DIPTI SHAH, ET AL.,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
HOWARD COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 02-30

OPINION

In this consolidated appeal, Appellants challenged the decision of the Board of Education of Howard County adopting new attendance zones for its high schools.[1] The matter was transferred to the State Office of Administrative Hearings for expedited review. A hearing took place on May 13 and 14, 2002. On June 3, 2002, the Administrative Law Judge (ALJ) issued a proposed decision, a copy of which is attached as Exhibit 1. Exceptions were filed and Ms. Shah on her own behalf, counsel for Mr. and Mrs. Smith, and the Howard County Board attorney presented final oral argument to the State Board on June 25, 2002.

Having reviewed the record in this matter and considered the arguments of the parties, we adopt the Findings of Fact and Conclusions of Law of the administrative law judge. In finding that the redistricting plan was neither arbitrary nor unreasonable, but represented sound educational policy, the ALJ explained:

> In Howard County, sound educational policy is determined through the representative democracy process. Members of the BOE (Board of Education) are elected by the public: they are chosen by the electorate to formulate educational policy for the county. By the exercise of their independent judgment and in considering the factors delineated in Policy 1675-R, they apply sound educational policy to the county as a whole. It is up to the BOE to establish sound educational policy. In this case I find that the BOE plan, while not perfect, represents sound educational policy. Therefore, the Appellants have not met the stringent legal standard set forth at COMAR 13A.01.01.03E(1)(b)(i).

[1]The Appellants are Dipti Shah; Anna Spring; and Roger and Patti Smith. Roger and Patti Smith are represented by legal counsel.

We concur. For the reasons stated by the administrative law judge, we therefore affirm the school redistricting decision of the Board of Education of Howard County.

Marilyn D. Maultsby
President

Reginald L. Dunn
Vice President

JoAnn T. Bell

Philip S. Benzil

Dunbar Brooks

Clarence A. Hawkins

Walter S. Levin, Esquire

Karabelle Pizzigati

ABSENT
Edward L. Root

Walter Sondheim, Jr.

John L. Wisthoff

July 10, 2002

EXHIBIT 1

DIPTI SHAH, et al.,	*	BEFORE JAMES T. MURRAY,
APPELLANTS	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE OF
BOARD OF EDUCATION	*	ADMINISTRATIVE HEARINGS
OF HOWARD COUNTY	*	OAH CASE NO. MSDE-BE-04-200200001

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

PROPOSED DECISION

STATEMENT OF THE CASE
PRELIMINARY MATTERS
ISSUE
SUMMARY OF THE EVIDENCE
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On January 24, 2002, the Howard County Board of Education (the "BOE") issued a decision adopting new attendance zones for its high schools (the "BOE Plan").[1] Appeals of that decision were filed with the Maryland State Board of Education (the "State Board") by Dipti Shah ("Shah"), Anna Spring ("Spring") and Roger and Patti Smith (the "Smiths") (collectively, the "Appellants"). The State Board consolidated those appeals and transmitted them to the Office of Administrative Hearings ("OAH") on April

[1] In the Order on Motion I issued on May 3, 2002, this plan was incorrectly referred to as the Superintendent's Plan.

3, 2002, for the purpose of conducting a consolidated and expedited contested case hearing.

On March 19, 2002, the BOE filed a Motion for Summary Affirmance with the State Board through its counsel, Mark Blom, Esquire. On April 3, 2002, the Smiths, through George W. Hermina, Esquire, filed an Opposition to Appellee's Motion for Summary Affirmance with the OAH. On April 22, 2002, the BOE filed its reply to the Opposition to Appellee's Motion for Summary Affirmance. On May 3, 2002, I issued an Order granting the Motion for Summary Affirmance in part and denying it in part.

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 13 and 14, 2002, before me at the offices of the Howard County Board of Education, 10910 Clarksville Pike, Ellicott City, Maryland to consider the remaining issues. Appellants Shah and Spring represented themselves and Appellants Smith were represented by Forrest Mays, Esquire on May 13, 2002 and George Hermina, Esquire on May 14, 2002. Mark Blom, Esquire, represented the BOE throughout.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Office of Administrative Hearings, and the COMAR regulations governing appeals to State Board. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999); COMAR 28.02.01; and COMAR 13A.01.01.03.

PRELIMINARY MATTERS

As a result of my Order of May 3, 2002, only two basic issues remained for hearing in this matter. On May 10, 2002, the BOE submitted a Motion to Dismiss one of those issues, whether the BOE had followed Policy 1675-R in making its redistricting decision. I considered the Motion prior to commencing the first day of hearing on the merits and, after taking time to deliberate on the arguments of the parties, I granted the Motion to Dismiss. The bases for granting the Motion to Dismiss are set forth below.

ISSUE

The issue is whether the boundary line change plan for high schools for school year 2002-03 adopted by the BOE on January 24, 2002 was arbitrary or unreasonable.

SUMMARY OF THE EVIDENCE

A. Exhibits

A list of exhibits is attached hereto as Appendix A.

B. Testimony

Sandra French, BOE member, Jane Schuchardt, Chair, BOE, and Dipti Shah testified on behalf of Appellant Shah. Appellant Spring presented the testimony of herself and Jerome Bialecki, co-chair of the Boundary Line Advisory Committee (BLAC), and Colleen Reardon. The Smiths presented testimony from David Drown and Kevin Gregory Fox. A proffer was also accepted on behalf of the Smiths that the testimony of Jeffrey Troll would be substantially the same as that of Mr. Fox. No witnesses were presented on behalf of the BOE.

FINDINGS OF FACT

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

1. All of the Appellants are residents of Howard County and have children who will be affected by the BOE plan. (Test. Shah and Spring; Appeals of Shah, the Smiths and Spring)

2. Every time a new school is opened in Howard County, it is necessary for the BOE to redistrict the schools of the type opened in order to relieve overcrowding at some schools and fill the new school. (Test. Drown, French and Schuchardt)

3. Children of all of the Appellants have been affected by previous redistricting plans implemented by the BOE due to the opening of new schools (Test. Drown, Shah and Spring)

4. In 1999 the BOE directed a review of the redistricting process, which included a boundary line advisory committee. That new collaborative effort resulted in a staff/community boundary lines recommendation to the BOE regarding Bonnie Branch Middle School. (Appellants Smith Ex. 5)

5. In approximately March of 2001, BLAC was reconstituted and charged with the responsibility of helping to create a stable path ("feeder system") from Kindergarten – 12th grade in the redistricting of high schools for the 2002 – 2003 school year. (Test. Bialecki and Drown; Appellants Smith Ex. 5)

6. In reviewing its mission, BLAC determined that creating or helping to create a

stable feeder system from Kindergarten – 12th grade was too complex a project. It focused instead on the redistricting of high schools for the 2002 – 2003 school year. (Test. Bialecki)

7. The redistricting of high schools for the 2002 –2003 school year was necessary due to the construction of Reservoir Hill High School ("Reservoir"), a new high school that will open for the 2002-2003 school year, and also to relieve overcrowding at four other high schools. (Test. Drown, French and Schuchardt)

8. In order to accomplish its goal, BLAC met numerous times between the time it was re-formed and the date it submitted its report to the BOE. During those meetings it considered numerous different potential redistricting plans. (Test. Bialecki; BOE Ex. 1 tab 2)

9. In its report to the BOE, BLAC presented three different redistricting plans. The BLAC report detailed its view of the strengths and weaknesses of all of the plans and the particular strengths and weaknesses of each plan. BLAC did not endorse any of the plans it presented to the BOE. (Test. Bialecki)

10. In addition to the three redistricting plans presented to it by BLAC, the BOE also considered a redistricting plan presented to it by the Superintendent of Schools and 5 independent plans presented to it by various community groups. (Test. Bialecki, Drown, French and Schuchardt)

11. The BOE received community input about the various plans and other concerns regarding redistricting the high schools at numerous regular BOE meetings and redistricting work meetings. The BOE and Board members also received input through

conversations with citizens, via email, regular mail and by telephone. (Test. Drown, Bialecki, Fox, French, Reardon, and Schuchardt)

12. After considering all of the other viable plans, the factors enumerated in Policy 1675-R, its own previous experiences in opening new high schools and the experiences of other counties in opening new high schools, on January 24, 2002, the BOE adopted its own redistricting plan, which was a modification of the Red Plan presented to it by Ms. Shah submitted the following, which were admitted into evidence:

1. Letter of appeal from Shah to Dr. Grasmick

2. Letter from Shah to Dr. Grasmick, with attachment

BLAC. (Test. French and Schuchardt)

13. Under the BOE plan, more students were moved than in other plans it considered and the transportation costs were higher than in other plans it considered. (Test. Bialecki, Drown, Fox, French, Schuchardt, Shah and Smith; Smith Appellant Ex. 3)

14. Under the BOE plan, the average time students had to ride a bus to school was less than in other plans it considered. (Test. Drown)

15. Under the BOE plan, no rising juniors were moved. (Test. Drown and French)

16. The BOE plan left fewer small pockets of students than other plans and it created a better feeder system than other plans it considered. (Test. Drown, Fox, Spring)

17. After learning of the BOE's redistricting plan, the Appellants filed appeals of that decision with the State Board. (Appeals of Shah, the Smiths and Spring)

DISCUSSION

I. Motion to Dismiss

Prior to the hearing, the BOE offered a Motion to Dismiss the issue of whether the BOE had followed Policy 1675-R in making its redistricting decision of January 24, 2002. Due to the nature of the Motion, I heard argument on it prior to commencing the hearing on the merits.

The BOE contended that it did not fail to follow policy 1675-R in reaching its decision on how to redistrict high schools on January 24, 2002, but even if it did, failure to follow its own policy regarding a redistricting decision, in and of itself, does not void the decision or otherwise adversely affect it. In support of that proposition, the BOE pointed to the State Board decision in Hart v. Howard County Board of Education, 5 Op. MSBE 155 (1988). The BOE maintained further that the Hart decision is binding pursuant to Md. Code Ann., State Gov't § 10-214(b) (1999).

The Appellants argued that to entertain the motion at the time set for the hearing to begin was inappropriate and unfair. They also maintained that to grant the BOE's motion would eviscerate their cases. The Appellants argued further that the language in Hart relied upon by the BOE is mere dicta and was not necessary to the actual holding. According to the Appellants, the language in Hart relied upon by the BOE does not fall within the ambit of Md. Code Ann., State Gov't. § 10-214(b), has no precedential value and is not binding.

OAH's Rules of procedure apply to all hearings before the OAH. COMAR 28.02.01.01A. COMAR 28.02.01.16 provides, in pertinent part:

> A. Unless otherwise provided by this chapter, this regulation pertains to all motions filed with the [OAH].

B. Unless otherwise provided by this chapter:

(1) A party may move for appropriate relief before or during a hearing;
(2) A party shall submit all motions in writing or orally at a hearing…

C. Motion to Dismiss. Upon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim for which relief may be granted.

The most instructive language from Hart is as follows:

> While it appears that the Board did not give full consideration to [Policy 1675], it is observed that these guidelines are not mandatory. The [BOE] has stated that "it may be impractical to reconcile each and every boundary line alternative with each and every factor."

Hart at 173.

State Board hearings are subject to Title 10, Subtitle 2 of the State Government Article, Annotated Code of Maryland, the "contested case provisions" of Maryland's Administrative Procedure Act ("APA"). Md. Code Ann., State Gov't § 10-203 (1999). Under the APA, a board, commission or agency authorized to conduct a contested case hearing may either hear the case itself or delegate the hearing to the OAH. Md. Code Ann., State Gov't. § 10-205(a) (1999). In this case, the State Board delegated its hearing authority to the OAH. Section 10-214(b) of the APA provides:

> (b) Regulations, rulings, etc. binding. – In a contested case, the [OAH] is bound by any agency regulation, declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or would have been bound if it were hearing the case.

While it is true that the BOE could have raised its Motion at an earlier stage of the proceedings, it was not required to do so. Therefore, in light of the relevant regulation, I find that the BOE's Motion is neither unfair nor inappropriate.

Turning to the merits of the Motion, it is apparent from § 10-214(b) that the language in Hart relied upon by the BOE is binding if it was a necessary part of the adjudication in that case. I find that it was. The quoted language is found in the section of the decision captioned "CONCLUSIONS OF LAW" and forms the core of the hearing examiner's decision. The hearing examiner found that although the BOE did not "give full consideration" to the "guidelines", he nonetheless affirmed the BOE's decision because the BOE "had a substantial and supportable basis for making the decision it made." Hart at 174. On the other hand, in Citizens Against Random Redistricting v. St Mary's County Board of Education, MSBE Op. 99-9 (1999), the State Board held that a local board was required to have some "guidelines" for making redistricting decisions. However, those guidelines were minimal. Finally, in Slider II, et al. v. Allegany County Board of Education, MSBE Op. 00-35 (2000), the State Board found that local board policies such as Policy 1675-R are not mandatory and violation of them by a local board does not nullify a local board's decision. Accordingly, I find that State Board has previously adjudicated the question of whether Policy 1675 or similar policies are mandatory and concluded that they are not. It has also already been adjudicated that failure of a local board to follow such a policy, in and of itself, is a not ground for voiding the local board's decision. Pursuant to § 10-214(b) of the APA, I am bound by those decisions.

As I explained on the record at the hearing, even if Hart and its progeny did not bind me, I would have reached the same conclusion. The Appellants' arguments implicate the so-called "Accardi doctrine," i.e., generally federal administrative agencies

must follow their own rules, and if they do not, the resulting agency action is invalid; no showing of prejudice by the complaining party is necessary. United States ex rel Accardi v. Shaughnessy, 347 U.S. 260, 268, 74 S. Ct. 499, 503, 98 L.Ed. 681 (1954). Maryland courts generally take a more pragmatic approach but, on occasion, have embraced the Accardi doctrine. See, Hopkins v. Inmate Grievance Commission, 40 Md. App. 329, 391 A.2d 1213 (1978).

The holding in Hopkins is most consistent with the stricter federal view of the Accardi doctrine issues. In Hopkins, the court found that the Division of Correction rule at issue, which was part of a federal Consent Decree, was couched in unambiguous, mandatory language and was not intended to govern internal agency procedures. It was specifically adopted to confer important procedural benefits and safeguards upon inmates, including, among other things, "minimizing the length of the period of restrictive confinement which an inmate may be forced to endure prior to an adjudication of guilt." 40 Md. App. at 337. However, even the Hopkins court recognized that the Accardi doctrine is not absolute when it stated:

> While there is an abundance of authority for the doctrine that an agency cannot violate its own rules and regulations, this doctrine has its exceptions. None, however, is applicable to the instant case. The principal exception is that the doctrine does not apply to an agency's departure from procedural rules adopted for the orderly transaction of agency business. In American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970), the Supreme Court, in refusing to set aside an order of the Interstate Commerce Commission for failing to require strict compliance with its own regulations, said:
>
> "The rules were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion as in Vitarelli v. Seaton, 359 U.S. 535, 79

> S.Ct. 968, 3 L.Ed.2d 1012; nor is this a case in which an agency required by rule to exercise independent discretion has failed to do so. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681; Yellin v. United States, 374 U.S. 109, 83 S.Ct. 1823, 10 L.Ed.2d 778. Thus there is no reason to exempt this case from the general principle that '(i)t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it . . .. Unlike some rules, the present ones are mere aids to the exercise of the agency's independent discretion." NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764 (8th Cir. 1953).

Hopkins, 40 Md. App. at 336.

That brings us to the crux of the Appellants' arguments: whether Policy 1675-R is mandatory and, if so, whether it was promulgated to facilitate the orderly transaction of business or to confer important procedural benefits.

The Appellants have not cited any language from Policy 1675-R or related documents in support of their claim generally, nor have they pointed to language that might be considered mandatory rather than permissive. In fact, they, as do the relevant MSBE decisions, refer to Policy 1675-R as a "guideline".

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Motor Vehicle Administration v. Gaddy 335 Md. 342, 346, 643 A. 2d 442, 444 (1994); Motor Vehicle Administration v. Shrader, 324 Md. 454, 462 (1991), 597 A.2d 939, 943; Taxiera v. Malkus, 320 Md. 471, 480, 578 A.2d 761, 765 (1990). This rule is applicable as well to regulatory construction. A statute, regulation or policy must be construed reasonably with reference to the purpose, aim, or policy reflected in it. Motor

Vehicle Admin. v. Vermeersch, 331 Md. 188, 194, 626 A.2d 972, 975 (1993); Kaczorowski v. City of Baltimore, 309 Md. 505, 513, 525 A.2d 628, 632 (1987); Hopkins, supra.

It has long been held that the question of whether a statutory provision is mandatory or directory "turns upon the intention of the Legislature as gathered from the nature of the subject matter and the purposes to be accomplished." Hitchins v. City of Cumberland, 215 Md. 315, 323, 138 A.2d 359, 363 (1958) (Regarding a provision using the word "shall"). Even the use of seemingly mandatory words like "shall" is not treated as signifying a mandatory intent if the context in which it is used indicates otherwise (citations omitted). Blumenthal v. Clerk of Cir. Ct., 278 Md. 398, 408, 365 A.2d 279, 285 (1976) (Citing cases dating from 1878). In recent years, that same position has been reiterated often. See, for instance, Gaddy, supra; Shrader, supra; Board of School Comm'rs v. James, 96 Md. App. 401, 625 A.2d. 401 (1993).

The purpose of Policy 1675-R is to provide a basic framework for the onerous task of redistricting schools in Howard County and to give the State Board some guidance as to how the BOE went about that process. There is no evidence that its purpose was to provide important procedural benefits to anyone. In fact, few procedural benefits of any type are required or are afforded at the county board level in school board redistricting matters. In this case those benefits, notice and an opportunity to be heard were afforded. Bernstein, 245 Md. at 473.

In order to determine whether failure of an agency to follow its own rules may affect its decision, courts also look to whether a penalty is provided for violation of the statute, regulation or guideline at issue. In Resetar v. State Board of Education, 284 Md.

537, 399 A. 2d 225 (1979) which upheld the termination of an employee of a county school system, the court noted that the county board of education's regulation provided no penalty and made no provision in the event of a violation. Resetar, 284 Md. at 547. In Shrader, supra, the Court of Appeals explained:

> We have previously held that dismissal is not the required sanction if a statute or rule does not state that dismissal will result from non-compliance; the statute or rule must be reviewed to determine whether a sanction for non- compliance is specified. (citations omitted).

Shrader, 324 Md. at 467.

The Shrader court went on to find that failure to hold an administrative hearing within the statutory time frame should not result in dismissal of the administrative case because no penalty was provided for in the statute and dismissal would not be consistent with the statutory scheme.

Nowhere in Policy 1675-R or in State Board cases that address that policy is a penalty prescribed for the failure of the BOE to strictly adhere to the considerations set forth in Policy 1675-R. The cases, in fact, are inapposite.

Accordingly, for the reasons stated above, I granted the BOE's Motion to Dismiss the issue of whether the BOE considered every factor set forth in Policy 1675-R.

II. Merits

COMAR 13A.0l.0l.03E, establishes the standard of review of decisions of county Boards of Education that involve local policy. It provides that the decision of a county Board of Education is considered prima facie correct.

In the present case, the Appellants have contested a redistricting plan passed by

the BOE that encompasses most of the public high schools in Howard County. The relief requested of the Appellants is unclear, but at the very least they seek to block the implementation of the BOE plan. At the conclusion of the Appellants' case, the BOE made a motion for judgment. I granted that motion. In reaching that decision, I relied upon the documentary evidence previously admitted into evidence and the evidence presented by the Appellant at the hearing. The reasons for that ruling follow.

The scope of appeals in redistricting matters is explained in Bernstein v. Board of Education of Prince George's County, 245 Md. 464, 226 A.2d. 243 (1967). In Bernstein, the Court held that test is not whether there were other plans that would have worked as well or even better than the plan adopted by the local board, but whether the action taken was arbitrary, capricious or illegal. That standard is codified at COMAR 13A.01.01.03E(1)(a).

In light of my prior rulings, the hearing was supposed to be limited to the issue of whether the BOE's redistricting plan adopted on January 24, 2002 was arbitrary or unreasonable.[2] A decision may be arbitrary or unreasonable if it is "contrary to sound educational policy" or "[a] reasoning mind could not have reasonably reached the conclusion the county board reached." COMAR 13A.01.01.01E(1)(b).

The Appellants complaints fall into several broad categories: the BOE plan did not "fix" the feeder school problem, it cost more than other plans, it moved more students than other plans, it left "small pockets" of students going to different schools than other students in their area, and procedural issues. I shall address the last category first.

[2] The evidence presented at the hearing by the Appellants was, however, not so limited.

What I have referred to as "procedural issues" has several aspects, all of which are related to some extent. A prominent theme underlying all of the present appeals is that past redistricting plans were not comprehensive enough. This, in turn, according to the Appellants, had several consequences; unnecessary movement of students, isolated pockets of students and preferential treatment for some families in the form of special exceptions.

Some of these complaints were in direct contradiction to one another. For instance, some Appellants were highly critical because the BOE did not engage in long-term planning for redistricting. In several of the Appellants' views, better long-term planning would result in redistricting less often and with better results. Conversely, several of the Appellants complained about a special exception granted by the BOE several years ago to students of Glenelg High School ("Glenelg") based on long-range plans. Some Appellants felt that in the present redistricting case they should be given the same consideration. Testimony from board members elicited by the Appellants, however, clarified the BOE's action in both regards. Witnesses from the BOE and Mr. Drown explained that the BOE does project a 5-year plan, but that due to factors beyond its control, the plan is very tentative. Ms. French stated that long-term planning is desirable, but, for the most part, impractical in terms of details because many of the factors that go into long-term planning are beyond the BOE's control. School budgets are planned several years in advance, but the County Council sets the actual budget less than a year in advance. The BOE also has no control over State monies or other agencies that can have a substantial impact on new school construction, additions to

schools and renovations. Additionally, the BOE has no control over zoning matters that may affect housing density or county growth patterns. Ms. French used the situation with Glenelg High School ("Glenelg") as an example of the problems that may result when planning is too long-range. The Glenelg situation of which some of the Appellants complain arose because the BOE planned to open a new addition to Glenelg due to overcrowding. It was projected that the new addition would open for the 2000-2001 school year. However, due to the overcrowding at Glenelg, it was necessary to transfer students from Glenelg to other schools during the construction period, but it was anticipated that many of those same students would eventually return to Glenelg when the new addition was opened. Therefore, in order to disrupt as few students as possible, the BOE granted a special exception to allow those Glenelg student who wanted to continue to attend Glenelg to do so under the condition that they were responsible for providing their own transportation. About half of the eligible students opted to remain at Glenelg. Unfortunately, due to problems with obtaining the necessary permits from the local health department and the Maryland Department of the Environment, the new addition to Glenelg did not open in 2000 and, in fact, probably will not open until 2005. Thus, the students to whom special exceptions were granted will have matriculated by the time the new addition is opened. Primarily because of its experience with Glenelg, the BOE no longer grants the kind of special exceptions that it did for Glenelg. In short, the BOE's last attempt to project detailed plans well into the future did not fare well. The BOE's attempt to move fewer students left Glenelg still crowded and, in fact, generated much dissatisfaction among other

county residents who feel they are entitled to the same treatment. Moreover, Appellant Spring testified that she is satisfied with the BOE's plan, but filed her appeal because she believes that she should be granted a special exception. In short, long term planning is a worthwhile objective, but because there are many important factors to consider over which the BOE has little control, concrete projections well into the future may be counterproductive.

Related to these claims is the contention that students are redistricted unnecessarily. In the Appellants' views, students in Howard County are moved from school to school unnecessarily because the BOE has not implemented a more comprehensive redistricting plan in the past, which includes a more comprehensive "feeder system" for the high schools. This, in turn, leads to more redistricting in the future. For the same reasons, the issue of isolated pockets of students was a major complaint. The evidence on these issues was unpersuasive.

More importantly, however, the above issues relate to past actions of the BOE or other actions of the BOE such as special exceptions. They do not relate to the BOE's plan and are therefore not probative of whether the BOE's plan is arbitrary or unreasonable.

Another issue that I consider procedural is the claim that the BOE made some of its assumptions based upon incorrect data. This claim assumes that a decision made based on some data that is inaccurate would be arbitrary or unreasonable. That may be true if the data relied upon was known to be incorrect and substantial portions of it were inaccurate. That is not the case here and, in any event the Appellants failed to

prove that the data relied upon by the BOE in making its decision on January 24, 2002 was not substantially correct. What the evidence did show was that some of the Appellants disagreed with some of the data relied upon by BLAC and the BOE and that in at least two instances data supplied to the BOE through the Superintendent's office were flawed. The evidence showed, as well, that the flaws in the Superintendent's data were pointed out by citizens and corrected before the BOE's plan was adopted. The evidence also showed that during the period at issue, the Superintendent had made arrangements to use new computer software designed to provide more accurate data and that the data set from which the information was compiled is very dynamic. Finally, the evidence is clear that when it made its decision on January 24, 2002, the BOE had available to it the latest and most accurate data available.

The remaining issues are of a different nature than those discussed above, but there is considerable overlap. The complaints here are that the BOE plan does not include a major reworking of the "feeder" system for high schools as was contemplated in the original charge to BLAC, it costs more than other plans, more students are moved than in other plans and Reservoir will be opening with only two grades instead of three. There is also the concern about "small pockets" of students under the BOE plan.

Although the procedural issues related to BLAC were addressed prior to the merits hearing, the Appellants believe this claim to be different. Here the Appellants apparently claim that the BOE plan is contrary to sound educational policy because the BOE did not abide by the original charge it gave to BLAC, which included devising a comprehensive redistricting plan that included a "feeder system" whereby the vast

majority of children stayed in the same school as their classmates from elementary school through high school. These arguments are not persuasive.

The statement that the BOE plan does not represent sound educational policy because of how it treated the BLAC recommendations is without merit. An Associate Superintendent, not the BOE originally conceived BLAC, in order to try to get more public input into the redistricting process. BLAC changed its own mission after determining that its original charge was too complex. However, in its recommendations to the BOE, the BLAC plans did attempt to improve upon the feeder system for high schools. The facts that BLAC may not have had all of the data that the BOE had, or that some of the data with which it was provided may have been incorrect are also not determinative. As the BOE had no obligation to rely on BLAC for anything, the fact that it did not adopt as its own plan one of the plans presented to it by BLAC is of no legal significance. In fact, the BOE would have been remiss in doing so because only it is empowered to make such decisions. Finally, the Appellants' claims regarding the feeder system are not supported by the facts. Under the BOE plan, the feeder system is improved. Moreover, the claim that other plans offer better "fixes" to the feeder system, is irrelevant. Bernstein, supra.

The issue of "small pockets" of children not going to the same schools as their peers from the same geographical area was also of great concern to several Appellants. Again, however, the evidence in that regard shows that under the BOE plan the number of these "small pockets" was apparently reduced compared to other plans, depending

upon one's definition of what constitutes a "small pocket".[3]

Other facts pointed out by the Appellants are supported by the evidence. Under the BOE plan, the cost of transportation may be as much as $20,000 more than other plans. The Appellants attempted to apply a cost/benefit analysis to this issue. That sort of analysis may be appropriate for engineering applications or possibly for capital expenditures, but it is not appropriate when considering the best interests of students. A payback period for these costs cannot be quantified. In fact, such a mathematical approach leaves little room for consideration of other important factors that may affect transportation decisions. This cost/benefit analysis approach flies in the face of the Policy 1675-R, which envisions a more subjective process, whereby the BOE is to weigh numerous factors, many of which may be in conflict with one another. In arriving at its decision on January 24, 2002, the BOE considered many factors and many alternatives. In fact, transportation costs under the BOE plan are higher, in part, in an attempt to make the feeder system better and because rising juniors were not moved.

The same is true of the number of students moved. The BOE could not consider the number of students to be moved in a vacuum. As noted above, in any redistricting decision there are many factors to consider. The BOE is supposed to consider the factors enumerated in Policy 1675-R in making its decision and each Board member must make judgments in light of her or his own experience and values. Again, the

[3] The term "small pockets" was never defined in terms of numbers. BLAC could not reach consensus on a definition, Ms. French suggested 5% to 10% of a class as the frame of reference, others used figures of between 10 and 150 students and Ms. Reardon used neighborhood signage as her criterion.

evidence is clear that the BOE carefully weighed these things in adopting the BOE plan.

Another discrete complaint of some Appellants is that the BOE changed its mind at the last minute and decided to open Reservoir with 2 grades instead of 3, as it had originally proposed. In stark contrast to this complaint is the claim that the BOE had its mind made up in advance. It is true that the BOE had intended to open Reservoir with 3 grades, but ultimately decided otherwise on January 24, 2002. The rationale for this change was clearly explained by Ms. French. She testified that in considering the experiences of schools from other counties as well as the experiences when opening other new high schools in Howard County, she came to the ultimate conclusion that each plan had its own strengths and weaknesses, but that the better option was to open with only 2 grades. That testimony was not disputed. Apparently other BOE members agreed with her, because that part of the plan was adopted by the BOE. Additionally, the fact that this change was made shortly before the final board vote makes it clear that the BOE did not have its mind made up prior to January 24, 2002.

COMAR 28.02.01.16E, Motion for Judgment, states:

> (1) A party may move for judgment on any or all issues in any action at the close of the evidence offered by an opposing party. The moving party shall state with particularity all reasons that the motion should be granted. Objection to the motion is not necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.
>
> (2) When a party moves for judgment at the close of the evidence offered by the opposing party, the judge may:
>
> (a) Proceed to determine the facts and render judgment against an opposing party; or

(b) Decline to render judgment until the close of all evidence.

COMAR 28.02.01.16E is patterned after Md. Rule 2-519, Motion for Judgment, and is the OAH equivalent. In adopting Rule 2-519 in 1984, the Court of Appeals made a significant change in practice when such a motion is made by B at the close of A's case in a non-jury action. In that situation, "the Rule no longer requires the court to view the evidence in a light most favorable to A and to consider only the legal sufficiency of the evidence, so viewed, but allows the court to proceed as the trier of fact to make credibility determinations, to weigh the evidence, and to make ultimate findings of fact." The Driggs Corporation v. Maryland Aviation Administration, 384 Md. 389, 402, n. 4, 704 A.2d 433 (1998). Similarly, under OAH's rule, in deciding a Motion for Judgment, the judge is not required to view the evidence in a light most favorable to the non-moving party. [4]

The Appellants in this matter have raised numerous issues that they believe show that the BOE's redistricting decision of January 24, 2002 was arbitrary and unreasonable. Under State Board regulations, a decision of a county board of education may be unreasonable if a reasoning mind could not have reasonably reached the conclusion the county board reached or the decision is contrary to sound educational policy. COMAR 13A.01.01.03E(1)(b).

The evidence presented shows that, among other things, hundreds or even thousands of citizens disagree, at least in part, with the BOE plan. In other words, the

[4] In Driggs, the Board of Contract of Appeals treated the motion as if it were a Motion for Summary decision, but the OAH rule for each of those motions is different.

Appellants have shown that many people apparently disagree with the BOE decision and that reasoning minds can disagree as to whether the BOE plan is based upon sound educational policy. Thus, reasoning minds could have reasonably reached the conclusion reached by the BOE in adopting its plan. Moreover, mere disagreement with a county board decision is insufficient. Accordingly, the Appellants have not met the legal standard set forth at COMAR 13A.01.01.03E(1)(b)(ii) and Bernstein.

The State Board has never defined the term "sound educational policy". Nor do I believe that it could. Sound educational policy is a value laden, amorphous concept that is impacted by many competing considerations as is reflected by Policy 1675-R. In Howard County, sound educational policy is determined through the representative democracy process. Members of the BOE are elected by the public: they are chosen by the electorate to formulate educational policy for the county. By the exercise of their independent judgment and in considering the factors delineated in Policy 1675-R, they apply educational policy to the county as a whole. It up to the BOE to establish sound educational policy. In this case I find that the BOE plan, while not perfect, represents sound educational policy. Therefore, the Appellants have not met the stringent legal standard set forth at COMAR 13A.01.01.03E(1)(b)(i).

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 Board of Education of Howard County of January 24, 2002, adopting new attendance zones for its high schools, was arbitrary, unreasonable, or illegal. COMAR 13A.01.01.03E; 13A.02.09.03B; 28.02.01.16E.

PROPOSED ORDER

I propose that the decision of the Board of Education of Howard County dated January 24, 2002, adopting new attendance zones for its high schools, be UPHELD.

June 3, 2002

James T. Murray
Administrative Law Judge

NOTICE OF RIGHT TO FILE OBJECTIONS

Any party adversely affected by this Proposed Decision has the right to file objections with the Maryland State Department of Education, c/o Sheila Cox, Maryland State Board of Education, 200 West Baltimore Street, Baltimore, Maryland 21201-2595, within ten (10) days of receipt of the Proposed Decision. COMAR 13A.01.01.03P(4).

DIPTI SHAH, et al.,	*	JAMES T. MURRAY
APPELLANTS	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE OF
BOARD OF EDUCATION	*	ADMINISTRATIVE HEARINGS
OF HOWARD COUNTY	*	OAH CASE NO. MSDE-BE-04-200200001

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

APPENDIX A

FILE EXHIBIT LIST

The case file as received from the State Board contained a Transmittal for Maryland State Department of Education Appeals (MSDE), which had the following attachments:

Letter to George Hermina from Jackie C. La Fiandra dated April 2, 2002, 1 page

Letter to John R. O'Rourke from George Hermina dated March 21, 2002, with attached envelope, 2 pages

Letter to Beth MacEwen from Valerie V. Cloutier dated March 26, 2002, with attached envelope, 1 page

Memorandum to John R. O'Rourke and Mark C. Blom from Valerie V. Cloutier dated February 27, 2002, 1 page

NOTICE OF APPEAL IDENTIFYING PARTIES AND ERRORS BELOW, with Exhibit 1 attached, dated stamped February 25, 2002, 20 pages

APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE, with cover letter dated March 19, 2002, 4 pages

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY AFFIRMANCE, undated, 34 pages with the following attachments:

The Gray Plan dated November 26, 2001, with appendices, 115 pages

Exhibit 1, which includes the following:

Tab 1 Staff Recommendations September 2002 dated November 29, 2001, 68 pages

Tab 2 Boundary Line Advisory Committee ("BLAC") Independent Report dated November 29, 2001, 13 pages

Tab 3 Superintendent's Proposed Plan dated January 8, 2002, 2 pages

Tab 4 Work Sessions -
Session agenda of January 22, 2002, 1 page;
Memorandum from David Drown to the BOE dated January 22, 2002, with attachment, 2 pages
Memorandum from David Drown to the BOE dated January 22, 2002, 1 page
Memorandum from David Drown to the BOE dated January 27, 2002, with attachments, 3 pages
Agenda for January 17, 2002, 1 page
Memorandum from David Drown to the BOE dated January 27, 2002, with attachments, 3 pages
Memorandum from David Drown to the BOE dated January 10, 2002, 2 pages
Agenda for January 8, 2002, with attachment, 7 pages
Memorandum from David Drown to the BOE dated December 20, 2001, with attachments, 19 pages
Agenda for December 6, 2001, with attachment, 8 pages
Agendas for November 29, December 4 and December 6, 2001, with attachment, 2 pages
Agenda for November 29, 2001, 1 page

Tab 5 Community Plans –
Letter from Kendall Echols to John O'Rourke, the BOE and David Drown dated December 20, 2001, with attachment, 3 pages
Feeder System Plan submitted November 16, 2001, 1 page
Gray Plan submitted November 16, 2001, 1 page
Red Plan with fixes submitted November 16, 2001, 1 page
Alternate Red Plan Grey Plan dated December 4, 2001, 4 pages
Gold Plan dated November 16, 2001, 1 page
Email from Dottie Balaban to John O'Rourke dated November 19, 2001, 2 pages

Email from Pat Baker dated November 2, 2001, 2 pages
Email from Hope Moraff dated November 2, 2001, 1 page
Email from Marge Lally dated November 2, 2001, 1 page
Email from Jeryl Baker dated November 3, 2001, 2 pages
Email from Bruce Dougherty dated November 5, 2001, 1 page
Email from Karin Walsh dated November 5, 2001, 1 page
Maps of Hammond Gold, undated, 2 pages
Equity Plan dated November 16, 2001, 1 page
Memorandum from David Drown to the BOE dated December 4, 2001;
Letter from Chris Wertman to David Drown dated December 6, 2001, with attachment, 8 pages
Minimal Approach Plan submitted November 16, 2001, with attachment, 2 pages;
Letter from Chris Wertman to David Drown dated December 3, 2001, with attachment, 12 pages

Tab 6 BLAC Charge/Process -
Unnamed, undated, partially hand written memorandum, 1 page
Memorandum from BLAC to the BOE dated January 29, 2001, with attachments, 7 pages
Board Agenda Item dated August 23, 2001, 2 pages
Board Agenda Item dated June 26, 2001, 1 page
Board Agenda Item dated June 14, 2001, 1 page
Email from Jerry Bialecki dated June 1, 2001, 4 pages
Board Agenda Item dated May 10, 2001, 3 pages
Board Agenda Item dated April 26, 2001, 2 pages

Tab 7 Proposed Motions Worksheets, undated, 13 pages

Tab 8 Minutes -
Minutes of January 24, 2002, 7 pages
Minutes of January 22, 2002, 6 pages
Minutes of January 17, 2002, 8 pages
Minutes of January 15, 2002, 7 pages
Minutes of January 8, 2002, 4 pages
Minutes of December 17, 2001, 12 pages
Minutes of December 13, 2001, 11 pages
Minutes of December 17, 2001, 12 pages
Minutes of December 13, 2001, 11 pages
Minutes of December 6, 2001, 5 pages
Minutes of December 4, 2001, 5 pages
Minutes of November 29, 2001, 6 pages

Minutes of October 25, 2001, 1 pages
Minutes of August 23, 2001, 11 pages
Minutes of June 26, 2001, 14 pages
Minutes of June 4, 2001, 1 page

Tab 9 Policy 1675, revised August 10, 1989, 6 pages

Exhibit 2 – Comprehensive Plan, undated, with attachments, 4 pages

Exhibit 3 – Approved High School Boundary Line Changes for 2002-03, undated 4 pages

Affidavit of Jane Schuchardt dated March 19, 2002, 1 page

Affidavit of David Drown dated, dated March 19, 2002, 10 pages

Capital Improvement program FY 1995-1999, undated 23 pages

The BOE also submitted the following:

COUNTY BOARD'S REPLY TO SMITH APPELLANTS' OPPOSITION TO COUNTY BOARD MOTION FOR SUMMARY AFFIRMANCE, dated April 22, 2002, with cover letter, 23 pages and the following exhibits:

Exhibit 2 Letter from David Drown to the BOE dated January 22, 2002, with attachment, 19 pages

Exhibit 3 Minutes of the BOE for January 17, 2002 and December 6, 2001, 9 pages

Exhibit 4 Email from Jeff Troll dated January 23, 2002, 1 page

Exhibit 5 The Gray Plan dated November 26, 2001, with appendices, 121 pages

Exhibit 6 Emails from Jeff Troll, Roger and Patti Smith and others, various dates, 36 pages

Exhibit 7 Email from Jeff Troll dated January 18, 2002, 2 pages

Exhibit 8 Policy 1675, revised August 10, 1989, 6 pages

Appellant Shah submitted the following, which were admitted into evidence:

- Letter of appeal from Appellant Shah to Dr. Grasmick

- Letter from Appellant Shah to Dr. Grasmick, with attachment

The following exhibits were admitted on behalf of Appellants Smith:

- NOTICE OF APPEAL IDENTIFYING PARTIES AND ERRORS BELOW, undated, with exhibit 1, 21 pages

- THE SMITH APPELLANTS' OPPOSITION TO APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE, undated, 11 pages

- Ex. 1 JEFFREY TROLL'S DECLARATION IN SUPPORT OF APPELLANTS' OPPOSITION TO HOWARD COUNTY BOARD OF EDUCATION'S MOTION FOR SUMMARY AFFIRMANCE dated April 3, 2002, 12 pages

- Ex. 2 KEVIN GREGORY FOX'S DECLARATION IN SUPPORT OF APPELLANTS' OPPOSITION TO HOWARD COUNTY BOARD OF EDUCATION'S MOTION FOR SUMMARY AFFIRMANCE dated April 3, 2002, 4 pages

- Smith Appellants Ex. #1 Video tapes of BOE meetings of January 8, 17, 22 and 24, 2002 (4 tapes)

- Smith Appellants Ex. #2 Partial minutes of June 26, 2001 BOE meeting, 3 pages

- Smith Appellants Ex. #3 Students Moved/Disrupted County Wide, undated 3 pages

- Smith Appellants Ex. #4 Partial minutes of May 10, May 24 and August 23, 2001 BOE meeting, 12 pages

- Smith Appellants Ex #5 Administrative Response to No Children Left Behind, March 13, 2000, 21 pages

Appellant Spring offered the following exhibits, which were admitted into evidence:

- Appeal of redistricting decision in Howard County, Maryland

- BOARD OF EDUCATION OF HOWARD COUNTY Appeal Information Form

- Appellant Spring Ex. #1 Testimony of Anna M. Spring, undated with attachments, 27 pages