

S.H., et al.,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 24-24

OPINION

INTRODUCTION

Several parents of students who were participating in the Montgomery County Public Schools (“MCPS”) Montgomery Virtual Academy (“MVA”) filed an appeal to the State Board of the Montgomery County Board of Education’s (“local board”) approval of its operating budget for fiscal year 2025 which eliminated the MVA.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 Reply.²

FACTUAL BACKGROUND

The material facts in this matter are not in dispute. MCPS began the MVA as the “Blended Virtual Program” in 2021 for the 2021-2022 school year as a continuation of the virtual learning experience resulting from the COVID-19 pandemic. (Appeal Ex. 12-Felder 6/11/24 Memo). On June 15, 2021, MCPS 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 June 24, 2021. (MCPS Ex. 2).³ The MVA was established to serve students in grades K through 12 in a blended virtual program that followed MCPS curriculum in a virtual synchronous and asynchronous setting. *Id.* Since the

¹ The Appellants are S [REDACTED] H [REDACTED] C [REDACTED] E [REDACTED] B [REDACTED] G [REDACTED] R [REDACTED] R [REDACTED] B [REDACTED] C [REDACTED] P [REDACTED] A [REDACTED] L [REDACTED] C [REDACTED] G [REDACTED] K [REDACTED] L [REDACTED] K [REDACTED] L [REDACTED] Y [REDACTED] S [REDACTED] A [REDACTED] and A [REDACTED] R [REDACTED] T [REDACTED] and S [REDACTED] H [REDACTED] C [REDACTED] M [REDACTED] J [REDACTED] P [REDACTED] J [REDACTED] P [REDACTED] P [REDACTED] M [REDACTED] H [REDACTED] S [REDACTED] J [REDACTED] L [REDACTED] and A [REDACTED] R [REDACTED]

² We have also issued an opinion today addressing the same issues with regard to the elimination of the Remote Virtual Program (“RVP”) for grades 3 – 5 from the Frederick County Public Schools (“FCPS”) fiscal year 2025 operating budget. *See C.C., et al. v. Frederick Cnty. Bd. of Educ.*, MSBE Op. No. 24-23 (2024).

³ Citation references to MCPS are to exhibits attached to the local board’s response to the appeal.

time of the MVA's creation, student participation has decreased, and its attendance and graduation rates were significantly less than that of the school system overall. (Appeal Ex. 12).

Students partaking in the MVA remain registered with their home school. (MCPS Ex. 2 at 6). Through their home school, MVA students can participate in various school offerings, such as extracurricular activities, athletics, and school counseling services. *Id.* at 5, 7. For students with Individualized Education Programs ("IEP"),⁴ school level case managers, as well as the MVA special education resource teacher and counselor, maintain organization of the necessary IEP meetings, IEP compliance timelines, and testing requirements. *Id.* at 6. Additionally, MVA students take all required State assessments at their home school. *Id.* at 2.

MVA does not have an MSDE assigned school code. (Local Bd. Response to App. at 5). MSDE does not receive information regarding the MVA as part of the MCPS School Data Submission and MSDE does not include the MVA in its school reporting to the United States Department of Education. Nor does MSDE list the MVA on the MSDE School Report Card page on its website.⁵

In developing its Fiscal Year 2025 ("FY2025") Operating Budget, the local board engaged in a formal and public process involving senior MCPS leadership, MCPS staff, students, parents/guardians, County residents, employee associations, and other community stakeholders. (Appeal Ex. 12 at 1-2). In January 2024, the board held three public work sessions, and two public hearings where it heard public comment. *Id.* at 2. On February 20, 2024, the local board held an operating budget hearing during which it considered modification or elimination of three programs, including the MVA, and heard public comment. *Id.* On February 22, 2024, the local board tentatively adopted its FY2025 Operating Budget. *Id.*

Ultimately, the Montgomery County Council approved an FY2025 Operating Budget for MCPS that was approximately \$30 million less than the local board's tentative budget. *Id.* at 3. To address the shortfall and achieve a balanced budget, the local board identified expenditure savings through increased class size to reduce positions, delayed prekindergarten expansion, reduced contractual services, and other reduced programs, including the elimination of the MVA. *Id.* at 5-8.

On June 11, 2024, the local board voted on the final adoption of the FY2025 Operating Budget. *Id.* at 8-9. The budget does not include funding for the MVA. *Id.*

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).

⁴ "IEP" refers to students eligible under the Individuals with Disabilities Education Act ("IDEA").

⁵ We take notice of these facts that are MSDE business practices. *See* NCES School Directory <https://reportcard.msde.maryland.gov/Graphs/#/DataDownloads/datadownload/3/17/6/99/XXXX/2024>; <https://reportcard.msde.maryland.gov/SchoolsList/Index?l=15>.

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 MVA 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 MVA. Specifically, the Appellants maintain that the local board failed to comply with the notice, public hearing, and written decision provisions and failed to consider the impact of elimination of the MVA on the eight identified school closing factors in COMAR 13A.02.09.01. The local board maintains that the MVA 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 MVA was established as a school or a school program under Maryland law is the controlling issue in this matter.⁶ 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.

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

⁶ In an advice letter from the Maryland Office of the Attorney General, Office of Counsel to the General Assembly summarizes the applicable law. *See* App. Response Ex. 2-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 FCPS 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.

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.⁷ 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. 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

⁷ We take notice of the publicly available MSDE forms that have been established for approval of a virtual program or virtual school.

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 MCPS submitted the MVA (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 MVA was the MCPS Blended Virtual Program which received MSDE approval on June 24, 2021, on a form entitled "Local School System Request for Blended Virtual Program."⁸ (Local Bd. Ex. 1). 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" and "virtual schools," providing separate definitions for each.⁹ *Id.* The approval form and program checklist do not resolve the issue.¹⁰

One salient fact in this case demonstrates MCPS did not intend to establish the MVA as a school and that it has always regarded the MVA as a program. MCPS requires students participating in the MVA to remain enrolled in their assigned home school. (MCPS Ex. 2). As students enrolled in their home school, MVA students may participate in programs and activities at the home school such as athletics, extra-curricular activities, counseling, and other offerings. *Id.* The MVA students also take the State assessments at their home school. This fact is dispositive of MCPS's intent not to establish the MVA as a school.

Additionally, MSDE has never assigned the MVA a school code. MSDE does not receive information regarding the MVA as part of the MCPS School Data Submission and MSDE does not include the MVA in its school reporting to the United States Department of Education. Nor

⁸ 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.

⁹ 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.*

¹⁰ 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.

does MSDE list the MVA on the MSDE School Report Card page on its website. This supports the conclusion that MSDE views the MVA as a program and never approved it as a school.

The Appellants make various arguments claiming that the MVA is a school related to budget, staffing, MVA program offerings, and more. We do not find any of the facts discussed in the Appellants' arguments determinative as to whether the MVA is a program or a school. The record demonstrates that MCPS does not view the MVA as a school and does not support a conclusion that MCPS intended to establish MVA as a school.

Given our legal conclusion that the MVA 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.

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 11, 2024 vote to adopt the MCPS FY2025 Operating Budget, which did not include funding for the MVA. 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 MVA.¹¹ The Appellants essentially argue that the decision was not made with an equity lens in consideration of equitable alternatives, and that MVA students are being denied equitable access to an inclusive educational opportunity that maximizes their academic success and social/emotional well-being and provides access to effective teachers. They claim that the elimination of the MVA disproportionately impacts students who rely on the virtual platform due to medical conditions, disabilities, or other personal circumstances.

There is no evidence of any unlawful discriminatory intent in the local board's decision making process. The local board had concerns about declining MVA enrollment and graduation rates, and its funding stream was eliminated. The local board heard and considered public

¹¹ The Appellants also allege violation of the local board's corresponding equity policy and nondiscrimination policy, MCPS Policy ACA – *Nondiscrimination, Equity, and Cultural Proficiency*. We address this as a matter of State policy in terms of the COMAR regulations.

comments about the needs of the students in the MVA but decided against keeping it. The local board is charged with balancing the needs of all students and deciding how to use its limited resources to best serve all MCPS students. Despite its efforts, the local board was not able to identify funding to keep the MVA. Although the Appellants disagree with the discretionary budget decisions implemented 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 COMAR 13A.01.06.

Alleged Violations of IDEA and Section 504

The Appellants argue that the closure of the MVA was illegal because it violates IDEA and Section 504,¹² which require the provision of a free appropriate public education in the least restrictive environment for those students serviced through an IEP or 504 Plan.

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.

CONCLUSION

The local board had to make difficult but necessary decisions to balance the FY2025 Operating Budget to bridge an enormous budget gap. The elimination of the MVA was one of many reductions made by the board to address the budget deficit. 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.

Joshua L. Michael
President

¹² "504" refers to students eligible under Section 504 of the Rehabilitation Act of 1973 ("Section 504").

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December 3, 2024