usage under the SRC

impossible. These students require lower teacher to student ratios. A classroom that could handle twenty general education students may only handle ten special education students. In conjunction with BCPS, 3D/I developed a LRC for each school to take into account the unique features of BCPS.

As stated by Dr. Morgan, the LRC is generally lower than the SRT. With respect to BCPS, this is clearly evident. A building which the State determines should hold 500 students may only be able to hold 425 based on the LRC.

The Appellants offered the testimony of Mr. Norm Fruchter, who is an expert in educational policy. He was not familiar with BCPS and his opinion about capacity is that optimum learning occurs at 90%. After questioning Mr. Fruchter, it appears he was referring to 90% of what we would term the SRC. Mr. Fruchter was not familiar the concept of a LRC.

However, Mr. Fruchter's opinion was simply that optimum learning occurred at that level. He certainly did not imply that schools above that rate cannot provide an adequate education. Additionally, he distinguished between the size of the building and class size, and admitted that the risk of losing anything of educational value is less when the building is large and the class size is small, which is precisely the course BCPS has taken.

In determining "capacity," the SRC is of little value, since many schools cannot, as a practical matter, educate this number of children in the building. Likewise, Mr. Fruchter's opinion certainly does not operate as some mandatory cutoff point, above which a school is automatically overcrowded.

Looking at the purpose of a LRC, it is clear that this number is a discounted version of the SRC, based on the unique needs of a particular school system. Therefore, the appropriate point

to use for capacity would be 100% of LRC.

If the LRC is designed to provide a guide for the particular system to consider capacity, then reducing it further, for no educational reason, makes no sense. Optimum capacity would not mean 90% of the LRC, and this number would simply be an arbitrary point with no educational basis.

When examining the effect of closing these schools, it is obvious the total enrollment in the receiving schools will rise. However, many of these schools will still be underutilized, even after absorbing students from the closing schools.

However, another factor must be considered, which is the enrollment trend in the system. If a school system was experiencing rising enrollment, then increased capacity approaching 100% would clearly be a sign of danger. However, the enrollment for BCPS, at least with respect to the area of the city where these schools are located, clearly does not indicate any increase in enrollment. Therefore, the utilization rates of the receiving schools after consolidation, represents the highest they will be for the foreseeable future. In the ensuing years, the rates will go down, not up.

Utilization Rates of Receiving Schools by LRC

School	#60	100%
School	#138	99
School	#223	98
School	#163	98
School	#157	98
School	#21	98
School	#144	97
School	#105	97
School	#62	96
School	#8	95
School	#250	94

School	#57	94
School	#217	94
School	#145	94
School	#102	94
School	#16	93
School	#159	92
School	#87	89
School	#130	86
School	#125	79
School	#101	75

The only school that would actually be at 100% utilization is #60, which is a receiving school for Edgewood. However, this school is expected to have a 15% decline in enrollment during the next few years. Since Edgewood will not close until 2002, the actual enrollment of School #60 would be below 100% at the time of consolidation.

Also, one must keep in mind that the LRC is lower than the SRC. If these numbers were converted to SRC, the actual utilization rates would be lower.

From the above, it is clear that some schools will still be underutilized, even after absorbing the students from the receiving schools.

Finally, there is the issue of the implementation of the decision. On this issue, the Appellants sought extensive discovery and questioning at the hearing, which amounted to nothing less than an attempt to supervise the schools system's implementation of the Board's decision. The Appellants are entitled to be as skeptical as they wish about whether BCPS will in fact keep small class size, enclose open space and provide bus transportation. However, neither the Appellants nor I have the right to supervise that process. For these reasons, the Appellants were not allowed to delve into the inner workings of the school system and examine which principal or teacher is going to which school, or where the certified teachers are going as opposed to the uncertified

teachers.

The law sets forth very clear guidelines for the time frame involved in closing schools, which in turns relates to the reasonableness of implementing the plan:

COMAR 13A.02.09.02 Date of Decision.

Except in emergency circumstances, the decision to close a school shall be announced at least 90 days before the date the school is scheduled to be closed but not later than April 30 of any school year. An emergency circumstance is one where the decision to close a school because of unforeseen circumstances cannot be announced at least 90 days before the date a school is scheduled to close or before April 30 of any school year.

In terms of providing sufficient time to implement the Board's decision, I have no authority to create timeframes apart from what the law already requires. A school system, which complies with the time and notice requirements, has, as a matter of law, made a decision which adequately affords sufficient time to implement its plan.⁹

The Board's authority in this area is clear, as the case of *Bernstein v. Montgomery County Bd. of Educ.*, 4 MSBE 409 (1986) states. The State Board found in that case that changes to a plan to close schools that involve the details of implementation of that plan can properly be made after the April 30th deadline and do not invalidate the underlying plan to close schools.

In *Bernstein*, a local board of education announced a plan well before the April 30th deadline to close a high school and to gradually send the affected students to another high school

⁹ An Appellant would clearly have the right to challenge the implementation of a closing plan, based on the plan itself, even if the decision was made before April 30. For example, a plan which had no implementation provisions, or one which calls for \$200,000 in transportation costs, but only commits half of that amount in deficient on its face. The Appellants in this case do not deny that the BCPS decision itself contains implementation provisions, they simply do not believe that BCPS will in fact make these implementations.

over the course of two years. After the April 30th deadline, the local board modified the closing plan by eliminating the decision to stagger the closing over a two-year period. Instead, the local board decided that closing would be accelerated and completed within one year. In that case, the State Board concluded:

The decision to close the Woodward High School at the end of the 1986-1987 school year was made by the County Board on December 2, 1985. The actions of the County Board on May 15th did not modify the decision to close Woodward, but only the details of the manner of implementing that decision, by providing that the total consolidation of the student body will take place in 1987 and not in 1988. Thus, the split campus that had been planned for the student bodies of these two schools for the 1987-1988 school year has been eliminated.

The modification of the implementation of the closing of Woodward High School does not change the undisputed fact that the County Board made the decision to close Woodward High School on December 2, 1985. Therefore, we conclude that the actions of the County Board on May 15th are not contrary to either Local Policy or the provisions of COMAR 13A.02.09.02.

Bernstein, 4 MSBE at 412.

In this case, there is not even an issue about changing the terms of implementation, simply implementing the decision as written.

Turning to the actual factors to be considered under COMAR, BCPS has clearly established its decision is justified under COMAR 13A.02.09:

.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.

The State Board has held that so long as there is adequate reason that is supported by at least one criterion, the decision to close a school will be upheld. *Kensington Elementary School v. Montgomery County Bd. of Educ.*, 2 MSBE 671, 681 (1982). In the instant case, there was more than one criterion that supported the Board's decision to close these nine schools.

The Board's decision in general is clearly supported under factors (1), (2) and (6). Indeed these factors are intertwined in the present case. The reduction in enrollment has led to reduced utilization, which in turn creates a financial drain on the system. BCPS will realize a savings of approximately \$40,000,000 in deferred capital maintenance and repairs by closing these schools. Additionally, it saves on operating costs.

With respect to factors (3) and (7), the transportation and relocations issues have been addressed and resolved. Students will be going to schools in the area where they live. BCPS has additionally waived its one-mile bus transportation requirement in one instance and will provide bus transportation where it normally would not.

There is no impact on racial composition, since the receiving schools will have the same racial profile after closing as before. There is a less than 2% variation in racial profile as a result of these closures.

By requiring 3D/I to adhere to the stated educational goals, there is no loss of educational programs.

With respect to each school, the factors are also sustained.

School #304, Harbor View, was built in 1971 as a school for students with special needs. It was designed to handle grades PreK-2. During the 2000-2001 year it had an enrollment of 31 students in a building rated to handle 175 under the LRC. Harbor View has an FCI of .35 (poor) and EAR of 60% (needs minor improvement).

However, Harbor View shares a site with Bay Brook Elementary, School #124, which is a comprehensive zoned school. Both schools can be consolidated into one building.

Closing School #304 is primarily an administrative matter and does not involve the relocation of any students. All records and equipment from Harbor View will be transferred to School #124 and the new school will handle grades PreK-5. Sixth grade students from #124 will be sent to the zoned school, Benjamin Franklin Middle School. The name "Harbor View" will be retired from the system. Projected cost savings from the physical condition of the building is \$1,049,601.

School #14, Park Heights, was built in 1976 and has a LRC of 230 students and serves

grades PreK-5. During the recent school year it had 192 students. It has an FCI of .10 (fair) and an EAR of 56% (needs major improvement). Improvements are needed in the art, music and physical education areas and toilet facilities. Classrooms are open space.

Although the utilization rate at #14 is higher than other schools, the school is smaller than the BCPS recommended range for an elementary school, with a capacity of 230 students. Therefore, the utilization rate is deceptive, since the school serves a small number of students.

The receiving school, Pimlico is one of the larger schools in the system and has essentially the same EAR and FCI scores as Park Heights. Students from Park Heights can be transferred to Pimlico Elementary School. After accepting students from Park Height, Pimlico will be at 75% utilization. BCPS has allotted \$61,000 to cover improvements in the kitchen at Pimlico and \$105,300 for transportation costs resulting from the closing of Park Heights. Projected savings from closing Park Heights total \$4,540,755.

School #135, Luther C. Mitchell, was constructed in 1974 and has a capacity for 105 students. It was originally constructed to handle overflow from School #101, Elmer Henderson. It currently has 63 students and serves grades PreK-1. It's EAR is 54% (needs major improvement) and FCI is .43 (poor).

This is another example of a school whose utilization rate is high, but serves a small population. The overcrowding which led to construction of the school in 1974 no longer exists. The capacity is well below the level set by the system for an elementary school, and the zoned elementary school, School #101 has capacity for all the students at School #135.

BCPS has budgeted \$30,000 to enclose the open spaces at School #101. There are no transportation costs anticipated. The receiving school, #101, will still be underutilized at 75% after receiving students from School #135. Total savings by closing School #135 are \$1,100,272.

School #26, Madison Square, was built in 1963 and has not received any renovations during its lifetime. It shares the site with a recreation center. It is in an area with three other underutilized schools. It has an EAR of 62% (needs minor improvements) and FCI of .23 (poor).

Students at School #26 can be accommodated in the other three schools in the area, one of which is in "fair" condition. After closing School #26 the receiving schools will be utilized at 86%, 88% and 94% LRC. All relocated students will be within one mile of their newly assigned school.

Transportation costs are anticipated at \$105,300 and upgrades for the food service will cost \$61,000. Projected savings from closing School #26 are \$4,877,427.

School #202, Lafayette, was built in 1963 and has not received any major renovations during its lifetime. It was originally built to relieve overcrowding at Schools #144 and #145. Those conditions do not exist any longer. It has a capacity of 410 students and had 302 students during the current year. It is in an area of four other underutilized schools and has the lowest EAR (53%) of these schools in the area. It has an FCI of .26 (poor).

Students at School #202 can be accommodated at the other four schools in the area. The utilization of these schools will be 91%, 99%, 97% and 94% after receiving students from School #202. Two of the receiving schools are in "good" condition.

Transportation costs are projected at \$105,300. Total savings by closing school #202 are \$4,797,535.

School #38, Malcolm X, was built in 1971 and has a capacity for 423 students. It had 213 students during the current year. It has an EAR of 53% (needs major improvement) and FCI of .27 (poor). It serves grade PreK-2. It was originally constructed as an overflow for the area elementary school and built as temporary, modular building. It does not meet the targeted size of an elementary school by BCPS and serves a small population.

Students from School #38 can be accommodated at Schools #254 and #62. These schools will be utilized at 94% and 96% respectively after receiving students from School #38. All relocated students from School #38 will be within one mile of their new school.

Renovation of classroom space at School #254 will cost \$109,000 and improvement to the freezer at School #62 will cost \$45,000. Transportation to both School #62 and #254 will cost \$175,000. Total savings from closing School #38 are \$1,762,710.

School #67, Edgewood, was built in 1958 and has not received any major renovations during its lifetime. It has a capacity for 515 students and had an enrollment of 341 during the current year. It also exists in an area with four other underutilized schools.

School #67 has an EAR of 52% and FCI of .20 (poor). Students can be reassigned to Schools #21, #87, #60 and #217. School #87 had an addition in 1974 and is in "good" condition. After closing school #62, School #21 will be at 98% utilization, School #217 will be at 94% utilization, School #87 will be at 89% utilization and School #60 will be at 100% utilization.

The obvious concern with School #67 was the capacity of one of the receiving schools, #60. If School #67 were closed in summer of 2001, School #60 would be at or slightly above capacity. However, this school is expected to experience a 15% decline in enrollment. Therefore, in 2002, when the school actually closes, enrollment will already be below 100%.

BCPS has budgeted \$140,400 for transportation cost associated with sending students to School #87 and \$85,000 for improvements to lighting, gym floor and other costs to School #60. Total savings in closing School #67 are \$2,538,901.

School #139, Charles Carroll, was built in 1927 with an addition built in 1972. It has capacity for 1,000 students and has an enrollment of 464 students during the current year. It has an EAR of 38% and the lowest FCI score of any of the schools in question, with a score of .53 (poor). It is also projected to have the lowest utilization of any of the schools in question, with an expected rate of 26% by the 2009.

Although it is a large school, it cannot absorb the students from the surrounding underutilized schools. It is a PreK-8 school, but the building itself is not well suited for this type of program. It also has a deferred capital savings cost of \$19,765,773.

Students from School #139 can be reassigned to School #8, which will then be utilized at 95%, School #102, which will then be utilized at 94%, School #57, which will then be utilized at 94% and School #16, which will then be utilized at 93%.

BCPS has budgeted \$210,600 for transportation costs and \$61,000 for improvements to the kitchen at School #8.

Mildred Monroe was a woman who worked as a custodian providing maintenance services at School #32, and who impressed the community to the point that it renamed the building after her. It is ironic that this school must now be closed, due to essentially a lack of maintenance, and a dwindling community.

School #32 has an EAR of 54% and FCI of .17 (poor). It has capacity for 285 students

in grades PreK-5 but has an enrollment of 178 students during the current year. School #39, Dallas Nicholas, is in the same area as Mildred Monroe and was built in 1976 as an open space school. It is air conditioned and in better condition than School #32. School #39 can accommodate students from School #32 and BCPS has budgeted \$105,000 for partitions to convert the open spaces to classrooms.

The Appellants' failure to sustain their burden of proof in this case is not due to an expedited hearing, lack of discovery into school system implementation policies and failure to obtain experts. Had the Appellants obtained their own demographic study, building report and set of recommended closures, it would not change the fact that this Board conducted a process which was thorough, complete and based upon reliable and accurate information.

" The test is whether the move was reasonable and within the discretion of the Board. The test is not even that there have been other plans that worked equally well, or may , in the opinion of some, have been better, the test is the action which was taken was arbitrary, capricious, or illegal."

Bernstein at 464 (1996).

Having fought the good fight, the Appellants should heed the words of Dr. Tildon:

I have to say me personally for myself, I have been having some sleepless nights because this is not easy, and if I were a parent and I knew that I had to change because of some of the decisions being made, I would feel just like most of you, but hopefully after the 13th, whatever the decisions are, we can all rally around those decisions and continue to move this system forward. Do not let anybody tell you that you want less than the product that we trying to give you, and that's an excellent one. . .BCPS Ex. #44 p. 118.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Appellants have failed to prove, by a preponderance of the evidence, that the decision of the New Baltimore City Board of School Commissioners to close nine (9) separate schools, was arbitrary, unreasonable, or illegal. COMAR 13A.01.01.03E; 13A.02.09.03B.

PROPOSED ORDER

It is proposed that the decision of the New Baltimore City Board of School Commissioners to close nine (9) separate public schools, based on the decision of March 13, 2001 be UPHELD.

Date: June 11, 2001

James W. Power
Administrative Law Judge