

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

PETITION OF:)
) CIVIL ACTION
CITIZENS FOR A RESPONSIBLE) NO. 284980
CURRICULUM)
P.O. Box 183)
Damascus, Maryland 20872,) PETITIONERS' REPLY TO
) RESPONDENTS' MEMORANDUM
PARENTS AND FRIENDS OF EX-GAYS)
AND GAYS)
P.O. Box 561)
Ft. Belvior, Virginia 22060,)
)
and FAMILY LEADER NETWORK)
c/o John Garza)
17 West Jefferson St.)
Rockville, Maryland 20850,)
)
Petitioners,)
)
FOR JUDICIAL REVIEW OF THE)
DECISION OF (THE):)
)
MONTGOMERY COUNTY PUBLIC)
SCHOOLS, MONTGOMERY COUNTY)
PUBLIC SCHOOLS BOARD OF)
EDUCATION and JERRY WEAST, in his)
official capacity as Superintendent)
850 Hungerford Drive)
Rockville, Maryland 20850,)
)
Respondents.)
)

)
IN THE CASE OF:)
)
CITIZENS FOR A RESPONSIBLE)
CURRICULUM, et al.)
v.)
MONTGOMERY COUNTY PUBLIC)
SCHOOLS, et al.)
)

QUESTIONS PRESENTED

Pursuant to Maryland Rules 7-201 et. seq., Petitioners seek judicial review of the Maryland State Board of Education’s final determination denying Petitioners’ challenge to Respondents’ curriculum. The question presented is whether the Maryland State Board of Education (“State Board”) applied an incorrect standard of review when denying Petitioners’ appeal; thereby permitting Respondents to implement their health curriculum, containing the at issue “human sexuality lessons,” in violation of Maryland law. Petitioners ask this court to remand this appeal back to the State Board and order an appropriate review consistent with applicable law and policy standards set forth in Code of Maryland Administrative Regulations (“COMAR”) 13A.01.05.05.

FACTS

Petitioners adopt all relevant facts from their previously submitted briefs.

ARGUMENT

Administrative agencies enjoy a very deferential standard of review regarding their decisions and Maryland courts are reluctant to second-guess the appropriateness of an administrative board’s decisions. However, it is disingenuous to argue that because, generally, a board or administrative agency acts in accord with Maryland law and courts uphold such action, that a challenge to a board or administrative agency must be defeated. Respondents rely on such deference to assert their arguments “because we said so” and “if you don’t like it vote us out.” However, the reason for such deference is because administrative boards usually act within the bounds of the law and policy—the State Board has not and thus is not entitled to it.

A lot of effort has been exerted trying to shift the focus of this appeal away from law and policy by accusing Petitioners of advancing an agenda. This is a red herring. Petitioners are asking that local school boards be required to follow the law and that when allegations are made that they have not, that the State Board review legitimate challenges according to appropriate legal and administrative mandates.

First, the State Board applied an incorrect standard of review. The State Board's own regulations dictate the standard of review to be used in appeals of "[d]ecisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board." The standard is that "the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal." COMAR 13A.01.05.05(A). Yet the State Board determined that, although this case involves a "decision of the local board concerning a 'local policy,'" it should depart from its own regulations and review the local board's decision only if it was patently illegal. *Citizens for a Responsible Curriculum et al. v. Montgomery Bd. of Educ.*, Maryland State Board of Education Opinion No. 07-30 (June 27, 2007), at 4 [hereinafter "State Op."] Furthermore, "that same scope of review, we believe, applies when this (State) Board, acting in its judicial capacity, is called upon to review a decision of a local board." State Op. at 5 (emphasis added). The State Board's determination is unfounded and there is no legal or administrative authority to back up the State Board's "belief" that it can restrict the applicable standard of review when it finds it convenient to do so. The State Board does not have the authority to choose which standard of legal review it

prefers depending on which appeal is before it. It must follow regulations and laws prescribing the standard of review applicable when reviewing local policies or controversies—whether the local board’s action or policy is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05(A); *Juanita Hopkins Ward v. Talbot County Bd. of Educ.*, Maryland State Board of Education Opinion No. 04-17 (March 31, 2004), *citing Breads v. Board of Educ. of Montgomery County*, Maryland State Board of Education Opinion No. 507 (1997); *Nancy Malone v. Baltimore City Bd. of School Commissioners*, Maryland State Board of Education Opinion No. 04-21 (April 21, 2004); *Stephen J. Berry v. Calvert County Bd. of Educ.*, Maryland State Board of Education Opinion No. 05-28 (Aug. 31, 2005); *Nicole Scott v. Wicomico County Bd. of Educ.*, Maryland State Board of Education Opinion No. 03-40 (Dec. 3, 2003).

The State Board maintains that since this case involves a quasi-legislative decision it must follow the judicial review applied by courts to administrative decisions of determining illegality by state and federal standards. (State Op. at 5.) However, not one pertinent case cited by the State Board or Respondents involves judicial or administrative review and oversight of a lower administrative agency’s policy or action. The State Board and Respondent’s cited authority for an abbreviated standard of review are inapplicable at the agency review level because the State Board is not a court. It is an administrative agency with the expertise necessary to review decisions of subordinate administrative agencies.

The State Board confuses the judicial standard of review with its own wider standard of review that includes an arbitrary or unreasonable standard. *See* COMAR

13A.01.05.05(A). Respondents continue to affirm the State Board's erroneous application of law and policy. Respondents' citations are most applicable because they demonstrate that the State Board has the authority to fully review county board decisions by virtue of its comprehensive visitatorial power—which it did not do. *See also* Education Article §2–205(e)(2).

The State Board held that an administrative agency responsible for overseeing subordinate agencies below it must absolutely uphold lower agency decisions unless those decisions are illegal. Essentially, they argue that Maryland agencies have no administrative authority to review the decisions of their subordinate entities. However, Education Article Section 4-111 indicates that County boards must establish curriculum guides subject to the bylaws, basic policies and guidelines established by the State Board. Furthermore, Education Article Section 4-108 indicates that County Boards must determine the educational policies of the county school system subject to the bylaws, rules and regulations of the State Board. Accordingly, one of the purposes of the existence of the Maryland State Board of Education is to explain its regulations and decide all controversies and disputes stemming from them. Accepting the State Board's holding and Respondent's assertions would effectively repeal the State Board's ability to regulate subordinate agencies pursuant to Education Article §2–205(e).

If the State Board cannot adequately review the decisions of its local boards, who can? Respondents argue that it is the State Board, acting in its capacity as an administrative agency, which has the proper administrative expertise and authority in this area. Petitioners wholeheartedly agree. However, in ruling on Petitioners' appeal, the

State Board has thrown away its power of review for this and all other future cases before it, in direct contravention of the State of Maryland's broad mandate. Education Article §2–205.

The State Board also incorrectly cites COMAR 13A.01.05.05, holding that it cannot “substitute its judgment for that of the local board’s” even when it is allowed to review a board’s decision using the arbitrary or unreasonable standard of review. State Op. at 5. Contrary to the State Board’s holding, COMAR 13A.01.05.05 authorizes the State Board to substitute its judgment for that of the local board when a decision of the local board is arbitrary or unreasonable. *See* COMAR 13A.01.05.05.

This court has the authority to act to correct Petitioners’ alleged errors. *Bd. of Educ. of Montgomery County v. Montgomery County Educ. Ass’n, Inc.*, 66 Md. App. 729, 740 (1986). “If the court believes that the [state] board has flat-out misconstrued the law, it is entitled, and indeed obliged, to substitute its view of the law for that of the board and deal with the board’s order accordingly.”); *cert. granted, Montgomery County Educ. Ass’n, Inc. v. Bd. of Educ. of Montgomery County*, 306 Md. 555 (1986); *aff’d, Montgomery County Educ. Ass’n, Inc. v. Bd. of Educ. of Montgomery County*, 311 Md. 303 (1987). To follow the State Board or Respondents’ logic defeats the very purpose of the COMAR regulations because, if applied, it would mean that a local school board—or any other subordinate administrative agency—can act at will and never be subject to either agency or judicial review.

Maryland established the State Board of Education to oversee the local boards. For the State Board to suddenly cease its review in this particular case amounts to a

refusal of the Board to follow the dictates of the state, its own regulations, and previous legal opinions where it has reviewed the decisions of its local boards to determine if they were “arbitrary, unreasonable, or illegal.” It is not reasonable, very arbitrary and likely illegal for the State Board to conclude that it could suddenly depart from the mandated standard of review and substitute a court review.

For example, the State Board refused to explain the intent and meaning of the “erotic techniques” regulation at COMAR 13A.04.18.03c(3)(a), instead deferring to the local board – “It is not appropriate for this Board to second guess that conclusion [of the lower board].” (State Bd. Op. at 14.) Hence, contrary to Respondent’s argument that the State Board is entitled to deference of its interpretations of its own regulations, the State Board cannot be entitled to deference in its interpretation of the public education laws when it has not even attempted to interpret them.

In *Janis Sartucci vs. Montgomery County Board of Education*, Maryland State Board of Education Opinion No. 05-38 (Dec. 6, 2005), the State Board held that to the extent that an issue raised in an appeal requires an interpretation of law, § 2-205(e) of the Maryland Education Article provides that the State Board, “without charge and with the advice of the Attorney General, shall explain the true intent and meaning of the provisions of the Education Article that pertain to public schools and public school systems in Maryland and the rules and regulations adopted by the State Board.” COMAR 13A.01.05.05E sets the standard of review that the State Board applies when it is interpreting school laws and regulations: “The State Board shall exercise its

independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations.”

Respondents cite to a case where the State Board affirms that it has the rightful authority to interpret state education regulations. *Baltimore City Bd. Of Sch. Comm’rs v. City Neighbors Charter Sch.*, 400 Md. 324, 335 (2007) (“With respect to standard of review, the [State] Board asserted that it was empowered to ‘explain the true intent and meaning’ of the provisions of the Education Article that were under its jurisdiction and to decide ‘all controversies and disputes under these provisions’ and that COMAR 13A.01.05.05E directed that the Board ‘exercise its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations.’”). Yet, here, the State Board goes so far as to assert that State regulations can be interpreted differently from county to county because different county boards may use differing interpretations. The State Board declines to interpret regulations for all counties stating: “What may be appropriate content in Montgomery County, may, in another county, be considered ‘erotic technique.’ But that is a local board’s decision.” (State Op. at 14). This is absurd. Why have a State Board with local interpretive authority?

The Court of Appeals of Maryland refuted such an assertion, stating that “[s]uch a conclusion, of course, raises the specter of 24 disparate methods of implementing a uniform State law and would denigrate [the State Board’s] long-established authority to explain the true intent and meaning of the public education laws that it is charged with enforcing.” *Baltimore City Bd. Of Sch. Comm’rs*, 400 Md. At 126. This court should do

the same. It is within this court's "prerogative to determine whether an agency's conclusions of law are correct and to remedy the situation if found to be wrong." *John A. v. Bd. of Educ. for Howard County*, 400 Md. 363, 382 (2007). This argument is also applicable to Respondents' interpretation of how "sexual variations" are defined (p.24 of Respondents' Memorandum). It is up to the State Board to explain the meaning and intent of the state's "sexual variations" and "erotic techniques" definitions and regulations—not Respondents.

In rejecting Petitioners' appeal, the State Board indicated that when reviewing challenges to local policy decisions it has dismissed appeals that use a quasi-judicial process to force a change in local board policy—which is a quasi-legislative process. (State Bd. Op. at 4). The Board cites *Richard Regan v. Montgomery County Board of Education*, MSBE Op. No. 02-29 (June 26, 2002) for the proposition that an appeal process is not the vehicle for modifying a curriculum or adopting a new policy governing the teaching one. However, unlike here, the State Board's citation involves a pre-existing curriculum. [See also *Montgomery v. Howard County Board of Education*, MSBE Opinion No. 04-35 (appeal of local board's decision not to adopt age of entry waiver policy as requested by parent is attempt to force a change in policy which is not appealable to State Board); *Regan v. Montgomery County Board of Education*, MSBE Opinion No. 02-48 (appeal by a parent of the presence of a Washington Redskins' marching band member as a guest reader at school seeks to establish or modify curriculum, policies, or procedures used by MCPS and is not appealable under Section 4-205(c)); *Regan v. Montgomery County Board of Education*, MSBE Opinion No. 02-29

(an individuals' appeal challenging an instructional activity is not appropriate vehicle for modifying the existing curriculum or adopting a new policy governing the teaching of the curriculum); *Astrove v. Montgomery County Board of Education*, MSBE Opinion No 02-14 (attempt to change existing policy is quasi-legislative matter not subject to appeal process).]

By serving on the local board's curriculum advisory committee, Petitioners were charged by the county board to develop a curriculum in accordance with law and policy. Petitioners attempted to uphold their duty at that time and continue to do so now. This appeal is distinguishable from others resulting in rejection from persons dissatisfied with an existing curriculum or persons attempting to establish new school policy without going through appropriate curriculum or policy development process. Petitioners, involved in the development of the curriculum, are not attempting to force a policy change through unauthorized means—they are merely ensuring that a county board acts according to law and policy and that the State Board applies the correct standard of review when local board action is challenged.

Respondents continually attempt to shift this court's focus away from crux of Petitioners' appeal. This appeal is not about and has never been about homosexuality, tolerance of homosexuals or advancing an agenda. The mission of Respondents' health curriculum is "to...provide...secondary students of the MCPS with accurate and comprehensive instruction about family life and human development and disease prevention and control, including information about human sexuality that promotes tolerance and understanding toward people regardless of sexual orientation...". This

appeal is about ensuring that Maryland children are taught an appropriate curriculum consistent with Maryland law.

To highlight the curriculum's arbitrariness, unreasonableness or illegality, consider the following: 1) it teaches as fact that homosexuality is "innate," when such a proposition is contradicted by most credible scientific evidence—it is not a proper matter for judicial notice nor even admissible evidence upon which experts may rely in order to testify before Maryland courts, Conaway v. Deane, 2007 WL 2702132 [EXHIBIT A]; 2) it excludes only the existence of ex-gays when discussing differences between and tolerance of different sexual identifications—despite ex-gays being the only sexual identification that has actually been treated intolerantly within the Montgomery County Schools [EXHIBIT B]; 3) it fails to warn students that condoms do not offer substantial protection against contracting sexually transmitted diseases during anal intercourse [EXHIBIT C]; it fails to instruct students that condom use during vaginal and anal intercourse is substantially different [EXHIBIT D]; it provides misleading and incomplete information regarding transgenderism [EXHIBIT E]; it fails to provide an "equal educational experience" for students not opting into the health education curriculum by failing to assign appropriately qualified instructors [EXHIBIT F]; and it implies that if students' beliefs are inconsistent with their instruction regarding sexual identity than they are ignorant or uneducated [EXHIBIT G]. Lastly, Respondents failed to timely afford parents an opportunity to review their decision to opt their children into the human sexuality instruction, as ultimately formulated by Respondents, following the October 10, 2007, revision [EXHIBIT H].

The purpose of the COMAR provision at issue is to allow court review of an administrative agency decision where, as here, the action by that agency is contrary to sound educational policy or illegal. The COMAR protects Maryland citizens from such arbitrary, unreasonable or illegal administrative action and Maryland's children are worth the fight. Respondents assert that the health curriculum is designed to "...provide...secondary students of the MCPS with accurate and comprehensive instruction about family life and human development and disease prevention and control, including information about human sexuality that promotes tolerance and understanding toward people regardless of sexual orientation..." Petitioners ask that this court hold them to it.

RELIEF REQUESTED

That this court remand this appeal to the State Board and direct that they review it in accord with applicable law and policy set forth in COMAR 13A.01.05.05. Bernstein v. Real Estate Commission of Maryland, 221 MD. 221 (1959); Department of Human Resources v. Thompson, 103 Md. App. 175 (1995); Montgomery County v. Buckman, 333 Md. 516 (1994); State Administrative Bd. Of Election Laws v. Billhimer, 72 Md. App. 578 (1987); Cardon Investments v. Town of New Market, 55 Md. App 573 (1983).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of December 2007, a true and correct copy of the foregoing, along with all Exhibits, was caused to be sent to the following by U.S. Mail, first-class postage prepaid:

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