

C.C., et al.,

Appellant

v.

FREDERICK COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 24-23

OPINION

INTRODUCTION

In this consolidated appeal, several parents of students who were participating in the Frederick County Public Schools (“FCPS”) Remote Virtual Program (“RVP”) for grades 3 –5 filed an appeal to the State Board of the Frederick County Board of Education’s (“local board”) approval of its operating budget for fiscal year 2025, which eliminated the grades 3–5 RVP.¹ The Appellants maintain that the local board’s decision constitutes a school closure and that the decision is arbitrary, unreasonable, or illegal on several bases, including failure to follow the school closing procedures in COMAR 13A.02.09. The local board responded to the appeal maintaining that this is a budgetary decision that eliminated a school program, and not a school closure decision subject to the COMAR school closing procedures; therefore, its decision should be upheld. The Appellants filed a response, and the local board filed a Sur Reply.²

FACTUAL BACKGROUND

The material facts in this matter are not in dispute. FCPS began the RVP as the “Blended Virtual Program” in 2021 for the 2021-2022 school year, in response to the COVID-19 pandemic. (Aliveto Affidavit ¶5).³ On May 12, 2021, FCPS submitted to the Maryland State Department of Education (“MSDE”) an application and proposal to “develop and implement a blended virtual program within the school system based on the qualifications outlined in [Education Art.] §7-1401 *et seq.*” MSDE approved the application and proposal on May 24, 2021. (Aliveto Aff. ¶6; FCPS Ex. A1).⁴ The RVP initially served students in grades K through 12 in a virtual program that followed FCPS curriculum in a virtual synchronous setting, including asynchronous opportunities. (Aliveto Aff. ¶7, FCPS Ex. A1).

¹ The Appellants are C ■■■ C ■■■ M ■■■ and D ■■■ C ■■■ S ■■■ M ■■■ A ■■■ K ■■■ J ■■■ C ■■■ A ■■■ and J ■■■ J ■■■ M ■■■ A ■■■ and P ■■■ C ■■■

² We have also issued an opinion today addressing the same issues regarding the elimination of the Montgomery Virtual Academy from the Montgomery County Public Schools fiscal year 2025 operating budget. *See S.H., et al. v. Montgomery Cnty. Bd. of Educ.*, MSBE Op. No. 24-24 (2024).

³ Jamie Aliveto is the FCPS Chief of Schools and Accountability. (FCPS Ex. A).

⁴ Citation references to FCPS are to the attachments to the local board’s response to the appeal.

Students partaking in the RVP remain registered with their home school. (Aliveto Aff. ¶8). Through their home school, RVP students can participate in various offerings, such as athletics, counseling support, extended learning opportunities or tutoring, extracurricular activities, media services, and in-person orientation sessions or conferences. (Aliveto Aff. ¶9; FCPS Ex. A1). For students with Individualized Education Programs (“IEP”) or 504 Plans,⁵ prior to acceptance to the RVP the student’s home school must initiate an IEP meeting or 504 Plan meeting, including representatives from the RVP, to review accommodations and determine if the student’s IEP or 504 Plan can be implemented in the RVP. (Aliveto Aff. ¶10; FCPS Ex. A3). Additionally, RVP students take all required State assessments at their home school. (FCPS Ex. A3).

The application for student participation in the RVP contains various acknowledgements in the Terms of Agreement. In the application, the parents/guardians indicate that they “understand that RVP is a program of choice that is demanding and rigorous” and that if the student “is not successful in the program or fails to meet all requirements, a probationary period...may be instituted.” (FCPS Ex. A3).

Each year FCPS provides MSDE with a list of schools through the School Data Set (“SDS”) submission, as is required by MSDE, which includes a school code. (Aliveto Aff. ¶11). FCPS does not include the RVP on this school list and the RVP does not have an MSDE assigned school code. (FCPS Ex. 4). Nor does MSDE list the RVP on the MSDE School Report Card page on its website. (Sur Reply Ex. A). Additionally, MSDE does not include the RVP in its school reporting to the United States Department of Education.⁶

For the 2023-2024 school year, there was lower interest and enrollment in the RVP for kindergarten, first grade, and second grade than for other grades, and there was concern about the developmental appropriateness of remote instruction for young students. (Aliveto Aff. ¶12). FCPS also faced budgetary issues forcing a need for reductions to the budget. In light of all this, FCPS decided to phase out the RVP for kindergarten through second grade. (Aliveto Aff. ¶12).

For the 2024-2025 school year, FCPS also faced lower enrollment numbers and fiscal constraints to achieve a balanced budget. (Aliveto Aff. ¶13). FCPS faced a nearly \$53 million shortfall between the local board’s requested budget and the revenues it would be receiving from the State and Frederick County. To balance the budget, FCPS reduced positions, staff salaries, and programs, including the elimination of grades 3–5 of the RVP. *Id.*

In working to balance the budget, the local board held various public work sessions and meetings on May 15, May 29, and June 12, during which it heard public comment on retaining the RVP, including comments from some of the Appellants. (Clabaugh Aff. ¶¶22–24). At the local board’s June 12, 2024 meeting, the local board voted to reinstate grades 6–8 of the RVP, reversing a prior decision to eliminate those grades. (FCPS Ex. B11).

On June 26, 2024, the local board adopted the FY2025 Operating Budget. (Clabaugh Affidavit, ¶20; FCPS Ex. B8). The budget does not include funding for the RVP for grades 3–5. (Clabaugh Aff. ¶20).

⁵ “IEP” refers to students eligible under the Individuals with Disabilities Education Act (“IDEA”). “504” refers to students eligible under Section 504 of the Rehabilitation Act of 1973 (“Section 504”).

⁶ We take notice of this fact that this is an MSDE business practice.

STANDARD OF REVIEW

Budget decisions made by a local board are quasi-legislative. *See* Md. Code Ann., Gen. Prov. 3-101(j)(2). “In cases involving a quasi-legislative decision of the local board, the State Board will decide only whether the local board acted within the legal boundaries of State and federal law and will not substitute its judgment for that of the local board ‘as to the wisdom of the administrative action.’” *Harford Cnty. Arts & Culture Alliance v. Harford Cnty. Bd. of Educ.*, MSBE Op. No. 16-48 (2016).

The State Board exercises its independent judgment on the record before it in the explanation and interpretation of the public-school laws and State Board regulations. COMAR 13A.01.05.06E.

LEGAL ANALYSIS

Program Versus School

The Appellants maintain that the RVP is a school and that the local board’s decision is arbitrary, unreasonable, and illegal because it violated the school closing procedures set forth in COMAR 13A.02.09 – *Closing of Schools* when it voted to eliminate the grades 3–5 RVP. Specifically, the Appellants maintain that the local board failed to comply with the notice, public hearing, and written decision provisions⁷ and failed to consider the impact of elimination of the RVP on the eight identified school closing factors in COMAR 13A.02.09.01. The local board maintains that the RVP is a school program, not a school, and that the closure of the program is not subject to the school closing procedures. The local board argues that its decision should be upheld because it did not violate State law, regulation, or statewide education policy.

The determination as to whether the RVP was established as a school or a school program under Maryland law is the controlling issue in this matter.⁸ School closing decisions are subject to the school closing requirements of COMAR 13A.02.09 and require transfer to the Office of Administrative Hearings (“OAH”) for review by an administrative law judge pursuant to 13A.01.05.07A. Abolishing or ending a school program is a quasi-legislative decision of the local board and the State Board’s review is limited to whether the local board’s decision violated State education law, regulations, or a statewide education policy.

⁷ The Appellants make clear that the claims concerning notice and hearing requirements pertain to the school closing requirements of COMAR 13A.02.09 and not requirements of the Maryland Open Meetings Act (“OMA”), Md. Code Ann., Gen. Prov. §§3-301–3-501. The State Board is not the appropriate forum for redress of OMA violations. *See van Herksen, et al. v. Montgomery Cnty. Bd. of Educ.*, MSBE Op. No. 20-45 (2020) and cases cited therein (dismissing claims of OMA violations for lack of jurisdiction).

⁸ In an advice letter from the Maryland Office of the Attorney General, Office of Counsel to the General Assembly summarizes the applicable law. *See* Ex. to Apps’ 7/12/24 Supp. Appeal-Letter to the Honorable April Miller from Asst. Att’y. Gen. Natalie R. Bilbrough, June 25, 2024 (“Advice Letter”). The Advice Letter explains that whether the RVP is a school “depends on whether FCPS established it as a public school, rather than a program, and whether it was approved as a school by the Maryland State Department of Education.” *Id.* at 2. We concur with the General Assembly’s counsel that the answers to these two questions are dispositive of this appeal.

Maryland Law and Background Regarding Virtual Schools and Virtual Programs

Education Art. §4-109(a) authorizes a local board of education to “establish a public school if, in its judgment, it is advisable,” subject to the approval of the State Superintendent and in accordance with State Board rules and regulations. Schools established under §4-109 become a part of the State program of public education. *Id.* at (b). Neither State law nor regulation provides a single definition of “school” or “public school” and different definitions apply in various regulations of the State Board. *See* Advice Letter. Nor is there a definition of “program” in the law, but the State Board and MSDE historically have allowed local boards to develop programs to serve populations of students (e.g. alternate programs, magnet programs).

Beginning in 2011, Education Art. §7-1402(a) authorized local boards to establish public virtual schools for elementary, middle, and high school students, subject to MSDE’s approval. The newly enacted law defined a “virtual school” as “a public school established by the Department or by a county board under §4-109 of this article in which the school uses technology to deliver a significant portion of its instruction to its students via the internet in a virtual or remote setting.” Md. Code Ann., Educ. §7-1401(c). The law also required virtual schools to provide certain services and items to enrolled students and parents (§§7-1403, 7-1404), required each virtual school to maintain an administrative office as its principal place of business (§7-1406), and directed county boards to evaluate the virtual school each year based on specified criteria (§7-1407).

MSDE has had a process in place since before the COVID-19 pandemic by which each local school system can establish a virtual program, a virtual school, or both in their district. MSDE’s process requires the school system to submit a plan to MSDE for review and approval. *Id.* The current process requires a local school system to submit either a Virtual Program Request Form or a Virtual School Request Form.⁹ Although MSDE approves the virtual program, each local school system determines other aspects of the program, such as the program policies and procedures, and the course and grade level offerings.

In 2023, the General Assembly amended several statutory provisions related to virtual schools, including the definition of a “virtual school.” *See* Senate Bill 610, Ch. 804 (Acts of 2023). Section 7-1401(d) now defines a “virtual school” as a public school:

- (1) Established by a county board or multiple county boards under a written agreement under §4-109 of this article;
- (2) That uses one or more technologies to deliver instruction to its students entirely or primarily online; and
- (3) In which the students and instructors participate remotely from separate locations.

Another change was the exclusion of certain virtual programs and courses from the law’s coverage. The law excluded (1) virtual learning opportunities offered by MSDE or a county board under §7-1002; (2) upper-level high school programs with online components and designed to accommodate student work schedules; and (3) public schools operating under a virtual education plan during a prolonged state of emergency. Md. Code Ann., Educ. §7-1401.1.

⁹ We take notice of the publicly available MSDE forms that have been established for approval of a virtual program or virtual school.

Thus, course delivery methods or virtual programs developed under Education Art. §7-1002 are exempt and are not schools under State law. Additionally, although MSDE already assigns all schools a code, the law now requires each approved virtual school to have a unique school code assigned by MSDE. Md. Code Ann., Educ. §7-1402(d).

The 2023 changes to the virtual program law went into effect on July 1, 2023. However, the General Assembly provided a two-year period through the 2024-2025 school year for already established virtual schools to come into compliance with the new requirements stating, in relevant part:

[A] virtual school established and operated by a county board of education under 4-109 of the Education Article and approved by the State Department of Education under 7-1402 of the Education Article before the effective date of this Act, including a virtual education program established through the Eastern Shore of Maryland Educational Consortium, may continue to operate as a virtual school through the 2024-2025 school year.

See Ch. 804 (Acts of 2023), Section 3(a) and 5. The non-statutory language in Chapter 804 demonstrates that the General Assembly contemplated that some previously existing virtual programs that blended synchronous and asynchronous instruction, such as the Eastern Shore of Maryland Educational Consortium, could be subject to the virtual school law if established and operated as a virtual school under Education Art. §4-109 and approved by MSDE.

Consistent throughout all these statutory provisions is the intent of the General Assembly to leave it to the local board's judgment as to whether the local board chooses to offer virtual learning and how to best implement the virtual learning through a virtual school, subject to MSDE approval, versus a program.

Program Versus School Discussion

Applying this legal framework to the undisputed material facts in the record, we must determine whether FCPS submitted the RVP (or its predecessor) to MSDE for approval as a “public school” or “virtual school” and whether MSDE approved that submission as a “public school.” *See* Md. Code Ann, Educ. §4-109; §7-1402. The precursor to the RVP was the FCPS Blended Virtual Program which received MSDE approval on May 24, 2021, on a form entitled “Local School System Request for Blended Virtual Program.”¹⁰ (FCPS Ex. A1). Although the form references Education Art. §§7-1401 *et seq.* regarding virtual schools, the intent to establish either a program or a school is not clear from the form alone. The form makes dual references to a “program” and to the virtual school statutes. Nor is it clear from the Blended Virtual Program Proposal Checklist, attached to the request form, which refers to both “blended virtual programs”

¹⁰ This form predated the use of the current MSDE forms. We have no information about when MSDE changed the forms required for approval of virtual programs and virtual schools.

and “virtual schools,” providing separate definitions for each.¹¹ *Id.* The approval form and program checklist do not resolve the issue.¹²

One salient fact in this case demonstrates that FCPS did not intend to establish the RVP as a school and that it has always regarded the RVP as a program. FCPS requires students participating in the RVP to remain enrolled in their assigned home school. *See* Aliveto Aff. ¶¶ 8, 9. As students enrolled in their home school, RVP students participate in programs and activities at the home school such as athletics, extra-curricular activities, services, and other offerings. *Id.* The RVP students also take the State assessments at their home school. This fact is dispositive of FCPS’s intent not to establish the RVP as a school.

The RVP application itself supports this conclusion. The acknowledgement in the application signed by the parents/guardians indicates their understanding that the RVP is a “program of choice.” (FCPS Ex. A3). There is no reference in the application to the RVP being a school. Thus, upon initial engagement with the RVP, it is the understanding of parents/guardians that the RVP is a program, consistent with FCPS’ intent to establish it as such.

The record also shows that MSDE views the RVP as a program and never approved it as a school, and that FCPS understood this to be MSDE’s stance. MSDE has never assigned the RVP a school code. Nor does MSDE list the RVP on the MSDE School Report Card page on its website. Consistent with this, FCPS does not include the RVP on its list of schools as part of the School Data Set submission to MSDE. Additionally, MSDE does not include the RVP in its school reporting to the United States Department of Education.

The Appellants make various arguments claiming that the RVP is a school, including that it operates like a school in terms of staffing of teachers and administrators, and it issues report cards, IEP notes, and other standard documents that reference it as a school. Many FCPS forms are standardized and do not allow for differentiation between schools and programs. *See* Local Board Sur Reply; Aliveto Supp. Aff.; and Keller Aff. The various documents rely on pre-printed demographic fields that are populated with student information from electronic systems or are manually completed by staff. *Id.* We do not find any of these facts discussed in Appellants’ arguments determinative as to whether the RVP is a program or a school. The record demonstrates that FCPS does not view the RVP as a school. FCPS does not report to MSDE that the RVP is a school and the record does not support a conclusion that FCPS intended to establish the RVP as a school.

Given our legal conclusion that the RVP is a program and not a school, this case is not a school closing appeal subject to the school closing requirements of COMAR 13A.02.09. We need not consider the Appellants arguments on that subject, nor must we transfer the matter to OAH for further proceedings.

¹¹ The form defines a “blended virtual program” as a “combination of asynchronous and scheduled synchronous teaching and learning provided by an LSS.” *Id.* It defines a “virtual school” as “asynchronous learning that includes minimal synchronous interaction, usually requested by student or parent.” *Id.*

¹² MSDE currently uses separate forms to be submitted by local school systems for approval of a virtual program or approval of a virtual school. We recommend that MSDE review these forms to ensure that the program/school distinction is clearly evident on each.

Review of Quasi-Legislative Decision

Before turning to the Appellants' other arguments, we clarify the posture of this case given our legal conclusion that it is not an appeal of a school closing decision. Rather, this is an appeal of the local board's June 26, 2024 vote to adopt the FCPS FY2025 Operating Budget, which did not include funding for grades 3–5 of the RVP. An appeal of this nature is an appeal of a quasi-legislative decision of the local board pursuant to the State Board's original jurisdiction under Education Art. §2-205. Section 2-205 confines matters subject to review by the State Board to those involving State education law, regulations, or a policy that implicates State education law or regulations on a statewide basis. *See Nash v. Montgomery Cnty. Bd. of Educ.*, MSBE Op. No. 20-41 (2020) (and cases cited therein). Accordingly, our jurisdiction is limited to deciding only whether the local board's decision violated State education law, regulations, or a statewide education policy. Consistent with our jurisdiction, we apply a standard of review that focuses solely on whether the local board's decision violates State education law and policy. We decline to consider the Appellants' arguments to the extent that they fail to allege a violation of such matters.

Claims Regarding COMAR 13A.01.06 – Educational Equity

The Appellants argue that the local board failed to meet its educational equity obligations as articulated in COMAR 13A.01.06 – *Educational Equity* when it eliminated the grades 3–5 RVP.¹³ The Appellants' argument is predicated on their assessment that the local board failed to engage in meaningful discussion on matters impacting educational equity before making the decision to reduce the RVP programming. Appellants believe that consideration of equity issues could have revealed that RVP mitigates economic and geographic inequalities that contribute to achievement gaps.

There is no evidence of any unlawful discriminatory intent in the local board's decision making process. The local board was concerned about the developmental appropriateness of remote instruction for young students, the RVP enrollment was declining, and its funding stream was eliminated. The local board heard and considered public comments about the needs of the RVP students but ultimately decided to implement budget cuts to the RVP. The local board is charged with balancing the needs of all students and deciding how to best use its limited resources to serve all FCPS students. Despite its efforts, the local board was not able to identify funding to keep all RVPs. Although the Appellants disagree with the discretionary budget decisions made by the local board, their disagreement in the allocation of resources does not mean equity issues were not considered. The record does not support a finding that the local board violated the regulations set forth in COMAR13A.01.06.

Alleged Violations of IDEA and Section 504

The Appellants argue that the closure of the RVP program for grades 3–5 was illegal because it violated IDEA and Section 504, which require the provision of a free appropriate public education in the least restrictive environment for those students serviced through an IEP

¹³ The Appellants also allege violation of the local board's corresponding equity policy, Policy 444 – *Educational Equity and Excellence*. We address this as a matter of State policy in terms of the COMAR regulations.

or 504 Plan. Appellants also argue that elimination of the RVP somehow alters accommodations under IDEA and 504 Plans.

To the extent that the appeal raises claims under the IDEA or Section 504, the State Board has declined to exercise jurisdiction where a separate administrative forum exists to address grievances under federal law. *See Ashley J. v. Montgomery Cnty. Bd. of Educ.*, MSBE Order No. OR21-07 (declining to review a claim under the Americans with Disabilities Act); *Phil N. v. Anne Arundel Cnty. Bd. of Educ.*, MSBE Op. No. 18-42 (2018) (declining to review claims under the Family Educational Rights and Privacy Act).

Specialized forums exist through the IDEA to resolve these complex and fact-intensive matters in a timely fashion. Parents may file a State complaint with the Maryland State Department of Education, a request for mediation, and/or a due process hearing at the Office of Administrative Hearings. COMAR 13A.05.01.15. *See S.R. v. Montgomery Cnty. Bd. of Educ.*, MSBE Op. No. 20-18 (2020); *Philip and Deborah W. v. Prince George's Cnty. Bd. of Educ.*, MSBE Op. No. 11-48 (2011); *Matthew W. v. Montgomery Cnty. Bd. of Educ.*, MSBE Op. No. 08-07 (2008); *Brado v. Montgomery Cnty. Bd. of Educ.*, MSBE Op. No. 06-23 (2006); and *Frye v. Montgomery Cnty. Bd. of Educ.*, MSBE Op. No. 01-30 (2001). Similarly, Appellants have the right to file a claim with the U.S. Department of Education's Office for Civil Rights if they believe the local board has violated the rights of students with disabilities under Section 504. Accordingly, we decline to address issues regarding the IDEA and Section 504 as part of this appeal.

Public Comment Arguments

To the extent that the Appellants maintain that that the local board deprived them of the opportunity for public comment, they have not cited to any relevant legal authority on the issue. The local board has its own policy on public comment at board meetings, but any allegations of a violation of that policy are not before us through an appeal pursuant to Education Art. §2-205. Moreover, the record reflects that the board heard public comment on the RVP issue at its meetings on May 15, May 29, and June 12.

Funding Structure Argument

Although the Appellants challenge the local board's decision based on the "funding structure" employed by the local board in constructing its budget, they do not explain how the "funding structure" is improper or how it violates federal or State law. (Apps.' Response). Instead, the Appellants argue that funding and per pupil expenditure cannot justify the decision to eliminate the program because the "RVP has been funded in a way that does not allow the funding to follow the student." To support their claim, the Appellants refer to a statement from MSDE in response to a Maryland Public Information Act ("PIA") request that "MSDE does not receive nor distribute any funding in regard to virtual programs or schools. Nor does MSDE's Digital Learning and School Library Media Branch have any requirements as to where funds come from or how local school systems allocate funds." (M.A. Appeal Ex. 6-Berry Letter, 8/28/24). We do not find that these statements support a finding of a violation of State law. The Appellants have not met their burden here.

CONCLUSION

The local board had to make difficult but necessary budget decisions to balance the FY2025 Operating Budget to bridge an enormous budget gap. The elimination of the RVP for grades 3–5 was one of many across the board cuts to programmatic offerings. For all of the reasons stated above, we do not find that the Appellants met their burden to demonstrate that the local board violated State law, regulation, or a statewide education policy. We therefore affirm the decision of the local board.

Signatures on File:

Joshua L. Michael
President

Monica Goldson
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Chuen-Chin Bianca Chang

Kenny Clash

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December 3, 2024